Banwarilal Jaipuria vs Sitaram Jaipuria And Ors. on 16 March, 1971

Equivalent citations: [1972]42COMPCAS29(CAL)

JUDGMENT

S.K. Mukherjea, J.

1. This is an application in a representative action by a shareholder for an injunction restraining the respondent company, Swadeshi Cotton Mills Co. 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 giving effect to the resolutions, if passed.

2. The history of the litigation may be briefly indicated. On January 29, 1970, a notice was given by the secretary of the respondent-company intimating that a general meeting of the company would be held on February 27, 1970, to consider and if thought fit to pass the following resolution among others.

> "Resolution No. 1.--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 Rs. 1 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. and 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/ or cause to be done all such acts, deeds or things as they may think expedient for the purpose. The explanatory statement annexed to the said notice stated :
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> 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 considered expedient to promote a new company.....Accordingly a company under the name and style of Swadeshi Polytex Company 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 aforesaid

> company. It is proposed to acquire equity shares to the extent of the aggregate value of Rs. 1 crore in the new company aforesaid."

3. The petitioner instituted a suit against the respondent-company and its directors for a permanent injunction restraining the respondents from holding any meeting pursuant to the said notice and from passing the resolutions mentioned in the said notice on the ground that the notice did not disclose material facts. On February 26, 1970, on an application moved ex parte, Mr. Justice, S.C. Ghose, passed an order of injunction restraining the respondents from giving effect to any resolution that might be passed pursuant to the said notice. The resolutions in question were passed at a meeting held on February 27, 1970. The application was finally disposed of by Ghose J. by an order dated September 7, 1970, By the said order, the directors of the respondent-company were restrained from acting on the resolution No. 1 until the same was confirmed or approved at a meeting properly notified. The said order of injunction was issued by the learned judge on the ground that the explanatory statement did not disclose a material fact, viz., 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.

4. Subsequently Swadeshi Polytex Ltd. decided to increase the issue of initial capital from Rs. 4 crores to Rs. 4 crores 40 lakhs divided into 33,00,000 equity shares of Rs. 10 and 1,10,000 preference shares of Rs. 100 each.

5. Thereafter, in pursuance of the order of Ghose J, the respondent-company on September 14, 1970, gave notice to the members that a general meeting of the respondent-company would be held on the 12th day of October, 1970, to consider and, if thought fit, to pass with or without modification, the following resolution :

> "Resolved that resolution No. 1 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."

The explanatory statement stated :

> "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 Ghaziabad in collaboration with Messrs. Vickers Zimmer AG. Frankfurt.
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> 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."

6. The petitioner instituted a representative suit against the respondent-company and its directors for a declaration that the notice dated September 14, 1970, and the explanatory statement annexed thereto convening a general meeting of the respondent-company for the purpose of passing the

resolution set out in the said notice were void and the said resolution, if passed, is void and inoperative and of no effect and for a permanent injunction restraining the respondents from holding any meeting pursuant to the said notice or giving any effect to the resolution if passed. The present application has been made in aid of the suit.

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

8. The notice and the explanatory statement are impugned by the petitioner on three grounds, viz.:

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

9. The only other objection of the petitioner is not an objection to the notice but to the resolution itself. It is urged that by reason of increase of share capital of the Swadeshi Polytex Ltd. subsequent to the order of Ghose J., the basis of the resolution which was sought to be confirmed had disappeared and a new state of affairs had come into existence. Therefore, the resolution could not have been validly confirmed.

10. The respondents contend that the Monopolies and Restrictive Trade Practices Act has no application in the facts of this case.

11. The preamble to the Monopolies and Restrictive Trade Practices Act, 1969, declares it to be an Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment. Chapter III of the Act is intituled "Concentration of Economic Power". Sections 20 and 22 occur in Part A of Chapter III. The relevant portions of Sections 20 and 22 may be set out:

> "20. Undertakings to which this part applies:--This part shall apply to-
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> (a) an undertaking, if the total value of--(i) its own assets, or
>
> (ii) its own assets together with the assets of its interconnected undertakings, is not less than twenty crores of rupees.....

