DISTRIC 24 PARGANAS (NORTH)

In the High Court at Calcuta
Civil Appellate Jurisdiction
(Appellate Side)

F.M.A 433 of 2003
4172

M.A.T.No. 1176 of 2003
W.P.No. 4209 (w) of 2002

In the matter of :
An application for stay of operation of the judgment and order dated 25 March 2003 passed by the Honâ□□ble Justice Kalyan Jyots Sengupta in W.P. No. 4209(w) of 2002 Jessop & Co. Ltd state Association Vs Union of India & Orsg.

And

In the matter of
Bharat Bhari Udyog Nigam Ltd. Calcutta. A Government of India undertaking having its office at 26 Raja Santosh Road Kolkata 700027.

Versus

1. Jessop & Co. Ltd. Staff Association represented by its Secretary Sri Alok Kumar Barhmachari, having its office at 59, Mott Lane, Kolkata- 700013.

2. Jessop Mazdoor Union, having registration No. 3760 and having its office at 8, R.B.C. Road. Dum Dum Cantonment, Kolkata 700028 and represented through Swapan Gupta, General Secretary, son of late Sushil Kumar Gupta, residing at 8/6, R B C Road, Kolkata 700028.

3. Rajendra Narayan Chakraborty son of late Jitendra Mohan Chakraborty of 31. M.C. Garden Road, Kolkata 700030.

4. Soumendranath Mukherjee son of Sachindranath Mukherjee of 46/2, Jawpur Road, Kolkata 700024.

5. Swapan Kumar Bank, son of late Sachindranath bani of 98/15, Neogi Para Road, Baranagar, Kolkata 700036.

6. Rakhal Ch. Saha son of Hari Mangal Saha of 2/2, Jogendra Basak Road, Kolkata 700036.

7. Jessop Employees Union having registration No. 814 having is office at 115, Netaji Subhas Road, Kolkata 70001 and represented through Shyamal Banerjee, Joint Secretary, son of late Promotha Nath Banerjee of 153/22 C S Mukherjee Konnagar Hooghly.

8. Samir Chkraborty son of late Ashim Kanti Chakraborty of 57, Gopal Banerjee, Howrah 711101.

9. Manoj Kumar Biswas son of late Manailal Biswas of 38/1, Rabindra Nagar, Dankuni, Hooghly.

10. Shanti Ranjan Chatterjee son of late Shiv Shankar Chatterjee of 5, Prosadmoyee Devi lane, Konnagar, Hooghly.

11. Subrota Roy son of late Anilendra Nath roy of 31/2/B. Kashinath Chatterjee Lane, Shibpur, Howrah-2.

12. Joydeb Patra son of late Tarapada Patra of P.O. and Village Dasghara, District Hooghly.

13. Jessop & Co. Supervisory Staff Association, registration No. 11047 and represented through Satya Phya Banerjee, Joint Secretary, son of late Nirmal Kumar Banerjee of 150, Motijheel Avenue. Kolkata 700024.

14. Jessop & Co. Shramik Karmachair Union, registration No.16/82, having its office at Rishi Bankim Chandra Road, Kolkata 700028 and represented through its general secretary Sri Netan Chandra Ghosh son of late Jugal Ghosh of 6, Manabendra Dutta Road, Kolkata 700028.

15. Chandra Sckhar Banerjee son of late Kalpipada Banerjee of 64, K.B. Lane, Paikpara, Kolkata 700037.

16. Pranab Ranjan Dutta, son of late Prafulla Ranjan Dutta of 68/2, D.J. Road, P.O. Bhadrakali, Hooghly.

17. Ashok Kumar Sen, son of late N.C.Sen of 6/71/1, G.L Road (North), Salkia, Howrah 711106.

18. Tapan Kumar Mukherjee, son of late S.K.Mukherjee of 60/20, Raja Ram Ballav Street, Kolkata 700003.

19. Amiya Kumar Ghosh, son of late Nandalal Ghosh of 3511 N.K Ghosal Road, Kolkata 700042.

20. Goutam Chakraborty son of late haradhan Chakraborty of Bagmari, C.I.T. Building, Block 10 Flat No. 13. 16. Bagmari Lane, Kolkata-700054.

21. Ranjit Kumar Basu, son of late Satish Chandra Basuy of 120/2B, Harish Mukerjee Road, Kolkata-700025.

22. The Board for Industrial and Financial Reconstruction a statutory authority created under the sick Industrial Companies Act. 1985 (as amended) and service through Chairman BIER.

23. Union of India through the Secretary Department of Heavy Industries and Public Enterprises Government of India, New Delhi.

24. Secretary, Department of Disinvestment Government of India, New Delhi.

25. The Jessop & Co. Ltd. 21 & 22. Jessop Road, Kolkata 700028 through its Managing Director.

26. Ruia Cotex Ltd. having its registered office at No. 5, Russel Street, Kolkata 700071.

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present :
The Honâ□□ble Mr. Ashok Kumar Mathur, Chief Justic
And
The Honâ□□ble Mr. Justice Ashim Kumar Banerjee

FMA No. 433 of 2003
Bharat Bhari Udyog Nigam Ltd.
Versus
Jessop & Co. Ltd. Staff Association & Orsg.
FMA No. 434 of 2003
Ruia Cotex Ltd.

Versus
Jessop & Co. Ltd. Staff Association & Orsg
FMA No. 435 of 2003
Jessop & Co. Ltd. Staff Association & Anr
Versus
Board of Industrial & Finance Reconstruction & zzorsg and
FMA No. 436 of 2003
Union of India
Versus
Jessop & Co. Ltd. Staff Association & Ors.

Mr. S.K. Kapoor, Additional Solicitor General, Mr. S.K. Banerjee, Mrs. S. Bhattacharjee, Mr. M.K.Goswami _____ for Union of India.
Mr. S. Pal Mr. Subrto Talukdar. Mrs.pompy Bosde and mr. Devjyoti Bhattacharjee _____for Jessop & company ltd. Staff association.
Mr. Anindya Mitra, mr. Amit Agarwal , Mr Jishnu chowdhary. Mr. A. Malhotra _____ for ruia Cotex Ltd.
Mr. Partap Ch. Mr Utpal Bose Mr. Samit Tlukdar Mr Soumiik Mukharjee, Mr. R. Kapoor , Mr Rudraraman Bhattacharjee and Mr. Nilay Pyne _____ FoBharat Bhari Udyog Nigam Limited.
Ms Anna Malhotra & Ms. Susmita Mukharjee_____ for Jessop & Co. Ltd.
Mr. Joydip Kar , Mr. Saptangsu Basu, Mr. Anirban Kar and Mr. Udayan Sen _____for State Bank of India.
Heard on: 17.6.2003, 19.6.203, 20.6.2003 and 24.6.2003
Judgment on 8.07.2003.

Ashok Kumar Mathur, Chief Justice : All the above appeals arise against the order passed by a Learned Single Judge dated 25th March, 2003. Therefore, they are disposed by a common order. By the said order the Learned single Judge has set aside the dis-investment of Jessop & Co. Ltd.

The appeal being FMA No. 433 of 2003 has been filed by Bharat Bhari Udyog Nigam Ltd,; FMA No. 434 of 2003 by Ruia Cotex Ltd.; FMA No. 435 of 2003 by Jessop & Co. Ltd. Staff Association and FMA No. 436 of 2003 Union of India.

The basic question involved in all these four appeals is whether dis-investment of 72% equity shares of Government of India in Jessop & Co. Ltd,. in favour of Ruia Cotex Limited is justified or not.

For convenient disposal of all these appeals it may be relevant to give a resume of the facts giving rise to these appeals.

Initially a writ petition was filed by Jessop & Co. Ltd Staff Association represented by its Secretary Aloke Kumar Brahmachari. By this writ petition the petitioner prayed for a writ of mandamus directing respondent Nos.3 and 4 by restraining them from recommending, finalizing and/or approving of any dis-investment of Government equity in Jessop & Co. Ltd. (for short JCL). It was further prayed that the respondent No. 1 be restrained from proceeding with the consideration of any proposal or package in favour of dis-investing the Government stake in JCL.

