U.P. State Sugar Corpn. Ltd vs U.P. State Sugar Corpn. Karamchari ... on 2 May, 1995

Equivalent citations: 1995 AIR SCW 2260, 1995 (4) SCC 276, 1995 ALL. L. J. 1771, (1995) 3 SCR 1004 (SC), (1995) 5 JT 676 (SC), (1995) 3 COMLJ 1, (1995) 84 COMCAS 139, AIR 1995 SUPREME COURT 1484

Author: S.C. Agrawal

Bench: S.C. Agrawal, Sujata V. Manohar

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           CASE NO.:
Appeal (civil)  817 of 1995

PETITIONER:
U.P. STATE SUGAR CORPN. LTD.

RESPONDENT:
U.P. STATE SUGAR CORPN. KARAMCHARI ASSO. AND ORS.

DATE OF JUDGMENT: 02/05/1995

BENCH:
S.C. AGRAWAL & SUJATA V. MANOHAR

JUDGMENT:
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JUDGMENT 1995 (3) SCR 1004 The Judgment of the Court was delivered by S.C. AGRAWAL, J. This appeal, by special leave, is directed against the judgment of the Allahabad High Court dated December 9,1994 in Civil Miscellaneous Writ Petition No. 27998 of 1994 filed by respondents Nos. 1, 2 and 3 whereby it has been held that the U.P. State Sugar Corporation Ltd., appellant herein, (hereinafter referred to as 'the Corporation') was not entitled to alienate its assets in view of the pendency of the proceedings before the Board of Industrial and Financial Reconstruction (hereinafter referred to as 'the Board') under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'the Act').

The Corporation is a company registered under the Companies Act, 1956. The State of U.P. holds 99.9% shares in the Corporation. The Corporation was incorporated with the object of taking over and running the private sugar mills which had been acquired by the State of U.P. under the U.P. Sugar Undertakings (Acquisition) Act, 1971. 29 such sugar mills had been acquired and the Corporation has established 6 more units and at present it is holding 35 sugar units spread over the State of U.P. The 29 sugar mills which had been acquired were old units and some of them were established nearly forty years prior to their acquisition in 1971. Their plant and machinery were obsolete and the units functioned at a very low capacity. Their operations were highly unprofitable and consequently the Corporation has been suffering continuing losses. In August 1992, the

Government of U.P. took a policy decision to privatise some of the units of the Corporation and a Privatisation Committee comprising senior officials of the State Government after examining the matter came to the conclusion that the sale of continuing losses making units was absolutely necessary. The Board of Directors of the Corporation considered the matter and on February 27,1993 they resolved that 8 of the units at Meerut, Bareilly, Barabanki, Burhwal, Nawabganj, Munderwa, Baitalpur and Ghughli be initially privatised. The said proposal for sale of units was accepted by the State Government and the said decision was communicated to the Corporation on September 4, 1993. The State Government also formed a Committee to recommend the procedure to be followed for such sale. The said Committee submitted its report on October 19, 1993 wherein the details of sale procedure to be followed was set out. This report was again considered by the Privatisation Committee on December 31, 1993 which broadly accepted the same and it was decided to set up a Committee to obtain proposals for privatisation, to negotiate with potential buyers and take appropriate action. The said Committee decided to get appropriate evaluation of each of the units proposed to be sold from independent valuers, namely, A.F. Ferguson & Company and S.R. Batliboi & Company. Thereafter, on March 20, 1994 an advertisement was publish-ed in leading newspapers in the country inviting tenders for outright sale of the said 8 sugar mills. In response to the said advertisement 41 offers were received but only 38 conformed to the requirements. The Committee presided over by the Principal Secretary, Sugar and Cane Department, after considering the said offers, submitted its report to the Government of U.P. on July 14, 1994. The said report was considered by the Privatisation Committee on July 19, 1994 and later by the State Government. Based on the recommendations of the Privatisation Committee the State Government issued directions to the Corporation on July 27, 1994 which were considered by the Board of Directors of the Corporation on July 28, 1994 and the said decision of the Board of Directors was approved at the annual general meeting of the Corporation held on July 28, 1994. On August 24/25, 1994 the Writ Petition giving rise to the present appeal was filed in the High Court by respondents Nos. 1, 2 and 3 (hereinafter referred to as 'the petitioners'). In the said writ petition the petitioners assailed the decision for the sale of the 8 sugar mills and prayed for issuance of a writ, order or direction in the nature of certiorari to quash the sale notice as published in the newspapers dated March 25, 1994 and July 29, 1994 and all proceedings undertaken in pursuance thereof and also prayed for a writ, order or direction of a suitable nature restraining the Corporation as well as respondents Nos. 4 and 5 from taking any action on the basis of the impugned sale notice. The said Writ Petition has been allowed by the High Court by the impugned judgment.

At this stage it would be convenient to take note of the relevant provisions of the Act. As stated in the Preamble, the Act was enacted by Parliament to make, in the public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. The Act was amended by Act No. 57 of 1991 and, more recently, by Act no. 12 of 1994 with effect from February 1, 1994. In the Act, as originally enacted, a Government company, as defined in Section 617 of the Companies Act, was expressly excluded from the ambit of the Act inasmuch as the expression 'Company' under Section 3(d) of the Act was defined to mean "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 that Act." By Section 2 of Act No. 57of 1991 the words "but does not include a Government company as defined in Section 617 of that Act" have been omitted from the said provision. As a result, a Government company has also been brought within the ambit of the Act. In Section 4 of the Act provision has been made for the establishment of the Board.

