Sitaram Jaipuria And Ors. vs Banwarilal Jaipuria on 17 September, 1971

Equivalent citations: AIR1972CAL105, 76CWN161, AIR 1972 CALCUTTA 105, ILR (1972) 2 CAL 64 76 CAL WN 161, 76 CAL WN 161

JUDGMENT

P.B. Mukharji, C.J.

1. This is an appeal from an interlocutory order of S.K. Mukherjea, J., dated the 16th March, 1971.

2. This was an application in a representative action by a shareholder for an injunction restraining the company, Swadeshi Cotton Mills Ltd. and its directors from holding any meeting pursuant to a notice dated September 14, 1970 or from passing any of the resolutions set out in the said notice, or from Riving effect to the resolutions, if passed. This notice dated Sep. 14, 1970 was accompanied by an explanatory statement under Section 173(2) of the Companies Act.

On the 12th Oct., 1970, the said resolution was unanimously passed by a general meeting held in pursuance of the said notice.

3. The notice and the explanatory statement are challenged in the petition on the three following grounds:

> (a) Neither document disclosed whether permission has been obtained from the Central Government as required under the Monopolies and Restrictive Trade Practices Act for establishing the undertaking of Swadeshi Politex Ltd. which, when established, would be an inter-connected undertaking of the respondent company.
>
> (b) The said documents informed the members that the work of the said polyester fibre plant has commenced; no disclosure was made whether a licence has been obtained in respect thereof as required by Section 11 of the Industries Act.
>
> (c) None of the terms and conditions of the collaboration agreement --financial, technical or otherwise -- were disclosed.

4. The learned trial Judge held that, in his opinion the undertaking of Swadeshi Polytex Ltd. transpires to be an inter-connected undertaking of the respondent company to which Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 will apply. The learned Judge also held that the shareholder plaintiff had a legal right to bring an action against the company of which he is

a share-holder, to restrain it from committing an illegal act under the Monopolies and Restrictive Trade Practices Act or from questioning the sufficiency or validity of the notice of the resolution.

5. The learned Judge also gave a meaning and interpretation of the word "inter-connected undertaking". He held that if a relative of the managing director of the company is the manag ing director of another company, their undertakings must be deemed to be inter-connected undertakings in the sense of the statute, even though the under takings may have nothing to do with each other, even though their constitu tion or organs of control may be total ly different. He said, "This may be bad logic or poor law, but it is good Monopolies and Restrictive Trade Prac tices Act." Therefore, he held that because Rajaram Jaipuria and Sitaram Jaipuria were interested and were re lated, therefore it became an inter connected undertaking. Rajaram Jai puria is the managing director of the respondent company and Sitaram Jai puria is the managing director of Swadeshi Polytex Ltd, They are bro thers.

6. The learned Judge also came to a certain conclusion with regard to Clause (b) of the Explanation of interconnected under takings in Section 2(g) of the Monopolies and Restrictive Trade Practices Act, 1969, which reads as follows:

> "Explanation-- For purposes of Clause (g) two or more undertakings shall be deemed to be inter-connected (b) if one or more individuals together with, the relatives or firms in which such individuals or their relatives are partners jointly or severally own manage or control the other".

On the interpretation of Clause (b), the learned Judge said, "No doubt, Clause (b) is one of the glaring instances of bad drafting in an ill-drafted statute. The syntax is defective but nevertheless, the sense is clear. It means that two or more undertakings shall be deemed to be inter-connected, if one or more individuals who own manage or control one undertaking, together with his or their relatives jointly or severally own, manage or control the other undertaking or other undertakings."

In fact, the learned Judge supplied the words "if one or more individuals who own, manage or control one undertaking" to the statute. The learned Judge made it clear, "I desire to make it clear that I hold that new undertaking to be an inter-connected undertaking on the sole and solitary ground that the respective managing directors are relatives and for no other reason."

7. To complete the statement of facts, one more point has to be noted. The plaintiff in this case filed another suit in the High Court being Suit No. 105 of 1970. That suit was instituted on or about the 26th day of February, 1970 and a prior suit. In that suit, the prayer inter alia was a declaration that the notice dated the 29th January, 1970, with an explanatory note annexed thereto, was bad, inoperative and of no effect and for permanent injunction restraining the respondents from implementing or giving effect to any of the resolutions passed at the meeting. There, in that suit. Ghose, J., ordered on the 8th September, 1970 :--

> "There shall be an interim injunction restraining the respondent directors (company's directors) from acting on the resolution No. 1 passed at the general

> meeting held on the 27th February, 1970 until the same is confirmed and approved at a meeting properly notified. All other interim orders stand vacated."

The respondents called a properly notified meeting and the resolution has been unanimously passed, confirmed and approved.

8. S.K. Mukherjea, J., after having come to the aforesaid findings gave an order for injunction restraining the respondents or each of them from giving effect to the resolutions set out in the notice dated September 14, 1970. This is an appeal against that order.

9. As I see it, there are two main considerations in an application for injunction. One is a question of balance of convenience. The other is a question of prima facie case. The petitioner never attended any meeting. The company was incorporated on the 26th March, 1970. Prior to that. on the 29th July, 1969, there was a Letter of Intent issued in favour of Swadeshi Cotton Mills Ltd. Then on the 25th July, 1970, the Letter of Intent was transferred to Swadeshi Polytex Ltd. On the 9th July, 1970 there was the commencement of business certificate. On the 7th October, 1970 industrial licence was issued in favour of Swadeshi Polytex Ltd. The petitioner holds only .7 voting rights. Besides, the appellants and their directors have given an undertaking to make good all the losses should they fail in the appeal. Apparently on the basis of these grounds, there is little scope for granting an injunction. From that point of view, the learned Judge's order cannot be sustained. He has in fact virtually decided the suit. The suit is pending. It is a representative action. The advertisements have not vet been issued. From that point of view, if injunction is granted, the whole affair will have come to a standstill. Time for different statutory engagements will have expired and it will mean freezing of the many steps that have been taken for setting up of the Swadeshi Polytex Ltd. and which was already functioning. On the other hand, if there is no injunction, the applicant will hardly lose anything being completely guaranteed by the undertaking given to this Court by the Appellants. Therefore, on the balance of convenience, it does not seem to me to be at all a case for injunction specially in this matter. The balance of convenience is not in favour of granting the injunction asked for. See Mahaliram Santhalia v. Fort Bloster Jute Manufacturing Co., . See also Richard Chow V. James Chow, (1971) 75 Cal WN 173. The celebrated observations in the judgment of James, L. J. in MacDougall v. Gardiner, (1875-1 Ch. D. 13 at page 23) may bear repetition:--

> "Has a particular individual the right to have it for the purpose of using his power of eloquence to induce the others to listen to him and to take his view ? That is an equity which I have never yet heard of in this Court, and I have never known it insisted upon before; that is to say, that this Court is to entertain a bill for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions viva voce at a meeting of the share-holders. If so, I do not know why we should not go further, and say, not only must the meeting be held, but the share-holders must stay there to listen to him and to be convinced by him. The truth is, that is only part of the machinery and means by which the internal management is carried on. The whole question comes back to a question of internal management; that is to say, whether the meeting ought or ought not to be held in a particular way, whether the directors ought or ought not to have sanctioned certain proceedings

> which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed. If there is some one managing the affairs of the company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed, the company are the proper persons to complain of that. It seems to me, therefore, that the thing is perfectly plain and obvious, and when the Master of the Rolls had the case before him he immediately pointed it out, and said, "You have the wrong plaintiff here --the plaintiff must be the company." From the first opening of this case before us, I have never had any doubt in my own mind that this was a bill which, if it was to be sustained at all, could only be sustained by the company."

10. The next question in an application for injunction is to find out where the prima facie case lies. It appears to me that the prima facie case is against the plaintiff. I will first examine Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969. It says:--

> "No person or authority other than Government, shall after commencement of this Act, establish any new undertaking which when established would become an inter-connected undertaking or an undertaking to which Clause (a) of Section 20 applies except under and in accordance with previous sanction of the Central Govt."

11. The learned Judge applied this section and held that the Swadeshi Cotton Mills Ltd. and the Swadeshi Polytex Ltd. come within the ambit of Section 22. It seems to me that prima facie the crucial words of the section "after the commencement of this Act" have been ignored by the learned Judge. Swadeshi Polytex Ltd. was incorporated on the 26th March, 1970. The Letter of Intent from the Government was given on the 24th July, 1969. The transfer of the Letter of Intent to Swadeshi Polytex was made on the 20th January, 1970. The certificate for commencement of business was granted to Swadeshi Polytex Ltd. on or about the 9th July, 1970.

12. If the incorporation of the company is taken as the establishment of the undertaking, then that took place on the 27th March, 1970 long prior to the Act came into force. Therefore, it was not a case of "any person or authority shall after the commencement of this Act establish any new undertaking." The Act came into force on the 1st June, 1970. Then it is said that incorporation of the company is not the establishment of a new undertaking but the commencement of the business certificate dated the 9th July, 1970. In this case and at that time, the Monopolies and Restrictive Trade Practices Act, 1969, had come into force.

13. Section 34 of the Companies Act is quite explicit on this point. Section 34(2) of the Companies Act states:

> "From the date of the incorporation mentioned in the certificate of incorporation, such of the subscribers of the memorandum and other persons, as may from time to time be members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal but with

such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."

14. The significant features about Section 34(2) of the Companies Act may be noted. From the very inception of the incorporation it not only becomes a body corporate but also "capable forthwith of exercising all the functions of an incorporated company" and also with "liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act." I can read these features only as establishing "company capable of exercising all the functions of an incorporated company." If this is not the establishment of an undertaking I do not (know ?) what is. With this establishment of business, it can buy lands, it can build factories, it can collaborate with other concerns. In fact, all these have been undertaken by Swadeshi Polytex Ltd.