The ground of challenge in the writ petition was that the impugned action violates the Government of India policy on dis-investment, that is, the more than 49% of equity can be divested in Strategic Sector industries and â□□Railway Transportâ□□ being in the strategic sector, more than 49% equity share of the Government of India in JCL cannot be divested. It was submitted that JCL is a main manufacturing company of the railway transport item such as EMU coaches and wagons. The JCL traditionally is specialized in railway coaches and wagon manufacturer. It was alleged that this action of the Government in divesting or off-loading 72% or more of its equity share in JCL, which falls in the strategic sector, is in violation of the Government of India dis-investment policy. It was also pointed out that since the Government is parting its share and the matter is pending in the BIFR (Case No. 502 of 1995), if the dis-investment is decided in favour of the private promoter, then it will become a fait accompli before the BIFR.

In short, the basic ground of challenge raised in the writ petition was that since â□□Railway Transportâ□□ falls in the strategic sector, JCL which manufactures the EMU coaches and wagons, also falls in the strategic sector and as such not more than 49% of the equity can be dis-invested in this strategic sector industry. This was the main ground on which the action of the Government was challenged in this writ petition with the aforesaid prayer. But unfortunately, it appears that the main issue which was sought to be challenged in this writ petition, has been lost sight of and the Learned Single Judge has proceeded to go into the questions which were raised by filing supplementary affidavits. We would not have referred to the synopsis of the main writ petition but it has become necessary at the outset because the Learned Single Judge has traveled beyond the pleadings and has primarily gone on the basis of the supplementary affidavits which has been filed from time to time in these proceedings. Theerefore, this is a serious question to be answered in this writ petition that all the pleadings be given to winds and the matter be decided on the basis of supplementary affidavits. During the pendency of the writ petition the BIFR decided the matter pending before it and approved the scheme of the Government of India on dis-investment in favour of the private party, that is, M/s. Ruia Cotex Ltd. (in short Ruia) and this order was also sought to be challenged by filing a supplementary affidavit during the pendency of this proceeding as a subsequent event. Therefore it is necessary to adjudicate in this matter whether there are necessary pleadings in the writ petition or not and whether the Learned Single Judge has proceeded beyond the pleadings or not.

However, before we advert to the pleadings and other things it may be relevant to mention here that the petitioner is an association of the Officer of JCL. This association of the officers of the company are not the competing bidders. Therefore we will have to consider that what is their right to challenge the action of the Government on dis-investment and to what extent they can be heard in the matter. A serious question of locus standi has also been raised that whether the employees of JCL can be heard to say that their employer should not be changed against their wishes, i.e., whether they can challenge the action of the respondent with reference to the process of dis-investment and the selection of the promoter. The narration will be incomplete if we do not give a short background of the company and the policy of dis-investment.

Jessop & Co. Ltd. (JCL) was established in 1788 and the Government of India took over the management of this company under section 18A of the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as Act of 1951) initially for a period of three years with effect from 15th May, 1958. Subsequently this was extended from time to time upto 14th August, 1969. In the meantime with a view to acquiring controlling interest of JCL, Government of India in August, 1965 purchased 11,23,300 ordinary shares of Rs. 100/- which constituted 50.1 percent of the total paid up share capital of JCL. Therefore, by virtue of the majority share holding in JCL, Government of India continued to control its affairs. In March, 1973 Government of India purchased preference shares, thus raising its share holding to 51.04 percent of the total paid up share capital. After formation of a holding company Bharat Bhari Udyog Nigam Limited (BBUNL), JCL became its subsidiary with effect from 30th May, 1987. As on 1st July, 1994, BBUNL, the promoter company, held more than 97 percent of JCLâ□□s paid up share capital. This company is a multi-product engineering company and it produces EMU coaches, wagons, cranes, structural road roller, mining and other goods. However, it is alleged that EMU coaches and wagons constitute 60-70 percent of its total product. Therefore, this has become a Government company manufacturing EMU coaches, wagons and other heavy engineering equipments. But, unfortunately, the company could not come up well and started incurring losses. Therefore, it was referred to BIFR in 1995. BIFR sanctioned a revival scheme in May, 1998. It sanctioned rehabilitation scheme in 1998 and Government of India infused fresh fund of Rs. 54 crores providing a financial restructure and thereafter Rs. 170 crores and agreed to provide counter guarantee of Rs. 7 crore to the bankers for extending banking facilities to JCL and the Government of India also consented to the revival scheme to the BIFR. Government of India also suggested before BIFR for converting JCL into a joint venture enterprise. Despite the aforesaid investment the company did not improve. The BIFR held that the revival scheme of JCL had failed and directed the Operating Agency, that is State Bank of India to advertise in the newspaper for change of its management within 90 days. The effort of the Operating Agency (SBI) to located a joint venture partner also failed as there was no

response to the advertisement issued by the Operating Agency. The performance of JCL with reference to the BIFR revival scheme is as under :

Swipe to view

high court jessop co ltd

Year	Cash Profit/loss		Sale value of Production		Net Profit/loss		Gross Margin	
	BIFR Target	Actual	BIFR Target	Actual	BIFR Target	Actual	BIFR Target	Actual
1997-98	85.67	39.58	31.27	80.73	29.50	37.92	2.74	18.28
1998-99	121.70	49.59	13.48	0.70	15.63	2.27	29.24	24.58
1999-00	138.94	35.22	21.10	43.92	23.53	42.32	37.20	19.20
2001-02	150.23	43.76	26.53	48.77	29.64	47.13	41.78	19.75

The net profit of the company was Rs. 80.73 crores, arrived at after considering the waiver of Government bank interests, penalty by the Provident Fund Authority amounting to Rs. 120.27 crores. Even sale of head office building could not reconstruct the company. Accumulated losses of the company as on 30th September, 2001 stood at the level of 372.37 crores. The net worth of the company on that day was (minus 290.39 crores). The outstanding loans and interest of the company to the Government of India and State Bank of India on that date stood at the level of Rs. 140 crores and Rs 116 crores respectively. The company could not execute fully the order of manufacturing of the wagons and EMU coaches placed by the Railways. This was the state of affairs of the company. It was on the verge of collapse and all these schemes to revive it reasonably failed to take off, so much so, that nobody was prepared to come forward even for a joint venture. This is not only the state of affairs with regard to this company, but as the facts which has been disclosed by the respondent in their affidavit wherein it was pointed out that out of the 946 state level enterprises over 241 units are not working at all and about 551 are making losses and 100 are reported to have not submitted their accounts at all. Therefore, the Government of India was unable to sustain public sector enterprises and this has led to a rethinking process in the Government of India to revive its economic policy and that led to appointment of Rangrajan Committee. The Rangrajan Committee recommended dis-investment policy and this dis-investment policy came be placed before the Parliament and the same was approved.

It is true that earlier the policy of encouraging the public sector was in force, but with the passage of time and the globalization of the world economy the policy of the public sector started receiving set backs and the Government was forced to revive its economic policy keeping in view the world scenario. The Rangarajan Committee submitted its report which was placed before the Parliament and after the approval of the report by the Parliament these process of dis-investment started in the country. In Chapter V of the Dis-investment Policy a rationale for dis-investment policy has been mentioned. We need not to reproduce the whole of that, but suffice it to say that in order to release large amount of public resources locked in non-strategic public sector undertakings and their re-deployment in public health, family welfare and social welfare, primary education and essential infrastructure, it became imperative to dis-invest its locked resources.

The Rangarajan Committee recommended the need for substantial dis-investment and stated that the percentage of equity to be divested would be upto 49 percent for industries explicitly reserved for public sector. It recommended that in exceptional cases, such as the enterprises which had dominant market share or where separate identity had to be maintained for strategic reasons, the target public ownership level could be kept at 26 percent, that is, dis-investment could take place to the extent of 74 percent. In all other cases, it recommended 100 percent dis-investment of Government stake.

The holding of 51 percent or more equity by the government was recommended only for 6 scheduled industries, namely :

i. Coal and lignite

ii. Mineral oils

iii. Arms, ammunitions and defence equipment

iv. Atomic energy

v. Radioactive minerals and

vi. Railway transport.

Therefore, by virtue of this policy, a distinction was made between strategic and non-strategic sector. So far as the strategic sector is concerned, holding of 51 percent or more equity by the Government was recommended. A detailed procedure was provided in Part-B of the policy that how steps should be taken for dis-investment of strategic and non-strategic sectors. A detailed method has been provided which shall be dealt with at appropriate stage.

In this background now we have to examine the controversy which has been raised in this writ petition by way of the oral submission dehors the pleadings.