Chapter III (Sections 15 to 22A) deals with references, inquiries and schemes in respect of a sick industrial company. Section 15 provides that where an industrial company has become a sick industrial company a reference shall be made to the Board for the determination of measures which shall be adopted with respect to the company. Under sub-section (1) of Section 15 such reference is required to be made by the Board of Directors of the company within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year at the end of which the company has become a sick industrial company. Sub-section (2) of Section 15 enables a reference to be made 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. Section 16 empowers the Board to make such inquiry as it may deem fit for determining whether an industrial company has become a sick industrial company upon receipt of a reference with respect to such company under Section 15 or upon information received with respect to such company or upon its own knowledge as to the financial condition of the company. Section 17 prescribes that if after making an inquiry under Section 16 the Board, it is satisfied that a company has become a sick industrial company, the Board shall decide by an order in writing whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable" time and in that event the Board shall, by order in writing, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses. If the Board decides that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in Section 18 in relation to the said company it may, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company. Section 18 makes' provision for preparation and sanction by the Board of a scheme with respect to a sick industrial company providing for any one or more of the measures, namely, financial reconstruction of the sick industrial company; the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company; the amalgamation of the sick industrial company with any other company or of any other company with the sick industrial company; the sale or lease of a part or whole of any industrial undertaking of the sick industrial company; the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law; such other preventive, ameliorative an remedial measures as may be appropriate; and such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures referred to above. Section 19 makes provision for rehabilitation by giving financial assistance if the scheme provides for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or authority to the sick industrial company. Section 20 provides that in cases where the Board, after making an inquiry under Section 16 and after consideration of all the

relevant facts and circumstances, is of all opinion that the sick industrial company is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court. Under Sub-section (4) of Section 20 the Board is empowered to cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of Section 529-A, and other provisions of the Companies Act, 1956. For the proper discharge of its functions under the Act, Section 21 confers on the Board the power with respect to matters specified in sub- sections (a) to

(d) relating to preparation of inventory of assets and liabilities and books of account, list of shareholders, valuation report in respect of shares and assets and an estimate of reserve price, lease rent or share exchange ratio. Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, by virtue of Section 22, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority. Section 22A, which was introduced by Act 12 of 1994, provides that the Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets (a) during the period of preparation or consideration of the scheme under Section 18, and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of Section 20 and upto commencement of the proceedings relating to the winding up before the concerned High Court.

Chapter IV (Sections 23 to 36) contains provisions relating to proceedings in case of potentially sick industrial companies misfeasance proceedings, appeals and other miscellaneous matters. Where the accumulated losses of an industrial company as at the end of any financial year have resulted in erosion of fifty per cent or more of its peak net worth during the immediately preceding four financial years Section 23 requires that the company shall within a period of sixty days from the date of finalisation of the duly audited accounts of the company for the relevant financial year report the fact of such erosion to the Board and hold a general meeting of the shareholders of the company for considering such erosion. Section 23A, introduced by Act 12 of 1994, makes provision for reporting the fact of such erosion to the Board 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 fifty per cent or more of its peak net worth during the immediately preceding four

financial years and the further steps to be taken by the Board on receiving information or upon its own knowledge about such erosion of the peak net worth. Under Section 23B the Board on receipt of a report under Section 23 or Section 23A or upon information or its own knowledge may call for any periodic information from the company as to the steps taken by the company to make its net worth exceed the accumulated losses and the company shall furnish such information.

From a perusal of the aforesaid provisions of the Act it would appear that the Act makes a distinction between the role assigned to the Board in relation to a sick industrial company, provisions for which are contained in Sections 15 to 22A in Chapter III, and in respect of a potentially sick industrial company for which provisions are contained in Sections 23, 23A and 23B in Chapter IV. In respect of a sick industrial company the Board has been assigned a more active role in the sense that on receipt of a reference under Section 15 or upon information received with respect to such a company or upon its own knowledge about the condition of the company, the Board is required to make such inquiry as it may deem fit for determining whether an industrial company has become a sick industrial company and under Sections 16 and 17 the Board makes suitable order after completion of the inquiry and a scheme may be prepared and sanctioned in relation to a sick industrial company under Section 18. There is provision for rehabilitation by way of financial assistance in Section 19 and express provision has been made in Section 22A empowering the Board to direct a sick industrial company not to dispose of any of its assets except with the consent of the Board during the period mentioned therein. In respect of a potentially sick industrial company the Board has been assigned a more limited role of requiring such a company to furnish periodic information as to the steps taken by the company to make its net worth exceed its accumulated losses. The Board can also require an operating agency to inquire into and make a report with respect to the matters specified in the order and on the basis of such report the Board may form its opinion that the company is not likely to become viable in future and that it is just and equitable that it should be wound up. There is no provision similar to Section 22A whereby the Board may direct a potentially sick industrial company not to dispose its assets. Such a power conferred under Section 22A is restricted to a sick industrial company only.

Having given a broad outline of the relevant provisions of the Act we would refer to some of the provisions which require closer examination. The expression "sick industrial company" is defined in Section 3(o) as under:-

> "3(o) 'sick industrial company' means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.
>
> Explanation.- For the removal of doubts, it is hereby declared that an industrial company existing immediately before the commencement of the Sick Industrial Companies (Special Provisions) Amendment Act, 1993, registered for not less than five years and having at the end of any financial year accumulated losses equal to or exceeding its entire net worth, shall be deemed to be a sick industrial company."