15. Section 149 of the Companies Act provides for the restrictions on commencement of business, namely, where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, it is provided that the company shall not commence its business or exercise any borrowing powers, unless certain things are done. Similarly, for a company having a share capital which has not issued a prospectus, the company shall not commence any business or exercise any borrowing powers, unless certain formalities are performed. Similarly, again, Section 149(2-A) provides for certain other restrictions for a company having a share capital whether or not it has issued a prospectus inviting the public to subscribe for its shares. When these requirements are satisfied, then the Registrar shall certify that the company is entitled to commence business and the certificate shall be conclusive evidence that the company is so entitled as provided in Section 149(3).

16. Now it is this certificate and this statutory provision which is contended by the learned Counsel for the respondent as the date of establishment of a new undertaking. Establishment of a new undertaking and commencement of business prima facie appears to me to be different. Establishment of a new undertaking commences from the incorporation of the company. Its culmination may be the commencement of the business certificate. Learned Counsel for the respondents have relied on a decision of the Supreme Court reported in Travancore-Cochin Chemicals (P) Ltd. v. Commr. of Wealth-Tax, Kerala, . There the Supreme Court had to consider a matter under the Wealth Tax Act under Section 45(d) of the Wealth Tax Act. It was held in that case by the Supreme Court that the appellant was "established" within the meaning of the proviso to Section 45(d) in December, 1953 or on January 1, 1954 and that there was a clear distinction between ihe word "registered" or "incorporated" and the "established". I think that there that interpretation was necessary and as Sikri J. pointed out at page 655 "if the legislature was thinking of incorporation of a company, then we fail to understand why this word was not used instead of the word "established." Further, if we look at Clause (d), it excludes certain industrial undertakings from the benefit of Section 45; what are excluded are companies "formed by the splitting up, or the reconstruction of a business already in existence or by the transfer to a new business of any building, machinery or plant used in a business which was being previously carried on." Ordinarily the date of incorporation of a company has nothing to do with the transfer of a machinery or plant to it." That consideration is absent here. The learned Counsel for the respondents also relied on another Wealth Tax Act case namely. Standard Mills Co. Ltd. v. Commr. of Wealth Tax Bombay . Reference was also

made to the observations of Buckley J. at page 393 in the case of In re. Otto Electrical Manufacturing Co. reported in (1906) 2 Ch. D. 390. But the learned Judge there had no occasion to contrast it with such statutory provisions as Section 34(2) of the Companies Act. But those decisions of the Supreme Court are with respect to the Wealth Tax Act where different considerations apply. The point we are concerned with relates to the Monopolies and Restrictive Trade Practices Act, 1969. Prima facie it appears to me that establishment of a new undertaking and commencement of business should be construed in that light. But in any event, without deciding the point itself and without deciding the issue which will ultimately be tried in the suit. I am of the view prima facie that this does not come within the ambit of Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969.

17. There is a further important consideration on prima facie case. I believe prima facie that Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 is intended for State intervention. It is not intended for aggrieved share-holders. The Act states in the preamble -- "An Act to provide that the operation of the economic system does not result in concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto." Monopolies, therefore, are a matter of public concern under the Act. The state is primarily bound to see that there is no concentration of economic power so as to come within its mischief. Therefore, this prohibition under Section 22 is intended for the State and not for disgruntled shareholders or a share-holder of .7 voting rights.

18. The reason is obvious. If a solitary share-holder is given this right, then the Court will have to come to a decision on Section 22 of the Act. But that decision is left with the Central Govt. in the first instance by the statute. If the Central Government is of the opinion that no such approval can be made without further enquiry, then under Section 22(3-B) of the Act it may refer the application to the Commission for an enquiry, and the Commission may, after such hearing as it thinks fit, report to the Central Government thereon. Under Section 22(3-C) of the Act, upon receipt of the report of the Commission, the Central Government may pass such orders with regard to the proposal for the establishment of a new undertaking as is contemplated under Section 22 of the Act as it may think fit. The whole scheme and procedure is through the Central Government and the Monopolies Commission in the first instance, and not through the Court.

19. Besides, there seems to be another great obstacle for the respondents. The prohibition contained in Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 does not make the contract or the undertaking illegal prima facie. There are many prohibitions in public statutes but they do not raise the question of illegality or ultra vires but whose breach is otherwise provided for in the statute itself. The scheme of the Monopolies and Restrictive Trade Practices Act, 1969 which has a series of sections on penalties and offences under Chapter 8 and Chapter 9 prima facie indicates that the establishment of a new undertaking which offends Section 22 of the Act and which is without the previous permission of the Central Government will be considered as offences under the said Act and will be visited by the penalties mentioned in the statute. See in this connection Archbold's (Freightage) Ltd. v. S. Spanglett Ltd., 1961-1 QB 374 at PP. 389 to 393 per Lord Justice Devlin and also St. John Shipping Corporation v. Joseph Rank (1957) 1 QB 267. The principles

mentioned in those two English cases appear to have been followed in Neminath v. Jumboo Rao, AIR 1966 Mys. 154 and upheld by the Supreme Court in . The decision in Cutler v. Wandsworth Stadium Ltd. in 1949 AC 398 and Lord Simmond's observations at page 407 may be seen.

20. Then again the question of valuation of assets is a very important question in this application. Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 is not attracted to an undertaking unless its own assets or its own assets together with the assets of its inter-connected undertakings is not less than twenty crores of rupees. Therefore, the relevant point of time at which the valuation of its assets and the assets of the inter-connected undertakings has to be computed is a matter of great importance. The time taken bv the learned Judge is 31st December 1969, that is to say, the last day of the financial year, but it has been contended that it should be the year 1968. But at that time there was no asset for Swadeshi Polytex Ltd. Besides, the learned Judge has introduced new words to give a meaning to the Explanation to 2 (g) of the Act He has suggested that the words "who manage or control one undertaking" are to be introduced to the Explanation of 2 (g) of the Monopolies and Restrictive Trade Practices Act, 1969. Prima facie in an application for injunction I am against the plaintiff in so crucial a matter of interpretation.

21. Finally, on behalf of the respondents, it is said that under Section 172 of the Companies Act, every notice of a meeting of a company shall specify the place and the day and the hour of the meeting and shall contain a statement of business to be transacted thereat. The explanatory statement that is required to be annexed to the notice under Section 173 of the Companies Act is said by the appellant company not to disclose to the shareholders the fact whether the Monopolies and Restrictive Trade Practices Act, 1969 applies or whether any permission has been obtained.

22. Now on that point at the time when the present application was made, the company has not applied for any such permission under the Monopolies and Restrictive Trade Practices Act, 1969. The learned Counsel for the respondents argues that at any rate the explanatory statement should have stated whether the Monopolies and Restrictive Trade Practices Act applies or not should have been brought to the notice of the general body of the shareholders. It is difficult to understand the point which the learned Counsel for the respondents wanted to make. Is it to be stated in the explanatory statement to the notice that -- "we invite an argument on the Monopolies Act and its applicability"? Surely that is not the purpose of an explanatory statement to the notice.

23. But there is a more fundamental obstacle on the part of the respondent in this regard. The notice is given in the following terms:--

> "Notice is hereby given that a General Meeting of the members of the Swadeshi Cotton Mills Ltd. will be held at the Registered Office of the company at Swadeshi House, Civil Line, Kanpur, on Monday, 12th day of October, 1970 at 2.30 p.m. to consider and if thought fit to pass with or without modification the following resolutions as an Ordinary Resolution.
>
> "Resolved that resolution No. 1 (set out hereunder) which had been unanimously passed as an Ordinary Resolution at a general meeting of the company held on the

27th February, 1970 at its registered office at Swadeshi House, Civil Line, Kanpur in pursuance of the notice dated the 29th January, 1070 be and is hereby confirmed and approved."

"Resolved that subject to the necessary approval of the Central Government being obtained pursuant to the provisions of Section 372 and all other applicable provisions, if any, of the Companies Act, 1956, the company hereby sanction the investment by it in the shares of Swadeshi Polytex Ltd., Kanpur, to the extent of the aggregate face value of rupees one crore by way of subscribing and/or purchasing to the extent of 10,00,000 Equity Shares of the value of Rs. 10/- each at par on such terms and conditions as the Board of Directors think fit notwithstanding the fact that the investment in the shares of the said Swadeshi Polytex Ltd. exceeds 10% of the subscribed capital of the said Swadeshi Polytex Ltd. and shall exceed 30% of the prescribed capital of this company, and the Board of Directors of the company be and are hereby authorised to do and/or cause to be done and/or execute and/or cause to be executed all such acts, deeds and things as they may think expedient for the purpose."

By order of the Board For Swadeshi Cotton Mills Co. Ltd. Secretary"

24. With the notice the explanatory statement required by Section 173 was enclosed. The Notice itself gives due information that subject to the necessary approval of the Central Government and all other applicable provisions if any of the Companies Act, the company sanctions investment by Swadeshi Cotton Mills Ltd. in the shares of Swadeshi Polytex Ltd., Kanpur to the extent of aggregate face value of rupees one crore. The explanatory statement said that the share capital of the new company proposed to be issued was four crores and the proposed investment together with the existing investment in the shares of the incorporated company shall be in, excess of 30% of the capital of the company. Hence under Section 372 of the Companies Act the approval of the company in General Meeting is sought. The explanatory statement made it clear that Sri S. Jaipuria was one of the persons proposed to be appointed as Managing Director of the new company of Swadeshi Polytex Ltd. and Shri Rajaram Jaipuria is proposed to be appointed as Managing Director of the company of Swadeshi Cotton Mills Ltd. Then there was a recital of certain civil proceedings, one of them being the present suit by the respondents being Suit No. 105 of 1970. In that suit an interim order was made which was also recited. Then in the correspondence itself it is stated that the general meeting of the members was duly held on the 27th February, 1970 and business of the meeting was taken and there was a resolution unanimously passed. Thereafter, follows a recital in Suit No. 105 of 1970 where the learned Judge by his interim order dated the 8th September, 1970 directed that:

"there shall be an injunction restraining the respondent Directors (Company Directors) from acting on the Resolutions passed at the General Meeting held on the 27th February. 1970 until the same is hereby confirmed or approved at a meeting properly notified. All other interim orders vacated."