Explanation.--The value referred to in this section shall be-

(i) in the case of an undertaking referred to in Clause (a) or Clause (b), as the case may be, the value of its assets on the last day of its financial year which closes during the calendar year immediately preceding the calendar year in which the question arises as to whether this part does or does not apply to such undertaking; .....

22. Establishment of new undertakings.--(1) No person or authority, other than Government, shall, after the commencement of this Act, establish any new undertaking which, when established, would become an interconnected undertaking or an undertaking to which Clause (a) of Section 20 applies except under, and in accordance with the previous permission of the Central Government.

(2) Any person or authority intending to establish a new undertaking referred to in Sub-section (1) shall, before taking any action for the establishment of such undertaking make an application to the Central Government in the prescribed form for that Government's approval to the proposal of establishing any undertaking....."

12. The respondent-company has a subsidiary of the name of Swadeshi Mining and Manufacturing Ltd. It is conceded that the undertaking of the subsidiary company is an inter-connected undertaking within the meaning of the statute.

13. It is clear that Section 22 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 Rs. 20 crores. It is not in dispute that the question as to whether Part I of Chapter III of the Act applies to the undertaking of the respondents arose in 1970. Therefore, the relevant point of time at which value of its assets and the assets of its inter-connected undertakings has to be computed is 31st December, 1969, that is to say, the last day of their financial year.

14. Section 2 of the Act provides that "value of assets" in relation to an undertaking means the value of its assets as shown in its books of account after making provision for depreciation or for renewals, or diminution in value. The balance-sheets of the respondent-company and of its subsidiary are prepared on the basis of their books of account. In the balance-sheet of the respondent-company for the year 1969, its assets have been valued at rupees 15,47,61,029 and the assets of the subsidiary at Rs. 5,15,32,205 aggregating Rs. 20,62,93,234. If one is to go by these figures the conclusion is inescapable that Part A of Chapter III is attracted to the undertaking of the respondent-company.

15. On behalf of the respondents it was contended by Mr. S.C. Sen that in computing the aggregate of the values of the assets of a holding company and of its subsidiary, the value of the shares of the subsidiary company held by the holding company should be ignored because if the two undertakings are treated as one for the purpose of valuation, the shares of the subsidiary company held by the holding company lose all significance. The balance-sheet of the respondent-company assesses the value of the shares of the subsidiary held by it at Rs. 1,69,56,121. If the value of these shares is left out, the aggregate comes to less than rupees twenty crores. In that view of the matter, Section 22 can have no application.

16. In my opinion, there is considerable force in the contention raised by Mr. Sen. The object of the Act, professedly, is to prevent the concentration of economic power in the hands of individuals, associations, groups or corporate bodies. Section 20 indicates that the degree of concentration of economic power in an undertaking or a group of undertakings is to be judged by the value of its or their assets. The Monopolies and Restrictive Trade Practices Act is concerned with the substance of a transaction, not with its form, with the real constitution of an association, a group, or a corporate body, not with its facade.

17. The statute seeks to tear the veil and not merely of corporate bodies. It aims at demolition of fictions. It is concerned with the actual magnitude of concentration of economic power, no matter how the concentration is achieved, by creation of partnerships, associations of persons or corporate bodies, or by taking recourse to devices or subterfuges. It is not among the objects of the statute, and it is certainly against its spirit, to endorse or sanction the validity of fictions. If the values of the assets of the holding company and of its subsidiary have to be added for the purpose of determining the degree of concentration of economic power, what ought to be considered is the real value of the total assets. Once the assets of the holding and of the subsidiary company are treated as one, the shares of the subsidiary company held by the holding company cease to be real assets and the question of valuing those shares does not arise. This will become clear if one visualises amalgamation of the subsidiary company with the holding company in which case the shares of the subsidiary company held by the holding company have to be written off. To include the value of shares of the subsidiary company held by the holding company in computing the total value of the assets of the two companies will be to inflate the total value by including fictional assets. The spirit of the Act militates against such inflation by the use of fiction. But for the definition of "value of assets" given in the Act itself, I would have deducted the value of the shares in the subsidiary company held by the respondent-company, but, having regard to the definition, I am unable to do so, I feel that in defining "value of assets" the legislature has overlooked the anomaly which underlies a situation like the one with which I am concerned in this case. Be that as it may, to exclude the value of the shares in the subsidiary company held by the respondent-company will not be proper in the face of the clear directive of the definition. I am, therefore, of the opinion that if the undertaking of Swadeshi Polytex Ltd. transpires to be an inter-connected undertaking of the respondent-company, Section 22 will apply.