The expression "net worth" is defined in Section 3(ga) in the following terms:-

> "3(ga) 'net worth' means the sum total of the paid-up capital and free reserves.
>
> Explanation - For the purpose of this clause, 'free reserves' means all reserves credited out of the profits and share premium account but does not include reserves credited out of re-evaluation of assets, write back of depreviation provisions and amalgamation."

The expression "date of finalisation of the duly audited accounts" is defined in Section 3(da) in the following terms:-

> "(da) 'date of finalisation of the duly audited accounts' means the date on which the audited accounts of the company are adopted at the annual general meeting of the company."

Sections 15, 22A, 23, 23A and 23B provide as under:-"Section 15. Reference to Board.-

(1) Where an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company:

> Provided that if the Board of Directors had sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company.
>
> (2) Without prejudice to the provisions of sub-section (1), 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 may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect to such company:
>
> Provided that a reference shall not be made under this sub-section in respect of any industrial company by-
>
> (a) the Government of any State unless all or any of the industrial undertaking belonging to such company are situated in such State;
>
> (b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to, such company, an interest is such Company."

"Section 22A. Direction not to dispose of assets.- The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest, by order in writing direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets-

(a) during the period of preparation or consideration of the scheme under Section 18; and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of Section 20 and upto commencement of the proceedings relating to the winding up before the concerned High Court."

"Section 23. Loss of fifty per cent net worth by industrial companies.-

(1) If the accumulated losses of an industrial company, as at the end of any financial year (hereinafter referred to as the relevant financial year) have resulted in erosion of fifty per cent, or more or of its peak net worth during the immediately preceding four financial year,-

(a) the company shall, within a period of sixty days from the date (hereinafter referred to as the relevant date) of finalisation of the duly audited accounts of the company for the relevant financial year-

(i) report the fact of such erosion to the Board; and

(ii) hold a general meeting of the shareholders of the company for considering such erosion;

(b) The Board of directors shall, at least twenty-one days before the date on which the meeting under sub-clause (ii) of clause (a) is held, forward to every member of the company a report as to such erosion and the causes for such erosion;

(c) The company may, be ordinary resolution passed at the meeting held under clause (a) remove a director (being a director appointed by the members of the company) and fill the vacancy created by such removal, so far as may be, in accordance with the procedure provided in sub-sections (2) to (6) of Section 284 of the Companies Act, 1956 (1 of 1956).

(2) A director removed under sub-section (1) shall not be entitled to any compensation or damages for determination of his appointment as director or of any appointment terminating with that as director.

(3) If default is made in complying with the provisions of this sections, 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 to two years and with fine."

"Section 23A. Proceedings on report, Etc. of loss of fifty per cent net worth.-

(1) Without prejudice to the provisions of clause (a) of sub-section (1) of Section 23, 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 may, if it has sufficient reasons to believe that the accumulated losses or any industrial company have resulted in erosion of fifty per cent or more of its peak net worth during the immediately preceding four financial years, report the fact of such erosion to the Board.

(2) If the Board has, upon information received or upon its own knowledge, reason to believe that the accumulated losses of any industrial company have result in erosion of fifty percent or more its peak net worth during the immediately preceding four financial years, it may call such information from that company as it may deem fit.

(3) Where the Board is of the opinion that an industrial company referred to in sub-section (1) is likely to make its net worth exceed its accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future, it may require by order an operating agency to inquire into and make a report with respect to such matters as may be specified in the order.

(4) After consideration of the report of the operating agency, the Board may publish or cause to be published a notice in such daily newspapers as the Board may consider necessary, for suggestions or objections, if any, within such period as the Board may specify, as to why the company should not be wound up.

(5) Where the Board, after consideration of the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of the opinion that the industrial company is not likely to make its net worth exceed the accumulated losses with a reasonable time while meeting all its financial obligations and that the company as a result thereof, is not likely to become viable in future and that it is just and equitable that the company should be wound up, the Board may record and forward its opinion to the concerned High Court in relation to the company as if it were a sick industrial company and the provisions of sub-sections (2), (3) and (4) of Section 20 shall apply accordingly."

"Section 23B. Power of Board to call for periodic information.- On receipt of a report under sub-clause (i) of clause (a) of sub-section (1) of Section 23 or under sub-section

(1) of Section 23A or upon information or its own knowledge under sub-section (2) of Section 23A, the Board may call for any periodic information from the company as to the steps taken by the company to make its net worth exceed the accumulated losses and the company shall furnish such information." The annual audited accounts of the Corporation, for the financial year 1989-90, ending on March 31,1990 were adopted at the annual general meeting held on October 25,1993. The said accounts showed that the total accumulated losses of the Corporation on March 31, 1990 exceeded the net worth, i.e., total paid up capital and free reserves of the Corporation on March 31, 1990. On May 7/11, 1994 a letter was addressed by the Corporation to the Secretary of the Board which was as follows :-

"CS/SSC/780 7-5-1994/11 Sub : Reference as prescribed under Sick Industrial (Special Provisions) Act, 1985.

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 eroded by more than 50%. Under the amended Sick Industrial Companies (Special Provisions) Act, 1985, the Company is required to make a reference to BIFR. Accordingly, as resolved by our Board of Directors at their 148th Meeting held on 30th April, 1994 we submit herewith our application in form CC alongwith required Annexures Etc. We will be pleased to submit any further information as may be required by BIFR.

