

ALLAHABAD HIGH COURT

Churk Cement Mazdoor Sangh

Vs.

State of U.P

C.M.W.P. No. 26223 of 1990 connected with Civil Misc. Writ No. 10607 of
1991

(B.P. Jeevan Reddy, C.J. and R.B. Mehrotra, JJ.)

22.07.1991

JUDGEMENT

B.P. Jeevan Reddy, C. J.

1. These writ petitions call in question the validity and legality of the sale by Government of U.P. of 51% shares in a wholly Government owned public sector Corporation, U.P. State Cement Corporation Ltd. (UPSCCL) in favor of Dalmia Industries (Respondent No. 5 in W. P. No. 10607 of 1991).

2. In the State of U. P., there are only three major cement factories, besides a few small units. All the three major units are in the public sector. They are Churk Cement Factory, Dala Cement Factory and Kajaarhat-Chunar Cement Factory. In 1972, the State Government formed a Government Company known as U.P. State Cement Corporation Ltd. (UPSCCL), which came to own these factories. It appears that two of these factories were started even prior to the incorporation of the Corporation, while the third was installed and commissioned by the Corporation itself.

3. The total installed capacity of the three plants is 25.60 lakhs M. T. per annum. Viewed in terms of their installed capacity, the Corporation is the third largest cement manufacturer in the country. Its Board of Directors is comprised of 15 directors, of which five are nominated by the Governor, two by the Financial Institutions, and the remaining elected by the Board/share- holders, which again means the State Government. For one or the other reason - indeed, the reasons appear to be many - the actual production has been far below

national average of cement factories. According to the company's own publication, production in the year 1985-86, 86-87, 87-88 and 88-89 has been 42.54, 39.45 and 44.92 and..... per cent respectively. According to the Corporation, the wet process employed in the Churk Factory is based upon an obsolete technology; plant and machinery have also become worn out due to prolonged use. A modernization and rehabilitation scheme has been prepared, which is likely to cost Rs. 52.25 crores. Even at the Dala Factory, which employs the dry process, there have been several problems, modernization and rehabilitation scheme prepared for this plant is expected to cost about rupees 45 crores. (Fortunately, however, the Corporation is not burdened with surplus labour, a common feature of public sector enterprises. According to a publication of the Corporation, the surplus labour is only 364 in the three units put together, which is likely to disappear in the next 4-5 years with the imposition of strict ban on fresh recruitment, now in force). As a result of unusually low production, and for several other reasons, the Corporation has been incurring substantial losses over the last two decades. With every passing year, losses have been mounting.

4. The authorized share capital of the Corporation is Rs. 80 crores, while the subscribed paid-up share capital is Rs. 63.53 crores, entirely contributed by the State. Accumulated losses, according to the counter-affidavit filed by the State Government, over the years 1972-73 to 1988-89 are in the region of Rs. 155 crores by March 31, 1991, it was expected to reach the figure of Rs. 180 crores. In the circumstances, the Corporation was obliged to borrow heavily from Industrial Development Bank of India (about Rs. 5 crores) and the Allahabad (Rs. 5 crores). The Corporation has borrowed substantial amounts from the State Government (more than Rs. 10 crores). According to the counter-affidavit, the outstandings to the Financial Institutions is in the region of Rs. 100 crores (55 crores principal and 46 crores interest).

5. The Corporation employs about seven thousand persons. The three factories are jointly located over an area of 13.5 square kilo metres. On the said land have come up, besides the manufacturing units and the auxiliary buildings, six residential colonies comprising more than 5,000 dwelling units, and six recognised educational institutions. The company owns three lime-stone mines as well, spread over an area of about 30 sq. kms. The Corporation also owns a

property in Lucknow known as 'Cement Bhawan'. It has entered into a contract with Bokaro Steels for supply of slag at concessional rates, which has still 20 years to run. These facts alleged in W. P. No. 10607 of 1991 are not disputed in the counter-affidavit filed by the State. The petitioners have further alleged that the total value of these assets including the limestone mines and Bokaro contract is Rs. 700 crores. The respondents have denied this valuation, but have not chosen to give their own valuation.

6. Part II : In view of the continuing losses incurred by the Corporation, the Government appears to have been thinking of ways to cut these losses. Various alternatives were explored, including the sale of units and joint-venture. Ultimately, it was decided to convert the said Corporation into a joint sector Corporation. It would be appropriate to notice the course of events leading to the agreement in question between the State Government and the Dalmia Industries (respondent No. 5), where under the State has agreed to sell 51% of the stock at the rate of Rs. 75 /- per share, at the same time extending certain concessions and accommodations. These facts are drawn from the records placed before us by the counsel for respondents in pursuance to our direction.

7. In the Economic Times dated 1-5-1990, an advertisement (occupying a space of 5" x 4") was published by the State Government of U.P. stating that the State Government had decided to privatize the U.P. State Cement Corporation Ltd. and that the desirous and reputed entrepreneurs may come for briefing on 19-5-1990 at 11 a.m. It was published in the name of D. K. Mittal, Special Secretary to Government of U.P., Industries Department. Interested persons were asked to contact the Special Secretary for further details and also for submission of their proposals. This advertisement did not specify whether the Corporation was to be privatized in its entirety or whether a joint venture was proposed to be entered into. All that it said was that the State Government had decided to privatize the said Corporation and that the parties interested may come for briefing on the specified day and time and contact the Special Secretary for further details.

8. On 15th June, 1990, the Hon'ble Chief Minister, while presenting the budget, reaffirmed his Government's faith in the public sector, but at the same time said that in respect of units incurring losses, steps are being taken to redress the situation either by merger, rehabilitation, or by placing them in the joint sector. He said that those units, which cannot be rehabilitated, will be closed. He

disclosed that the State Government has, on the basis of a preliminary scrutiny, invited proposals from private entrepreneurs in respect of certain units and that an officer of the rank of Secretary to Government has been deputed to process the matter further.

9. In pursuance of the advertisement dated 1-5-1990, several industrialists responded. On 19-5-1990, a meeting was held in the office of the Principal Secretary, Industries, Government of U.P. According to the minutes of this meeting, as many as 25 entrepreneurs participated in it. The Principal Secretary explained in details the status of the Corporation and gave a detailed note covering all its aspects including the balance-sheet of 1988-89. He informed the participants that the State Government had decided to convert the Corporation into joint-sector by inducting private management, and that it would not make any further investment therein either by way of loan or by way of Government guarantees. He informed them that there ought to be no retrenchment of workers and that it was a pre-condition to any agreement. The entrepreneurs were asked to send their offers based upon the above points and on the further assumption that the reliefs available to sick units as per policy of the State Government and guidelines of the Reserve Bank of India would be made available. Offers were invited before the end of June, 1990. The detailed note supplied to the participants contained several particulars relating to assets, capacity, annual production, finances, debts and so on.

10. By a proceeding dated 27th August, 1990, a committee known as Privatization Committee was constituted by the Government to negotiate with prospective entrepreneurs in the matter of privatization of loss-making Government units. It comprised seven members, namely, 1. Principal Secretary, Public Enterprise Department (Chairman), 2. Shri Ram Bajjal, Ex-Chairman, IEL Group, Noida, 3. Col. B. K. Rai, Ex-Managing Director, U.P. Electronic Corporation, 4. Secretary of the concerned Administrative Department, 5. a nominee of the Chairman of IDBI, 6. a nominee of the State Bank of India and 7. Secretary, Public Enterprise Department. This Committee was to deal with the Privatization of four companies, namely, 1.U.P. State Cement Corporation Ltd., 2. Auto Tractors Ltd., 3.U.P. Tyres and Tubes Ltd. and 4. U.P. Instruments Ltd.