18. On behalf of the respondents, Mr. Sen submitted that the Monopolies and Restrictive Trade Practices Act is a piece of public legislation brought into existence to give effect to the economic policy of the State in public interest; it has not been enacted for the benefit of an individual or a class. Only the State can seek to enforce its provisions; no person or class is competent to do so by an action ; at the most, the petitioner may invoke the writ jurisdiction of the court and ask for an order directing the State to enforce the statute. Counsel relied on Craies on Statute Law, 6th edition, Chapter 11, pages 229-249. He also relied on Vallance v. Falle, [1884] 13 Q.B.D. 109, Clegg, Parkinson & Co. v. Early Gas Co., [1896] 1 Q.B. 592, Cutler v. Wandsworth Stadium Ltd., [1949] A.C. 398 ; [1949] 1 All E.R. 544 (H.L.) and Newman v. Francis, [1953] 1 W.L.R. 402. It is not necessary for me to go into the question raised by counsel. It is true that the Act has not been enacted for the benefit of shareholders of bodies corporate which own, control or manage inter-connected undertakings. On the contrary, the statute seeks to restrict the powers of those bodies, and,

therefore, of their shareholders. That does not, however, detract from the legal right of a shareholder to bring an action against the company of which he is a shareholder to restrain it from committing an illegal act or from questioning the sufficiency or validity of the notice of a resolution. Here the petitioner is not asking for an injunction restraining the respondent-company from acquiring shares of the polytex company ; he is contending that the notice of the meeting at which the resolution proposing the acquisition of shares was passed was invalid and asking for an injunction restraining the respondent-company from implementing the resolution. A shareholder is competent to ask for such an order. In that view of the matter, I reject the contention that the petitioner has no locus standi to make the application.

19. In Clause (v) of Section 2 of the Act the word "undertaking" has been defined to mean an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of services of any kind. Therefore, an "undertaking" in the sense of the statute, has to be an undertaking in its grammatical signification. The Oxford English Dictionary assigns to the word "undertaking" the meaning of a "a thing undertaken or attempted". The word does not mean the owner of a thing undertaken. This construction is supported by the use of the neuter relative pronoun "which" in Section 2(v) which can never be used in relation to a natural person.

20. Although "undertaking" has been defined, it seems that in the use of the word in the statute the definition has been occasionally lost sight of, and the term "undertaking" has been used loosely in some places to mean the owner of an enterprise. For example, in Section 2(g)(i) "one" can only mean" the owner of an enterprise", though the "other" means the other-enterprise. Section 25 speaks of "Directors of undertakings"; there "undertaking" means a corporate body which owns an undertaking. Be that as it may, an examination of the statute reveals that the term " under taking" is used in the statute, by and large, in the sense of "a thing undertaken" as defined in the Act. The word "undertaking", therefore, should be read in the sense of "a thing undertaken" unless the context requires otherwise.

21. The term "interconnected undertaking" has been defined in Section 2(g) of the Act to mean two or more undertakings which are inter-connected with each other in any of the following manner, namely :

> " (i) if one owns or controls the other.....
>
> (iii) where the undertakings are owned by bodies corporate,--
>
> (a) if one manages the other, or
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> (b) if one is a subsidiary of the other, or
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> (c) if they are under the same management within the meaning of Section 370 of the Companies Act, 1956,

(d) if one exercises control over the other in any other manner.