A perusal of the pleadings in the writ petition would show that primarily the challenge is against off-loading of 72 percent of the share holding of Government of India in JCL. The argument was that JCL, a Government of India undertaking, falls in the strategic sector being â□□Railway Transportâ□□. Therefore, more than 49 percent of the equity shares of Government of India cannot be dis-invested.

The writ petition was opposed by the respondents by filing affidavits-in-opposition and it was submitted that the railway industry is not a strategic industry and therefore the dis-investment to the extent of 72 percent can be made. The Learned Single Judge examined the matter at length and answered this question in negative, that is, against the petitioner and held that JCL does not fall in the strategic sector, i.e., â□□Railway Transportâ□□. As against this the writ petitioner has filed the appeal (FMA No.435 of 2003).

Before we advert to the other aspects of the matter, we may dispose of this argument at this stage that whether JCL falls in â□□Railway Transportâ□□, i.e., strategic sector or not. Mr. Pal, learned counsel for the writ petitioner submitted that since the EMU coaches and wagons are the main production of this industry and without the wagon the coaches, the railway cannot efficiently run. Therefore, it shall always be treated as part of the strategic sector. In this connection he has invited our attention to Item No. 7(4) of the First Schedule of the Industries (Development and Regulation) Act, 1951, which reads as under :

7. Transportation :

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(4) â□□Railway rolling stockâ□□

He has also invited our attention to the definition given in Clause 2 (20) of the Railways Act, 1989 which reads as under :

â□□2(20). â□□Government railwayâ□□ means a railway owned by the Central Government.â□□

He has also invited our attention to the definitions given in Clause 2(31) of the Railways Act, 1989 which read as under :

â□□2(31) â□□railway means a railway, or any portion of a railway, for the public carriage of passengers of goods, and includes _

(a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;

(b) all lines of rails, sidings, or yards, or branches used for the purpose of, or in connection with, a railway;

(c) all electric traction equipments, power supply and distribution installations used for the purpose of, or in connection with, a railway;

(d) all rolling stocks, stations, officers, warehouses, wharves, workshops, manufactories, fixed plants and machinery, roads and streets, running rooms, rest houses, institutes, hospitals

water works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, railway;

(e) all vehicles which are used on any road for the purposes of traffic of railway and owned, hired or worked by a railway; and

(f) all ferries, ship, boats and rafts which are used on any canal, river, lake or other navigable inland waters for the purpose of the traffic of a railway owned, hired or worked by a railway administration.â□□

From this the learned counsel wanted to develop his argument that since the railways are run by the Government, it is in the strategic sector, therefore, JCL which manufactures the coaches which are required for the transportation will fall in the strategic sector, that is, â□□Railway Transportâ□□ and the Government cannot disinvestment-invest its share of more than 49 percent. This argument was negatived by the Learned Single Judge and he held that â□□Railway Transportâ□□ means a service and not manufacturing of rolling stock and wagons. Same argument was repeated by the learned counsel for the writ petitioner before us also. Suffice it to say that â□□Railway Transportâ□□ means the transportation of passengers and the goods. â□□Railway Transportâ□□ by no stretch of imagination could mean to include the manufacturing units which manufactures the wagons, carriages, railway lines and engines. What is meant by â□□Railway Transportâ□□ is the railway administration which runs all round the country and performing essential service for carrying passengers and the goods, and that alone will include in the expression â□□Railway Transportâ□□ and not â□□manufacturing partâ□□. Railway wagons are not only manufactured by JCL but there are many other private agencies also who manufacture railway wagons and coaches and they are supplied to the railways. Therefore, it is not necessary that all who manufacture railway coaches or wagons shall necessarily fall within the expression â□□Railway Transportâ□□. JCL is one of the manufacturing units under the public sector which manufactures coaches, but there are many more private sector companies which also manufacture coaches and supply to the railways. Therefore, to mean â□□Railway Transportâ□□ to include all manufacturers of the coaches, wagons, railway lines and engines will be totally mis-leading of the expression â□□Railway Transportâ□□. â□□Railway Transport in its simple form will only mean â□□Railwayâ□□ which is engaged in India for transportation of passengers and goods is being administered by the Central Government. It would not include the industries which manufacture the railway wagon or coaches, be it a private industry or be it a public sector industry. Simply because JCL is one of the manufacturing unit for the railway wagon and coaches it cannot form part of â□□Railway Transportâ□□. Therefore, the view taken by the Learned Single Judge that JCL does not fall in the strategic sector appears to be correct and we do not find any substance in the contention of Mr. Pal, learned counsel for the writ petitioners.

The matter should have ended here because that was the issue raised in the writ petition and the same was answered by the Learned Single Judge in the negative and we uphold the view of the Learned Single Judge. But, unfortunately, the Learned Single Judge did not stop here, but felt persuaded to go into the question which was not the subject matter of the writ petition, like transparency in the disinvestment-investment process, violation of principles of natural justice, questioning sale of 72 percent share to Ruia and the order passed by the BIFR on the scheme of disinvestment-investment submitted by the Government. These are all matters which were totally alien to the pleadings in the writ petition. But the learned Single Judge entered into the controversy which was not within his domain to examine the full process of short-listing of M/s. Ruia Cotex and the proceedings which has taken place before the BIFR. But the Learned Single Judge on the basis of various supplementary affidavits filed during the pendency of the writ petition entered into complicated questions of fact. So much so, there is no whisper about the conditions of service of the employees in the petition, but the Learned Single Judge dilated on that aspect also that whether the employees of the association who have the status will be transferred to a private master without safeguarding their interest and against their wishes. With great respect, all these questions could not have been taken up by the Learned Single Judge in these proceedings as there were no such pleadings. However we shall examine these aspects as that have been dealt with by the Learned Single Judge and he has allowed the writ petition on those grounds.

At the outset we would like to mention that the parties cannot be permitted to travel beyond their pleadings and make out a new case on the basis of supplementary affidavits. If this kind of procedure is adopted, then the value of pleadings will have no meaning and it is likely to prejudice the parties as they may be mis-led because of the piecemeal presentation of facts by supplementary affidavits filed in the proceedings. Normally, whenever a major issue arises during the proceedings and there are no proper pleadings then parties have to be restricted to their pleadings and they should not travel beyond that. As we have already mentioned above that the basic case put up by the writ petitioners in the writ petitioners in the writ petition was whether JCL falls in the strategic sector or not and accordingly reliefs were prayed. All other questions which have been considered by the Learned Single Judge were not part of the pleadings but they were brought by way of supplementary affidavits filed from time to time.

Before we examine this question, let us see what are the pleadings and prayers in the writ petition. The prayers of the writ petition read as under :

â□□a) Writ of Mandamus commanding the respondent Nos.2,3 and 4 by restraining them from recommending, in JCL,;

b) Writ of Mandamus commanding the respondent No. 1 not to proceed with the consideration of any prop stake in JCL;

c) Writ of Certiorary commanding the respondent Nos.1,2, 3and 4to produce the records of the case and, sufficient cause in defence of their actions impugned herein, to quash the same so that conscionable jus

d) Rule NISI in terms of prayers above,â□□

The basic grounds which have been raised in the writ petition are as under :

â□□I. For that the impugned actions violate the GOI's stated policy on dis-investment, i.e. not more than 49% of equity can be dis-invested in strategic sector industries;

For that JCL has the expertise and the tradition specializing in Railway Transport manufacture and is a pioneer in meter gauge coach manufacturing ;

For that impugned actions of the competent authorities of JCL show that the GOI is rapidly proceeding with the disinvestment of the bulk of the GOI equity and has short-listed private promoters without considering the fact that such selection of private promoters is ab initio bad as no proposal can be entertained for off-loading 72% or more of GOI's equity in JCL;â□□

Mr. Kapoor, Additional Solicitor General strongly urged that the Learned Single Judge should not have gone beyond the pleadings and emphasized that a party cannot travel beyond the pleadings and invited our attention to the case of Mica Export Promotion Council vs. Joneja reported in 72 CWN 117 wherein their Lordships observed :

â□□There is a good deal of force in the contention that there should be proper pleading either in the plaint or in the petition to build up a case on the basis of the provisions of section 256(4) of the Companies Act.â□□

As against this, Mr. Pal, learned counsel for the writ petitioners submitted that Courts normally take a very liberal approach in the matter of pleadings in writ proceedings and the subsequent events are taken into consideration and in this connection he has referred to the decision in the case of Venkateswarlu vs. Motor & General Traders reported in AIR 1975 SC 1409. In this case their Lordships observed:

â□□For making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceedings provided the rules of fairness to both sides are scrupulously obeyed.â□□

Our attention was also invited to the decision in the case of Ram Narain Arora vs. Asha rani & Ors. Reported in (1999) 1 SCC 141. In this case the question was with regard to a dispute between landlord and tenant for bonafide requirement of landlord. In that context their Lordships observed that non-disclosure by landlord about his having another accommodation would not be fatal to the eviction proceedings if both the parties understood the case and placed materials before the Court and case of

neither party was prejudiced. Their lordships also observed that defective or vague pleadings would not be fatal if both the parties understood what the case pleaded was and accordingly placed material before the Court and neither party was prejudiced. In our case it is neither defective pleadings nor vague pleading but it is a case of no pleading in the writ petition and the same was sought to be introduced by way of supplementary affidavits. It is understandable that if there are some defective or vague pleadings, that means that there are some pleadings to that effect, but if there are no pleading, can the party be permitted to build up a new case on the basis of supplementary affidavits ?