11. The first meeting of the Privatization Committee took place on 11-9-1990

where it deliberated upon the various aspects of the job entrusted to it. One of the important matters discussed at this meeting was 'valuation' of the units (subject 3). One of the members Sri A. K. Puri expressed the opinion that it is essential to have all the units valued properly by reputed approved valuers. It was necessary, in his view, to find the main assets and investments in each of the units (vide page 3 of Annexure VIII in the Material Paper Book supplied by the Government). Sri Puri also suggested names of five approved valuers for this purpose, namely, 1. A. F. Ferguson and Co., New Delhi, 2. P. N. Section Advisory Service, New Delhi, 3. Price Water-house Associates, New Delhi, 4. Ray and Ray, New Delhi and 5. SectionR. Botliboi and Co., Bombay. The Committee decided that a sub-committee of four members including Sri Puri will decide upon the agency through which the units shall be got valued. It is significant to notice that in spite of this decision, the unit in question (UPSCCL) was not got valued by any of the aforementioned valuers/agencies.

12. It is not necessary to refer to the proceedings of the second meeting of the Privatization Committee (PC), since nothing significant was transacted thereat. Meanwhile, negotiations were being held with the Associated Cement Companies (ACC). The said company requested the PC to have an immediate valuation of the UPSCCL carried out by a reputed firm of chartered accountants to determine a realistic basis for negotiations. They suggested the name of M/s. Section B. Billimoria and Co., Bombay, for the purpose (vide letter of ACC dated 20-9-1990 in the Material Paper Book supplied by the State Government). Accordingly, the Government of U.P. asked Billimoria and Co. to undertake the job. Parameters of the study were indicated in the letter of the Government dated 10-10-1990 addressed to the said firm of chartered accountants. (A copy of the letter has, however, not been made available to us). The cost of the said study was to be shared by the Government and the ACC in equal proportion. The said firm carried out a study and submitted its report, comprised in two volumes, on 10-10-1990. They valued the shares of the Corporation at Rs. 20/- each. (The face value of the shares is Rs. 100/-each). After receiving the said report, ACC wrote to the Government on 12-11-1990, indicating the main features of their offer, on the basis of which they were prepared to enter into a joint sector agreement. Certain negotiations appear to have taken place in pursuance thereof between the PC/Government and the ACC. We have not been apprised of the particulars of these negotiations, particularly of the discussions

which are said to have taken place on 21st and 22nd November, 1990 at Lucknow. What is relevant is that on 28th December, 1990, ACC wrote to the Government indicating their disinterest in the matter. The relevant paragraph of that letter reads thus:-

"I write further to my letter dated 12th November, 1990 and the subsequent discussions my colleague Mr. I.M.M. Mabiari and I had with you and the Privatization Committee on 21st and 22nd December, 1990 at Lucknow.

In the light of our discussions, the matter was further considered by us along with Senior Directors of the company. Having regard to the large accumulated losses and recurring burden of excessive work force, it was felt that it will not be possible for the ACC to restructure UPSCCL and run it on a viable basis within the broad parameters of Privatization indicated by you and your colleagues during the discussions. We, therefore, deeply regret our inability to take any further interest in the proposal."

13. In December, 1990, an offer was received from the Raymond Woollen Mills. They were interested in an outright purchase of all the assets. They were not prepared to take over any of the liabilities. This offer was given no serious consideration by the PC. The Orient Paper Mills, who had earlier made an offer, expressed their inability to enter into a joint venture. The net result was that by the end of the year, only the Dalmia Industries (R-5) remained in the field. Their offer was considered by the PC at its meeting held on 11-1- 1991. We think it relevant to refer to the minutes of this meeting at some length. Indeed, it would be appropriate to extract the entire minutes relating to the UPSCCL considered as item 2.

(MINUTES)

" Item No. 2.

Outlining the details given in item 2 of the agenda notes, Chairman elaborated as to how the Sub-Committee started the negotiations with the parties concerned with just two stipulations from the State Government side and how during the discussions a pattern for collaboration emerged. He also informed that the contents of Billimoria's valuation report was

made available to other parties also in the final round of discussions.

Members agreed that there is an immediate need for Privatization since Government will be avoiding the substantial cash losses incurred year after year and Government will also stand to benefit through increased tax inflows as the capacity utilisation improves under private sector management.

Members then discussed the parameters; that had emerged during the negotiations by the sub-committee and approved them as under:--

1. UPSCCL will be handed over to the joint sector promoter on an 'as is where is' basis with all the assets and liabilities.

2. The joint sector arrangement will be Govt. : Private Promoter-49 : 51.

At the time of any future disinvestment by the Government, they will give the first offer of the shares to the promoter on a mutually agreed price to be decided at that time.

3. While Government might need an initial payment at the time of signing of the MOU, balance payments will have to be paid in installments as per an agreed time schedule. The promoter will have to provide sufficient and satisfactory guarantee for this balance amount. The promoter will also pay interest on this amount from the day of the agreement at a mutually agreed rate of interest to be paid in half yearly installments.

4. The promoter will bring in funds required for the short term and long term investments in the corporation according to a pre-determined investment plan.

5. The promoter will take over the labour on an 'as is where is' basis and after taking over the management will decide on the future course of action.

6. State Government will be requested to make available the ST. deferment concession. They would also be requested to consider deferring the payment of liabilities due to the State Government and its agencies.

7. As regards concessions from financial Institutions and Banks, State Government will assist the promoter in his negotiations to get these as are available to sick units that are being revived.

8. Representation on the Board will be in the same ratio of share holding. The Chairman will be nominated by the State Government and full time

Managing Director by the promoter.

U.P. Asbestos had not given any firm offer. Thus there were only two sealed offers received from M/s. ACC and M/s. Dalmia regarding the price of the shares at which they are willing to come in as joint sector partners. These two covers were opened at the meeting.

It was found that M/s. ACC had expressed their regrets about their inability to take any further interest in the proposal. The other offer of M/s. Dalmia was, therefore, the only one to be considered.

M/s. Dalmia Industries Ltd. have offered for a share having face valued Rs. 100/-.

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| 1 s . . 4 4 / - - | With no benefits available from financial institutions. |
| 1 s . . 7 2 / - | With all the benefits like |
| | i) reduction of rate of interest |
| | ii) writing off penal and compound interest on the term loan |
| | iii) Converting the interest due into interest free loan. |
| 1 s . . | If along with the benefit from the financial institutions, State Govt. also write off the entire amount of contingent liabilities as on date of |

take over.

The Committee felt that the offer contained a number of conditionality's and desired a firm offer. What concessions will be available from the financial institutions will only be known after the joint sector venture comes into existence and discussions are held by the private promoter with the financial institutions.

Sri Pravin Kumar who represented M/s. Dalmia Industries was called before the committee. The members wanted to know from him the details of the investment plan and turn around strategy, the general details about the Dalmia group, its annual cash generating capacity, etc.

Sri Pravin Kumar explained his groups operations. He said the current annual turnover was around Rs. 600 crores which is expected to increase to Rs. 1000 crores. He agreed to send a 2 page brief about the Dalmia group.

As regards the turn around strategy, he stated that they would be concentrating on the Dalla units, make them operate at 80-85% capacity utilization, to generate revenue surplus. They would be taking up a rehabilitation plan for Churk only later. As regards surplus labour he was of the opinion that to have industrial peace, they may not like to attempt any reduction in the first year and may plan rationalization only later. For the short term investments of 10-15 crores required, they would be depending on internal resources of the group and will be approaching the financial Institutions only for the modernization programme which would need around Rs. 120 crores.

As regards guarantees, Sri Pravin Kumar agreed to provide corporate guarantee from the Dalmia Industries as also from the other group companies which will be investing in UPSCCL.

Sri Pravin Kumar was informed that the following concessions could be recommended to the State Government for consideration :-

- i) Sales tax deferment for 5 years as per the approved scheme.
- ii) Rescheduling of about Rs. 25 crores payable to different State Government departments. The payment schedule will be a moratorium

period of 3 years followed by payment in 5 equal annual installments.