Kindly acknowledge receipt of this application. Thanking you, Yours sincerely, sd/-(P.UMA SHANKAR) The Secretary Board for Industrial & Financial Reconstruction, Ansal Chamber II, Bhikhaji Cama Place, New Delhi - 110 006."

Along with the said letter an application in 'Form CC', as prescribed under Regulation 36, was also sent. In the said Form at serial No. 20 against "Date of finalisation of duly audited accounts of the company for the relevant financial year (i.e. date of annual general meeting of the company) thereat duly audited annual accounts of the company were approved for the financial year at the end of which net worth declined to 50% or less of peak worth during the immediately preceding five financial year" it was stated "25th October, 1993". At serial No. 21 against "Date on which the general meeting of shareholders of the company is proposed to be convened for purpose of considering the erosion if not worth. Whether mini- mum 21 days notice given after the annual general meeting", it was stated "will be called shortly."

On May 27, 1994 the following communication was sent from the office of the Board to the Corporation :-

"Government of India Ministry of Finance Economic Affairs Board for Industrial and Financial Reconstruction Javahar Vyapar Bhawan Tolstoy Marg, New Delhi BIFR/Sec.23/GC-32 Date 27.5.1994 To, M/s. U.P. State Sugar Corpn. Ltd., 5, Meera

Bai Marg, Lucknow.

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

Sir, Please refer to your letter No. CS/SSC/780 dated 11.5.1994 forwarding Form- C for the year ended 31.3.89.

2. You are requested to furnish copies of the notice together with the minutes of the general meeting of the shareholders convened on 25.10.1993 to consider the erosion in peak net worth, and audited accounts for the last five financial years for further action.

Yours faithfully, Sd/-(P.D. TAHILIANI) Section Officer (B.C.) The following reply was sent by the Corporation to the said communication on August 12/September 1, 1994 :-

"CS/SSC/2521 12.8.1994 01.9.1994 Shri P.D. Tahiliani Section Officer (B.C.), Government of India, Ministry of Finance, Department of Economic Affairs, Board for Industrial and Financial Reconstruction, Jawahar Vyapar Bhawan, Tolstoy Marg, New Delhi - 110 001.

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

Sir, Please refer to your letter No. BIFR/SEC.23/GC-32 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 on 28th July, 1994 for considering the erosion of peak net worth and audited accounts for the last five financial years are enclosed.

Your faithfully, Sd/-(PREM NARAIN) Managing Director"

It appears that there was some confusion in the minds of the petitioners with regard to the nature of the communication that was sent by the Corporation to the Board on May 7/11, 1994. The said confusion appears to have been caused by the use of the word 'reference' in the said letter. The petitioners, in the writ petition, have construed the said letter as a reference made under Section 15(1) of the Act as is evident from paragraphs 34 and 35 of the writ petition which read as follows :-

"34. That however, despite this Mandatory 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 and 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 and Financial Reconstruction, New Delhi. A true copy of which letter is being enclosed herewith and marked as Annexure 15 to this writ petition."

"35. That the aforesaid reference made by the letter dated 7/11 May, 1994 has been received by the board for Industrial and Financial Reconstruction and 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 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 :-

A true copy of the Sick Industrial Companies (Special Provision) Amendment Act, 1993 (Act 12 of 1994) is being enclosed here with and marked as Annexure-16 to this writ petition."

It was not the case of the petitioners that apart from the letter dated May 7/11, 1994 there was any communication from the Corporation to the Board whereby a reference was made to the Board under Section 15(1) of the Act.

The Corporation did not make any effort to remove this confusion in the counter affidavit filed on their behalf before the High Court. In paragraphs 41 and 42 of the said counter affidavit the following reply was given to paragraphs 34 and 35 of the 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 and with due deligence."

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

The matter was made worse by the Corporation in paragraph 47 of the said counter affidavit wherein it was stated :-

"47. That the contents of paragraph No. 41 of the writ petition are also false and are denied. Even on the allegation made by the petitioners, the reference was made on 7th/llth May, 1994 to the Secretary of the Board under Act, 1985, but the Board has neither formed any opinion as contemplated under the provision to Section 15(1) of the Act nor has done any thing upto now even though more than three months have expired and the crushing season is coming. It is further stated due to the pendency of such an application before the Board does not bar the respondents to proceed to sell unit by inviting tenders etc."

This would give an impression that the Corporation was also proceeding on the basis that the reference was made under Section 15 although the Board in its letter dated May 27, 1994 under the subject 'Report under Section 23 of the Sick Industrial Companies (Special Provisions) Act, 1985' has rightly construed it as a report under Section 23 of the Act. The High Court has, however, gone by the averments contained in the writ petition and the counter affidavit filed on behalf of the Corporation and has proceeded on the basis that the communication dated May 7/11, 1994 from the Corporation to the Board was a reference under Section 15 of the Act and has considered the matter on that basis. The High Court has also placed reliance on the report of the auditors, M/s. Ram Lal & Company, dated July 12,1994 in respect of the annual accounts for the financial year 1991-92 wherein it is stated :-

> "According the information and explanations given to us, the Corporation is a sick industrial company within the meaning of clause (o) of sub-section (1) of Section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 and a reference has been made to the Board for Industrial and Financial Reconstruction under Section 15 of the Act."

