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CAREW AND COMPANY LTD.

v.

UNION OF INDIA

August 22, 1975

[A. N. RAY, C.J., K. K. MATHEW, V. R. KRISHNA IYER AND S. M. FAZAL ALI, JJ.]

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Monopolies and Restrictive Trade Practices Act, 1969, *Sections* 2(*v*), 22 *and* 23(4)—*Undertaking, meaning of—Appellant proposing to form new company for taking over sugar unit owned by it—New company, if can be said to be engaged in production.*

Section 2(v) of the Monopolies and Restrictive Trade Practices Act, 1969, defines an "undertaking" as an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind. Section 22 provides for the establishment of new undertakings. It says that no person or authority, other than government, shall, after the commencement of this Act, establish any new undertaking which, when established would become an inter-connected undertaking of an undertaking to which clause (a) of s. 20 applies, except under, and in accordance with the previous permission of the Central Government, Sub-section (2) of the section provides for an application for that purpose to the Central Government. Section 23(4) lays down that if an undertaking to which Part A of Ch. III applies proposes to acquire by purchase, take over or otherwise the whole or part of an undertaking which will or may result either (a) in the creation of an undertaking to which Part A would apply; or (b) in the undertaking becoming an inter-connected undertaking of an undertaking to which Part A applies, it shall, before giving any effect to its proposals, make an application in writing to the Central Government in the prescribed form of its intention to make such acquisition, stating therein information regarding its inter-connection with other undertakings the scheme of finance with regard to the proposed acquisition and such other information as may be prescribed.

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The appellant is a public limited company and is a subsidiary of United Breweries Ltd. and other companies interconnected with it. The appellant's undertaking consists of a sugar factory and a distillery for manufacture of liquor at Rosa, Shahjahanpur and another distillery at Asansol. The appellant's sugar factory at Rosa had been facing difficulties for some years on account of inadequate supply of sugarcane and to ensure regular and adequate supply of sugarcane, the appellant proposed to float a company with a share capital of Rs. 50 lakhs for the purpose of taking over the sugar unit of the appellant and for working it as an undertaking of the company to be formed. The proposal was that the appellant would be entitled to an allotment of 100 per cent shares in the new company and a further sum of Rs. 15,77,093/- as consideration for transfer of the sugar unit. The appellant applied to the respondent for permission under s. 372 of the Companies Act to acquire the 100 per cent shares of the new company upon its incorporation. The appellant was told by the Central Government in its letter dated 5-1-1972 that sections 22 and 23 of the Monopolies and Restrictive Trade Practices Act, 1969, would *prima facie* be attracted and that the appellant should file a separate application under the relevant section. The appellant filed an application dated 5-5-1972 purporting to be under S. 23(4) of the Act. The new company proposed to be set up by the appellant was incorporated on June 15, 1973 under the name of Shahjahanpur Sugar Private Limited. By order dated July, 2, 1973, the Central Government, in the Department of Company Affairs rejected the appellant's application under s. 372(4) of the Companies Act for investing Rs. 50 lakhs in the equity shares of the Capital of Shahjahanpur Sugar Private Limited. By another order dated 30-6-1973, the Central Government, in the Department of Company Affairs also rejected the appellant's application under s. 23(4) of the Act. This appeal is against the order dated 30-6-1973 under s. 55 of the Act.

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It was contended for the appellant that, (i) in order that an enterprise may become an 'undertaking' within the definition of the word 'undertaking' in s. 2(v) of the Act, it is necessary that the enterprise must be engaged in produc-

tion, supply, distribution or control of goods of any description or the provision of service of any kind and that when the appellant proposed to form the new company for taking over the sugar unit of the appellant in consideration of 100 per cent shares in the new company, that company had not acquired the sugar unit of the appellant nor was it engaged in the production, supply, distribution or control of goods, etc. as an enterprise of Shahjahanpur Sugar Private Limited and so there was no proposal to acquire by purchase, take over or otherwise of the whole or part of any undertaking within the the meaning of s. 23(4); and (ii) in any event the proposal to acquire 100 per cent shares in Shahjahanpur Sugar Private Limited by the appellant would not involve a proposal to acquire an undertaking to be owned or even owned by Shahjahanpur Sugar Private Limited, as the acquisition of 100 per cent shares would only vest in the appellant, the right to control and manage the affairs of Shahjahanpur Sugar Private Limited.