The interest payment for these rescheduled liabilities will be 12% p.a. with a rebate of 3% for timely and prompt payments. There will be no moratorium on interest payment - that is - interest is payable on the outstanding amount from the date of the agreement.

iii) Among the contingent liabilities, Rs. 140 lakhs towards sales tax cases and Rs. 11 lakhs towards stamp duty may be considered for write off. All other contingent liabilities will be the responsibility of the promoter. Efforts will also be made to drop the pending sales tax cases.

Given these concessions which could be reasonably expected to be granted by the State Government Sri Pravin Kumar was expected to give a firm price. The committee also informed him that no commitment can be made on behalf of Financial Institutions and Banks regarding the concessions that would be available.

He should while arriving at the price make whatever assumptions he would like to make regarding the usual concessions that would generally be available to a sick unit.

Sri Pravin Kumar finally offered a price of Rs. 75/- per share. The members felt that this was a very fair offer and should be recommended to the Government.

The Committee, therefore, decided to recommend that the offer of M/s. Dalmia Industries be accepted. The committee authorized the Sub-Committee to prepare a draft MOU on the terms and conditions indicated above and the final recommendations to the Government."

14. On 19-1-1991, the Chairman of the PC wrote to the Chief Secretary to Government of U.P. that terms of joint venture have been settled with Dalmias and that the IDBI has also welcomed the proposals. He referred to the proceedings of the PC dated 11-1-1991 wherein the Deputy General Manager of the IDBI participated. It was said that the said Deputy General Manager apprised Sri Nadkarni, Chairman of the IDBI, of the proposals on telephone and that Sri Nadkarni welcomed the same. The letter further states that Sri Nadkarni also verified the financial status of Dalmia Industries and said that there was nothing against them.

15. A memo of understanding (MOU) was finalized and signed by both the

parties, i.e., the State Government and the Dalmia Industries. (The MOU does not bear the date on which it was signed nor could the Counsel for the State furnish us the date. It, however, appears that it was executed sometime in January/February, 1991). It would be appropriate to set out the MOU in full :
(MOU)

"M.O.U. between the Industries Department, U.P. State Govt. and M/s. Dalmia Industries Ltd.

The Government of U.P. and M/s. Dalmia Industries Ltd. have agreed to enter into Joint Sector Agreement in respect of U.P. State Cement Corporation Ltd.

1. Dalmias will take over the management of UPSCCL taking over all the assets 'as is where is' basis.
2. The Joint Sector Agreement will be U.P. State Government : Dalmias 49 : 51.
3. The shares with a face value of Rs. 100/-at present will be disinvested by the State Government to Dalmias at a price of Rs. 75/-per share.
4. Dalmias will pay to the Government on entering into an agreement an amount of Rs. five crores as per the following schedules :

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| At the times of signing the agreement. | Rs. On e cro re. |
| After three months of signing the agreement. | Rs. Tw o cro res. |
| After six months of signing the agreement. | Rs. Tw o cro res. |

The later two payments will also be made at the beginning itself by post dated cheques.

5. Balance amount shall be paid within Twenty-Four months from the date of this M.O.U. This balance amount will carry an interest of 12% p.a. from the date of the agreement till the date it is paid to the State Government.

6. This balance amount mentioned in para 5 above as and when it is paid by the Dalmias will be reinvested by the State Government as secured loans or against secured debentures into UPSCCL and these loans will carry the same rate of interests of 12% p.a. These loans debentures are repayable after a period of five years in four equal annual instalments.

7. Whenever the State Government decides to disinvest its remaining shares, Dalmias will be given the first right to purchase the same at a mutually agreed price to be fixed at that time.

8. Immediately on entering into an agreement with the State Government, Dalmias will furnish a Corporate guarantee and also guarantees from the other companies of the group who will be investing the UPSCCL for the balance amount mentioned in para 6 above.

9. All the employees of UPSCCL will be taken over on an 'as is where is' basis by the Joint Sector venture.

10. Representation on the Board of Directors will be in the same ratio as the share holding. State Government will have four Directors and Dalmias five Directors. The Chairman will be nominated by the State Government out of the four Directors and the full time Managing Director by the Dalmias out of the five Directors.

11. The capital basis of the Corporation will not be changed without the prior consultation and agreement of the U.P. State Government.

12. Dalmias hereby give an undertaking that they will run UPSCCL as a cement manufacturing unit at least for a minimum period of five years.

13. If Dalmias are not able to meet any of the commitments given to the State Government at the time of the formation of the Joint Venture, in addition to the stipulation that the internal and external auditors shall be appointed in consultation with the State Government, the State Government will be at liberty to take over the management of the Company.

14. Other than what has been stated above, there will be no further inflow

of funds to UPSCCL, in future from the Government.

15. State Government will not give any guarantee for any funds to be raised in future by the Management of UPSCCL.

16. After the Joint Sector Venture comes into existence, on application UPSCCL may be granted the following concessions :

i) Sales Tax deferment facility for five years.

ii) Rescheduling the liabilities due to the State Government and its agencies to the tune of Rs. Twenty Five Crores the payment schedule will be a moratorium period of three years followed by payments in five equal annual installments.

The interest payment for these rescheduled liabilities will be 12% p.a. with a rebate of 3% for timely and prompt payments. There will be no moratorium for interest payment that is interest is payable on the outstanding amount from the date of agreement.

iii) Contingent liabilities of Rs. 1.4 crores to the Sales Tax Deptt., and Rs. 11 Lakhs towards stamp duty shall be waived. Further the Sales Tax Department will be requested to drop all past cases.

16. All other contingent liabilities other than what has been mentioned in item 15 above shall be payable by UPSCCL if and when they materialize.

17. The memorandum of articles of association will have to be suitably amended to reflect the changed version of the company and other changes envisaged in the Board etc."

The terms of the MOU were also incorporated in a G.O. issued by the Government on 13/23rd February, 1991, and another G.O. issued on 23rd February, 1991.

16. Another meeting of the PC was convened on 4-3-1991, but the meeting could not go on because of a forged stay order produced before the Committee. As to who was responsible for and who produced this forged order, we shall discuss elsewhere. At this stage, it is sufficient to notice that the meeting could not take place. When it was discovered that the order produced before the meeting was a forged one, another urgent meeting was called on 7th March, 1991, telephonically, and it was held on that day. At this meeting, it was resolved to transfer 49 per cent of the shares in the UPSCCL in favor of the Dalmia Industries and their nominees, and for this purpose, a share Transfer Committee was constituted. It may be mentioned here that the decision to

transfer only 49 per cent shares, and not 51 per cent shares as per the MOU, was taken in view of the stay order dated 16-10-1990 passed by this Court, to which we shall refer presently. Another step taken at this meeting was to accept the resignation of certain directors from the Board of Directors of the UPSCCL and induction of four Directors who were the nominees of the Dalmia Industries.

17. Part III : W.P. No. 26223 of 1990 was filed on 16-10-1990 by several trade unions and employees' unions. It is evident that by the said date (16-10- 1990), nothing concrete had emerged. The writ petition was based upon the apprehension that the Corporation was being privatised, which would affect the service conditions and the very continuance in service of the workers and employees. The prayer in the writ petition was to call for the records relating to the decision of the Government to privatise the UPSCCL and to quash the said decision. It was also prayed that the services of the employees, workers and officers of the Corporation should be continued as of date. It came up before a learned single Judge on 16-10-1990 and the following order was passed on the stay application :-

"Learned counsel for the petitioners has stated that the State Government has taken a decision to privatise the U.P. Cement Corporation and necessary steps are being taken to implement the aforesaid decision.

Until further orders, the final implementation of the decision to hand over the factories, run by the Corporation, shall remain stayed during pendency of the writ petition. However, in the meantime, other formalities may be completed (Sd. Section C. Verma J.)"