The High Court did not attach any importance to the assertion in the counter affidavit filed on behalf of the Corporation that it has not been declared a sick industrial undertaking. The High Court also did not properly scrutinise the contents of the letter dated May 7/11, 1994 and the annexed application in 'Form CC' which was sent by the Corporation to the Board which clearly indicates that it is not a reference under Section 15 of the Act but it is a report under Section 23 of the Act because in the said letter it is clearly mentioned that as per the annual accounts for the financial year ended on March 31,1990 net worth of the company has been eroded by more than 50%. 'Form CC' in which the application was made has been prescribed under Regulation 36 for a report under Section 23 of the Act. Serial No. 19 of the said Form which refers to 'Reasons for potential sickness' and serial nos. 20 and 21 refer to matters which pertain a potentially sick industrial company governed by Section 23 of the Act.

It must, therefore, be held that the letter dated May 7/11, 1994 sent by the Corporation to the Board was not a reference under Section 15(1) of the Act but it was a report under Section 23 of the Act and the High Court was not right in proceeding on the basis that a reference had been made by the Corporation under Section 15(1) of the Act and the same was pending at the time of the impugned sale. Once it is held that there was no reference under Section 15(1) of the Act then the only question which requires to be considered is whether after a report has been made to the Board by a potentially sick industrial company under Section 23 of the Act the company is prohibited from disposing of its assets. We have been unable to find any provision in the Act which imposes such a restriction. Under the Act the only restriction on the right on an industrial company to dispose of its assets is that contained in Section 22A whereby the Board has been empowered to pass an order directing a sick industrial company not to dispose of, except with the consent of the Board, any of its assets. Apart from the fact that this power is restricted in its application to a sick industrial company dealt with under Chapter III of the Act and does not apply to a potentially sick industrial company dealt with under Chapter IV, even in respect of a sick industrial company this power to impose such a restriction is available only during the period of preparation or consideration of the scheme under

Section 18 and during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of Section 20 and upto commencement of the proceedings relating to the winding up before the concerned High Court. The said provision in Section 22A cannot, therefore, be invoked to impose a restriction on the power of the Corporation to dispose of a part of its assets after it had sent the letter dated May 7/11,1994 by way of a report under Section 23 of the Act.

At this stage we may deal with the contention urged by Shri Gobinda Mukhoty, the learned senior counsel appearing for the petitioners. Placing reliance on the proviso to sub-section (1) of Section 15 Shri Mukhoty has urged that having regard to the financial condition of the Corporation, as disclosed in the audited accounts for the subsequent years, it had become a sick industrial undertaking on March 31, 1992, as per the accounts for the financial year 1991-92 because the accumulated losses had exceeded the entire net worth and, therefore, it was obligatory on the part of the Board of Directors of the Corporation to make a reference to the Board under Section 15 of the Act. In this regard it has been pointed out by the learned counsel for the Corporation that auditing of the accounts for the financial year 1991-92 was completed as per the report of the auditors dated July 12, 1994 and the said audited accounts were cleared by the Comptroller and Auditor General of India on December 23, 1994 but the said audited accounts have not yet been approved at annual general meeting of the Corporation.

Under Section 15(1) of the Act the reference is required to be made to the Board after the finalisation of the duly audited accounts of the company for the financial year at the end of which the company has become a sick industrial company. The proviso to Section 15(1) requires such a reference to be made even before the finalisation of the duly audited accounts if the Board of Directors have sufficient reasons to form the opinion that the company had become a sick industrial company. The expression 'date of finalisation of the duly audited accounts' has been defined in Section 3(da) to mean the date on which audited accounts of the company are adopted at the annual general meeting of the company. The submission of Shri Mukhoty is that in the present case the Board of Directors had sufficient reasons to form the opinion that the Corporation had become a sick industrial company on the basis of the audited accounts for the year 1991-92. This could be only after the audited accounts for year 1991-92 were placed before the Board of Directors of the Corporation. Since the audit of the accounts was completed by the auditors, as per their report, on July 12, 1994, the audited accounts could be placed for consideration before the Board of Directors only after July 12, 1994 and only thereafter the Board of Directors could be required to make a reference to the Board within sixty days of such consideration. There is, however, nothing on record to show whether the audited accounts for the year 1991-92 were placed before the Board of Directors of the Corporation before the impugned decision for sale. Moreover, the making of a reference under Section 15 does not ipso facto attract the restriction on the right of a sick industrial company; to dispose of its assets. Such a restriction has to be imposed by the Board by a specific order passed under Section 22A of the Act and such an order can be passed only after the Board has considered the matter in accordance with the provisions of Sections 16 and 17 of the Act and passed an order for framing a scheme under Section 18 of the Act. That stage never reached in this case. In these circumstances the proviso to Section 15(1) can have no bearing on the validity of the impugned decision for sale.

According to the learned Judges of the High Court the limitation on the right of a sick industrial company or a potentially sick industrial company to dispose of its asserts flows from the pendency of the proceedings under Sections 16 and 17 of the Act and they have not placed reliance on Section 22A for such limitation. They have observed :-

> "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 the 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."
>
> "This is a rule of common sense and 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 experience which is presented 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 is of no avail, implying thereby that the sickness is terminal and its death is imminent. The power of the Board to 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."

We find it difficult to subscribe to this view. It runs counter to the express terms of Section 22A of the Act which confers a limited power on the Board to pass an order prohibiting a sick industrial company from disposing of its assets only during the period specified in clauses (a) and

(b). Except when the Board passes an express order in accordance with the provisions of Section 22A, it is not possible to infer a limitation from the provisions of the Act on the right of a sick industrial company or a potentially sick industrial company to dispose of its assets. In so far as a potentially sick industrial company is concerned, there appears to be no reason why such a company, in order to revive itself, should not be able to dispose of its assets. The High Court, in our opinion, was in error in holding that the Corporation was not competent to sell the 8 sugar mills which it was proposing to sell in view of the provisions contained in the Act. The judgment of the High Court cannot, therefore, be upheld and the appeal must be allowed.