Our attention was also invited to a decision in the case of Bank of India vs. Kekhimoni Das & Ors. Reported (2000) 3 SCC 640 wherein their Lordships observed that where facts are well known and the parties go to the trial on the basis that the claim was known to the other side, want of pleading would not prejudice the parties. Therefore, the principle which emerges is that if there are lack of pleadings but the facts are well known to both the parties and they have gone on trial and no prejudice has been caused, then Courts cannot take serious objection to pleadings. In the present case, as pointed out above, that there was no case put up by the writ petitioners with regard to decision making process of off-loading 72 percent of equity shares of Government of India in favour of Ruia Cotex; or non supply of any copy of document; or the order passed by the BIFR accepting the scheme; or that the order of BIFR suffers from any arbitrariness. All these issues were developed by the way of supplementary affidavits and additional documents from time to time. This procedure cannot be countenanced.

In this connection our attention was also invited to an Apex Court decision in the case of B.R. Ramabhadriah vs. Secretary, Food & Agriculture Department, A.P. & Ors. reported in AIR 1981 SC 1635. This case relates to a service matter where the grievance of the petitioner was his rank in seniority in relation to the respondents has not been correctly assessed, but the Central Government set right this grievance qua ranking of petitioner. Therefore, he did not pursue this relief and pursued the second contention that is relief against one of the respondents, that is respondent No. 6, and this was allowed by the Learned Single Bench granting relief to the petitioner by modifying the gradation list by showing the appellant as senior to respondent No. 6. The matter was taken up in appeal before the Division Bench and the Division Bench allowed the appeal and set aside the order of the Learned Single Judge and the matter was taken up before the Apex Court and the Apex Court and the Apex Court after examining the matter found that since the petitioner submitted before the Learned Single Judge at the time of hearing that he was pursuing the writ petition to the extent of his seniority over respondent No. 6, the Apex Court held that when larger relief was sought and smaller relief was granted because of changed circumstances, this possible. But in the present case the main relief was limited whether JCL falls in strategic sector or not but the Learned Single Judge on the basis of these supplementary affidavits enlarged the scope of the writ petition and tried to probe into the decision making process for short-listing Ruia to whom 72% of the shares was sold under the dis-investment process. This was not the case put up by the petitioners in the writ petition. Therefore this case does not help the writ petitioners in any manner.

As far as principle is concerned that if subsequent development takes place after filing of the proceedings then they can be taken into consideration provided they are germane to the issue. But in the present case, as mentioned above, the grounds and prayers made in the petition was limited only to the question whether Jessop falls in the strategic sector or not. Whereas by filling successive supplementary affidavits the arena of dispute was substantively altered. Through these supplementary affidavits an entirely new case has been sought to be built up. The question before us is whether such kind of procedure is permissible or not.

In order to fully appreciate the controversy, we may detail the supplementary affidavits filed after filing of the writ petition as hereunder :

1. Supplementary affidavit on behalf of the writ petitioners affirmed by Aloke Kumar Brahmachari on 8th March, 2002 annexing certified copy of trade unions from the Registrar of Trade Unions and a letter dated 23rd February, 2002 from the Director General of Mines Safety, Govt. of India, Dhanbad regarding JCLâ□□s integrated test facilities addressed to the Secretary, Department of Heavy Industry, Govt. of

India;

2. Application for addition of party filed on 3rd April, 2002 being CAN No. 2958 of 2002.

3. Application for addition of party filed on 3rd April, 2002 being CAN No.2958 of 2002.

4. Supplementary affidavit on behalf of the writ petitioners affirmed by Alok Kumar Brahmachari on 11th April, 2002 annexing letter dated 20th March, 2002 to Smt. S. Bhattacharya, Learned Central Government Advocate from Registrar of Trade Unions, West Bengal and a copy of the letter dated 5th April, 2002 from JCSA to Registrar of Trade Unions, West Bengal and reply of Registrar of Trade Unions, West Bengal dated 5th April, 2002 to JCA.

5. Interim application on behalf of the writ petitioners filed on 11th April, 2002 being AST No. 244 of 2002 from imp leading the Operating Agency, State Bank of India, as party respondent to the writ petition restraining State Bank of India from operating as the Operating Agency annexing letter of State Bank of India dated 3rd April, 2002 in connection with purported joint meeting held on 27th March, 2002 enclosing minutes of the said meeting.

6. Supplementary affidavit on behalf of the writ petitioners affirmed by Aloke Kumar Brahmachari on 16th May, 2002 annexing written statement submitted on behalf of Jessop & Co. Ltd. Staff Association before the Ld. BIFR on 30th April, 2002 and summary record of all proceedings before the BIFR upto 29th March, 2001 except BIFR minutes dated 2nd June, 1995 and 6th May, 1998.

7. Supplementary affidavit on behalf of the writ petitioners affirmed by Aloke Kumar Brahmchari on 6th July, 2002 annexing copy of the BIFR order dated 10th May, 2002 containing minutes dated 30th April, 2002; copy of the letter dated 20th May, 2002 from State Bank of India, Operating Agency to JCSA circulating the Draft Rehabilitation Scheme (DRS); a copy of the Draft Modified Revival Scheme (DMRS) circulated by State Bank of India; copy of the letter dated 30th May, 2002 written by Jessop & Co. Ltd. Staff Association to the deputy General Manager, State bank of India on DMRS; a copy of the reply dated 31st May, 2002 from State Bank of India to Secretary, Jessop & Co. Ltd. Staff Association ; Representation dated 3rd June, 2002 on DMRS submitted by JCSA to SBI; Notice dated 8th June, 2002 from Operating Agency; and copy of the letter dated 13th June, 2002 enclosing minutes of the meeting of the meeting dated 3rd June, 2002;

8. Supplementary affidavit on behalf of the writ petitioners affirmed by Aloke Kumar Brahmachari on 8th July, 2002 annexing LB Jha & Co.â□□s valuation report and a copy of the BIFR communication dated 1st July, 2002 enclosing order dated 28th July, 2002 containing the DRS ;

9. Application for addition of party filed on 8th August, 2002 by Ruia Coatex enclosing order of BIFR dated 29th July, 2002.

10. Interim application on behalf of the writ petitioners filed on 30th September, 2002 being CAN No. 9509 of 2002 praying for a declaration that the final order of the BIFR dated 20th September, 2002 be quashed enclosing order of BIFR dated 29th July, 2002 ; order of BIFR dated 4th September, 2002 ; and final order dated 20thSeptember, 2002;

11. Supplementary affidavit on behalf of the writ petitioners affirmed by Alok Kumar Brahmachari on 3rd October, 2002 annexing copy of the letter dated 13th August, 2002 written by A.F. Fergusan & Co. addressed to P.K. Ruia; copy of the letter dated 14th August, 2002 written by Ruia Coatex Ltd. Addressed to the Chairman & Managing Director, Bharat Bhari Udyog Nigam Limited ; copy of the letter dated 20th August, 2002 written by Jessop & Co. Supervisory Staff Association to the Chairman, BIFR ; copy of the letter dated 20th August, 2002 written by Jessop & Co. Employees Union to the

Chairman, BIFR ; and a copy of the letter dated 19thAugust, 2002 written by Jessop & Co. Sramik Karmachari Union to the Chairman, BIFR.