18. On 13-3-1991, the Churk Cement Adhikari Kalyan Samiti filed the second writ petition at Lucknow, numbered as W.P. No. 1003 of 1991. By this date, the agreement between the Government and the Dalmia Industries had been arrived at and the transaction practically finalised. The petitioners themselves filed a copy of the MOU and the GOs aforementioned and questioned the same on several grounds. The reliefs sought for in this writ petition are :

(i) quashing the Government orders dated 13/23rd February, 1991 and 23rd February, 1991, respectively;

- (ii) quashing the MOU; and
- (iii) a direction to the respondent Government to consider the proposals submitted by the employees of the Company for running the Company on the terms incorporated therein.

Certain interim orders were passed in this Writ Petition on 13/3, 15/3, 29/3 and again on 9-4-1991. It is not necessary to refer to them in any detail. Suffice it to say that the interim order passed on 15-3-1991 was vacated on 9-4-1991 and the writ petition was directed to be heard along with the other writ petition filed at Allahabad. The said writ petition was accordingly transferred to Allahabad and renumbered as W.P. No. 10607 of 1991. The following are the averments in this writ petition :

19. The U.P. State Cement Corporation Ltd. is a State within the meaning of Article 12 of the Constitution. It is a Government company and all its shares are held by the State Government. It was incorporated in 1972. The Government exercises far-reaching control over the company. It owns three cement factories, which are located over an area of 13.5 sq kms. In the said area are located the manufacturing units and their auxiliary buildings, six residential colonies comprising five thousand dwelling units, six recognized educational institutions and three lime-stone mines. The value of the land is more than Rs. 100 crores at the rate of Rs. 100/- per square yard. The cost of the residential buildings is rupees 55 crores. The lime-stone mines yield, on an average, two lakhs of metric tons per month. There are roads, railways, tracks, electrical installations within the said area. The Corporation also owns a property known as 'Cement Bhawan' at Ashok Marg in Lucknow. The cash in bank account is in the sum of Rs. 8.82, crores, which is supported by the note dated 25-2-1991 prepared by the Accounts Officer of the Company. The company has also a subsisting contract with Bokaro Steels for supply of slag at a rate less than 1/3rd of the current market rate. This contract has still to run for 20 years. This is a great advantage. The installed capacity of the three Cement Factories is 25.60 M.T. of cement per annum. The cost of installation of a cement plant is Rs. 2000/- per metric ton, which would mean that cost of setting up a cement plant of that capacity would be more than Rs. 500/- crores. The existing inventory of the Corporation is valued at Rs. 15 crores. Eighty per cent of the cement produced by the Company is sold to the State Government Departments and only 20 per cent to public. Sale to Government is at a lesser rate than the market rate. The

installed capacity of the three cement factories is equal to 50 per cent of the annual consumption of cement in the State. Corporation is paying Excise duty in sum of Rs. 21 crores annually and a sum of Rs. 1.25 crores towards royalty and Welfare Cess to State Government. It also pays Rs. nine crores as Sales Tax every year. On 1-5-1990, the Government published an advertisement in the Economic Times, indicating its intention to privatize the Corporation and inviting offers. The employees of the Company have also submitted a proposal (a copy of which is Annexure 8 to the writ petition), which has been neither considered nor any orders passed thereon by the Government. While so, on 13/23rd February, 1991, the Government issued a G.O. stating that a decision had been arrived at to sell 51% of shares in the said Corporation in favour of Dalmia Industries (R- 5). Another G.O. has also been issued on 23-2-1991. A memo of understanding is also said to have been executed between the Government and the Dalmia Industries in pursuance of the said proceedings. Five persons nominated by the Dalmias are going to be appointed to the Board of Directors of the Company. Shares are also going to be transferred to the said party. The said MOU, G.P. and the agreement are all illegal inasmuch as the State Government had at no point of time issued any advertisement or public notice notifying its decision to run the Corporation as a joint sector company nor were any offers invited on that basis. All the terms and conditions have been finalized only after choosing the transferee and in private negotiations with them. The procedure adopted is neither proper nor fair and is violative of Article 14 of the Constitution. Valuable public property worth several hundreds of crores is gifted away in favour of Dalmia Industries (R-5) for a taken payment of Rs. One crore. Besides the low price, several attractive concessions and incentives are also extended to the said respondent. The entire transaction is vitiated by secrecy and is prejudicial to public interest. The transaction is contrary to the provisions of Section 30-B of the Monopolies and Restrictive Trade Practices Act, 1969. It is also contrary to the agreements the Corporation has entered into with the Financial Agencies namely IDBI, SBI and Allahabad Bank, where under the Corporation has undertaken not to transfer any of its shares except with the prior approval of IDBI. No such prior approval has been obtained. There has been no proper valuation of the shares or properties of the Company. The transaction is prejudicial to the public interest and unconstitutional and has been arrived at in a clandestine manner.

20. On behalf of the respondents, a counter-affidavit has been filed on behalf of the Government of U.P. (R-1), which has been adopted and affirmed by respondents 2 to 4 (UPSCCL and its officers) and the Dalmia Industries (R-5). We shall, therefore, refer to the contents of the counter-affidavit filed by 1st respondent. The petitioner has no *locus standi* to maintain the present writ petition. The employees of the Corporation are not Government employees and do not have the protection of Article 311 of the Constitution. They have no right to challenge the policy decision of the Government to privatise the Corporation or to enter into a joint sector agreement. The rights and privileges of the workers of the Corporation are not affected in any manner by the agreement entered into between the Government and the 5th respondent. The fifth respondent has agreed to take the employees of the Corporation on 'as is where is' basis. The petitioner has suppressed material facts, on which ground alone the writ petition is liable to be thrown out. In W.P. No. 26223 of 1990, the petitioner (in W.P. No. 10607 of 1991) filed an application to implead itself on 25th February, 1991. Though the said application was heard on 4th March, 1991 by a learned single Judge of this Court, no orders were passed thereon. The said petitioner moved a stay application also, requesting the Court to stop the holding of the meeting of the Board of Directors of the Corporation scheduled to be held on 4-3-1991. No orders were passed thereon. The application has merely adjourned to 29th April, 1991. Having thus failed in their attempt to obtain a stay order from this Court, a forged stay order (purporting to have been passed on 27th February, 1991) was delivered to the Chairman of the Corporation along with a covering letter purported to have been written by the Churk Cement Staff Association. The meeting convened on 4th March, 1991 was adjourned on that account. After discovering that it was a forged order, a meeting of the Board was held on 7th March, 1991. This conduct of the petitioner disentitles him any relief from this Court; the writ petition must be dismissed on this ground itself. The decision to convert the corporation into a Joint Sector Corporation was taken after due consideration. It is neither arbitrary nor is open to judicial review. The installed capacity of the three cement factories owned by the Corporation is, no doubt, 25.6 lakhs M. T. per annum, but it has been regularly and consistently incurring losses from the year 1972-73 except for one year 1982-83. It has never been able to fully utilize its installed capacity. For example, during the years 1987-88 and 1988-89, it could utilise only 44 per cent of its installed capacity. It has further fallen to 32 to 35