25. This was duly passed at the General Meeting. Thereafter the present suit was filed being Suit No. 451 of 1970 by Banwarilal Jaipuria against the appellants. Before Mr. Justice Ghose the issue was whether the Letter of Intent has lapsed and it was on that ground that the order of iniunction was made by the learned Judge.

26. In order to appreciate this point better, it will be necessary to refer to certain correspondence. On the 12th February, 1971 Swadeshi Polvtex Ltd. wrote to the Secretary to the Government of India, Company Affairs, that that company has been registered for the establishment of polyster fibre unit and that it has been granted an industrial licence dated the 7th October, 1970, it drew the particular attention of the Government to the additional conditions in the licence where it is stated.

> "Please note that the licence does not in any way constitute an authorisation under the Monopolies and Restrictive Trade Practices Act, 1969. Wherever applicable such permission or clearance as may be required under the provisions of this Act should be invariably obtained by the undertaking before instituting an effective step for implementing the licence."

In that letter Polytex Ltd. wrote that they understood that the provisions of the Monopolies and Restrictive Trade Practices Act will not apply to an undertaking which has taken steps towards substantial compliance with the terms of the Letter of Intent before the 1st June, 1970, being the date of the coming into operation of the Act. Then they proceeded to give in that letter particulars of the Letter of Intent, collaboration agreement, acquisition of lands, powers, import of machinery, application to the Controller of Capital Issue, project report and loan application and substantial amount of expenditure incurred prior to 1st June, 1970. To this there was a reply on the 6th March, 1971 stating inter alia "you will appreciate that the question of granting a clearance from the applicability of the provisions of Section 22 of the Monopolies and Restrictive Trade Practices Act will arise only if such provisions applicable to your undertaking." On the 12-4-1971 the Swadeshi Polytex Ltd, again wrote to the Deputy Secretary Government of India, giving the particulars that Rajaram Jaipuria Managing Director of Swadeshi Cotton Mills Ltd. and his brother Sitaram Jaipuria, M. P. are Directors and that having regard to the provisions of Section 2(g) read with Explanation (b) Swadeshi Polytex Ltd. should be regarded, when established, as inter-connected undertaking with Swadeshi Cotton Mills Ltd. A reference was made also to Suit No. 451 of 1970 in that letter. The letter closes with the request that by way of abundant caution application was enclosed for approval under Section 22 of the Monopolies and Restrictive Trade Practices Act. Then on the 12th May, 1970 the Government replied to the letter of 12 February, 1970 saying that "I am directed to say that on the facts stated this department is of the view that the provisions of Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 will not apply to the establishment of the new undertaking for the manufacture of polyester fibre." Finally on the 20th May, 1971 they categorically wrote stating that "in view of the department's letter dated the 14th May, 1971 addressed to vou the application under Section 22 is filed."

27. Now all that Section 22 of the Monopolies and Restrictive Trade Practices Act does is to provide that "No person or authority other than the Government shall after the commencement of this Act establish any new undertaking which when established would become an inter-connected

undertaking to which Clause (a) of Section 20 applies except in accordance with the previous permission of the Central Government". But the Central Government itself does not think that Section 22 of the Act applies. That seems to me to be an end of the matter. There is no prima facie case for an injunction on that basis.

28. The learned Counsel for the respondents has placed a good deal of reliance on Section 173 of the Companies Act. Sub-section (2) of Section 173 reads as follows:--

> "Where any item of business to be transacted at a meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business including in particular the nature of the concern or interest, if any. therein of every Director and Manager, if any."

29. At the time when notice of the meeting was given there was no application pending with the Government of India for permission under the Monopolies and Restrictive Trade Practices Act. Therefore, nothing was required to be stated in the explanatory statement but the explanatory statement did seek the permission of the General Meeting for sanctioning one crore rupees as investment of the money of Swadeshi Cotton Mills Ltd. in the shares of Swadeshi Polytex Ltd. under Section 372 of the Companies Act. Now Sub-section (2) of Section 173 of the Companies Act requires "a statement setting out all material facts concerning each such item of business," All material facts as then available had been mentioned in the notice and the explanatory statements. Subsequently the Government of India has also stated that Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 does not apply. Therefore, it is not "material fact" to be disclosed. The fact that the Monopolies and Restrictive Trade Practices Act does not apply cannot be a material fact.

30. Looking at the problem it does not appear to me that prima facie Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969 applies at all in this case, that the notice of the meeting is not at all tricky and that sufficient information had been given to the general body of shareholders that they were expected to accord sanction to the investment of one crore rupees of Swadeshi Cotton Mills Ltd. in Swadeshi Polytex Ltd.

31. The question under Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969. is primarily a question for the Central Government and thereafter by the Commission followed by report to the Government and it is not the primary duty of a Court to adjudicate on a point whether a company is inter-connected or not within the meaning of Section 22 of the Monopolies and Restrictive Trade Practices Act, 1969. Besides. I have already traced the history from the correspondence where the Government of India considers that Section 22 does not apply at all to the facts of this case.

32. Section 173(2) of the Companies Act does not imply that any and every lapse should be visited with the consequence of ultra vires doctrine. A special business requires to find a place in the explanatory statement, but it does not mean that any and every legal requirement should be placed before the General Meeting of the general body of the share-holders. It is to be presumed that all

legal requirements, before a venture is undertaken, is carried out properly. For instance, there are various restrictions which require to be satisfied: for a factory, before it is intended to be put into operation, requires a factory licence, land, before it is purchased, requires registration, conveyance and permission in some cases of municipalities; foreign collaboration and import of materials requires permission under the Foreign Exchange Regulations Act and Import Control Act. It is not, in my view, necessary to state all that before the general body of share-holders: What is necessary, as for instance in this case, is to inform the general body of share-holders as a special business that Swadeshi Cotton Mills Ltd. is investing one crore rupees of its money in Swadeshi Polytex Ltd. and the requirement of Section 372 of the Companies Act has been satisfied.

33. I will now notice some of the decisions which have been cited by the Bar but most of them have no application to the facts of the present case. In the case of Bimal Singh v Muir Mills Co. Ltd., () it was said that where there is a large body of share-holders who reside at great distances from the registered office of the company, the Court does not think it fair on the part of the company to leave the proposed articles at the registered office and give the shareholders notice of that fact. In a case like this the Court agreed with Mr. Palmer that printed copies of the proposed new articles should have been sent with the notice. In this case that was not done and the Court took the view that the notice did not disclose fully and frankly the facts upon which the share-holders were asked to vote. The facts here are entirely different.

34. In Lalita Rajya Lakshmi v. Indian Motor Co., it was held that although it imposes by Section 173(2) an obligation that there shall be annexed to the notice of the meeting a statement of the type and nature which is discussed in that judgment, the question is, does failure to comply with the details of Section 173(2) of the Companies Act make it a Case ipso facto of oppression in conducting the affairs of a company within the meaning of Section 397(1) of the Companies Act which the Court was considering in that case. The Court there held at page 131 of that report.

> "that does not mean that this failure to supply the fullest possible details in the explanatory note under Section 173(2) of the Companies Act will be visited with an application under Section 397 as typifying such failure to be act of oppression within the meaning of Section 397."

It was also stated in that case at page 130.

The first answer on the facts follows from the proposition that if a share-holder is aware of the facts, it is not for him or her to complain of insufficiency of notice ot a meeting. This principle was laid down by the Privy Council in the case of Parashuram Detaram v. Tata Industrial Bank Ltd., 55 Ind App 274 = (AIR 1928 PC 180).

35. Then again when a Division Bench of this Court in East India Commerical Co. (P) Ltd. v. Raymon Engineering Works Ltd., had to consider the question of "material facts" in Section 173(2) of the Act, it was said that the solution of the problem as to whether all material facts were disclosed depends upon the facts of each case. It is, however, not the function of an explanatory statement to travel beyond the scope of the proposed resolution. Material facts have to be given but not detailed

particulars.

36. There was some discussion in Narendra v. Institute of Engineers, . It dealt with the question of difference in the character of a chartered company and a company formed by or under an act of Parliament.

37. In Vita Food Products v. Unus Shipping Co. Ltd., (1939 AC 277) it was held that Section 3 of the New Foundland Carriage of Goods by Sea Act, 1932 which provides that every bill of lading shall contain an express statement that it is to have effect subject to the provisions of the said rules as expressed in this Act" were directory and not mandatory and that failure to obey the directions did not, therefore, make the contract illegal.

38. But where an Act made the adoption of the agreement in the prescribed manner as a condition of its validity, it was held that the resolution was ineffective owing to the absence of notice of the contents of the agreement and that the agreement and the acts done in pursuance of it were consequently ultra vires the company and incapable of being made valid by acquiescence on the part of the shareholders as in Pacific Coast Coal Mines Ltd. v. Arbuthnot, (1917 AC 607) = (AIR 1917 PC 52).

39. Then again in Samuel Montagu & Co. Ltd v. Swiss Air Transport Co. Ltd., (1969-2 QB 307) it was stated by Lord Denning M. R. and Samuel L. J. construing Article 8 (q) of the Warsaw Convention that it should not be given so rigid an interpretation as to hamper the conduct of business. It is desirable that Air Transport companies should be able to use on waybill to fit both international and also non-international carriage. I am quoting the observations of Denning M. R. at page 314 of that report:

> "I do not think we should give a strict interpretation to Article 8 (q) in the Convention. We should not give it so rigid an interpretation as to hamper the conduct of business. I do riot interpret the article as meaning that the waybill must contain the statement verbatim. It is sufficient if it contains a statement to the like effect. It follows that (q) is satisfied if the statement says that the carriage is subject to the rules so far as the same are applicable to the carriage."