(vi) if the undertakings are owned or controlled by the same person or group of persons...

Explanation.---For the purpose of Clause (g), two or more undertakings shall be deemed to be inter-connected.....

(b) if one or more individuals together with their relatives, or firms in which such individuals or their relatives are partners, jointly or severally own, manage or control the other."

22. As in this case, the undertakings are owned by bodies corporate the tests prescribed in Sub-clause (iii) of Clause (g) of Section 2 will apply. The respondent-company does not manage the polytex company; it is not its managing agent. The polytex company is not a subsidiary of the respondent-company nor are the companies under the same management within the meaning of Section 370 of the Companies Act, 1956. Mr. Prabir Sen, counsel for the petitioner, strongly relied on paragraph (d) of Sub-clause (iii) of Clause (g) of Section 2. The term, "control", he argued, is of the widest amplitude. He relied on Commissioner of Income-tax v. Nandlal Gandalal, where at page 1150, the court observed :

" It is settled, we think, that the expression ' control and management' means de facto control and management and not merely the right or power to control and manage."

23. Mr. S.C. Sen, on behalf of the respondent-company, relied on British American Tobacco Co. Ltd. v. Inland Revenue Commissioners, [1943] A.C. 335; [I943] 1 All E.R. 636; 29 T.C. 49; 11 I.T.R. (Supp.) 29 (H.L.) and urged that " control", in the context of Section 2(g) of the Monopolies Act, can only mean the control of the majority of the voting power in a company. He submitted that the words " any other manner" in paragraph (d) refer to the machinery through which the control of the majority of voting power is exercised. " Control", he argued, does not mean minority control or managerial control,

24. I am inclined to agree that " control", in the context of paragraph (d), means any species of de facto control, majority control, minority control or managerial control. Now de facto control obviously means lawful de facto control. Majority control, minority control or managerial control are all cases of de facto control. If, apart from majority control, minority control and managerial control, there are other species of control, though I do not know of any, I agree that such species of control will come within the ambit of paragraph (d). In any event, the court will have to be satisfied that the respondent-company exercises or will exercise control over the polytex company. Section 22 contemplates only those undertakings which when established would become inter-connected undertakings. The word used in Section 22, Sub-section (1), is " would" and not "might". A certainty, though prospective, and not a mere possibility of inter-connection has to be established. There has to be evidence that the respondent-company will exercise control over the polytex company. Suspicion is not proof. As the respondent-company does not intend to hold a majority of shares in the polytex company it will not exercise majority control. It will hold a minority of shares but that by

itself does not prove that it will exercise minority control. In order to establish the case for minority control, the court will have to be satisfied that a sufficient number of shares will remain dormant and the respondent-company will be in a position to ensure that a larger number of votes than the votes it commands will not be cast against any resolution which it seeks to pass at a meeting. No such evidence is available. As the respondent-company does not manage or intend to manage the polytex company, it is not possible to hold that it will exercise managerial control over the affairs of the other company. In the absence of any evidence, I am unable to hold that paragraph (d) has any application in this case.

25. Counsel on behalf of the petitioner relied on paragraph (vi) of Clause (g) of section 2. There is no evidence again that the undertakings are owned or controlled by the same group of persons. It was contended that the polytex company is controlled by the same group of persons, namely, the members or some members of the Jaipuria family who also control the respondent-company. The board of directors of each of the companies consists of seven directors. There are three common directors, namely, Mr. Rajaram Jaipuria, Mr. Sitaram Jaipuria and Mr. R. Chaudhuri. Mr. Rajaram Jaipuria is the managing director of the respondent-company and Mr. Sitaram Jaipuria is the managing director of Swadeshi Polytex Ltd. Be that as it may, the majority of the directors of one company are not the majority of the directors of the other. Therefore, it is difficult to see how it can be said that the Jaipuria group or the Jaipuria group together with Mr. Chaudhuri will control the undertaking of the polytex company.