per cent in the subsequent year. The Corporation has incurred losses of Rs. 155 crores till 31-3-1990. It has been incurring loss of over rupees two crores per month. By 31st March, 1991, the losses are likely to reach the figure of Rs. 180 crores. It has been continuously defaulting in payment of State dues, namely, electricity charges, sales tax, etc. In the year 1990, the Government sanctioned a sum of Rs. 10 crores to enable the Corporation to pay its electricity bills. Even so, electricity dues are mounting. Dues of other financial institutions are also substantial. The principal amount outstanding to them is Rs. 55 crores and interest Rs. 46 crores. The entire capital of the Corporation (Rs. 68 crores) has been wiped off by the losses. Production has been continuously going down. In these circumstances, decision was taken by the Cabinet in its meeting held on 20th April, 1990 to convert this public sector Corporation into a joint sector Corporation in order to minimize the recurring losses. Accordingly, an advertisement was published in Economic Times on 1st May, 1990. Offers were invited. To process these offers a high level committee, called the Privatization Committee (PC), was constituted and the offers received were duly scrutinized and processed. The question of valuation was referred to an independent and recognized valuer who determined the value of the shares of the Corporation at Rs. 20/-per share (face value being Rs. 100 per share). Indeed, some parties felt that even this was an over-valuation. After several meetings and discussions, the Dalmia Industries offered to purchase the shares at the rate of Rs. 75/- per share, which was found to be best offer, and accordingly, the deal was finalized with it. There is no basis for any apprehension in the minds of the workers and employees of the Corporation regarding their service conditions. Clause 9 of the MOU clearly safeguards their service. Government is not divesting itself totally. Moreover Article 125(a) of the Articles of Association of the Corporation empowers the Governor to give binding directions. It is a sufficient safeguard. Because of the poor performance of these units, a stage had arrived where it was difficult for the State to run these factories. Government's financial position also does not permit any substantial investment, which may be required for redressing the situation. The proposal submitted by the workmen is not feasible or workable. They have not indicated the guarantee which they can furnish to the Government. It is for this reason that they were not called for discussions. In view of the orders of this Court dated 16-10-1990, the Government did not transfer 51 per cent of shares, but transferred only 49 per cent shares. The shares have been transferred and duly registered and recorded in the register of

members of the Corporation on 19-3-1991. The transaction entered into is a fair and appropriate one, in all the circumstances. The 5th respondent has already paid a sum of rupees two crores and has also furnished security for a sum of Rupees 21 crores to the State Government in terms of the MOU. So far as the concessions said to have been given to the 5th respondent are concerned, they are the normal concessions extended to all sick and loss making units. In any event, these concessions were taken into account while fixing the value of shares at Rs. 75/- each. It is untrue that under the terms and conditions of the transaction entered into between the Government and the 5th respondent, the latter is getting a benefit of Rs. 770 crores. It is really an exaggerated and unrealistic figure. Even today, the Board of Directors of the Corporation consists of 15 directors of which four would be the nominees of the State Government, five of the Dalmias, two of the Financial Institutions, one of the State Bank of India, and two of the Railways. In other words, Dalmias do not have a majority in the Board of Directors. There is no violation of any of the provisions of M.R.T.P. Act. The nominees of the financial Institutions like IDBI are parties to the agreement and have approved the same. The properties of the Corporation continue with the Corporation and they are not transferred to the 5th respondent. The writ petition accordingly deserves to be dismissed.

21. Part IV : Sri Section P. Gupta, learned counsel for the petitioners in both the writ petitions, urged the following contentions :

(1) U.P. State Cement Corporation Ltd. has been established by the State of Uttar Pradesh in discharge of the duty placed upon it by Part IV of the Constitution. Establishment of the Corporation is directly related to Article 38, Clauses (b) and (c) of Article 39 and Article 43-A. As held by the Supreme Court in *Akadasi Padhan v. State of Orissa*,¹ reaffirmed in *Tinsukhia Electric Supply case* (1989) 3 SCC 709 : (AIR 1990 Supreme Court 123), our Constitution has accepted and incorporates the doctrinaire approach to socialism as distinguished from rational/pragmatic approach. Privatization of public sector companies is a direct negation of the philosophy underlying our Constitution. It is also held by the Supreme Court that nationalization must be deemed to be in public interest. This is the inference drawn from Clause (6) of Article 19. From this, it follows that any act of denationalization, total or partial, is against

public interest. Privatization of public sector concerns, whether total or partial, is contrary to the Directive principles contained in Part IV in particular, Clauses (b) and (c) of Article 39. It has again been ruled out by the Supreme Court that any executive act or legislation which runs counter to these directive principles must be deemed to be contrary to public interest. Privatization is *per se* unconstitutional and against public interest.

2. Even assuming that Privatization of a loss-making public concern is permissible, the transaction and the agreement arrived at by the State Government with the Dalmia Industries (R-5) is an unreasonable one and contrary to public interest. 51 per cent shares in a public sector Company, worth several hundred crores of rupees, is being made over for a song. What the Government ultimately got is only rupees one crore and, even if the Dalmia Industries pays the subsequent instalments of rupees two crores each, it will only be rupees five crores. The rest is only a promise which amount again is to be deployed back for the purposes of the Corporation. The substantial concessions and facilities extended under the agreement are themselves worth several crores of rupees. The deal smacks of arbitrariness, underhand dealing and a total surrender of public interest to favour a private party. The procedure adopted for and the manner in which the negotiations took place and the agreement arrived at are neither open nor fair. Prior approval of the IDBI was not obtained, as required by the agreement between the Corporation and the Financial Agencies dated 27th February, 1978.

3. The agreement and the understanding in question are violative of Section 30-B of M.R.T.P. Act.

4. The Government acted arbitrarily in not at all considering the offer made by the workers and employees of the Corporation. They were not invited for discussions, while the other entrepreneurs were. The reasons given in the counter-affidavit for not considering the worker's offer are totally unsustainable and are not borne out from the record produced by the respondents themselves.

Serious objection was taken by the learned counsel to the State of U.P. and the Dalmia Industries (respondents 1 and 5 respectively in W. P. No. 10607 of 1991) being represented by the same counsel. He submitted that both of them engaging the same Counsel is not only inappropriate but

also speaks volumes of the total surrender of public interest by the State in favour of, and to promote the interest of a private party. He made grievance of the fact that a firm of solicitors Khetan and Co. was engaged by the Cement Corporation and the 5th respondent, and a substantial amount of rupees five lakhs was paid from out of the funds of the Cement Corporation by way of fees to the said solicitors.

22. On the other hand, Sri Sudhir Chandra learned counsel appearing for the State of U.P. and the Dalmia Industries, made the following submissions.

(i) That the first writ petition (W.P. No. 26223 of 1990) was filed by the workers and employees' unions questioning the Privatization move, on the apprehension that any such Privatization would affect their conditions of service adversely and may result in their retrenchment. This apprehension is belied in view of Clause 9 of the MOU, which expressly provides that "all employees of UPSCCL will be taken over on 'as is where is' basis in the joint sector venture." Indeed, this was one of the preconditions stipulated by the Government before entering into any joint venture agreement. Since all the employees of the Corporation will be continued in service of the Corporation even after it becomes a joint sector venture, there is absolutely no room for any such apprehension on the part of the employees. In view of the said clause in the MOU, the very cause of action for this writ petition disappears. The employees and workers thus lose whatever *locus standi* they had for maintaining the first writ petition.

(ii) Writ Petition No. 10607 of 1991 must be thrown out in view of the fraud played by the petitioners, viz., producing a forged order and getting the meeting dated 4-3-1991 adjourned on that basis. Having failed to obtain an order from this Court, they forged and fabricated an order, which conduct by itself disentitles them to any discretionary relief from this Court under Article 226 of the Constitution.

(iii) the impugned agreement and understanding with 5th respondent was not arrived at by the Government in a hurry. It is the culmination of an elaborate and protracted scrutiny and negotiations by a high level body. It has also been blessed and approved by the financial agencies like the IDBI. In the light of the huge losses accumulated by the Corporation and

its constantly falling production, its inability to meet its financial and other obligations, and also in view of the anxiety of the State Government to cut its losses and not to invest any further amounts in the said factories, the deal arrived at is the best one in the circumstances. There has been no secrecy nor any underhand dealing in the matter. The transaction has been only arrived at. In fact, one of the causes for the poor performance of the Corporation is indiscipline among workmen, and, in particular, corruption among the officers of the Corporation. The officers of the Corporation had been siphoning off the properties and products of the Corporation. They have thus developed a vested interest in the public sector management. They are afraid that if the 5th respondent takes over the management, they would not be allowed to indulge in these corrupt activities. That is the real reason why they have come forward with the present writ petitions.