All these documents were filed after filing of the writ petition and on the basis of these subsequent document and supplementary affidavits, entirely new case was sought to be built up which was never put up in the pleadings. We shall deal all these points subsequently. At present, the question is whether this kind of procedure adopted by the writ petitioner before the Learned Single Judge for developing a new case by filing supplementary affidavit should be accepted or not. We are conscious that in writ jurisdiction provisions of the Civil Procedure Code with regard to pleadings are not required to be strictly adhered to, but the basic principle of law of pleading has to be kept in view. The writ petition cannot be dehors the minimum pleading. In the present case as we have pointed out above that the entire case put up before the Learned Single Judge was on the question whether JCL comes within the meaning of â□□Strategic Sectorâ□□ or not. Prayers were also made to this effect, as reproduced above. But by way of supplementary affidavits all these new pleadings were sought to be introduced, this mode cannot be countenanced. If the petitioner wanted to challenge the entire process of selection of the promoter in this dis-investment process then it was binding on the writ petitioners to amend the writ petition and incorporate all these grounds. But peculiar method was adopted by the writ petitioners to bring out a new case by filing supplementary affidavits and annexing documents from time to time to make it impossible for the Court as well as for other parties to meet the case of the writ petitioner. We cannot approve this kind of practice and it has to be dis-approved in no uncertain terms. We can appreciate that subsequent events after filing of the writ petition has taken place and if the parties to the wirt petition want to bring them on record these new developments then Courts in its liberal approach take into consideration of these subsequent events but that should be done by amending the writ petition and not by filing successive supplementary affidavits. In the present case all limits have been crossed and entirely a new case as been sought to be developed by the writ petitioners and strangely enough the Learned Single Judge countenanced the same despite the fact that he has already held on the main case against the writ petitioners that JCL does not fall in the â□□Strategic Sectorâ□□. Therefore, we are of the opinion that the submissions of Mr. Kapoor deserves to be accepted that new case which has been sought to be developed by the writ petitioners by inserting various documents through affidavits, cannot be countenanced and we strongly dis-approach.

However, the Learned Single Judge has accepted a new case developed by the writ petitioners on the basis of these supplementary affidavits and struck down the decision making process of dis-investment in favour of Ruia cotex and also held that the order passed by the BIFR is not legal and the same has been struck down. We have to consider in detail all these aspects also. We would have left the matter as it is but since finding has been given by the Learned Single Judge on the question of the decision making process and order of BIFR has been set aside, therefore, we need to examine these aspect also. But before we go into that question we may detail here what are the norms of dis-investment process and in what way dis-investment exercise has been undertaken and how Ruia Cotex has been selected. The policy of dis-investment has been summarized at paragraph 4(E) of the affidavit in opposition of the Union of India, which reads as under :

> â□□ (i) Proposals for disinvestments in any PSU, based on the recommendations of the Dis-investment Commission or in accordance with the declared Dis-investment Policy of the Government, are placed for consideration of the Government.
>
> (ii) After Government clears the dis-investment proposal, selection of the Advisors is done though global competitive bidding process for assisting in the implementation of the disinvestment decision.
>
> (iii) The Advisors assist the Government in issue of advertisement in leading national and international newspaper/magazines/journals, for inviting Expression of Interest (EOI) from

Prospective Strategic Partners. In some cases, to expedite dis-investment, EOI advertisements have been issued before appointing Advisors.

(iv) After receipt of the EOI, Prospective Bidders are short-listed, according to the pre-qualification criteria in EOI advertisement.

(v) The Advisors, after due diligence of the PSU, prepare the Information Memorandum in consultation with the concerned PSU, which is given to the short-listed Prospective Bidders, after they have entered into a Confidentiality Agreement.

(vi) The draft Share â□□Purchase Agreement and the Share holder Agreement are also prepared by the Advisors, with the help of the Legal Advisors, and given to the Prospective Bidders for eliciting their reaction.

(vii) The prospective Bidders undertake due diligence of the PSU and hold discussions with the Advisors/the Government/the management of the PSU for any clarifications.

(viii) Concurrently, the task of valuation of the PSU is undertaken in accordance with the standard national and international policies.

(ix) Based on the response received from the Prospective Bidders, the Share Purchase and Shareholders Agreement is finalized and vetted by the Ministry of Law and approved by the Government and is then sent to the Prospective Bidders for inviting the final binding bids (Technical and Financial).

(x) After examination, analysis and evaluation, the recommendations of the Inter Ministerial Group (IMG) are placed before a Core Group of Secretaries on Dis-investment and the Government for a final decision regarding selection of the Strategic Partner, singing of the Share Purchase or Shareholders Agreements and other ancillary issues.â□□

This process has come up for challenge before the Apex Court in the case of Balco Employees Union vs. Union of India reported in (2002) 2 SCC 333 and the Apex Court has considered this process and upheld it in no uncertain terms and held that the policy decision of the Government cannot be challenged. It was held.

â□□Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. In matters relating to economic issues, the Government has, while taking a decision, right to â□□trial and errorâ□□ as long as both trial and error are bonafide and within limits of authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the Courts. Here the policy was tested and the motion defeated in the Lok Sabha on 1-03-2001.â□□

Therefore, as far as the policy of dis-investment is concerned and the procedure which has been quoted above has already got the seal of approval of the Apex Court in the Balco case (supra).

Now the question is in terms of this policy whether the process which was adopted was consistent with this policy or not. The process has also been dilated at paragraph 4(J) of the affidavit in opposition of the Union of India which reads as under:

â□□(i) Ministry of Dis-investment constituted an Inter Ministerial Group (IMG) on 23.03.2000. The IMG is headed by Secretary (Dis-investment) and is comprised of representatives from the Ministry of Dis-investment, ministry of Finance, Department of Heavy Industry, Department of Public Enterprises, Department of Legal Affairs, Department of Company Affairs, Bharat Bhari Udyog Nigam Limited, Jessop & Co. Ltd. etc.

(ii) Based on the technical presentation and financial bids before the MG by a number of Consultants/Advisors, A.F. Fergusan & Co. were appointed in July, 2000 as Consultant/Advisors for undertaking the exercise for induction of a Strategic Partner in respect of Jessop.

(iii) The joint venture formation exercise was kept on hold till January, 2001 in view of the Honourable BIFRâ□□s order dated 17.8.2000, directing Operating Agency to issue advertisement for change of management of Jessop. The advertisement issued by the Operating Agency did not attract any response from prospective parties.

(iv) After the availability of the direction of AAIFR in January, 2001, advertisement inviting Expressions of Interest (EOI) was issued in the newspapers in February, 2001. The last date of receipt of EOI was stipulated as 23rd March, 2001.

(v) The five short-listed bidders were provided with the bid documents, namely, Confidential Information Memorandum and Draft Transaction Document, i.e. Shareholders Agreement (SHA), Share Purchase Agreement (SPA) and Guarantee Agreement (GA) M/s. Luthra & Luthra, the Legal Advisors for the transaction, drafted the Draft Transaction Documents.

(vi) The bidders completed their date room/plant visit and due diligence exercise.

(vii) The comments of the bidders on the Draft Transaction Document were considered by the IMG.

(viii) Based on the decision of IMG, the documents were revised and vetted by the Department of Legal Affairs.

(ix) Simultaneously, M/s. Devcon Engineering Ltd., Calcutta was appointed as Asset Valuers to value the assets of the Company.

(x) The Government approved, in January, 2002, the final SHA/SPA/GA in respect of induction of the strategic partner in Jessop.

(xi) Financial Bids were invited from the prospective bidders by 15.2.2002.

(xii) An Evaluation Committee was appointed by the Ministry of Dis-investment with the Additional Secretary & Financial Advisor, Ministry of Heavy Industries & Public Enterprises as the Chairman to fix the reserve price of Jessop. The other member of the Committee are the representative from the Ministry of Dis-investment, Ministry of Finance, Department of Public Enterprises, Department of Heavy Industry, BBUNI and Jessop & Co.

(xiii) After taking into consideration the assets, the liabilities of the company, the future estimated profitability of Jessop, etc., the Evaluation Committee recommended reserve price of Rs. 12 crore for 72% equity shares of Jessop in its meeting held on 15.02.2002.