40. The important point of this decision is that in construing the provisions like Section 173(2) too rigid an interpretation should not be made as to "hamper the conduct of business". Section 173(2) of the Companies Act means a notice and explanatory statement which should give notice of the essence and substance of the transaction intended to be passed at the meeting. It is a business document. It must be used in a commonsense business way. So long as that standard is satisfied this Court should not be astute to find legal and technical points to defeat the notice and the explanatory statement. Even applying the test laid down by Kekewich, J., that "the man I am protecting is not the dissentient but the absent shareholder" as applied in the decision of Biswanath. Prasad Khaitan v. New Central Jute Mills Co. Ltd., ((1960) 64 Cal WN 970), the instant case does not come within the meaning of that test.

41. Lastly, the case of Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd., (1970-2 Com LJ 200 (Bom)) was cited. This was a judgment of a single Judge. At pages 244-45 it was observed in that case "Reliance was also placed upon in which the Privy Council's decision in Shamdasani's case was followed and upon Kalinga Tubes Ltd. v. Shanti Prasad Jain, which was affirmed by the Supreme Court in Shanti Prasad Jain V-Kalinga Tubes Ltd. . Relying upon these authorities it was sought to be contended that the plaintiffs having full knowledge of the facts which according to them were not disclosed in the explanatory statements, had no right to challenge the validity of the notices on this ground and were estopped from doing so. There is, however, no such plea in any of the affidavits in reply, and this question really does not arise for my consideration, 'but as this question, was argued at some length and as the contesting defendants, insisted that they could spell out such a plea from their affidavit-in-reply which they have not been able to do so -- I will shortly deal with the same. In my opinion, none of these authorities support the contesting defendants. Each turns upon its own facts. The Privy Council decision in Shamdasani's case was under the Indian Companies Act, 1913 which did not contain any section corresponding to Section 173(2) of the 1965 Act Regulation 49 of Table A of Schedule 1 of the 1913 Act inter alia required that in case of special business, the general nature of that business should be set out in the notice. This regulation corresponds to Section 172(1) of the 1956 Act which requires every notice of a meeting to contain a statement of the business to be transacted thereat. The Privy Council did not have to decide the question of a mandatory statutory provision, non-compliance with which would invalidate the notice. The Privy Council held that there was nothing questionable about the notice."

42. On the question of balance of convenience and prima facie case, it does not appear to me to be a case for an injunction. We, therefore, set aside the judgment of the learned Judge and allow the appeal.

43. There is a cross obiection on behalf of the respondents. They relate first to the industrial licence and secondly to the non-disclosure of the financial arrangement. The learned Judge found against the respondents on these two points. We find, however, that the appellants never asked for inspection of the financial and technical agreement and collaboration. The plea for non-disclosure of the terms and conditions of the agreement has been held by the learned Judge to be equally lacking in bona fide. Here inspection was offered but was not taken. There was, therefore, little left of this argument. On the point of industrial licence, it was argued by the learned counsel for the respondents that the notice and the explanatory statement should have disclosed that no licence under the Industrial- Development and Regulation Act had been obtained for establishing Polytex undertaking. In fact, the licence was obtained on the 7th October, 1970. Prima facie it ap-appears that the learned Judge was right in saying that all that Section 11 of the Industrial Development and Regulation Act requires is that a licence must be obtained before the undertaking is established. He also noticed that the words "previous permission" are not used in the relevant Section 11(1) of the Act. It is true that the learned Judge held that until and unless undertaking is established, no question of licence under Section 11(2) of the Industrial Development and Regulation Act,, 1969 can arise. The learned Counsel for the resoondents drew our attention to the proviso to that section which he construed to mean that after an undertaking is established there will be no occasion for a licence. But we do not think that the industrial licence need at all be in the explanatory notice in view of what I have said under Section 173(2) of the Companies Act.

44. Various other points were argued by Mr. Samiran Sen, appearing on behalf of the appellants. One of them is a question of res judicata but it is unnecessary for us here to express an opinion on that point. His point was that the suit before Mr. Justice Ghose should have been amended to include the subject matter of the present suit. The Monopolies and Restrictive Trade Practices Act came into operation on the 1st June, 1970 and the hearing of the suit before Mr. Justice Ghose began and concluded in August 1970. Therefore he says that it barred by constructive res judicata. But, as I say, it is unnecessary to decide this point in the present application in view of what we have already stated before.

45. For these reasons the appellants succeed and the cross objection fails. The appellants' costs certified for two counsel will be costs in the cause. I have seen the judgment of my learned brother and I agree with the order proposed.

B.C. Mitra, J.

46. The short point involved in this appeal is whether an order of Injunction restraining the appellants from giving effect to a resolution of a company, was rightly made. The respondent who is a shareholder of the 8th appellant brought a representative action, for self and other shareholders, for an Injunction restraining the 8th appellant and its Directors from holding any Meeting of the company pursuant to a Notice dated September 14, 1970 or from passing any of the resolutions set out in the Notice or from giving effect to the resolutions, if passed. An earlier Notice dated January 29, 1970 was issued on behalf of the 8th appellant for a General Meeting of the company to be held on February 27. 1970 to consider and if thought fit, to pass the following among other resolutions:--

> "Resolution No. I -- Resolved that subject to the necessary approval of the Central Government being obtained pursuant to the provision of Section 372 and all other applicable provisions, if any of the Companies Act, 1956, the company hereby sanctions investment by it in the shares of the Swadeshi Polytex Ltd., Kanpur, to the extent of the aggregate face value of Rupees One Crore by way of subscribing and/ or purchasing to the extent of 10,00,000 Equity Shares of the value of Rs. 10/-each at par on such terms and conditions, as the Board of Directors think fit notwithstanding the fact that the investment in the shares of the said Swadeshi Polytex Ltd. exceeds 10 per cent, of the subscribed capital of the said Swadeshi Polytex Ltd. shall exceed 30 per cent, of the subscribed capital of this company and the Board of Directors of the company be, and are hereby authorised to do and so far cause to be done all such acts, deeds or things as they may think expedient for the purpose."

The explanatory statement annexed to the Notice was as follows:

> "The company had received a Letter of Intent from the Government of India for establishment of a new undertaking for the manufacture of Polyester Fibre. As a considerable amount of capital will have to be raised, it was considerably expedient to promote a new company ... ... Accordingly, a company under the name and style of Swadeshi Polytex Co. Ltd. is being incorporated. Considering the future

> prospects and the profitability of the company. Swadeshi Polytex Ltd., it is considered desirable that this company should invest liberally in the shares of the said company. It is proposed to acquire Equity Shares to the extent of the aggregate value of Rupees One Crore in the new company aforesaid."

47. On receipt of this Notice the respondent instituted a Suit in this Court (Suit No. 105 of 1970) (Cal) against the 8th Appellant and its Directors, for an Injunction restraining them from holding any Meeting pursuant to the said Notice and from passing the resolutions mentioned therein on the ground that the Notice did not disclose material facts. In this Suit, on an application by the respondent an ad interim order was made by Ghose, J., on February 26, 1970, restraining the 8th appellant and its Directors from giving effect to any resolution that might be passed pursuant to the said Notice. The resolutions set out in the Notice were passed at the Meeting of the company held on February 27, 1970.

48. On September 7. 1970. Ghosh J. disposed of the application for Injunction by making the following order:--

> "There shall be an Injunction restraining the respondent-Directors from acting on the resolution No. 1, passed at the General Meeting held on the 27th of February, 1970, until the same is confirmed or approved at a Meeting properly notified".

Before proceeding any further I should note that this order has become final as between the parties. The Injunction, mentioned above, was issued on the ground that the explanatory statement did not disclose a material fact namely, that the offer contained in the Letter of Intent had lapsed on January 24, 1970, and was no longer in force when the Notice was issued.

49. In compliance with the order of Ghose, J., and with a view to terminate the effect of the Injunction, another Notice was issued on September 14, 1970 for a General Meeting of the 8th appellant to be held on October 12, 1970 to consider and if thought fit, to pass with or without modification the following resolution:--

> "Resolved that Resolution No. 1 which has been unanimously passed as an ordinary resolution at the General Meeting of the company held on February 27, 1970 in pursuance of the Notice dated 29th January, 1970, be and is hereby confirmed and approved."

Along with the Notice of the Meeting and the draft resolution, an explanatory statement was circulated to the Members and this statement was as follows:--

> "The Letter of Intent which has been revalidated by the Central Government has been transferred by the Central Government to the name of Swadeshi Polytex Ltd. and accordingly the plant is being put up by them at Gaziabad in collaboration with Messrs. Vickers Zimmer A. G. Frankfurt. Terms of collaboration have been approved by the Central Government and the work has already commenced. The plant is likely

to go into production in early 1973."

On receipt of the said notice the respondent filed another representative suit against the appellants for a declaration that the said Notice dated September 14, 1970 and the explanatory statement annexed thereto, convening a General Meeting of the 8th appellant for the purpose of passing the resolution, were void and inoperative and for a permenant Injunction restraining the appellant from holding any Meeting pursuant to the said Notice or giving any effect to the resolution, if passed. The General Meeting of the company was duly held on October 12, 1970 and the resolution mentioned above, was unanimously passed.

50. In the second suit (that is the suit, out of which this appeal arises) filed by the respondent, he made an application for an Injunction and on this application S. K. Mukherjea, J., made an order on March 16, 1971 granting an Injunction restraining the appellants and each of them from giving effect to the resolution set out in the Notice dated September 14, 1970. The order was made without prejudice to the rights of the appellants and the Members of the 8th appellant to pass a fresh resolution according to law in terms similar to the resolution which was the subject-matter of the application. Aggrieved by this order the appellant has preferred to this appeal.