(iv) In matters of this nature, this Court, while exercising jurisdiction under Article 226 of the Constitution, does not sit as an Appellate Court. Its jurisdiction is only to see that the Government has acted fairly, and once it is satisfied on that score, no further scrutiny is permissible. In view of the fact that ACC and other entrepreneurs backed out, and in view of the further fact that the Dalmias offered to purchase the shares of the Corporation at Rs. 75/- per share as against Rs. 20/- (the value placed upon them by Billimoria and Co. Bombay), the deal must be said to be in the interest of public and the State. The concessions extended to the 5th respondent are neither unusual nor out of ordinary. They are the normal concessions extended to any sick or loss making unit -- or for that matter, to a newly established industrial unit.

23. We may mention that Shri Section P. Gupta, learned counsel for the petitioners, disclaimed any role or responsibility for production of the forged order on 4-3-1991. He said that none of the petitioners are responsible therefore. He said that the said order was not produced by any of the petitioners or their representatives. It is said to have been produced by the Chairman of the Corporation from out of his pocket. There is absolutely no material he says in our opinion rightly to connect the petitioners with the said affair. He further submitted that Clause 9 of the MOU does not fully safeguard the service conditions of the employees. He submitted that there was an agreement between

the Corporation and the workers to treat them on par with the employees of the Cement Corporation of India and this may not be honoured by the new management dominated by the 5th respondent. In any event, he submitted that when it is brought to the notice of this Court that public property worth several hundred of crores of rupees is being parted with in favour of a private party for practically no consideration, this Court must step in to protect public interest and examine the matter to safeguard the interest of the public and the State.

24 Part V.: It is not alleged by the petitioners that the State of Uttar Pradesh has embarked upon Privatization as a matter of policy. The State also does not say so, nor is there any material to hold so. It is not privatizing all the public sector Corporations as a matter of principle or as a matter of ideological or philosophical faith. It is privatizing only those public sector Corporations which have been consistently incurring losses over the last several years and where it finds that it is not possible for it to redress the situation and to put the industry back on rails. Let us take the case of this very Corporation. Over the last 20 years, it has been consistently incurring losses except for one year. Its entire capital base has been wiped out. It owes more than Rupees 100 crores to financial Institutions. To put it on proper lines, substantial fresh investment is necessary, which the Government is not in a position to spare. In these circumstances, the Government has decided to privatise it. Mr. Gupta says that instead of deciding to privatise it, the Government ought to have tried to identify the causes of the failure and to take steps to rectify the same. This, he says, is the constitutional obligation of the State. But as we have pointed hereinbefore, the real problem is not the identification of the causes - they are too well known; the real problem is the will and the capacity to take steps to rectify the situation. Successive Governments have found it beyond themselves to redress the situation over the last twenty years. The Government has its own limitations and compulsions. In this situation, it took the decision to privatise. It cannot be said to be a *mala fide* decision. The petitioners may have a different view, but that is not very material. It was for the Government to take the decision and in the circumstances, it cannot be termed to be a colorable one i.e. arrived at for achieving an ulterior or oblique objective. No unconstitutionality is involved in this decision. Similarly, it is true, as has been held on the basis of the provisions in Article 19(6), that nationalization must be deemed to be in public interest. But from this it does not follow that any and every act of

denationalization/Privatization is *per se* contrary to public interest. Indeed, in a given case, Privatization may be in public interest. After all, whose money is lost if a public sector enterprise incurs huge losses consistently ? It is public money - whether it comes from Government funds or IDBI or SBI. One may have to weigh all the factors and determine what is ultimately in public interest. So long as the decision is arrived at by the Government bona fide, this Court cannot sit in judgment over it. In the circumstances of UPSCCL, we cannot say that the decision of the Government to privatise it is not a *bona fide* decision. We are unable to see how such a decision can be said to violate the directive principles in Articles 38 and 39. These Articles point out the goal; they do not prescribe a particular path. A Government is not precluded from acting as any other prudent owner would in such circumstances. The Privatization in question is only an instance of prudent management, which any other owner in the position of the State Government could have undertaken. We cannot read the decisions cited by Mr. Gupta as laying down any proposition that whatever be the situation, no public sector concern can ever be privatised. It is also not a case where the Government is seeking to privatise a public sector concern merely because it is incurring losses. If that were the only ground, the situation would probably have been different, but here is a case where in addition to continuous losses, there has been a constant and steady fall in actual production vis-a-vis the installed capacity. Moreover, huge funds are also required for rehabilitating the units, which the Government thinks it is in no position to provide. In such a situation, it cannot be said that the decision to privatise the UPSCCL is either a *mala fide* one or that it is prohibited by the constitutional provisions. The contention urged by Mr. Section P. Gupta may become relevant if and when the State embarks upon Privatization as a matter of policy or ideological compulsion, unrelated to the facts and circumstances of the public sector ventures. It need not be considered in these writ petitions. This discussion, however, calls for a brief reference to the trend of Privatization gaining currency all over the world.

25. A fresh wind of change is blowing across the globe, the wind of Privatization - some call it the process of disinvestment (by State) though both terms may not be synonymous. The years following the termination of world war II was many a former colony emerging as a free nation. India was one among them. Jawahar Lal Nehru had a vision of India which aimed at political,

social and economic justice to the people of India. In economic sphere, it meant growth accompanied by distributive justice; it contemplated State playing a dominant role in reshaping the Indian economy. The concept of welfare state, he envisioned, called for State control of the commanding heights of the economy. The Industrial policy resolution gave shape to this thinking. It was felt that capitalist path of development does not suit this country, nor can it follow the path trod by Soviet Union. A humanist path towards socialistic pattern of society was ideal for India. Clauses (b) and (c) of Article 39 of the Constitution illustrated this ideal. According to it, the State shall, in particular, direct its policy towards security "(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good (and) (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment." As is well known, there were two competing economic doctrines - one spoke of growth and growth alone, while the other spoke of growth accompanied by distributive justice. Clauses (b) and (c) of Article 39 illustrate the latter doctrine. The Industrial policy resolution of 1948 clearly contemplated the State controlling the commanding heights. It is in pursuance of this policy that substantial resources of the State were diverted to establishment of key industries, nationalization of several important sectors, like insurance, transport, power, banking and so on. It was said that private enterprise in India is neither willing nor is capable of establishing heavy industries, which the State alone must undertake. Theories propounded by certain British economists of labour persuasion influenced our thinking at that stage. The experiment of State-run industries has not been happy in England. It has been much less happy in India. While other countries in Europe progressed by leaps and bounds, British economy stagnated. Then came Mrs. Margaret Thatcher with the slogan of Privatization. She undertook the job of disinvestment with gusto. Major British industries from British Airways down to Traffic Lights were privatised. The process is still on. Shares in these companies were sold to public at large. Result is that 30 per cent or more of the British population has become stock holders. Whether on account of this or otherwise, British economy turned the corner. Towards the close of 1980s, Russian economy reached a critical stage. It was realised that total state control of the economy over centralization was having a deadening effect upon the average man's initiative, drive and enterprise. People had no incentive to work and to produce more. It was felt that a market oriented

economy - or what is called market friendly economy - is the solution. They started restructuring their economy accordingly what is popularly known as 'perestroika' accompanied by 'glasnost' (Openness). Other eastern European countries hitherto following the Soviet Pattern started changing at a greater speed - it has been a lurch away from socialist economy. These winds of change could not but affect the thinking in our country as well. It is infecting the entire world. In mid 80's, our Government veered round to the view that a sheltered and protected economy, which may have served us well at the initial stages of development, is no longer workable. It led to deterioration in the quality of our products; they could not compete in the world market, they were priced out. Without a proper level of exports, our balance of payments position became precarious. In such a situation, the view that liberalisation of the economy is the answer, gained acceptance in official thinking. The idea was to integrate our economy into world economy, to make our industries compete with industries the world over. But what about the public sector? How does it rhyme with the new thinking ? Leviathan in proportions, it has not been growing even at, what is derisively called, the 'Hindu rate of growth : And what about the losses being merrily run up by many of them ? Even taking an overall picture, the public sector as a whole has not been yielding a profit of more than 2 to 3 per cent of the capital invested in it. Several economists, committees and commissions have gone into the causes of this poor performance, and have suggested several steps to redress it. (A brief discussion of this aspect is found in paras 29 to 31 of a judgment rendered by one of us (Jeevan Reddy C.J.) in *Grindwell Norton v. A.P.Section E.B.*². But nothing meaningful could be done to repair the situation. Meanwhile, our economy has been steadily going downhill, which developed its own compulsions, which we need not refer to here. Willy nilly, we seem to have embarked on a process of disinvestment by State. It is as yet in an emerging stage, of course.