(xiv) Two bidders submitted the financial bids on 15.2.2002.

(xv) The financial bids were opened by the IMG in its meeting held on 16.2.2002.

(xvi) M/s. Titagarh Wagons Limited (consortium), Kolkata and M/s. Ruia Cotex Limited (consortium), Kolkata submitted financial bids and the higher bid of Ruia Cotex Ltd. was accepted for recommending to BIFR.

(xvii) On 27th February, 2002, Government decided to accept the higher bid of Ruia Cotex Ltd. subject to final approval by BIFR.â□□

The process of dis-investment employed was approved by the Apex Court in the case of Balco (supra). Now in the context of the present case the question is whether there is any flaw in the decision making process. Mr. Pal, learned counsel for the writ petitioners frankly submitted that he has no grievance as far as the policy of dis-investment is concerned. What he is aggrieved is the decision making process. Therefore, we have to examine whether the decision which has been taken is transparent and fair or not. In this connection we may also refer to the objections raised by Mr. Kapoor, Mr. Mitra and Mr. Kar about the locus standi of the writ petitioners to challenge this decision making process. It is true that as far as the writ petitioners are concerned they are not competitors or bidders in this case of dis-investment.

Since the petitioners are not the bidders or competitors in this process, question arises as to whether they should be heard in the matter, or whether this decision making process was reasonable or there was any transparency or whether there was any breach of principles of natural justice. In our opinion, all these questions are not open to the petitioners as they were not the bidders in this dis-investment process. Had they been the bidders in this process, perhaps it would have been open for them to argue that far better promoter could be available than the persons who have been selected by the Union of India and approved by the BIFR. However, it is unfortunate that the Learned Single Judge has entered into probing of the matter at the instance of the persons who are nobody in the matter. Therefore, before we enter into the question of transparency and the reasonableness of the process, we may, at the outset, state that they are just outside in the process of dis-investment and it is

not open for them to challenge the whole process of dis-investment. At the same time it will be relevant to mention that the petitioners have nowhere in this writ petition challenged that their status or rights are likely to be jeopartised by this dis-investment. There is no such pleading to that effect in the writ petition. Mr. Kapoor is justified in his submission that all these threads have been picked up from the various documents which have been filed by way of supplementary affidavits and the petitioners tried to build up a new case which was never pleaded in the writ petition.

However, we directed Mr. Kapoor to show us in what way they have safeguarded the interest of the employees. Mr. Kapoor has invited our attention to the Note of the Cabinet Committee on dis-investment, though it should not have been placed on record being a secret document, but somehow the writ petitioners have procured the same and placed on record and in the Cabinet Note it had been clearly mentioned that a sum of Rs. 20.08 crores have been earmarked for settling the pending statutory dues as on date, a grant of Rs. 4.99 crores for repayment for Air Force Group Insurance Scheme (AFGIS) dues as onetime settlement, which is backed by Government guarantee. Apart from this it has also been mentioned in this very Note that so far as the employees are concerned, same terms and conditions shall be incorporated in the agreement clause to bring uniformity in the employment process of the agreement of the other dis-invested public sectors like BALCO, HTL,IBP, VSNL, etc. meaning thereby that whatever terms and conditions which has been made available to these industries which have been dis-invested same terms and conditions will be applicable so far as the employees of JCL are concerned. It has further been pointed out that Government of India will fund the salary and wages for the additional six monthsâ□□ period during 2002-2003.

Mr. Kapoor has also invited our attention to the Annexure VII to the BIFR to show that interest of the employees have been properly safeguarded.

The said chart will show that the interest of the employees have been safeguarded upto 2010 and it has been clearly mentioned in the order of the BIFR also under the heading â□□Workmen./Employees of Jessopâ□□, which reads as under :

Constitution, can claim a superior or a better right than a government servant and impugn its change of status. In taking of policy decision in economic matters at length, the principles of natural justice have no role to play. While it is expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision.â□□

It was further observed in paragraphs 48 and 49 as under :

> â□□48. Merely because the workmen may have protection of Articles 14 and 16 of the Constitution, by regarding BALCO as a State, it does not mean that the erstwhile sole shareholder viz. Government had to give the workers prior notice of hearing before deciding to disinvest. There is no principle of natural justice which requires prior notice and hearing to persons who are generally affected as a class by an economic policy decision of the Government. If the abolition of a post pursuant to a policy decision does not attract the provisions of Article 311 of the Constitution as held in State of Haryana vs. Desh Raj Sangar [(1976) 2 SCC 844] on the same parity of reasoning, the policy of dis-investment cannot be faulted if as a result thereof the employees loss their rights or protection under Articles 14 and 16 of the Constitution. In other words, the existence of right of protection under Articles 14 and 16 of the Constitution cannot possibly have the effect of vetoing the governmentâ□□s right to dis-invest. Nor can the employees claim a right of continuous consultation at different stages of the disinvestment process. If the disinvestment process is gone through without contravening any law, then the normal consequences as a result of disinvestment must follow.
>
> 49. The Government could have run the industry departmentally or in any other form. When it chooses to run an industry by forming a company and it becomes its shareholder then under the provisions of the Companies Act as a shareholder, it would have a right to transfer its shares. When persons seek and get employment with such a company registered under the Companies Act, it must be presumed that they accept the right of the Directors and

shareholders to conduct the affairs of the company in accordance with law and at the same time they can exercise the right to sell their shares.â□□

Thereafter, their Lordships in paragraph 50 approved the decision of the Madras High Court in the case of Southern Structural Staff Union vs. Southern Structural Ltd. reported in (1994) 81 Company Cases 389. It was observed in the decision of Madras High Court as follows :

> â□□The employees have no vested right in the employer company continuing to be a government company or â□□other authorityâ□□ for the purpose of Article 12 of the Constitution of India. Apart from the fact that the very status claimed by the employee in this case is a fortuitous occurrence with the employees having commenced work under a private employer and while on the verge of losing employment, being rescued by the State taking over the company, the employee cannot claim any right to decide as to who should own the shares of the company. The State which invested of its own volition, can equally well disinvest. So long as the state holds the controlling interest or the whole of the shareholding, employees may claim the status of employees of a government company or â□□other authorityâ□□ under Article 12 of the Constitution. The status so conferred on the employees does not prevent the Government from dis-investing : nor does it make the consent of the employees as necessary precondition for disinvestment.â□□

Therefore, the rights of the employees have been sufficiently safeguarded in the present case. The employees are not going to be retrenched, but their interest have been adequately protected under the orders of the BIFR and the Government scheme. In fact, if the Government had not resorted to dis-investment, perhaps the company would have to be wound up and all the employees who are working would have been on the road. But while dis-investing the shares to the extent of 72 percent to the private parties the Government has safeguarded the interest of the employees and their welfare has been properly taken care. The employees cannot dictate terms to the employers that they should not transfer their interest to third Party or change their master. They are the employees of the company and their service conditions have been adequately protected and they cannot get better status than that of a civil servant. If the company had been wound up, then all the employees and staff would have been retrenched and they would have gone on knocking at the door of the Industrial Courts. But in this dis-investment policy proper interest of these employees have been taken care.

In view of the aforesaid observation by the Apex Court in an almost identical situation, while the challenge was made to the dis-investment of BALCO their Lordships have categorically laid down that employees have no right to challenge the dis-investment. It was also specifically pointed out by Mr. Kapoor that neither in the pleadings of the writ petition nor at any point of time the employees, who were representing before the BIFR, made any serious grievance that they will not receive a better treatment under their new master. This was never their grievance. The main grievance of the employees representing before the BIFR was that the dis-investment policy should not be implemented and 72 percent of the share should not be off-loaded. Therefore, we are of the opinion that the interests of all the officer and employees have been properly safeguarded. The matter should not have been further probed by the Learned Single Judge. The employees have no right to challenge the so-called reasonableness of the decision or transparency or non-supply of valuation report or BIFR has not given them proper hearing or there is breach of principles of natural justice.

All these issue should not have been probed at the instance of the petitioners. They have no locus standi to challenge the reasonableness of the decision making process of dis-investment or off-loading of 72 percent of the shares to the private party. More so, there was no such pleading in the writ petition.