51. The grounds of attack on the resolution passed on October 12, 1970 confirming the earlier resolution of the company passed on February 27, 1970 were entirely different from the grounds which formed the subject matter of attack on the resolution passed on February 27, 1970. The new ground of attack canvassed by the respondent in the second application for Injunction, was that neither the Notice dated September 14, 1970, nor the explanatory statement set out therein disclosed whether permission had been obtained from the Central Government as required under the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the Act) for establishing the undertaking of Swadeshi Polytex Ltd., which when established would be an inter-connected Company of the 8th appellant. There were certain other grounds namely that no disclosure was made as to whether a Licence had been obtained as required by Section 11 of the Industries (Development and Regulation) Act. and that the terms and conditions of the collaboration agreement were not disclosed.

52. Mr. S. C. Sen, counsel for the appellant, raised several points in support of this appeal. The first point raised by him was that the bar imposed by Section 22 read with Section 20(a)(ii) of the act could not be invoked in this case as the total value of the assets of the inter-connected undertakings was less than Rupees 20 crores. The second point urged by him was that even assuming that there was violation or infringement of the provisions of the Act, the respondent as shareholder of the company could not rely on such violation as a ground for Injunction restraining the appellants from Riving effect to the impugned resolution. The third point urged by counsel for the appellant was that the trial Court erred in construing the provisions of the Act, inasmuch as it was held that if a relative of the Managing Director of a company was a Managing Director of another company, the two undertakings must be deemed to be inter-connected undertakings by reason of explanation (b) to Section 2(g) of the Act. The last point urged by Mr. Sen was that the trial Court was in error in construing explanation (b) to Section 2(g) by holding that it meant that two or more undertakings should be deemed to be inter-connected if one or more individuals who own or manage or control

one undertaking together with his or their relatives jointly or severally owned, managed or controlled the other undertaking or undertakings. It was contended that in giving this meaning to the explanation the trial Court had read into it the words "who own manage or control one undertaking" which it should not have done. The next point urped by counsel for the appellant was that the statute specifically provided for penalties for contravention of provisions of the same. These provisions have been made in Chapter VIII of the Act, and even assuming that Statutory provisions had been violated, no Injunction could be issued but the only remedy was imposition of a penalty as provided in Chapter VIII of the Act.

53. In support of these contentions Mr. S.C. Sen relied on several passages in Craies on Statute Law 6th Ed. pp. 231, 232, 234, 235 and 237. Reliance was placed on several English decisions Vallance v. Falle, (1884) 13 QBD 109, (Cutler v. Wandsworth Stadium Ltd.) 1949 AC 398, Newman v. Francis, (1953) 1, WLR 402 and in Re:

Indo-Burma Wood Products (P) Ltd., .

54. In developing the points formulated by him Counsel for the appellants argued that in computing the aggregate value of the shares of the holding company and its subsidiary, the value of the shares of the subsidiary company, held by the holding company, should be excluded. It was argued that if the two undertakings were treated as one for the purpose of valuation, the shares of the subsidiary company in the hands of the holding company, ought not to be taken into consideration in computing the assets of the two companies. In the Balance Sheet of the 8th appellant as at December 31, 1969, the value of the shares of the subsidiary held by the 8th appellant (holding company) has been shown at Rs. 1,69,56,121. If the value of the shares are left out, it was contended, as it ought to be left out the aggregate value of the assets of the inter-connected undertaking would be less than Rs. 20 Crores and therefore. Section 22 of the Act would not be attracted. The trial Court, however, rejected this contention because in its opinion, the definition of 'value of assets' given in the Act, precluded this method of calculation of the assets of the inter-connected undertakings. For the purpose of this appeal we do not think we should go into the question of valuation of the assets of the holding company and the subsidiary company or the mode of calculating such assets. The suit is still pending and these questions have to be investigated in the suit itself. We, accordingly, refrain from expressing any views on the question of valuation of the assets of the undertakings.

55. The next point argued by Counsel for the appellant was that even assuming that the provisions of the Act had been violated, such violation would not make the contract, for the purchase of shares of Swadeshi Polytex Ltd. illegal. It was argued that if the Statute prohibited the contract either expressly or impliedly the contract would become illegal. But in this case there was no such absolute prohibition so as to make the contract for purchase of shares illegal. Reliance was placed by Counsel on Cheshire and Fi-foot on the Law of Contract 7th Ed. page 297. Reliance was also placed on (1961) 1 QB 374 and (1957) 1 QB 267. We do not think we need go into these questions, which should be left to be determined at the trial of the suit itself. The only question before us is whether in the events that have happened, and keeping in view the provisions in the Act the respondent bad prima fade, made out a case for an Injunction restraining the appellants from giving effect to the resolution

passed at the General Meeting of the Company held on October 12, 1970.

56. The respondent's grievance Is that by reason of the omission to supply the information in the explanatory statement about an application to the Central Government for permission under Section 22 of the Act, the shareholders attending the General Meeting was misled. In other words, if the shareholders were informed bv a statement in the explanatory statement that no application had been made to the Central Government for permission contemplated by Section 22 of the Act, they would not have voted, as they did, at the Meeting held on October 12, 1970. It appears to us that this contention has no merit. What is the effect of the omission on the part of the Directors of the 8th appellant ? If an application, was in fact made, the Directors could have stated either that the application was pending or that it was refused by the Central Government, but that has not happened in this case. No application was made by the Directors of the 8th appellant for the permission contemplated by Section 22 of the Act at the time when the Notice and the explanatory statements were issued. In this situation what the Directors could have stated was that no application had been made to the Central Government for permission under Section 22 of the Act as thev were advised not to make such application. I do not see how, a statement such as this, would have helped the shareholders either in supporting or opposing the resolution.

57. The next contention of Counsel for the appellant was that it was not necessary under Section 173 of the Companies Act 1956 to give all the details and particulars in matters covered by a proposed resolution. He argued that the approach to the question, whether an explanatory statement was adequate, should be a businessmen's approach and not the approach of an expert lawyer. In support of this contention reliance was placed on a Bench decision of this Court . In that case the question was whether leave granted under a clause 12 of the Letters Patent should be revoked. Two of the Di rectors of a company retired and there was an agreement by certain parties to enter into a partnership for buving the majority shares of a company with a view to get the controlling interest therein. Pursuant to this agreement a large number of ordinary, and prefer-

ence shares were acquired by the partners. This was followed by incorporation of two new companies. The shares of these new companies were held by the partners in equal shares. A proposal was made to change the Articles of the parent company so as to give the entire control to the partners to the exclusion of the minority shareholders. For this purpose a Notice and a circular was issued for a Meeting of the company. In the Notice it was said that the changes in the Articles were necessary for the management of the company's affairs by a Managing Agent instead of the Managing Directors. A suit was filed alleging that the real object of the Meeting for the purpose of changing the Articles, namely, control of shares of the company by the partners, was suppressed. It was contended that the Notice was misleading. The real' document was not sent to the shareholders along with the Notice and they were unable to form any opinion as to the real purpose of the Meeting. It was held that in such cases it was not right to keep the altered Articles at the Registered Office and merely inform the shareholders that they could have inspection of the proposed alteration and that copies of the new Articles should have been sent with the Notice. Mr. Sen sought to distinguish this case on the ground that fraud was attempted to be perpetrated upon the shareholders and there was suppression of the fact that what was really contemplated, was a change in the control of the company by a new group of shareholders.

58. It seems to us, however, that for the purpose of this appeal it is not necessary for us to go into the various questions raised by parties. The Notice dated September 14, 1970, for a General Meeting of the company to be held on October 12, 1970, was manifestly given pursuant to the order of Ghose. J., by which the Directors of the 8th appellant were restrained from giving effect to the resolutions passed at the General Meeting of Company held on February 27, 1970, until the resolution was confirmed at another General Meeting of the Company properly notified. The order of Ghose, J., was obtained by the respondent, and as noticed earlier that order became final as between the parties. All that the respondent had to do, in order to terminate the eifect of the Injunction, was to call a General Meeting of the company after uuly giving Notice for the same, and have the resolution passed on February 27, 1970, confirmed at this Meeting. The General Meeting of the Company held on October 12, 1970, was held in accordance with the order of Ghose, J. It is to be noticed that no grievance was made by the respondent in the earlier suit or in the petition for Injunction about the alleged contravention of anv of the provisions of the Act or about the failure on the part of the Directors of the 8th appellant to state in the explanatory statement relating to the Notice dated January 29, 1970, about infringement of any of the provisions of the Act, or about the omission to disclose in the explanatory statement if permission of the Central Government was obtained under Section 22 of the Act; nor was there any direction in the order of Ghose, J., to inform the shareholders of the company in the explanatory statement about an application made to the Central Government for permission under Section 22 of the Act or about the fate of any such application. In the light of the order made by Ghose, J., one can understand an attack on the resolution passed at the Meeting held on October 12, 1970, on the ground that the resolution was not duly notified as required by the order, or on the ground that the resolution was not duly confirmed at the Meeting. But these are not the grounds of attack by the respondent on the resolution passed on October 12, 1970. In our view it was not open to the respondent to attack the resolution passed at the General Meeting held on October 12, 1970, on any of the grounds on which he attacked them in the petition for injunction. The respondent had raised various objections to the resolution proposed to be passed at the Meeting to be held on February 27, 1970, and Ghose, J., after taking into consideration all these objections had passed an ad interim order for Injunction as mentioned above and the appellants were entitled under the terms of the order to take steps to terminate the effect of the injunction by having a resolution confirmed at another General Meeting. The respondent, in our view, is not entitled to attack the resolution passed at the Meeting held on October 12, 1970, on the ground of omission to state in the explanatory statement, if an application was made for permission of the Central Government under Section 22 of the Act or if such an application was made what was the fate of the same.