26.PART VI: The more important and crucial question to be examined is how did the Government go about it; how did it proceed in the matter; did it adopt and follow a procedure consistent with public interest; and did it safeguard public interest while parting with a major 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,² the Supreme Court proceeded to examine the merits of a complaint by workers of the Fertilizer Corporation that certain machinery said to be surplus and obsolete was being sold for a song. It has been held in *National Textiles Worker's Union v. P.R. Ramakrishnana*,³ that in winding up proceedings, the workers have a right to be heard and they must be held to have the necessary *locus standi* to maintain a writ petition designed to protect their interest. In *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha*,⁴, it has been held that workers are equal partners in an enterprise. It must, therefore, be held that workers and employees of a public sector concern are vitally interested in the matter and that, in any event, when such an important matter 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 and is as much committed to public weal as any other wing of the State.

27. Once a decision to privatise was taken, and before any offers were invited, one would have expected the Government to have ordered a thorough valuation of the assets and liabilities of the Corporation to find out what it is worth. Any reasonable and prudent owner of property would do this before he puts his property for sale. He would first assess for himself the value of the property he is selling, since that alone would enable him to judge the offers received unless, of course, it is a distress sale. The same ought to have been done by the State Government both as a prudent owner and also because it is in the nature of a trustee of the public property. It is, however, surprising to note that no such effort was made. The first move towards Privatization was made by the Government by its letter dated 16-4 1990 addressed to IDBI seeking its guidance about Privatization and requesting them to send a nominee to finalise the details of the proposal. No follow-up action was taken. Then followed the advertisement in the newspaper 'Economic Times' on 1-5-1990. 25 persons responded and there was a preliminary meeting on 15-5-1990. Even then, no attempt was made to value the net worth of the Corporation. What is significant in this connection is that in the very first meeting of the PC held on 11-9-1990, one of the members Sri A. K. Puri suggested that before taking any step in this behalf, it is essential to determine the present value of these units. He suggested that valuation of these units should be undertaken without any delay. He also suggested the names of five agencies, including A.F. Ferguson and Co., New Delhi and Price Waterhouse Associates, New Delhi, for this purpose. The

Committee agreed with this suggestion and constituted a sub-committee comprising five members to select valuers for the purpose and have these units valued. It appears rather inexplicable that no steps whatsoever were taken to have the assets of the Corporation valued through any of those five agencies, nor through any other agency. What happened is that during this course of negotiations with ACC, they suggested on 13-9-1990 that report of a chartered accountant be obtained to determine the present value of the shares of the Corporation and also to have a physical verification of its assets. The ACC also indicated their choice of the chartered accountant, namely, Billimoria and Co. Accordingly, the said firm of chartered accountants was asked to value the shares. They valued the shares at Rs. 20/- per share. They did not undertake valuation of assets. A good amount of criticism has been levelled against the basis adopted by the said firm for valuing the shares, and the manner in which they went about their job. It is really unnecessary to dilate upon the correctness of their report, because no one appears to have attached any value to it. The Dalmia Industries offered to purchase 51 per cent shares of the Corporation at Rs. 45/- per share, without asking for any kind of concession, facility or accommodation. This shows that the valuation made by the Billimoria and Co. was wide off the mark. In this context, it would be appropriate to refer to the pleadings of the parties. According to the petitioners, the value of the assets of the Corporation is more than Rupees 700 crores. In the counter-affidavit filed by the Government this figure has been disputed as exaggerated and incorrect, but the Government has made no effort to give its own figure. Evidently, it could not, in the absence of any valuation by a competent agency. The fact remains that the Corporation owns 13.5 Sq. kms. of land wherein are situated factories and other allied buildings, six residential colonies comprising five thousand dwelling units, six recognised educational institutions, besides limestone mines and a building called 'cement Bhawan' at Lucknow. There is a subsisting contract for supply of slag with Bokaro Steels, whereunder, according to the petitioners, the Corporation gets slag at 1/3rd of the market rate. The above particulars relating to the assets of the Corporation are not denied in the counter-affidavit. It may be remembered that the paid up capital of the Corporation is about Rupees 64 crores. As against this, the Corporation has run up an accumulated loss of about Rupees 180 crores.

About Rupees 100 crores is due to the Financial Agencies and about 10 and odd crores to the State Government. In the above circumstances, it cannot be said

that the liabilities of the Corporation are almost equal to its assets. It is well known that value of land and buildings has been appreciating over the last several decades. Even allowing for depreciation their value should be substantial. Evidently, it was for this reason that the Dalmias offered to purchase the shares at Rs. 45/- each, even without asking for any type of concession, facility or accommodation, and ultimately, they agreed to pay Rs. 75/- per share, subject to the Government granting concessions, facilities and accommodations mentioned in the MOU and the GOSection We are told that a formal agreement has also been entered into between the Government and the Dalmia Industries, but a copy of the agreement has not been made available to us. (We presume that the agreement is in the same terms as the MOU and GOS aforesaid mentioned).

28. Two questions have to be answered; What is it, the Dalmia Industries have got under the deal, and what is it, they have paid ? We know what they have paid. According to the MOU, the total amount payable by them for 51 per cent of the shares at Rs. 75/- per share is a little above 26 crores. Of this amount, they paid one crore at the time of signing the agreement. Two crores they agreed to pay within three months of the signing of the agreement. (We are told at the time of the hearing of the petitions that this amount has been paid). Another two crores they have agreed to pay within six months of the signing of the agreement. The balance amount of about Rupees 21 crores is payable within 24 months of the date of the MOU. It, no doubt, carries interest at 12% per annum, but this amount when paid to Government, has to be re-invested by the Government, as secured loan or against secured debentures, in the Corporation. These loans are to carry interest at 12% and are redeemable after five years in four equal installments. Certain units controlled by the Dalmia Industries were to furnish a corporate guarantee for this balance amount. Under clause 9 of the MOU, it was agreed that all the employees of the Corporation will be taken over on 'as is where is' basis, which means that they will be continued on the same basis. As against four directors of the Government, the Dalmias are to have five directors. Managing Director is to be appointed out of the five directors nominated by the Dalmias. The State Government clearly declared that they will not give any guarantee for funds to be raised in future by the Corporation. As against this, the following concessions were extended by the State Government. For a period of five years, the Corporation was exempt from