Mr. Pal has challenged that the whole decision making process, in the present case, alleging lack of transparency. It was pointed out that no valuation report was given to the employees and the valuation report was not taken into consideration by the Operating Agency. Learned Single Jude has also made observation in his judgement that the valuation report was not given to the Operating Agency and was not made available to the employees. He also observed that the scheme of restructuring was not advertised and this exercise was done after short-listing promoters. It may be relevant to mention here that it is an admitted fact that there were no takers of this dying industry as in 1995 attempt was made

by advertising but nobody turned up. Ultimately, the matter was taken up and the scheme was prepared by the Government and submitted to the BIFR. The Government before taking the decision of off-loading 72 percent share examined the validity at various stages at Secretariat level meeting then Ministerial level meeting and thereafter before Cabinet and after approval of the Cabinet the scheme was forwarded to the BIFR for its approval. The advisor, A.F. Fargusan & Co. employed the discounted cash flow method and worked out the share value and recommended that the value of 100 percent equity of JCL should be around 17 crores and 72 percent of that will work out around 12 crores, which was kept as reserve price. After the process of elimination only 2 prospective bidders remained in field, that is, Titagah Industries Limited (consortium) who quoted Rs. 11 crores and Ruia Cotex Ltd. (consortium) who quoted 18.18 crores. The Inter-Ministerial Group for dis-investment of JCL in its meeting held on 16th February, 2002 recommended that the bid of Rs. 18.18 crore submitted by Ruia Cotex Ltd. be accepted. Then the Inter-Ministerial Group noted that the reserve price was based on DCF method with further make up for asset backing. Therefore, the matter has been examined at threadbare at all level and it is not that there is a case of some hide and seek. The matter was properly advertised with all the facts and they were also made available on the website and it is nobodyâ□□s case that they were not supplied with necessary material. No bidder or any promoter has made any such grievance. It is this busybody who has nothing to do with bids is making imaginary grievance to somehow stall dis-investment. Therefore, we do not find any unfairness or illegality in the decision making process. The process which is conceived in the dis-investment policy has been consistently followed in the present case and after taking into consideration all the aspects and employing the DCF method the valuation of the shares have been worked out and Ruia Cotex being the highest bidder was accepted by the Government and the same was approved by the BIFR. It is wrong to say that the valuation report was not available or was not taken into consideration. This is absolutely wrong. We shall deal with this aspect further at the time when we will deal with the challenge of the Scheme framed by the BIFR, but it may be relevant to mention here that Devcon Engineering Co. was employed to value the assets of JCL. But Mr. Pal submitted that the valuation of assets was not made and he tried to make much out of it. We asked Mr. Kapoor to submit the valuation of the assets made by Devcon Engineering Co. Mr. Kapoor placed on record the realizable value of the assets worked out by the valuer, i.e., Devcok Engineering Co. and a copy of the same was given to Mr. Pal. Therefore, the attempt of the learned counsel for the writ petitioner to dig out the minute details and probe into the matter to discredit the whole process of dis-investment is absolutely without any basis. We have examined the matter and found that proper advertisement was issued and all the facts and datas were given to the prospective promoters. Therefore, there is no invalidity in the process of dis-investment and the finding given by the Learned Single Judge is absolutely erroneous.

Mr. Pal also submitted that had all the facts of restructuring properly advertised, perhaps this would have invited a better promoter. He submitted that the re-structuring is being sought to be done by condoning the liability of the state like waiving the liability of the Sale Tax or Central Excise and Customs for re-structuring purpose, had all these facts been given in the advertisement perhaps it would have fetched a better promoter, but this is neither here not there. The petitioners are not the prospective promoters and no promoter has come up before us for making this grievance that all these re-structuring had not been made public then that would have a better response. All these are nothing but argument for the sake of argument. We asked Mr. Pal to suggest if he has any prospective bidder in his view who can give a better deal, he was unable to point out any. Therefore, all the arguments that if all these re-structuring scheme had been disclosed in the EOI (Expression of Interest) then it would have evoked better response, is a argument in despair. Mr. Pal tried to make out that re-structuring was done after short-listing promoters and not prior to the issue of the advertisement, that is EOI, therefore, the whole process is vitiated. This argument is without any substance. It is not possible for the state to disclose every minute detail as these minute detail has to be negotiated with party. Therefore, the facts were mentioned in the advertisement that restructuring would be undertaken and restructuring scheme was disclosed to all the prospective bidders who were short listed. More so, this argument does not lie in the mouth of the employeesâ□□ association as they are not the bidders. Simply because it would have evoked a better bid had all these facts been given, all these arguments are in the harness to somehow

frustrate the dis-investment process. These arguments are not open to the present petitioners and we are satisfied that there was no lack of transparency and that there is no illegality in the decision making process. It is consistent with the dis-investment policy.

Now coming to the challenge to the validity of the order passed by the BIFR, at the outset we would like to observe that there was no challenge in the writ petition and the order of BIFR was challenged by filing supplementary affidavits. We have already observed that this kind of challenge is not permissible. The order of BIFR dated 20th September, 2002 was not the subject matter of the writ petition. This was filed with an interim application and challenge was made by way of supplementary affidavits. The challenge to such kind of substantive order cannot be permitted by supplementary affidavits. Unfortunately, it was entertained by the Learned Single Judge and much of the argument was built up on this. Therefore now we shall advert to that challenge.

Mr. Kapoor, Learned counsel for the Union of India has seriously objected to the locus standi of the writ petitioners to challenge this. However, without prejudice to that he argued that the view taken by the Learned Single Judge with regard to the procedure adopted by BIFR is unexceptionable and observations made by the Learned Single Judge are without any basis. He has pointed out various observations made by the Learned Single Judge in his judgement which does not bear with the pleadings and facts. He highlighted one of the observations made by the Learned Single Judge with regard to BIFR that the valuation report was not given to the Operating Agency and it was not considered by the BIFR. It was observed by the Learned Single Judge that :

â□□I do not find any separate valuation of non-core assets of the company namely amongst other land, building and physical assets. How this figure of 17 crores is arrived at is not clear to the Court nor is it explained in the affidavit. The value of non-crore is not certainly included.â□□

Mr. Kapoor submitted that this observation made by the Learned Single Judge is wholly wrong and submitted that perhaps the Learned Single Judge has not properly examined the merit of the case. He invited our attention to the finding given by the BIFR in its order. He has also invited our attention to various other observations made by the Learned Single Judge on this aspect. He submitted that this is factually incorrect and invited our attention to paragraph 5 of the findings given by the BIFR, wherein it was observed :

â□□SBI (OA) vide its letter dated 4.5.2002 submitted that they had perused the proposal of GOI and also the papers/documents, such as Share Holders Agreement (SHA), Share Purchase Agreement (SPA), Guarantee Agreement (GA) and valuation report provided by GOI Deptt. Of Disinvestment (DOD) letter dated 1.5.2002 and were satisfied that (a) provisions of SHA, SPA were considered to be adequate for safeguarding the interest of the employees; (b) necessary provisions has been made in SHA, SPA for safeguarding against assets stripping by the strategic partner (SP); (c) the procedure followed in the selection of the strategic partner was proper and transparent.â□□

Therefore, the above observation made by the Learned Single Judge appears to us to be incorrect. We have already mentioned that Devcon Engineering Limited was the agency entrusted with the work of preparing the valuation of the physical assets and that was done and copy of that valuation report was given to Mr. Pal and that copy was also sent to the Operating Agency and it was placed before the BIFR. Therefore, the valuation of the assets of JCL was taken into consideration by the Operating Agency as well as by the BIFR. In fact much issue was raised out of this by Mr. Pal that no assessment of the assets of JCL, that is, moveable and immoveable property as well as plant and machinery, was taken into consideration. This was alleged only on the basis of one letter written by the workmen where they have made a grievance that copy of that report was not given to them and on that basis question was raised and Mr. Pal to make much out of it, but it is factually incorrect. Copy of that valuation report was called from Mr. Kapoor and the covering copy was given to Mr. Pal and same was kept on record. Therefore this grievance made by Mr. Pal, which has been upheld by the Learned Single Judge, is incorrect. Mr. Kapoor submitted that the employees association was appearing before the BIFR at various stages and specially during the meeting held on 18th July,2002, 20th August, 2002 and 20th September, 2002 of BIFR but none of the members raised any objection that the copy of the

valuation report of Devcon Engineering Limited was not given to them. Therefore, the finding given by the Learned Single Judge on the basis of the so called valuation report and the serious doubt cast on the decision making process by the Learned Single Judge is absolutely mis-conceived. We have examined the matter thoroughly and we do not find any lack of transparency in the matter. In fact on the basis of this valuation report the Learned Single Judge has described one of the main reason as lack of transparency. The valuation report submitted by Devcon Engineering Limited was duly considered by the BIFR. Therefore, this finding given by the Learned Single Judge is totally mis-placed.