But this does not conclude the matter. The High Court has commented adversely against the conduct of the Corporation and its officers and has also directed the Registrar of the High Court to file a complaint against the deponent of the counter affidavit filed on behalf of the Corporation as well as the Secretary of the Corporation and the Board of Directors of the Corporation for violation of the provisions of Chapter XI of the Indian Penal Code for giving false evidence. The learned counsel for the Corporation have assailed the said directions and it is necessary to deal with the said contention.

The High Court has observed that in the counter affidavit filed on behalf of the Corporation in the Writ Petition before the High Court certain false statements have been made and relevant records were suppressed from the Court. The High Court has also observed that the person who had sworn the said counter affidavit on oath and the Board of Directors of the Corporation who abetted in arranging such a defence shall be deemed to have intentionally given false evidence at the stage of judicial proceedings. The High Court has, therefore, directed the Registrar of the High Court to draw out complaint to be filed before the Chief Judicial Magistrate, Allahabad on the violation of the provisions of Chapter XI (of False Evidence and Offences against Public Justice) of the Indian Penal Code and that the complaint shall name the deponent of the counter affidavit filed on behalf of the Corporation, its company secretary and the Board of Directors of the Corporation not excluding those referred to in minutes of the ordinary meeting of members held at Ganna Kisan Sansthan, Dali Bagh, Lucknow on Thursday, July 28, 1994. The reasons underlying the giving of these directions by the High Court are:

> (1) Even though the Corporation has acknowledged, in its letter dated May 7/11, 1994, to the Board that it has been sick for the last four years but in the affidavit before the High Court the Corporation says that it has not been declared a sick industrial company.
>
> (ii) Even though it was required by letter dated May 27, 1994 from the Board to send a copy of the Resolution dated October 25, 1993 the Corporation, instead of sending a copy of the said Resolution, has sent a copy of the Resolution dated July 28, 1994 and the Corporation has falsely made a statement of fact that there was a general meeting on October 25, 1993 to consider the erosion of peak net worth being more than 50 per cent.

and

(iii) In para 47 of the counter affidavit filed by the Corporation a false plea has been raised before the High Court and the Corporation, deliberately with every intention to suppress material facts, gave an impression as if the Board was delaying the proceedings although it was the Corporation which had not provided thorough and complete information to the Board within time and the said false statement was deliberately made with an intention to prejudice the Court that the fault lay with the Board and not with the Corporation. The Corporation had manufactured a plea before the High Court that the Board was delaying matters and it was left with no choice but to sell its assets without the permission of the Board.

We have carefully perused the judgment of the High Court in respect of the matters referred to above. We find ourselves unable to agree with the High Court that any mis-statement has been made in respect of the matters aforementioned in the counter affidavit that was filed on behalf of the Corporation before the High Court.

As regards the Corporation being a sick industrial company, we are of the view that the Corporation was justified in taking the plea in the counter affidavit that it had not been declared a sick industrial

company under the Act. The said statement in the counter affidavit is in consonance with the definition of the expression 'sick industrial company" contained in Section 3(o) of the Act which contemplates that in order that an industrial company is to be regarded as a sick industrial company if its accumulated losses at the end of any financial year are equal to or exceed its entire net worth. The High Court appears to have lost sight of the distinction between a sick industrial company and a potentially sick industrial company whose accumulated losses, as at the end of any financial year, have resulted in erosion of 50 per cent, or more of its peak net worth. In the letter dated May 7/11, 1994 sent by the Corporation to the Board it was stated that as per the annual accounts for the financial year ended on March 31, 1990 the net worth of the Corporation had been eroded by more than 50 per cent, meaning thereby that the Corporation had become a potentially sick industrial company governed by Section 23 of the Act. The said letter cannot be construed as an acknowledgment that the Corporation was a sick industrial company since 1990. To a certain extent the Corporation can be held responsible for creating some confusion in this regard because the letter dated May 7/11, 1994 from the Corporation to the Board bears the heading 'Reference as prescribed under Sick Industrial Companies (Special Provisions) Act, 1985' and after stating 'as per the Annual Accounts for the financial year ended on March 31, 1990 net worth of the company had been eroded by more than 50 per cent' the said letter states "under the amended Sick Industrial Companies (Special Provisions) Act, 1985, the Company is required to make a reference to BIFR." The use of the word 'reference' in the said letter was not correct because the application which was sent in 'Form CC' alongwith the letter was in relation to proceedings under Section 23 of the Act which deals with a potentially sick industrial company and not with a sick industrial company. This letter was, therefore, not a reference to the Board under Section 15(1) of the Act. In the writ petition the petitioners have wrongly assumed the said letter dated May 7/11, 1994 as a reference under Section 15 of the Act. In the counter affidavit filed on behalf of the Corporation, without pointing out the error in the averments contained in the writ petition, all that was stated was that the Corporation had not been declared as a sick industrial company. This was not wrong. The auditors, in their audit report dated July 12, 1994 in respect of annual accounts of the Corporation for the period ending on March 31, 1992, have also erroneously stated :

> "According the information and explanations given to us, the Corporation is a sick industrial company within the meaning of clause (o) of sub-clause (1) of Section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 and a reference has been made to the board of Industrial and Financial Reconstruction under Section 5 of the Act."