26. Reliance was placed on the fact that the letter of intent, which was originally granted to the respondent-company has been transferred to the polytex company. In that connection, counsel relied on a letter dated May 20, 1970, from the Under-Secretary to the Government of India, addressed to the respondent-company. The Under-Secretary wrote :

> "The Government has no objection to your implementing the project for the manufacture of 'polyester fibres' under the name of Swadeshi Polytex Ltd. Accordingly, the said letter of intent of even number dated 24th July, 1969, is transferred to the name of Messrs. Swadeshi Polytex Ltd., Kanpur."

27. Transfer of the letter of intent does not confer control or management of the transferee undertaking on the transferor and therefore in my judgment the transfer is not a relevant consideration. The reason for transfer has been explained in the explanatory statement.

28. Counsel relied on the report of the monopoly enquiry commission in support of his contention that the group which controls the respondent-company also controls the polytex company. The ways of control, he said, are devious as indicated in the report. At page 390 of the report, the respondent-company is enumerated among the companies comprising the group or the house of Jaipurias. There is no evidence that the Polytex company belongs to the said group. At page 2 of the report, it is said :

> "So, it frequently happened, as we have already mentioned, that an industrialist contributing a small amount of capital himself was able to obtain control of big

enterprises and the snowballing process gathered strength as it proceeded."

At page 5, it is said :

> " Even where investment in another corporation is not of an extent to give it a control over the voting power, it is sometimes sufficient to enable it to have one or more directors on the board of directors of the investee company. This helps to give the investor company some voice in the decisions of the investee and also makes important information available to it. Where such interlocking of directors is achieved in a company in the same line of production, or a company engaged in the distribution of its products or one engaged in the production of an allied product, or of raw materials, it has clearly a tendency to increase concentration of economic power."

At page 34, it is said :

> " It is proper to mention that in each case we have tried to ascertain the substance of the control and have not adhered to the deeming provisions about the same management and the same group as contained in the Companies Act. Nor have we followed the concept of ' outer circle ' as has found favour with some authorities. For the purpose of the present study a 'business group' has been taken to comprise all such concerns which are subject to the ultimate and decisive decision making power of the controlling interest in the group, the group master."

29. As I have already said, there is no evidence of minority control exercised by the Jaipurias over the polytex company. There is no evidence again of any group master having the ultimate and decisive decision making power in the affairs of the polytex company. There are common directors. That may or may not lead to concentration of economic power. It all depends on the facts and circumstances of a particular case. The question before me is not whether having regard to the constitution of the two companies, concentration of economic power has taken place or is likely to take place. The question is whether the undertakings are inter-connected undertakings within the meaning of the statute. The tests of inter-connection which the statute lays down are ownership, control and management. Unless one of the three tests is satisfied by legal evidence, inter-connection cannot be predicated. It may not be out of place to mention that a great deal of the observations in the report was not reflected in the relevant bill and the bill itself suffered many alterations during its passage through the legislature.

30. It was submitted that the directors of the respondent-company are the promoters of the polytex company. That, it was urged, is an evidence of inter-connection. The explanatory statement fully explained why the respondent-company had promoted the new company. Its directors decided to establish a polyester fibre plant having regard to its profitability. They received a letter of intent from the Government. As it was necessary to raise a considerable amount of capital, it was considered expedient to promote a new company. In the light of the future prospects of the new company, the directors considered it desirable to invest Rs. 1 crore in its shares. The large sum of

money proposed to be invested in the new company is sufficient reason for transfer of the letter of intent and also for promoting the polytex company. The promoters of a company do not necessarily control or manage its affairs or own the majority or even a substantial quantity of its shares.