Mr. Pal has raised objection, in addition to the arguments which has been raised before the Learned Single Judge, that the order of BIFR suffers from breach of principles of natural justice because no copy of the Government proposal was given to the employees and it was directly sent to the Chairman of BIFR and that the Operating Agency got a copy and held a meeting without notice to the employees and valuation report was not given to them and in 18th July, 2002 meeting nobody called the employees. It was also submitted that the workmen never agreed with the scheme. It was also pointed out that the Railway did not assign free issue of the materials. It was also pointed out that the Central Board of Direct Taxes has no authority to grant exemption and likewise Central Board of Customs and Excise. He has also submitted that the BIFR abdicated its power and they dittoed the proposal of the Government of India. We have summarized the objections raised by Mr. Pal only for the purpose of mentioning them and we reject them. All these questions cannot be allowed to be raised by the employees because if they have any grievance then they could have filed an appeal against the order of the BIFR before the AAIFR, but they did not resort to appeal and chosen a sort cut method by introducing challenge to the BIFR order in the proceeding for which no foundation was laid in the writ petition. As we have examined the matter thoroughly and we find that the employees were associated from time to time and they knew all the facts what transpired in the meeting of the BIFR and when the final proposal came from the Government of India which came on account of the direction given by the AAIFR and it was considered by the BIFR and the employees were participating from time to time, simply because copy of the valuation report was not given to them, to which they have no concern whatsoever, they cannot challenge the process of dis-investment. They have no right to say that JCL should not be dis-invested. They have only right to protect their service condition. It is not for the employees to say whether the Central Board of Direct Taxes or Central Board of Customs and Excise have any power to exempt the Tax liability for restructuring or Railways can or cannot assure free supply of goods. All these are not within the domain of the employees to raise these questions. It is for the Government of India to decide after taking into pros and cons of restructuring for disinvestments. The Government of India found that since despite infusion of huge funds JCL was running in loss, for the benefit of the public at large the Government of India, after following full procedure, which is laid down in the dis-investment policy, thought it fit to dis-invest their share to the extent of 72% and we do not find any transparency in the matter. The employees have only right to safeguard their part of the interest, they have no right to challenge the authority of the Government of India to dis-invest. In fact the attempt of the employees was that dis-investment should not be undertaken, that cannot be sustained as they have no right whatsoever, except to safeguard their part of interest.

Mr. Pal has invited our attention to the case of Hirday Narayan vs. Income Tax Officer, Bareilly reported in AIR 1975 SC 33 and Harbanslal. Sahnia Vs. Indian Oil Corporation reported in 2002 (10) JT 561 to say that alternative remedy is no bar for challenging the order directly under Article 226 of the Constitution before this Court as it is a self imposed restriction. It is true that Courts can interfere in Article 226 if it finds that the order is in violation of principles of natural justice or violative of Article 14 of the Constitution, or it is arbitrary and without jurisdiction. But none of the conditions are present in the instant case.

It was also submitted by Mr. Pal that in fact Ruia Cotex has been chosen and the assets of crores have been given to Ruia Cotex for a song. This submission of Mr. Pal is also not correct. It is relevant to mention here that it is not that Ruia Cotex will be free to deal with the assets and properties of JCL. In fact, the Government of India still holds more than 26% shares in JCL. Apart from that the scheme contemplates a lots of restrictions; that the State Bank of India would be designated as the Monitoring Agency and it also contemplates that the company shall strengthen/restructure the

management setup with the inclusion of representatives of institutions/banks/BIFR to the satisfaction of the BIFR and Monitoring Agency. The company will also constitute a managing committee which is acceptable to the BIFR and the Monitoring Agency for reviewing on half-yearly basis. BIFRâ□□s Special Director shall also be a member of the Committee along with one representative each from the financial institutions and banks. The company shall also appoint a reputed Chartered Accountant with the approval of Monitoring Agency. It also lays down that the company will not undertake any project or expansion or make any investment or obtain any asset on lease/hire purchase without the prior approval of the Monitoring Agency and BIFR. The package of reliefs and concessions shall be subject to annual review. The assets would be sold, if required, through an Asset Sale Committee as per guidelines of BIFR. The entire sale proceeds would be used as per the scheme sanctioned or as per the directions of the BIFR. The company would enter into a memorandum of understanding with the workerâ□□s union for its smooth functioning. Therefore, all the fetters are there in the scheme and it is not that the company will be able to sell off their assets without prior sanction from the BIFR or from the Government of India. It is also pointed out by Mr. Kapoor that it is not that the Ruia Cotex will be taking the company for a song but they will be taking the company with a huge liability and not way Mr. Pal has tried to show by his own calculations.

Mr. Kapoor, learned counsel for Union of India has pointed out that the current liability which will be borne by Ruia Cotex is to the extent of Rs. 189.53 crores plus Rs. 18.18 crores. Therefore, it is not correct on the part of the learned counsel for the writ petitioner to submit that Ruia Cotex has been shown any favour or the entire property worth crores being given to Ruia Cotex for a song. Ruia Cotex even after paying a sum of Rs. 18.18 crores, will have to undertake other liabilities to the extent of Rs. 189.55 crores (Annexure 3 page 759). Mr. Pal also tried to raise a question that the control premium was not added and in that connection he tried to rely on an observation by the Apex Court in the case of BALCO (supra), but it may be relevant to mention here that BALCO was a profit making going concern. Therefore, it was necessary to include the control premium, but in the present case the company is a loss making one and there is no question of adding control premium.

It was also argued by Mr. Pal that no evaluation on technical capabilities of Ruia Cotex was undertaken by the Committee. So far as the technical aspects are concerned, when all the aspects have been taken into consideration for making it viable simply because that the technical aspect was no adhered to by the Evaluation Committee could not make the whole sale illegal. When the comprehensive approach was done especially with regard to the fact that there were only two candidates remained in the field, that is, Ruia Cotex and Titagarh Industries Limited and amongst them Ruia Cotex quoted Rs. 18.18 crores and Titaghah Industries Limited quoted Rs. 12 crores. Then in that case the person who has given higher bid had been accepted, that should be a good ground to overlook other aspects in the matter. Therefore, we do not find that there was any unreasonableness or any lack of transparency.

Mr. Mitra, learned counsel for Ruia Cotex has also submitted that as per the showing of the valuation report prepared by L.B. Jha & Co., produced by the writ petitioners, it would appear that 72 percent share value of JCL will be much less than paid by Ruia Cotex. Mr. Pal seriously objected to it, be that as it may, we need not to go into this calculation process in this proceedings as we have found that the highest bidderâ□□s bid had been accepted, that is, Ruia Cotex bid which was more than the reserved price arrived at by well recognized method. Moreover, the valuation is the question of fact and the Court will not interfere in the matter unless the methodology adopted is arbitrary. It needs to be mentioned that the methodology adopted in the present case bas been fully affirmed by the Apex Court in the BALCO (supra).

Therefore, as a result of the above discussion we are of the opinion that the view taken by the Learned Single Judge cannot be sustained and we set aside the order of the Learned Single Judge and allow the appeals being FMA No.433 of 2003 (by Bharat Bhari Udyog Nigam Ltd.); FMA No.434 of 2003 (by Ruia Cotex Ltd.) and FMA No. 436 of 2003 (by Union of India) and dismiss the appeal being FMA No. 435 of 2003 filed by Jessop & Co. Ltd. Staff Association & Ann, and dismiss the writ petition with no order as to costs.

(Ashok Kumar Mathur, Chief Justice)

Ashim Kumar Banerjee, J. : I agree

(Ashim Kumar Banerjee J.)

Later on:-

The prayer for stay of operation of the judgment made by the learned Counsel for the appellant is rejected. If an urgent Xerox certified copy of the judgment is applied for, the same is to be supplied to the applicant at an early date.

(Ashok Kumar Mathur, CJ)

(Ashim Kumar Banerjee, J)