Accepting the contentions and allowing the appeal,

HELD : (*Per* Ray, C.J. and Mathew J.) (i) The sugar unit of the appellant was no doubt engaged in production of goods. etc., when the proposal was made and was, therefore, an undertaking; but it was only an undertaking of the appellant as the sugar unit had not been transferred and had not become an enterprise of Shahjahanpur Sugar Private Limited. The sugar unit did not become an undertaking of Shahjahanpur Sugar Private Limited as it was not and could not be engaged in the production of goods, etc., on its behalf before it was transferred to it. Sub-section (4) of s. 23 is confined to the case of a proposal to acquire an undertaking by purchase, take over or otherwise but, to become an undertaking, it must presently be engaged in the production of goods, etc. The mere fact that the Memorandum of Association of Shahjahanpur Sugar Private Limited contained an object clause which provided for production of sugar would not necessarily mean that the company would go into production and thus become the owner of an undertaking as defined in s. 2(v) of the Act. Even if the phrase 'engaged in business' in the definition conveys the idea of embarking on it, it is not correct to say that Shahjahanpur Sugar Private Limited had embarked on the business of production of sugar merely because its memorandum of association provided that the object of the company was to produce sugar. [387B-C, E-F]

The Union of India v. Tata Engineering and Locomotive Co. Ltd., [1972] 74 Bombay Law Reporter, 1 and *In re Canara Bank Ltd.*, A.I.R. 1973 Mysore, 95. referred to.

(ii) It is well settled that a company has seperate legal personality apart from its shareholders and it is only the company as a juristic person that could own the undertaking. Beyond obtaining control and the right of management of Shahjahanpur Sugar Private Limited, the purchase of 100 per cent shares had not the effect of an acquisition of the undertaking owned by it. [388F-G]

Per Krishna Iyer, J. (*concurring*) (1) An 'undertaking' is defined as an undertaking....which itself discloses the difficulty felt by the draftsmen in delineating the precise content. Obviously, a dynamic economic concept cannot be imprisoned into ineffectualness by a static strict construction. 'Is engaged in production', in the context takes in not merely projects which have been completed and gone into production but also blue-prints. It is descriptive of the series of steps culminating in production. One is engaged in an undertaking for production of certain goods when he seriously set about the job of getting everything essential to enable production. Economists, administrators and industrialists understand the expression in that sense and often times projects in immediate prospect are legitimately set down as undertakings engaged in the particular line. Not the tense used but the integration of the steps is what is decisive. What will materialse as a productive enterprise *in futuro* can be regarded currently as as undertaking, in the industrial sense. [391F-H]

Massachusetts B & Insurance Co. v. *U.S.* 352, U.S. 128, 138, and *Gymkhana Club*, [1968] 1 S.C.R. 742, referred to.

(2) Sections 22 and 23(4), when placed in juxtaposition suggest that the appellant's operation is to *establish* a new undertaking (out of its old sugar unit, though) which, in view of the share-holding, will inevitably become an interconnected undertaking of Carew & Co. (the original undertaking, i.e., the appellant). Not so much to *acquire* an existing undertaking as to *establish*, by a concealed expansionist objective, a new undertaking with sugar manufacture is the core of the operation. Therefore, it is not s. 23(4) that magnetizes the appellant's proposal but, prima facie, Sec. 22. [395EF]