31. Then it was said that the two companies have a common secretary. The secretary is a ministerial or an administrative officer. He does not control or manage the company. The statute does not say that if two corporate bodies have a common secretary, their undertakings will be deemed to be interconnected undertakings. In any event, Mr. Sitaram Bhowsingka, the common secretary, has stated in his affidavit affirmed on March 4, 1971, that since January 1, 1971, he has ceased to be the secretary of the Polytex company.

32. Reliance was placed by counsel on an article by Mr. S.R. Bhowsingka which appeared in the Statesman on October 12, 1970, under the caption "Role of Jaipurias in Industrial Development". There it is stated "on October 12, 1970, the President of India will lay the foundation stone of India's first continuous process polyester staple fibre plant of Swadeshi Polytex Ltd., another Jaipuria enterprise with an authorised capital of Rs. 10 crores". The article is of a laudatory nature and full of generalities. Apart from the question whether a company is bound by a statement made by its secretary with regard to its constitution, control and management, I feel that the character of the article is such that it will be unsafe to rely on it and hold that Swadeshi Polytex Ltd. is controlled or managed by the same group of persons who control and manage the respondent-company in the absence of any evidence.

33. Counsel for the petitioner relied on paragraph (h) of the Explanation to Clause (g) of Section 2 of the Monopolies and Restrictive Trade Practices Act which provides that for the purpose of Clause (g) two or more undertakings shall be deemed to be inter-connected if one or more individuals together with their relatives, jointly or severally, own, manage or control the other. A distinction is made in the explanation between management and control. Mr. Rajaram Jaipuria is the managing director of the respondent-company. His relative, Sitaram Jaipuria, is the managing director of the polytex company. The term "manage" or "management" has not been denned in the Monopolies and Restrictive Trade Practices Act or in the Companies Act.

34. Be that as it may, I am unable to hold that the managing director of a company does not manage its undertaking, within the meaning of Clause (g) of Section 2. In my judgment, on a proper construction of paragraph (b) of the Explanation, it must be held that if a relative of the managing director of a company is the managing director of another company, their undertakings must be deemed to be inter-connected undertakings in the sense of the statute ; they will be inter-connected because the managing directors who are relatives will be managing either undertaking severally. The undertakings may have nothing to do with each other ; their constitutions and organs of control may totally differ ; and yet only because their managing directors happen to be relatives, they will be deemed to be inter-connected by virtue of the Explanation though, in fact, they are not. This may be bad logic and poor law but it is good Monopolies and Restrictive Trade Practices Act. I do not think that by use of the words "together with", the Explanation requires that the relatives must act in unison in the management of either undertaking or, in other words, that the undertakings must be managed directly or indirectly by both of them. The use of the words "jointly or severally" militates

against such a construction.

35. Mr. Sen submitted that Clause (b) of the Explanation is incomplete ; grammatically and syntactically it makes no sense ; it makes no sense unless words are supplied which are not there. 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.

36. In view of the Explanation, I am constrained to hold that the undertaking of Swadeshi Polytex Ltd. will be an inter-connected undertaking of the respondent-company and therefore the former cannot be lawfully established except under the previous permission of the Central Government as required by Section 22. I desire to make it clear that I hold the 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.

37. If no application has been made as required under Section 22(2) and no permission has been obtained as required by Section 22(1), as is admittedly the case, those are material facts which ought to have been disclosed in the notice. An application for approval by the Central Government to the proposal of establishing the undertaking is a prerequisite to any step taken for establishment of the undertaking and, before it was resolved to invest one crore of rupees in the undertaking, the shareholders ought to have been told that no such application had been made and the necessary permission was yet to be had. After all, the Central Government may or may not grant the permission. In the absence of such disclosure, the notice must be held to be invalid having regard to Section 173 of the Companies Act.