payment of Sales Tax. The amount collected by it on account of Sales Tax during this period has to be paid in the five equal annual installments. Payment of these installments is to begin after the expiry of eight years. The debts due to the State Government and its agencies to the extent of Rupees 25 crores were re-scheduled. There was to be a moratorium for a period of three years, whereafter the said debts were to be repaid in five equal instalments. These debts were to carry interest at 12% with rebate of 3% for timely and prompt payment. Besides this, contingent liabilities of Rs. 1.4 crores to the Sales Tax Department and 11 lakhs towards stamp duty were to be waived. Further, Sales Tax Department was to be requested by the State Government to drop all its cases - a very significant and pRegulation nt concession. The last clause of the MOU provided that the memo of articles of association of the Corporation will be suitably amended to reflect the changed version of the Company and other changes envisaged in the Board etc. Mr. SectionP. Gupta contends that 51 per cent of ownership of the Corporation was made over to Dalmia Industries on a mere payment of rupees one crore. In any event, the real cash payment, he says, is only rupees five crores. The rest is, no doubt, payable within two years, but when paid, it has to be reinvested by the State Government in the very same Corporation, which again is repayable after a period of five years in four equal installments which means that the payment will really begin after seven years. His argument, therefore, is that assets worth rupees 700 cores were made over for a mere pittance. The State Government, no doubt, denies this imputation vehemently, but strangely, as it may seem, they have not given their valuation of the net worth of the Corporation. As we have pointed out hereinbefore, since they have made no attempt to have the net worth of the Corporation valued by any competent agency, they could not also have stated the same clearly. It is not as if they were not aware of this requirement. We may repeat that in the very first meeting of the PC, one of its members opined that it was essential to value the assets of these units before any step is taken towards their Privatization. He also suggested agencies competent to do the job. Other members of the Committee agreed with his suggestion and a sub-committee was also constituted to select the agency and have the valuation done, but no such valuation was done. Instead, Billimoria and Co. was asked to do it and they made a mere superficial job. As we have said above, no one has taken the said valuation seriously.

29. When a factory/industry/company is acquired by Government, they do not merely pay the prevailing value of the shares (in a case where shares of such company are quoted on Stock Exchange), such values are determined by a Complex array of consideration. The normal method of determining the compensation in such cases is to value the assets, determine the liabilities and find out its net worth-unless, of course, the compensation is fixed by the enactment itself. In this connection, it would be relevant to notice certain observations made by the Supreme Court in *R. C. Cooper v. Union of India*,⁶ at pp. 609 to 611 :

"The important methods of determination of compensation are - (1) market value determined from sales of comparable properties, proximate in time to the date of acquisition, similarly situate, and possessing the same or similar advantages and subject to the same or similar disadvantages. Market value is the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase; (ii) capitalization of the net annual profit out of the property at a rate equal in normal cases to the return from gilt-edged securities. Ordinarily in value of the property may be determined by capitalizing the net annual value obtainable in the market at the date of the notice of acquisition, (iii) where the property is a house, expenditure likely to be incurred for constructing a similar house, and reduced by the depreciation for the number of years since it was constructed; (iv) principle of reinstatement, where it is satisfactorily established that reinstatement in some other place is *bona fide* intended, there being no general market for the property for the purpose for which it is devoted (the purpose being a public purpose) and would have continued to be devoted, but for compulsory acquisition. Here compensation will be assessed on the basis of reasonable cost of re-instatement; (v) when the property has outgrown its utility and it is reasonably incapable of economic use, it may be valued as land plus the break up value of the structure. But the fact that the acquirer does not intend to use the property for which it is used at the time of acquisition and desires to demolish it or use it for other purpose is irrelevant; and (vi) the property to be acquired has ordinarily to be valued as unit. Normally an aggregate of the value of different components will not be the value of the unit.

These are, however, not the only methods. The method of determining the value of the property by the application of an appropriate multiplier to the net annual income or profit is a satisfactory method of valuation of lands with buildings, only if the land is fully developed, i.e., it has been put to full use legally permissible and economically justifiable, and the income out of the property in the normal commercial and not a controlled return or a return depreciated on account of special circumstances. If the property is not fully developed, or the return is not commercial the method may yield a misleading result.

... ..

Compensation to be determined under the Act is for acquisition of the undertaking, but the Act instead of providing for valuing the entire undertaking as a unit provides for determining the value of some only of the components, which constitute the undertaking, and reduced by the liabilities. It also provides different methods of determining compensation in respect of each such component. This method of determination of compensation is *prima facie* not a method relevant to the determination of compensation for acquisition of the undertaking. Aggregate of the value of components is not necessarily the value of the entirety of a unit of property acquired, especially when the property acquired is a going concern, with an organized business. On that ground alone, acquisition of the undertaking is liable to be declared invalid, for it impairs the Constitutional guarantee for payment of compensation for acquisition of property by law. Even if it be assumed that the aggregate value of the different components will be equal to the value of the undertaking of the named bank as a going concern the principles specified in our judgment, do not give a true recompense to the banks for the loss of the undertaking..... It appears clear that in determining the compensation for undertaking- (i) certain important classes of assets are omitted from the heads (a) to (h); (ii) the method specified for valuation of lands and buildings is not relevant to determination of compensation, and the value determined thereby in certain circumstances is illusory as compensation; and (iii) the principle for determination of the aggregate value of liabilities is also irrelevant.

... ..

The value determined by excluding important components of the

undertaking, such as the good will and value of the unexpired period of leases, will not, in our judgment, be compensation for the undertaking."

30. It cannot be denied that by selling 51 per cent share holding in the Corporation, the Government has in truth transferred 51 per cent of its ownership. Before determining the price, at which the shares were to be sold, the Government ought to have, as a reasonable and prudent owner, and more so because it is in the nature of a trustee vis-a-vis public property, got a thorough valuation done of the assets and liabilities to find out the net worth of the Corporation. It would then have known what it was selling and would have been in a better position to determine which offer to accept and at what figure. Without such a valuation, the determination of rate of shares for the purpose of the sale was without any basis. We are left wondering whether any of the persons responsible for the deal would have acted in the same fashion, if they had been selling 51 per cent shares in a company owned by them.

31. Now, coming to the two questions raised by us a little while ago, we do not know the net worth of the assets of the Corporation and, therefore, we cannot say what did the Dalmia Industries get in the shape of 51 per cent of the shares of the Corporation. In the face of a mere general denial in the counter-affidavit, without giving any valuation of their own, we would well have been justified in holding that the figures mentioned by the petitioners are correct, which would mean that the assets are valued at more than rupees 700 crores, while the liabilities are in the region of rupees 200 crores. In that event, net worth would not be less than 500 crores, 51 per cent whereof would be worth more than rupees 250 crores, which is being sold for rupees 26 crores, and even that accompanied by so many concessions and accommodations. But, we are of the considered opinion that adopting such a course would not be just and proper one, in all the circumstances of the case. The deal has gone through and the subject-matter of the deal is of a very high value. Though we are not satisfied with the manner in which the Government and its agencies have proceeded in the matter, we are of the opinion that before we can pass any final orders in the writ petitions, we should have the net worth of the Corporation valued, at least now, through a reputed and well-known agency. For this purpose, we fall back upon the very same material as is disclosed in the minutes of the first meeting of the PC. Five agencies were mentioned, who, according to Sri A.K. Puri, were

competent to value the assets and liabilities of the Corporation to find out its net worth. Accordingly, we appoint two agencies, namely, A. F. Ferguson and Co., New Delhi and Price Water-house Associates, New Delhi, and request them to independently value the assets and liabilities of the UPSCCL and to determine the net worth of the Corporation as on 1-2-1991. Both the agencies shall independently do their job and submit their reports separately. The reports shall be submitted within two months of service of a copy of this order upon them. The Government, the Corporation, the 5th respondent and the petitioners shall furnish all assistance to the said agencies in doing and completing their job. The expenses of the said exercise by both the agencies shall be borne by the State Government. For this purpose, the State Government is directed to deposit a sum of rupees three lakhs into the Court within ten days from today. Of this amount, a sum of rupees Fifty thousand shall be paid to each of the said firms as initial payment. The total fees payable to each of the agencies will be determined by this Court later in consultation with them.

Post these matters after the receipt of the reports of the said two firms.

Order accordingly.

Cases Referred.

1. AIR 1963 SC 1047
2. AIR 1989 AndPra 14
3. AIR 1983 SC 75
4. AIR 1980 SC 1896
5. AIR 1970 SC 564