Per Fazal Ali, J. (*Concurring*) The object of the Act appears to be to prevent concentration of wealth in the hands of a few and to curb monopolistic tendencies or expansionist industrial endeavours. This objective is sought to be achieved by placing three-tier curb on industrial activities to which the Act applies, namely :—(1) By providing that if it is proposed to substantially expand the activities of a Company by issue of fresh capital or by installation of new machinery, then notice to the Central Government and its approval must be taken under s. 21 of the Act. (2) In the case of establishment of a new Company by insisting on the previous permission of the Central Government under s. 22 of the Act. (3) In the case of acquisition of an existing Company by another Company by requiring the sanction of the Central Government to be taken by such Company under s. 23 of the Act. The present case may fall within the second category. [398-H, 399AB]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1308 of 1973.

From the Order dated the 30th June, 1973 of the Central Government, Ministry of Law, Justice and Company Affairs, Department of Company Affairs.

S. V. Gupte and *Vinoo Bhagat,* for the appellant.

P. P. Rao and *S. P. Nayar,* for respondent.

Shri Narain, for interveners.

The Judgment of A. N. Ray, C.J., and K. K. Mathew, J. was delivered by Mathew, J. V. R. Krishna Iyer, J. and S. Murtaza Fazal Ali, J. gave separate Opinions.

MATHEW, J. This appeal is from an order dated 30-6-1973 passed by the Government of India dismissing an application filed by the appellant on 5-5-1972 under s. 23(4) of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the 'Act') for acquiring 100 per cent share capital of Shahjahanpur Sugar Private Ltd.

The appellant is a public limited company and is a subsidiary of United Breweries Ltd. and other companies interconnected with it. The appellant's undertaking consists of a sugar factory and a distillery for manufacture of liquor at Rosa, Shahjahanpur and another distillery at Asansol. The appellant's sugar factory at Rosa had been facing difficulties for some years on account of inadequate supply of sugarcane and to ensure regular and adequate supply of sugarcane, the appellant proposed to float a company with a share capital of Rs. 50 lakhs for the purpose of taking over the sugar unit of the appellant and for working it as an undertaking of the company to be formed. The proposal was that the appellant would be entitled to an allotment of 100 per cent shares in the new company and a further sum of Rs. 15,77,093/- as consideration for transfer of the sugar unit. According to the appellant, its object in getting 100 per cent shares in the new company was to offer the shares to cane growers later on.

The appellant wrote a letter to the Secretary of the Company Law Board on 15-10-1971 stating that since the new company would be a subsidiary of the appellant, the approval of the Company Law Board under s. 372 of the Companies Act would not be necessary, in view of the provisions of clause (d) of sub-section 14 of the said section. The Central Government in the Ministry of Industry and Company Affairs replied by a letter dated November 1, 1971, that the provisions of s. 372(2) of the Companies Act would be applicable to the acquisition of the shares by the appellant in the company proposed to be formed. The appellant, therefore, applied for permission under s. 372 of the Companies Act to acquire the 100 per cent shares of the new company upon its incorporation. The appellant was also told by the Central Government in its letter dated 5-1-1972 that sections 22 and 23 of the Act would *prima facie* be attracted and that the appellant should file a separate application under the relevant section. The appellant had already intimated the Central Government, Department of Company Affairs on 17-11-1971 that the provisions of sections 21, 22 and 23 of the Act would not apply to its proposal to acquire the shares of the company proposed to be formed for taking over the sugar unit of the appellant. However, the appellant filed an application dated 5-5-1972 purporting to be under s. 23(4) of the Act. The new company proposed to be set up by the appellant was incorporated on June 15, 1973 under the name of Shahjahanpur Sugar Private Limited. By order dated July 2, 1973, the Central Government, in the Department of Company Affairs rejected the appellant's application under s. 372(4) of the Companies Act for investing Rs. 50 lakhs in the equity shares of the capital of Shahjahanpur Sugar Private Limited. By another order dated 30-6-1973, the Central Government, in the Department of Company Affairs also rejected the appellant's application under s. 23(4) of the Act. As already stated, this appeal is against the latter order, under s. 55 of the Act.