38. One of the grounds taken in the petition is that the notice and the explanatory statement are bad because none of the terms and conditions of the collaboration agreement, financial or technical, have been disclosed. At the hearing counsel conceded on the authority of East India Commercial Co. Ltd. v. Raymon Engineering Works Ltd., that the technical aspect of the collaboration agreement need not have been disclosed. In that case, there were two sets of agreements, one for financial participation in the enterprise by the foreign parties and the other for technical collaboration. The terms for financial participation were disclosed in the explanatory statement; the terms of the collaboration agreements were not disclosed nor was their inspection offered. The court held that the agreement for technical collaboration is a matter peculiarly within the competence of the directors and ordinary shareholders are not to be treated as experts on the technical aspects of manufacture. The non-disclosure complained of did not vitiate the notice. The court also found that the plea of non-disclosure of the technical collaboration agreement was not bona fide. In their correspondence the appellants never asked for inspection of those agreements. In the present case, the plea of non-disclosure of the terms and conditions of the agreement is equally lacking in bona fides. Here inspection, though offered, was not taken.

39. Counsel argued that, in any event, the financial aspect of the agreement should have been disclosed. Counsel for the respondents produced a copy of the collaboration agreement at the request of the petitioner's counsel. The agreement is intituled "purchase agreement". The date is September 7, 1970. It is an agreement for supply of plant and machinery and for technical assistance. There is no provision for financial participation in the project by the foreign collaborator, though, naturally, provision has been made for payment for goods and services. In my judgment, it is a purely technical collaboration agreement, the terms and conditions of which do not require disclosure on the principles laid down in East India Commercial Co. Ltd. v. Raymon Engineering Works Ltd., I need only add that the petitioner's counsel did not admit that the agreement disclosed by the petitioner is the one spoken of in the explanatory statement.

40. It was submitted on behalf of the petitioner that the notice and the explanatory statement should have disclosed that no licence under the Industries (Development and Regulation) Act had been obtained for establishing the ploytex undertaking. In fact, the licence was obtained on October 7, 1970. The meeting, it will be remembered, was held on October 12, 1970. It can hardly be said that the industrial undertaking had been established on or before September 14, 1970, the date of the notice. The explanatory note stated that the plant was being put up by the polytex company in collaboration with Messrs. Vickers Zimmer A.G.; that the terms of collaboration had been approved by the Central Government and the work had already commenced. It appears from the article written by the secretary of the polytex company in the Statesman to which reference has been made that the foundation stone of the new undertaking was laid on October 12, 1970.

41. It was contended by counsel appearing on behalf of the petitioner that under Section 11 of the Industries (Development and Regulation) Act a licence is required before any steps could be lawfully taken for establishment of an industrial undertaking; that a licence is required even before laying the foundation of the undertaking or even before preparation of the blueprint. In that view of the matter, action taken before the licence was obtained, namely, the work of putting up the plant or any other work done in connection with the establishment of the undertaking was not permissible under the law. The explanatory note, therefore, should have at least disclosed that the requisite licence under Section 11 had not been obtained.

42. Sub-section (1) of Section 11 of the Act provides that no person or authority other than the Central Government, shall, after the commencement of this Act, establish any new industrial undertaking except under or in accordance with a licence issued in that behalf by the Central Government.

43. In my opinion, all that Section 11 requires is that a licence must be obtained before the undertaking is established. An industrial undertaking is not established on the preparation of a blue-print or on laying the foundation of its factory or even at the stage when the work of establishment has made some progress. The statute does not prohibit taking steps for establishing a new industrial undertaking except under a licence. Under the proviso to Sub-section (1), a Government other than the Central Government requires previous permission to establish a new industrial undertaking. It is not without significance that the words " previous permission" are not used in the relevant part of Sub-section (1).

44. In this connection reference may be made to a provision in part materiel, namely, Section 22 of the Monopolies and Restrictive Trade Practices Act, which prohibits establishment of a new undertaking in certain cases except with the previous permission of the Central Government. Sub-section (2) of Section 22 specifically enjoins that before taking any action for establishing a new undertaking an application has to be made for approval of the Government to the proposal of establishing a new undertaking referred to in Sub-section (1). In the Monopolies and Restrictive Trade Practices Act, a distinction is made between establishing an undertaking and action taken for its establishment; there is a prohibition in Sub-section (1), a direction in Sub-section (2). There is no provision in Section 11 of the Industries (Development and Regulation) Act analogous to Sub-section (2) of Section 22 of the Monopolies and Restrictive Trade Practices Act.