The said audit report has not yet been placed before the annual general meeting of the Corporation. But on the basis of the said audit report the High Court has erroneously assumed that the Corporation has been declared as a sick industrial company. The statement in the counter affidavit that the Corporation has not been declared a sick industrial company cannot be held to be a false or misleading statement.

As regards the Resolution dated October 25, 1993 the application which was sent alongwith the letter dated May 7/11, 1994 to the Board contains the following statements :-

"20. Date of finalisation of duly, audited accounts of the company for the relevant financial year (i.e. date of annual general meeting of the company) thereat duly audited accounts of the company were approved for the financial year at the end of which net worth declined to 50 per cent or less of peak net worth during the immediately proceeding five financial years.

25th October, 1993.

21. Date on which the general meeting of the shareholders of the company is proposed to be convened for purpose of considering the erosion of net worth. Whether minimum 21 days notice given after the annual general meeting."

will be called shortly The said statements indicate that the duly audited annual accounts of the company for the financial year ending on March 31, 1990 were approved at the annual general meeting of the Corporation held on October 25, 1993 and that the general meeting of the shareholders of the Corporation will be called shortly for the purpose of considering the erosion of its net worth. Under the provisions of Section 23 of the Act, an industrial company whose accumulated losses at the end of any financial year have resulted in erosion of 50 per cent or more of its net peak worth during immediately preceding four financial years is required to report the fact of such erosion to the Board within a period of 60 days from the date of finalisation of the duly audited accounts of the company for the relevant financial year and it is also required to hold a general' meeting of the shareholders for considering such erosion. In other words, Section 23 postulates two general meetings, viz, (i) a meeting in which the audited accounts of the company have been approved; and (ii) the meeting in which the matter of erosion of 50 per cent or more of its peak net worth is considered. According to the statements made in the application sent to the Board, the meeting held on October 25, 1993 was the annual general meeting in which the duly audited accounts for the year ending on March 31,1990 were approved and the other general meeting in which the erosion was required to be considered had not been held till the letter dated May 7/11, 1994 was sent by the Corporation to the Board. It appears that in the office of the Board it was mistakenly assumed that the matter of erosion of the peak net worth had been considered in the general meeting held on October 25, 1993 and in the communication dated May 27, 1994 sent by the Board, the Corporation was asked to furnish copies of the notices together with the minutes of the general meeting of the shareholders convened on October 25, 1993 to consider the erosion of peak net worth. In its reply dated August 12/September 1, 1994, the Corporation, without explaining that the matter of erosion was not considered at the general meeting held on October 25, 1993, sent a copy of notices together with the minutes of the general meeting of the shareholders convened on July 28, 1994 for considering the erosion of peak net worth. On the basis of this failure on the part of the Corporation to make a reference to the Resolution dated October 25,1993 in its letter dated August 12/September 1, 1994 the High Court has assumed that no meeting of the shareholders was held on October 25, 1993. In this context, the High Court has referred to the minutes of the meeting of July 28,1994 which did not show that the minutes of the earlier meeting held on October 25,1993 were confirmed at the said meeting. The High Court has thereby concluded that the Corporation made a misstatement of facts that a general meeting was held on October 25, 1993 to consider the accumulated losses of the company being 50 per cent. The said conclusion drawn by the High Court

is not correct because it was never the case of the Corporation that erosion of peak net worth being more than 50 per cent was considered at meeting held on October 25, 1993. According to the corporation the duly audited accounts of the Corporation for the year ending on March 31, 1990 had been approved at the annual general meeting held on October 25, 1993. Merely because in the letter sent from the Board dated May 27, 1994 it is erroneously stated that the matter of erosion of peak net worth was considered at the meeting held on October 25, 1993, and this error was not pointed out by the Corporation in its reply to the Board dated August 12/September 1, 1994, it is not possible to hold that the Corporation has made a false statement and was coming forward with a different version that the matter of peak net worth was considered at the meeting held on July 28, 1994. The fact that the duly audited accounts for the year ending on March 31,1990 were approved at the annual general meeting held on October 25, 1993 was not disputed by the petitioners at any stage and the High Court was in error in assuming that no such meeting was held.

We would not come to the averments contained in paragraph 47 of the counter affidavit which have been found to be false and misleading. In our view it is necessary to consider the said averments in the light of the averments contained in paragraph 41 of the Writ Petition. Paragraph 41 of the writ petition and Paragraph 47 of the counter affidavit are reproduced as under

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> "Paragraph 41 of the writ petition That the respondent authorities have acted malafidely in not promptly making reference to the Board for Industrial and Financial Reconstruction with regard to its sickness and not taking proceedings for selling of the sugar factories with great haste so . as to preclude any scrutiny by the Expert Body of the Board for Industrial and Financial Reconstruction which has been constituted for this purpose."

> "Paragraph 47 of the counter affidavit That the contents of paragraph 41 of the writ petition are also false and are denied. Even on the allegation made by the petitioners, the reference was made on 7th-llth May, 1994 to the Secretary of the Board under Act, 1985, but the Board has neither formed an opinion as contemplated under the provisions of Section 15(1) of the Act and has done any thing upto now even though more than 3 months have expired and the crushing season is coming. It is further stated due to the pendency of such an application before the Board does not bar the respondents to proceed to sell unit by inviting tenders etc."