The point for consideration in this appeal lies in a narrow compass viz., whether s. 23(4) was attracted to the facts of the case. To decide the question it is necessary to refer to certain provisions of the Act.

The object of the Act as is clear from the preamble is that the operation of the economic system should not result in the concentration of economic power to the common detriment, for prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

"Undertaking" is defined under s. 2(v) :

> "undertaking" means an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind".

Chapter III is concerned with concentration of economic power and s. 20 occurring in Part A of that chapter states that this part shall apply to an undertaking if the total value of—

(i) its own assets, or

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(ii) its own assets together with the assets of its inter-connected undertaking is not less than twenty crores of rupees;

and, to a dominant undertaking—

(i) where it is a single undertaking, the value of its assets, or

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(ii) where it consists of more than one undertaking, the sum-total of the value of the assets of all the inter-connected undertakings constituting the dominating undertaking, is not less than one crore of rupees.

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Section 21 deals with expansion of undertakings. It provides that where an undertaking to which this Part applies proposes to substantially expand its activities by the issue of fresh capital or by the installation of new machinery or other equipment or in any other manner, it shall, before taking any action to give effect to the proposal for such expansion, give to the Central Government notice of its intention to make such expansion stating therein the scheme of finance with regard to the proposed expansion, whether it is connected with any other undertaking or undertakings and, if so, giving particulars relating to all the inter-connected undertakings and such other information as may be prescribed. Section 22 provides for the establishment of new undertakings. It says that no person or authority, other than government, shall, after the commencement of this Act, establish any new undertaking which, when established would become an inter-connected undertaking of an undertaking to which clause (a) of s. 20 applies, except under, and in accordance with the previous permission of the Central Government. Sub-section (2) of that section provides for an application for that purpose to the Central Government. Section 23 provides :

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"23. *Merger, amalgamation and take-over*—(1) Notwithstanding anything contained in any other law for the time being in force,—

(a) no scheme of merger or amalgamation of an undertaking to which this Part applies with any other undertaking,

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(b) no scheme of merger or amalgamation of two or more undertakings which would have the effect of bringing into existence an undertaking to which clause (a) or clause (b) of s. 20 would apply,

shall be sanctioned by any Court or be recognised for any purpose or be given effect to unless the scheme for such merger or amalgamation has been approved by the Central Government under this Act.

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(2) If any undertaking to which this Part applies frames a scheme of merger of amalgamation with any other undertaking or a scheme of merger or amalgamation is proposed

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between two or more undertakings, and, if as a result of such merger or amalgamation, an undertaking would come into existence to which clause (a) or clause (b) of s. 20 would apply, it shall, before taking any action to give effect to the proposed scheme, make an application to the Central Government in the prescribed form with a copy of the scheme annexed thereto, for the approval of the scheme.

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(3) Nothing in sub-section (1) of sub-section (2) shall apply to the scheme of merger or amalgamation of such inter-connected undertakings as are not dominant undertakings and as produce the same goods.

(4) If an undertaking to which this Part applies proposes to acquire by purchase, take over or otherwise the whole or part of an undertaking which will or may result either—

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(a) in the creation of an undertaking to which this Part would apply; or

(b) in the undertaking becoming an inter-connected undertaking of an undertaking to which this Part applies,

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it shall, before giving any effect to its proposals, make an application in writing to the Central Government in the prescribed form of its intention to make such acquisition, stating therein information regarding its inter-connection with other undertakings, the scheme of finance with regard to the proposed acquisition and such other information as may be prescribed.

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(5) No proposal referred to in sub-section (4) which has been approved by the Central Government and no scheme of finance with regard to such proposal shall be modified except with the previous approval of the Central Government.