59. There is another point which seems to us to have a great bearing on this appeal. The bar imposed by Section 22(1) of the Act is a bar on a person or authority from establishing any new undertaking after the commencement of the Act. It is only if a person or authority seeks to establish an undertaking after the commencement of the Act, which undertaking, if established, would infringe the provisions of the Act, that the previous permission of the Central Government is to be obtained. The Act came into force on June 1, 1970. The new undertaking in this case namelv. Swadeshi Polytex Ltd. was incorporated on March 21, 1970. The letter of Intent, issued by the Central Government in favour of the 8th appellant, was transferred to the new undertaking on May 20, 1970. It seems to us, therefore, that prima facie Swadeshi Polytex Ltd. was not an undertaking which was established

after the commencement of the Act.

60. The next question is whether the information which was omitted in the explanatory statement namely whether an application was made to the Central Government under Section 22 of the Act and if so the fate of this application was a material information, the omission to furnish which would make the resolution, passed at the Meeting invalid or void. Sub-section (2) of Section 22 of the Act requires a person or authority intending to establish a new undertaking to make an application to the Central Government before taking any action for the establishment of such undertaking. Admittedly, in this case, nothing was stated in the explanatory statement about any application having been made to the Central Government as required by Section 22(2) of the Act. As I have noticed earlier the Notice for the General Meeting of the Company was dated September 14, 1970, and the Meeting was to be held on October 12, 1970. At this Meeting the resolution, which was the subject matter of challenge in the earlier suit and with regard to which the Injunction was issued by Ghose, J., was unanimously passed. The resolution runs as follows:--

> "Resolved that Resolution No. 1 which has been unanimously passed as an ordinary resolution at a General Meeting of the company held on February 27, 1970, in pursuance of the Notice dated 29th January, 1970, be and is hereby confirmed and approved."

After this resolution was passed on October 12, 1970, the 8th appellant wrote to the Central Government on April 12, 1971, that it was advised that Chapter III, Part A of the Act which Included Sections 20 to 26 of the Act, did not apply to the 3th appellant. The letter, however, concluded with a statement that by way of abundant caution an application for approval under Section 22 of the Act was enclosed therewith. This letter is to be found at pages 384-385 of Part II of the Paper Book. Quite plainly no application was made before the Notice dated September 14, 1970, was issued and the General Meeting of October 12, 1970, held. It cannot, therefore, by any means, be said that an application for permission undesr Section 22 of the Act was suppressed, as no such application was in fact made, before the Meeting of October 12, 1970, was held. In answer to the letter of the 8th appellant dated April 12, 1971, the Central Government wrote on May 14, 1971, to say that in the opinion of the Department of the Company Affairs, the provisions of Section 22 of the Act did not apply to the establishment of the new undertaking. The authority to grant permission under Section 22 is the Central Government, and that authority was of the view that no permission was necessary and no application for permission was, therefore, called for. In that view of the matter we are of the opinion that information about application for permission under Section 22 of the Act in the explanatory statement, was not a material information, the omission to state which would make the resolution void or illegal. In the view, that the Central Government took on the question of permission, there was no necessity, whatsoever, for an application for permission under Section 22 of the Act; and in omitting to make the application under Section 22 and in omitting to state in the explanatory statement that no application was made, the 8th appellant did not, in our view, act irregularly or in violation of or contrary to the provisions of the Act or the Companies Act, 1956. Information regarding an application for permission under Section 22 of the Act or information that no such application has been made is not in our view, a material information which should have been included in the explanatory statement or in the Notice of the Meeting. The absence of such

information in the explanatory statement, does not make it or the resolution passed at the General Meeting confirming the resolution, which was passed at the General Meeting held on February 27, 1970, illegal or void. Nor does such omission, entitled the respondent to an Injunction restraining the appellants from giving effect to the resolutions passed at the General Meeting held on October 12, 1970. I shall revert to this question later in this judgment.

61. It was next contended by Counsel for the appellant that explanatory statements are not to be construed with excessive strictness and substantial compliance with the Articles would be sufficient. In support of this proposition reliance was placed on Palmer's Company Law 21st Ed. p. 475. Reliance was also placed on Section 172(3) of the Act in which it is provided that accidental omission to give notice to or non-receipt of notice by any member or other person to whom it should be given shall not invalidate the proceedings at a Meeting. Reliance was also placed on (1875) 1 Ch. D. 13 for the proposition that if a thing complained of, is a thing which the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something is done which the majority are entitled to do legally, no useful purpose is served by litigation, the ultimate result of which is a Meeting of the company where the majority gets its wishes. Reliance was next placed on a decision of the Judicial Committee 1939 AC 277 for the proposition that omission to do something does not nullify the contract contained in a Bill of Lading, nor could such omission make the contract illegal. This decision was relied upon in support of the contention that even if it was held that the omission to make a statement that no application was made to the Central Government under Section 22 of the Act was material Information, such omission did not make the explanatory statement illegal nor did it make the resolution, passed at the Meeting, invalid. The next case relied on was Samuel Montagu & Co. Ltd. v. Swiss Air Transport Co. Ltd., (1966) 2 QBD 306. In that case damages were claimed for loss of certain consignment of gold in transit. The defence was that Article 8 (ii) of the Convention signed at Warsaw, limited the liability to a certain sum. It was held that the Article in the Convention limiting liability, should not be so strictly construed as to hamper the conduct of business. Counsel for the appellant also referred to Palmer's Company Precedents 17th Edn. Part I pages 483-485 for the proposition that a Notice which is to state general nature of the business, should give Members fair Notice of the matters to be dealt with, and that such Notice should be sufficient Notice to enable a Member to decide whether to attend or not and that an insufficient or misleading Notice invalidates a resolution.

62. Relying on the various authorities mentioned above. Counsel for the appellant contended that even assuming that there was omission to furnish material information, that would not make the resolution invalid or illegal. He further submitted that the omission, assuming there was one, did not, in any manner, mislead the shareholders of the company. He also urged that the explanatory statements should not be too strictly construed, but should be given a liberal construction and the only requirement should, be that its contents are clear to an ordinary person engaged in business.

63. It seems to us that there is a good deal of force and substance in the above contention of Counsel for the appellant. It is to be remembered that the General Meeting was called for the purpose of confirmation of a resolution passed by the company on February 27, 1970. The resolution passed on October 12, 1970 in terms of the order of Ghose, J., runs as follows :

> "Resolved that a Resolution No. I which had been unanimously passed as an ordinary resolution at a General Meeting of the company held on February 27, 1970, in pursuance of the Notice dated the 29th January, 1970 be and is hereby confirmed and approved."

64. The object of the Meeting held on October 12, 1970, and the purpose of the resolution, passed at that Meeting, was to terminate the effect of the order of Injunction in compliance with the terms of that order. The only business to be transacted at the Meeting held pursuant to the Notice of September 14, 1970, was confirmation of the resolution passed at the earlier Meeting. It is also to be remembered that the challenge to the resolution passed at the Meeting held on February 27, 1970, was on the ground that a Letter of Intent, issued by the Central Government, had expired, and had not been revalidated and therefore, the new company could no longer be established. The Letter of Intent issued by the Central Government expired on January 24, 1970 and was not revalidated at the time when the Meeting was held. The explanatory statement, with regard to the second Meeting of the company held on October 12, 1970 cleared up those points and runs as follows:

> "The Letter of Intent which has been revalidated by the Central Government has been transferred by the Central Government to the name of Sawdeshi Polytex Ltd. and accordingly, the plant is being put up by them at Gaziabad in collaboration with M/s. Vickers Zimmer A. G., Frankfurt. Terms of collaboration have been approved by the Central Government and the work has already commenced. The plant is likely to go into production in early 1973."

65. It will be clear from the explanatory statement quoted above that the cause of challenge to the earlier resolution and the explanatory statement was removed before the Meeting of October 12, 1970 was held and information about transfer and revalidation of the Letter of Intent was duly given to the shareholders. As matters, stood before the Act came into operation, no exception of any kind could have been taken by the respondent or any other shareholder either to the resolution passed on October 12, 1970, or to the explanatory statement relating thereto. The Act came into operation on June 1, 1970, and the hearing Of the respondent's application before Ghose, J., commenced on August 10, 1970.

66. Mr, Prabir Sen, Counsel for the respondent argued, that the new Company, namely Swadeshi Polytex Ltd., would undoubtedly be an inter-connected undertaking as contemplated by Section 20 of the Act. In aid of this argument he relied upon the definition of "inter-connected undertakings" in Section 2(g) of the Act. He argued that this case came within Clause (d) of Section 2(g)(iii) of the Act. It was contended that in this case, the 8th appellant, its Managing Director (by reason of his relationship with the Managing Director of the new company) and also the other Directors of the 8th appellant would undoubtedly exercise control over the new company. Control, it was argued, was not denned in the Act or in the Companies Act. Therefore, it was submitted, any kind of control whether de facto or de jure, would make the undertaking an inter-connected undertaking as contemplated by the Act. On this question the trial Court rejected the respondent's contention and the respondent has filed cross-objection against the judgment on, that ground.

67. It is true that Clause (d) of Section 2(g)(iii) of the Act merely provides "if one exercises control over the other in any other manner." It is also true that the control as contemplated by the Act has not been defined in the Act itself but in construing a provision such as this, certain considerations must be borne in mind. In the first place, the concept of control implies a dominant and a dominated undertaking. In other words, the controlling undertaking must be in a position to dominate the affairs of the controlled undertaking either in respect of the management of its affairs, or in respect of its finance or with regard to the capital structure. In the absence of one or other of these features the element of control cannot come into the picture. The mere fact that there are some common Directors or that the Managing Director of the 8th appellant is a relative of the Managing Director of the new company or that the 8th appellant is going to invest Rs. 1 Crore in the share capital of the new company, do not by themselves make the 8th appellant an undertaking controlling the undertaking of the new company.