In paragraph 41 the petitioners had asserted that the Corporation had failed to make a prompt reference to the Board with regard to its sickness and that it was taking proceeding to sell the sugar units with great haste so as to preclude any scrutiny by the expert body of the Board. In reply to paragraph 41 this fact was denied in paragraph 47 of the counter affidavit and it was stated that although reference was made on May 7/11, 1994 to the Secretary of the Board but the Board did not from any opinion as contemplated under the provisions of Section 15(1) of the Act and had not done anything although more than 3 months had expired. There is a slight error in the reply contained in paragraph 47 of the counter affidavit in the sense that the communication dated May 7/11, 1994 has

been described as a 'reference' to the Board though it was not so and was only a report as required under Section 23 of the Act and, therefore, there was no question of the Board forming any opinion as contemplated under Section 15(1) of the Act. But that does not lead to the inference that a false plea was manufactured by the Corporation, to justify its action by placing the blame for delay on the Board. All that was indicated in the said reply in paragraph 47 was that there was no impediment in the way of the Corporation in selling the sugar units under the provisions of the Act. The High Court has wrongly assumed that in the averments contained in paragraph 47 of the counter affidavit the Corporation was seeking to put the blame on the Board for delaying the proceedings.

For the reasons aforementioned, we are unable to hold that a case is made out for prosecution of the person who had sworn the said counter affidavit filed on behalf of the Corporation in the Writ Petition before the High Court or the Company Secretary of the Corporation or the Board of Directors, and the direction given by the High Court to the Registrar, High Court, to file a complaint in that regard cannot be upheld and must be set aside. While doing so we may also state that in the absence of any material on the record to show that the counter affidavit was placed before the Board of Directors and had been approved by them, the High Court was not justified in proceeding on the basis that the Board of Directors had abetted with the person who had sworn the counter affidavit on oath in arranging false defence and should be deemed to have given false evidence.

After the writ petition was filed in the High Court it was placed before the Court on August 25, 1994 on which date it was adjourned to August 26, 1994. On August 26, 1994 the Court issued notices on the writ petition. The matter was adjourned to August 30, 1994 for orders on the stay petition but the Court expressed the hope that while the matters are under hearing, the proceedings could go on peacefully without the Court being reminded that the status quo of the state of affairs on the transfer of assets of the Corporation is being altered, and that this may not be an atmosphere conducive to hearing nor would it be appropriate for the Court to permit complications to happen and to restitute situations subsequently, which may be difficult. On August 27,1994 a deed of agreement to sell the sugar factory at Burhwal to M/s. Balrampur Chinni Mills Ltd. was executed and the said agreement was registered on August 30, 1994. This fact was brought to the notice of the Court when the matter was taken up on August 30, 1994 and on behalf of the Corporation it was pleaded that they came to know of filing and pendency of the writ petition only on September 1, 1994 and till that date they only knew of the passing of the orders by the Court on August 26,1994, and they came to know of the said order passed in the writ petition on September 2, 1994, and that immediately thereafter on September 2,1994 the Managing Director of the Corporation took steps to regain the possession of the assets of the Burhwal sugar unit and that the possession of the said sugar factory was taken back by the Corporation on the same day. A considerable part of the judgment of the High Court is devoted to this aspect. We have been informed that the said agreement for sale has been cancelled and the purchaser is not longer interested in purchasing the said mill. We, therefore, do not consider it necessary to go into it this question except saying that the said sale shall be treated as cancelled.

Before we conclude, we consider it necessary to advert to some of the observations contained in the judgment of the High Court wherein the learned Judges have disparagingly referred to the attitude of the civil servants in running the industrial undertakings in the public sector which also contain an implied criticism of the State policy regarding nationalisation of industries. It has been observed:-

> 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 a state enterprise to run a business or an industrial venture."
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> "It is a common knowledge, though not disputed in proceedings of this case, that in the absence of an incentive element in State and Government run industries and enterprises barring a few exceptions, state ventures have usually run amuck, saddling the people with a huge bill to make up for the ill- advised State run industries where bureaucrats yearned to become corporate executives. But, they tied themselves up in knots of red ribbon and tapes, when they could neither shed their power and got entangled in the use of it. To be an industrialist, one has to be a floor shirt mechanic and a corporate executive, both; civil servants would not like to spoil their collars and cuffs, but, would like to wear cravats and links on double cuffs in the fashion of a corporate image."

Civil service has an important role in the administration of the State. Civil servants are entrusted with the task of implementation of the State policies. They have been discharging their responsibilities to the best of their judgment and abilities. Without having a full appreciation of the reasons for failure of a particular policy it would not be fair to place the blame for such failure on the civil servants. The remarks made by the High Court, in our opinion, are unjustified and unwarranted. On a number of occasions in the past this Court has expressed its disapproval of the use of strong and carping language by judges while criticising the conduct of parties or their witnesses before it. It has been said that Judges must act with sobriety, moderation and restraint and must have the humility to recognise that they are not infallible. Emphasising the need for mutual respect it has been observed that in order to command respect there must be respect by the judiciary to those who come before the court as well as other co-ordinate branches of the State, the executive and the legislature. (See : State of M.P. & Ors. v. Nandlal Jaiswal & Ors., [1986] 4 SCC 566 at p. 615 and A.M. Mathur v. Pramod Kumar Gupta & Ors., [1990] 2 SCC 533 at pp. 538-39). We are constrained to say that the learned Judges have failed to display the judicial restraint that is expected from the Bench in highest Court in the State.

The appeal is accordingly allowed, the judgment of the High Court dated December 9, 1994 is set aside and the writ petition filed by the petitioners is dismissed. Nor order as to costs.

Appeal allowed.