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(6) On receipt of an application under sub-section (2) or sub-section (4), the Central Government may, if it thinks fit, refer the matter to the Commission for an inquiry and the Commission may, after such hearing as it thinks fit, report to the Central Government its opinion thereon.

(7) On receipt of the Commission's report the Central Government may pass such orders as it may think fit.

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(8) Notwithstanding anything contained in any other law for the time being in force, no proposal to acquire by purchase, take-over or otherwise of an undertaking to which this part applies shall be given effect to unless the Central Government has made an order according its approval to the proposal.

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(9) Nothing in sub-section (4) shall apply to the acquisition by an undertaking which is not a dominant under-

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taking, of another undertaking which is not also a dominant undertaking, if both such undertakings produce the same goods:

Provided that nothing in this sub-section shall apply, if, as a result of such acquisition, an undertaking comes into existence to which clause (a) or clause (b) of section 20 would apply."

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Section 28 states that the Central Government before according approval in the exercise of its powers under Part A or Part B of Chapter III shall take into account all matters which appear in the particular circumstances to be relevant and enjoins that regard shall be had to the need consistently with the general economic position of the country to achieve the production, supply and distribution, by most efficient and economical means, of goods of such types and qualities and several other considerations specified therein.

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The submission of the counsel for the appellant was that in order that an enterprise may become an 'undertaking' within the definition of the word 'undertaking' in s. 2(v) of the Act, it is necessary that the enterprise must be engaged in production, supply, distribution or control of goods of any description or the provision of service of any kind and that when the appellant proposed to form the new company for taking over the sugar unit of the appellant in consideration of 100 per cent shares in the new company, that company had not acquired the sugar unit of the appellant nor was it engaged in the production, supply, distribution or control of goods, etc. as an enterprise of Shahjahanpur Sugar Private Limited and so there was no proposal to acquire by purchase, take over or otherwise of the whole or part of any undertaking within the meaning of s. 23(4). According to counsel, it is only when an 'undertaking' to which Part III applied proposes to acquire by purchase, take over or otherwise, the whole or part of an undertaking which would result in the creation of an undertaking to which that Part applies that s. 23(4) would be attracted. In other words, the argument was that as the proposal was only for acquirising 100 per cent shares in Shahjahanpur Sugar Private Limited, the proposal was not to acquire the whole or any part of an undertaking since neither Shahjahanpur Sugar Private Limited had become the owner of the sugar unit of the appellant as there was only a proposal to transfer it to it, nor was that unit engaged in production, supply, distribution or control of goods as an enterprise owned by Shahjahanpur Sugar Private Limited. The further submission was that in any event the proposal to acquire 100 per cent shares in Shahjahanpur Sugar Private Limited by the appellant would not involve a proposal to acquire an undertaking to be owned or even owned by Shahjahanpur Sugar Private Limited, as the acquisition of 100 per cent shares would only vest in the appellant, the right to control and manage the affairs of Shahjahanpur Sugar Private Limited.

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Section 2 of the Act makes it clear that the definitions given in that section will be attracted only if the context so requires. The word

'undertaking' is a coat of many colours, as it has been used in different sections of the Act to convey different ideas. In some of the sections, the word has been used to denote the enterprise itself while in many other sections it has been used to denote the person who owns it. The definition of the word 'undertaking' in s. 2(v) of the Act would indicate that 'undertaking' means an enterprise which is engaged in production, sale or control of goods, etc.