45. Learned counsel for the petitioner referred to Sub-section (2) of Section 11 which provides that a licence under Sub-section (1) may contain such conditions including, in particular, conditions as to the location of the undertaking as the Central Government may deem fit to impose.

He also alluded to Sub-section (2) of Section 12 which provides that subject to any rules that may be made, the Central Government may also vary or amend any licence issued under Section 11 provided that no such power shall be exercised after effective steps had been taken to establish the new industrial undertaking in accordance with the licence. Relying on these provisions, he argued that before any step is taken for establishment of the undertaking, the permission required under Section 11(1) must be had. In my judgment until and unless an undertaking is established, no question of a license under Section 11(1) can arise. An undertaking is not established at a stage when the work of establishment has merely commenced. The language of Sub-section (1) of Section 11 is clear and unequivocal. As for Sub-section (2) if the Central Government does not approve of the proposed location of the undertaking it cannot be established there. It does not imply that any step taken for establishing it is in contravention of the statute. Moreover, the license required under the Industries (Development and Regulation) Act was obtained in this case, before the meeting was held. The shareholders, therefore, have suffered no prejudice. In that view of the matter, the contention raised by the petitioner fails.

46. I may now briefly deal with the objection that after increase of share capital of the polytex company it was no longer open to the members of the respondent-company to confirm the resolution in pursuance of the order of Ghose J. It is true, that by increase of share capital the proposed holding of the respondent-company in the polytex company will be reduced to less than thirty per cent. of its equity capital. The explanatory statement fairly disclosed the proposed increase in the share capital. The resolution which was sought to be confirmed was the same resolution in respect of which the order of Ghose J. was made. I fail to see why the resolution could not be confirmed merely because the capital of the polytex company is proposed to be increased. It was said that the polytex company seeks to increase its share capital to reduce the proportion of the holding of the respondent-company so as to avoid the mischief of Section 370 of the Companies Act and also to avoid being deemed to be an inter-connected undertaking within the meaning of the Monopolies and Restrictive Trade Practices Act. That, in itself, counsel submitted, is evidence of inter-connection. I do not agree. To increase the share capital to avoid inter-connection is a perfectly legitimate procedure. It is no evidence of inter-connection ; on the contrary, it is evidence of the

desire on the part of the polytex company and, may be, also of the respondent-company, to avoid such a situation.

47. Mr. S.C. Sen submitted that in the application heard by Ghose J. the petitioner had raised the same objections on the score of non-compliance with the provisions of the Industries (Development and Regulation) Act and non-disclosure of the terms of the collaboration agreement; the learned judge having disposed of the application, it is no longer open to the petitioner to urge the same grounds over again. It appears from the judgment of Ghose J. that he disposed of the application on a different point. The learned judge did not find it necessary to consider the other grounds of objection nor did he go into their merits.

48. In any event, apart from the question whether an interlocutory order can operate as res judicata in an application in a different suit, it is necessary to remember that the present application is not at all concerned with the notice which Ghose J. had to consider. For more reasons than one, I am unable to uphold the contention raised by Mr. Sen.

49. In the view I have taken, the application succeeds. There will be an order for an injunction restraining the respondents and each of them from giving effect to the resolution set out in the notice dated September 14, 1970. The order is made without prejudice to the rights of the respondents and the members of the respondent-company to pass a fresh resolution according to law in terms of or similar to the resolution No. 1 which is the subject-matter of this application. There will be no order for costs.

50. Upon the respondents giving an undertaking to the court through their counsel, Mr. Nag, that they will not invest in the shares of Swadeshi Polytex Ltd. for a period of three weeks, there will be a stay of operation of the order made herein for the same period. The previous undertaking given by the respondents on the 12th of October, 1970, is hereby discharged.