68. Counsel for the respondent also relied upon Clause (b) of the Explanation to Section 2(g)(vii). He submitted that in this case, admittedly, the Managing Director of the 8th appellant was a relative of the Managing Director of the new company, and therefore, the new company Swadeshi Polytex Ltd. was an inter-connected undertaking of the 8th appellant. This contention, on behalf of the respondent, has been upheld by the trial Court. Counsel for the respondent further argued that the provisions in Section 20 and Section 22 of the Act were attracted in this case, inasmuch as, the total value of the assets of the 8th appellant together with the value of the assets of Swadeshi Mining and Manufacturing Co. Ltd. exceeded Rupees 20 Crores. He submitted that on the basis of the valuation of assets, the two companies should be treated as inter-connected undertakings, and therefore previous permission of the Central Govt. was needed.

69. The next contention of Counsel for the resppndent was that the provisions in Chapter VIII comprising Sections 45 to 53 which provide for penalty for contravention of Section 22, did not bar a challenge by his client to the proposed resolution. He argued that Section 4 of the Act provided that the remedies provided by the Act should be held to be in addition to those provided in any other law, for the time being, in force. As a share-holder of the company, it was argued, the respondent had a right to challenge the validity of the explanatory statement and the resolution, under the Company Law, and this right was protected by Section 4 of the Act. Therefore, he argued, the provisions for imposition of penalty in Chapter VIII of the Act should be held to be a remedy provided by the Act in addition to other remedies available under any other law.

70. Dealing with the question whether the private rights of the respondent could be protected by invoking the provisions of the Act, which should be enforced by the Central Government only, to avoid concentration of econo-

mic power in the hands of a group of individuals it was argued, that if the individual and private rights of his client were injured or invaded, he was entitled to invoke the provisions of the Act to obtain remedy. In support of this contention. Counsel for the Appellant relied on Halsbury Third Edition Vol. 21, p. 347, Article 727 and Palmer's Company Law 21st Edition pp. 498-499.

71. It seems to us that the real and substantial issue in the application, out of which this appeal arises, has been lost sight of in the din and bustle created by the conflicting claims of the parties regarding the provisions of the Monopolies and Restrictive Trade Practices Act, 1969. The respondent claims that the provisions of the Act applied in this case, and that the new company, namely, Swadeshi Polytex Ltd., would be an inter-connected undertaking under the Act. The appellant, on the other hand, contend that the provisions in the Act have no application, for the reasons which I have discussed earlier. Viewed in the proper perspective these questions are not relevant for the purpose of this appeal. Nor was it relevant for the purpose of the application out of which this appeal arises. It is not for this Court to decide or determine, if the total value of the assets of the 8th appellant, and those of its subsidiary, amount to Rs. 20 crores or more. Nor is it for this Court to determine if Swadeshi Polytex Ltd., when established, would become an inter-connected undertaking of the 8th Appellant. As we read the provisions in the Act we are left in little doubt that those are questions for determination by the Central Government in the first instance, and by the Monopolies and Restrictive Trade Practices Commission, in cases where a deeper probe is called for. In clear and unambiguous words the Statute has left those matters for the decision of the Central Government and the Commission. So far as the issues, involved in this appeal, are concerned we do not see why this Court should embark upon a discussion of the provisions of the Statute regarding inter-connected companies and also upon an investigation if the 8th appellant is an inter-connected undertaking on the basis of materials in its Balance-sheet Issues in this appeal, as I have noticed earlier lie in a very narrow compass and those issues have been lost sight of by the parties, the respondents contending that the provisions of the Act had been violated and the appellants trying to repel such contentions. The only issue, as we see it, is whether the explanatory statement in the Notice of September 14, 1970, and the resolution passed on October 12, 1970, are illegal or invalid on the ground that material facts were not disclosed in the explanatory statement. That is the only ground of challenge to the explanatory statement and the resolution.

72. The letter by which the Central Government informed the 8th appellant that Section 22 of the Act did not apply to the establishment of the new undertaking, is dated May 14, 1971. The judgment of the trial Court was delivered on March 16, 1971. Quite plainly, therefore, the trial Court did not have the advantage of having before it the opinion of the Central Government relating to the applicability of Section 22 of the Act. The application by the 8th appellant to the Central Government for permission under Section 22 of the Act is dated April 12, 1971. The application itself was, therefore, made after the judgment was delivered by the trial court. Shortly before the judgment was delivered the 8th appellant wrote to the Central Government on February 12, 1971, to say that according to the reported opinion given by the Attorney-General the provisions of the Act did not apply to the 8th appellant. In this letter a request was also made that a clearance 'should be issued to the 8th appellant that the provisions of the Act did not apply to it. This letter was answered on behalf of the Central Government by N. K. Sengupta. Deputy Secretary, on March 26. 1971. In this letter a request was made that the basis on which the undertaking would be an inter-connected undertaking, might be intimated to the Central Government. It was added that the question of granting clearance from the applicability of Section 22 of the Act would arise only if such provisions were otherwise applicable to the undertaking. This letter, in its turn, was followed on April 12, 1971, by the 8th appellant's application for approval under Section 22 of the Act. On May 14, 1971, the Central Government wrote to the 8th appellant in answer to its letter of February 12, 1971,

communicating to the 8th appellant the views of the Central Govt. that the provisions of the Act would not apply to the establishment of the new undertaking. On May 25, 1971, the Central Government replied to the 8th appellant's letter of April 12, 1971, along with which the application for permission was forwarded and stated that in view of the letter of May 14, 1971, addressed to the 8th appellant the application under Section 22 is filed. Quite clearly the views of the Central Government as expressed in the letters of May 14, 1971, and May, 25, 1971, make it clear that in the opinion of the Central Government, Section 22 of the Act did not apply to the new undertaking proposed to be set up and no permission of the Central Government, as contemplated by Section 22 of the Act, was required. Counsel for the respondent contended that since the Central Government stated in its letter of May, 25, 1971, that the 8th appellant's application under Section 22 was filed, the application was not disposed of and was still pending. This contention on behalf of the respondent, is altogether without any merit. The views of the Central Government were clearly stated in the two letters mentioned above and the use of the word 'filed' in the letter dated May 25, 1971, did not keep the application pending before the Central Government.

73. As I noticed earlier the opinion of the Central Government, that no permission as required by Section 22 of the Act was needed, was given after the judgment was delivered bv the trial Court. This Court is entitled to take note of subsequent events which could not be taken into consideration in the trial Court. The application for permission under Section 22 was made on April 12, 1971, long after the notice and the explanatory statement were issued on September 14, 1970. Therefore, all that could be stated in the explanatory statement, issued along with the notice of September 14, 1970, was that an application was not made by the 8th appellant for permission of the Central Government under Section 22 of the Act. This intimation, no doubt, was not given in the explanatory statement as the Directors of the 8th appellant took the view that Section 22 of the Act was not attracted, and therefore no application need be made to the Central Government for permission contemplated by that section. The Central Government, which is the authority for granting permission also came to the same conclusion that the new undertaking would not be an inter-connected undertaking and therefore, no permission was needed, as required by Section 22 of the Act. In these facts we are of the opinion that there is no escape from the conclusion that the information that no application was made to the Central Government under Section 22, was not a material information to be included in the explanatory statement.

74. A notice of a General Meet-Ing of a company and an explanatory statement attached to such Notice can be condemned as tricky, if either of them is likely to mislead the share-holders or if there is omission to state facts which would enable the share-holders to decide if they would attend the Meeting or not. A Notice and an explanatory statement can also be condemned if there is suppression of material facts. These principles are well settled and it is on the basis of such principles that it is to be determined if the impugned Notice and explanatory statement are illegal or invalid. Applying these well-settled tests, we cannot say that the Notice and the explanatory statement, in this case, were either tricky or misleading or that there was deliberate suppression of facts which ought to have been communicated to the share-holders to enable them to decide if they would attend the Meeting or not. The respondent who claims to be aggrieved by the Notices and the explanatory statements issued for the purpose of two General Meetings of the company, did not attend either of them. Keeping in mind, the various points now urged on his behalf, one would

expect him to attend the Meeting and record his vote against the resolutions. But that is not what he did. He staved away from both the meetings and then filed two suits challenging the validity of the resolutions as also of the Notices and the explanatory statement. All in all it seems to us that the grievances, which he is aiming are not the genuine grievances of an aggrieved share-holder but are the manifestation of a determination to block the efforts of the 8th appellant at expansion and diversification.

75. Turning now to the question of balance of convenience or inconvenience it is to be seen if the order for Injunction is justified. As will be presently seen nearly everything has been done for the purpose of carrying on the normal business of the new company, namely, Swadeshi Polytex Ltd. This company was incorporated on March 21, 1970, long afterwards on January 1, 1968, the 8th appellant applied for a licence under the Industries (Development & Regulation) Act, 1951, On July 24, 1969, the Central Government issued a letter of Intent to the 8th appellant in which the conditions of a licence under the Industries (Development & Regulation) Act, 1951, were communicated to the 8th Appellant. The Letter of Intent was valid for a term of six months from the date of issue but was renewed till October 24, 1970, and the renewed Letter of Intent was transferred to the new company. A collaboration agreement with a foreign concern namely. Vickers Zimmer A. G. West Germany, was entered into and the agreement was submitted for approval of the Central Government on January 12, 197ft. An application for consent of the Controller of Capital Issue for the issue of shares, was made on November 19, 1969. An application for import of machinery was duly filed on November 19, 1969. A plot of 80 acres of land at Gaziabad has been reserved for the purpose of the new undertaking and a letter of such reservation was issued by the Executive Engineer, U. P. State Industrial Corporation Limited on January 14 1970, and a sum of Rupees 2,51,800/- was deposited for the said plot of land on February 17, 1970. Sanction for supply of power by the U. P. State Electricity Board was obtained on January 24, 1970. A certificate for commencement of business was issued to Swadeshi Polytex Limited on July, 9, 1970. An industrial licence under the Industries (Development & Regulation) Act, was issued to the new company on October 7, 1970. The foundation stone of the factory premises was laid by the President of India on October 12, 1970. According to the explanatory statement, issued with the Notice of September 14, 1970, the plant is likely to go into production in early 1973.

76. It is clear from the steps, taken, that expeditious steps have been taken to enable the new company to commence production. Statutory sanctions and licence has been obtained, collaboration agreement arrived at and approved by the Central Government, land secured and construction of factory premises started. It is in these facts that it is to be seen if the ends of justice demand that the 8th appellant should be restrained from investing Rs. 1 crore in the share capital of Swadeshi Polytex Ltd. Is it just and proper that when nearly every possible step has been taken to enable the new company to commence production, the 8th appellant should at the instance of one single share-holder be restrained from making the investment ? Even assuming that there is all the merit in the respondent's contention that the explanatory statement did not contain the information which it should have, can it be said in the facts of this case that ends of justice demand that an Injunction should be issued restraining the 8th appellant from making the investment ? In our opinion, the answer to both these questions must be in the negative. Wisdom of the investment is a matter with which this Court is in no way concerned. That is a question of policy to be determined

by the share-holders and they have in no uncertain terms expressed their opinion in the matter of making the investment.

77. Counsel for the respondent contended that in considering the question of balance of convenience, steps taken for the establishment of Swadeshi Polytex Ltd. should not be taken into consideration. He argued that the suit was not filed against Swadeshi Polytex Ltd., and the application was not made against that company for an Injunction and if such a suit was filed and such an application was made, steps taken for the establishment of Swadeshi Polytex Ltd. would have been material factors in considering the question of balance of convenience. But in this case, he argued, his client was seeking an Injunction restraining the 8th appellant from investing a large sum of money in the share capital of Swadeshi Polytex Ltd. We are unable to accept this contention of Counsel for the respondent. The 8th appellant was keen to invest a large sum of money in the share capital of the new company-Such an investment cannot earn any returns, unless the new company is enabled to carry on its business. From the resolutions passed at the Central Meetings of the 8th appellant, it is clear that it is ready and willing to make the investment. In determining the question whether an Injunction should be granted restraining the 8th appellant from giving effect to the resolutions authorizing the investment, steps taken for the establishment of Swadeshi Polytex Ltd., are, in our view, material and relevant in deciding the question of balance of convenience in favour or against the grant of an order of Injunction. In dealing with the question whether the 8th appellant should be allowed to invest Rs. 1 Crore in Swadeshi Polytex Ltd., steps taken for the establishment of the latter can, by no means, be said to be irrelevant or immaterial in deciding the question of balance of convenience for or against an order of Injunction regarding the investment. If the decision of this appeal rested only on the question of balance of convenience or inconvenience, we would have had no hesitation in saying that the balance of convenience is entirely against the issue of an order of Injunction restraining the appellant from making the investment. But the decision of this appeal depends upon the various other questions which I have discussed earlier in the judgment. Quite apart from my views on the other questions raised in this appeal, so far as, balance of convenience is concerned, we are of the opinion that balance of convenience is entirely against an order of Injunction at this stage, restraining the 8th appellant from investing Rupees One Crore in the share capital of Swadeshi Polytex Ltd.

78. I will now proceed to deal with the cross-objection filed by the respondent Two of the grounds of objection pressed before us were, firstly that the Learned Judge was wrong in holding that the question oi a licence under Section 11 of the Industries (Development and Regulation) Act, was not a material fact to be stated in the explanatory statement. Dealing with this question. Counsel for the respondent, contended that it should have been disclosed in the explanatory statement that no licence had been obtained under the said Act for establishing the new company. Without going into the question if the new undertaking was established before the licence under Section 11(1) of the said Act was obtained, and without again, going into the question if the new undertaking could be established without such a licence we are of the opinion that the explanatory statement cannot be condemned as invalid or illegal on the ground that it did not inform the share-holders that a licence under Section 11(1) of the said Act was not obtained.

79. In dealing with this question of validity of an explanatory statement, the scope, purpose and object of Section 173 of the Companies Act, 1956, should not be lost sight of. The requirement of that section is that the share-holders should be informed truly of the nature of the business to be transacted at the General Meeting. The business before the General Meeting was confirmation of a resolution passed earlier authorizing investment of Rupees One Crore in Swadeshi Polytex Ltd. That being the only business before the General Meeting, the question whether a licence under Section 11(1) of the said Act had been obtained, can, by no means, be said to be material information, which should have been furnished to the share-holders of the 8th appellant. In the first place, why should it be pressumed that promoters and Directors of the new company are bent upon establishing the new undertaking in violation of all laws and regulations, enjoining licence and permission before the establishment of the new undertaking ? Why, again, it should be presumed that the Directors of the 8th appellant have deliberately suppressed from the shareholders, material information which may influence their mind in confirming the earlier resolution ? Neither in fact, nor in law are such presumptions justified. As appears from the materials, an application for licence under Section 11(1) or the Act was duly made and a licence has been duly obtained. It is easy to overstate the requirement of Section 173 of the Companies Act, 1956. It is perhaps easier for a single share-holder to demand that every single step required for the establishment of a new undertaking must be communicated to the share-holders of an investing company. For instance, it might be said that the share-holders of the investing company should be told that a licence under the Factories Act had been obtained or that a licence under the local Municipal Law for carrying on business, has been obtained or again that the plans for erection of structure had been duly sanctioned by the local authority. But information about these matters can, by no means, be said to be material information which must be furnished to the shareholders in an explanatory statement and the omission to furnish which must invalidate the resolution passed at the General Meeting. In pur opinion, there is no substance in this ground of the cross-objection.

80. The second ground of cross-objection pressed before us was that the learned Judge was wrong in holding that non-disclosure of the financial aspect of the collaboration agreement did not vitiate the impugned notice and the explanatory statement. This again in our view, is not a matter for inclusion in the notice or the explanatory statement. In the first place, intricate details of a financial arrangement with the colloborators are hardly likely to influence the views of the share-holders, in considering the question of investment in the new company. In the second place, there may be very good and cogent reasons for withholding information regarding financial arrangement, not excluding the question of commercial rivalry. It cannot and it should not be expected that a commercial undertaking of large dimensions would lay bare its financial strength or weakness fnr a review by the share-holders at large and thereafter by the Public. Lastly, the financial arrangement is an arrangement made between the new undertaking and various financing institutions. The company which is seeking to invest money in a new undertaking is neither likely to, nor is it expected to know the details of such financial arrangements made between the investee company and the financing institutions. Prima facie, those arrangements are between Swadeshi Polytex Ltd. and the financing institutions and disclosure of information relating to such arrangements would certainly be a breach of commercial propriety. The demand for a disclosure of financial arrangement is therefore a matter which the Court cannot approve of and cannot for that reason hold that failure to include the particulars of the financial arrangement with the colloborators make the notice and

the explanatory statement invalid or illegal.

81. For the reasons mentioned above the cross-objection raised by the respondent must fail.

82. Before concluding I should note several decisions on which Counsel for the parties relied. The grounds, on which my judgment in this appeal rests, make it unnecessary for me to deal with these decisions at length. Besides the decision relied on by Mr. S. C. Sen which have been already dealt with by me in this judgment, he relied upon the decisions reported in, 1949 AC 398. , , AIR 1966 Mys 154, , , , , , . Mr. Prabir Sen relied upon. , , , (1970) 2 Com. LJ 200 (Bom). 1917 AC 607 = (AIR 1917 PS 52), .

83. I have carefully taken into consideration the grounds advanced on behalf of the respondent in support of the Injunction issued by the trial Court. In my view, the order for Injunction cannot be sustained in the facts of this case. This appeal therefore succeeds and is allowed. The judgment and order of the trial Court are set aside. Costs of this appeal will be costs in the cause. Certified for two Counsel.

84. I now turn to the order that ought to be made in this appeal. On April 7, 1971, an order was made by this Bench on the application of the appellant for admission of the appeal and stay of operation of the order under appeal. That order seems to us to be a model order for the purpose of Ad Interim protection of the rights of the parties until final determination of the suit. If I say it is a model order it is because the order has taken into consideration the contentions advanced by the parties and has given them the protection to which they are legitimately entitled. It seems to us that the order made by this Bench on April 7, 1971 with minor variations to which I will presently refer, ought to remain in force until final determination of the suit out of which this appeal arises.

85. Mr. S.C. Sen, Counsel for the appellant submitted that three of the Directors of the 8th appellant.

namely, Shri B.P. Khaitan, Shri R. Chaudhuri and Shri B. Malik, whom Mr. Sen described as outside Directors, should be released from the undertaking given by the Directors of the 8th appellant to this Court on April 7, 1971. Mr. Prabir Sen said that he had no objection to the release of these three Directors from the undertaking. Both Mr. S.C. Sen and Mr. Prabir Sen submitted that their clients would be content if the order made on April 7, 1971, is continued until final determination of the suit Accordingly, we order that in the event of it being ultimately held that the investment to be made by the 8th appellant on the basis of the impugned resolution, is illegal and in the event of the investment not being regularised in accordance with law within three months of the final determination of the suit, the Directors of the 8th appellant other than Shri B. P. Khaitan. Shri R. Chaudhuri and Shri B. Malik undertake to this Court through Counsel for the 8th appellant to have the shares of the 8th appellant sold and/or disposed of within four months from the date of final determination of the suit and further undertake to this Court to reimburse any loss that the 8th appellant may suffer by reason of sale of the shares pursuant to this order.