We think that the question to be asked and answered in this case in terms of s. 23(4) is : Did the appellant make a proposal to acquire any undertaking of Shahjahanpur Sugar Private Limited by purchase, take over or otherwise? To answer this question, it is necessary to see whether the sugar unit which was proposed to be transferred to Shahjahanpur Sugar Private Limited had been engaged in the production of goods, etc., as an enterprise of that company. It is clear that on the date of the proposal the sugar unit of the appellant had not become an undertaking of Shahjahanpur Sugar Private Limited as it had not been engaged in the production of goods, etc., as an enterprise owned by that company. It is only possible to visualize two possibilities when the proposal was made : either the sugar unit remained an undertaking of the appellant, although it was proposed to be transferred to Shajahanpur Sugar Private Limited or that the sugar unit became an enterprise of Shahjahanpur Sugar Private Limited. If the sugar unit remained part of the undertaking of the appellant when the proposal was made to take the 100 per cent shares, the proposal cannot be one to acquire an undertaking, as *ex hypothesi* the undertaking had not been transferred to Shahjahanpur Sugar Private Limited. But, if the proposal to take 100 per cent shares involved an acquisition in future by the appellant of the sugar unit after it has been transferred to the new company, there was no proposal to acquire by transfer, take over or otherwise of an 'undertaking' as the sugar unit was not at the time of the proposal engaged in production of goods, etc. as an enterprise of Shahjahanpur Sugar Private Limited.

An enterprise can be characterized as an undertaking within the definition of the term only when it is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind. In *The Union of India v. Tata Engineering and Locomotive Co. Ltd.*(1), the Court held that a mere capacity or a mere intention by an undertaking to carry on an activity as referred to in clause (v) of s. 2 of the Act in future alone without its being so done in the present, i.e., at the material date, or some time in the past i.e., before the material date, cannot mean that the undertaking is engaged in an activity as contemplated in s. 2(v) of the Act. No doubt, a temporary cessation of the activity will not detract an enterprise from its character as an undertaking, if the *animus* to resume the activity as soon as possible is there. If a factory has had to close down its operations on account of a strike, lock out, shortage of raw materials, shortage of power, or even want of finance, it cannot be said

(1) [1972] Bombay Law Reporter 1.

A that it is not engaged in the production of goods, if the intention of the owner is to resume its activities. The view taken in *In re Canara Bank Ltd.*(1) is much the same. There the Court followed the decision of the Bombay High Court referred to above and said that until a concern goes into the actual production, it cannot be said to be an 'Undertaking'.

B The sugar unit of the appellant was no doubt engaged in production of goods, etc., when the proposal was made and was, therefore, an undertaking; but it was only an undertaking of the appellant as the sugar unit had not been transferred and had not become an enterprise of Shahjahanpur Sugar Private Limited. The sugar unit did not become an undertaking of Shahjahanpur Sugar Private Limited as it was not and could not be engaged in the production of goods, etc., C on its behalf before it was transferred to it. Sub-section (4) of s. 23 is confined to the case of a proposal to acquire an undertaking by purchase, take over or otherwise but, to become an undertaking, it must presently be engaged in the production of goods, etc. The mere fact that the Memorandum of Association of Shahjahanpur Sugar Private Limited contained an object clause which provided for production of sugar would not necessarily mean that the company would D go into production and thus become the owner of an undertaking as defined in s. 2(v) of the Act. Take for instance the case of an individual or a firm. Does he or it become an 'undertaking' merely because he or it entertains an object to produce goods unless he or it is actually engaged in production of goods, etc.? Certainly not. If that is so in case of an individual or a firm, we see no reason why a E different standard should be applied in the case of a company merely because the object or one of the objects of the company is to produce goods, etc., if it is not actually engaged in production of goods. Reference was made to Stroud's Judicial Dictionary, 4th edition, Vol. 1, p. 909 where it is stated that the phrase "engaged in any business" is apt to include employment at a salary as well as embarking on a business or in partnership. We do not think that even if the phrase F 'engaged in business' conveys the idea of embarking on it, Shahjahanpur Sugar Private Limited had embarked on the business of production of sugar merely because its memorandum of association provided that the object of the company was to produce sugar. It is, therefore, difficult to imagine how when the proposal was made there was an enterprise engaged in the production of sugar and owned by Shahjahanpur Sugar Private Limited which could be acquired.

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To put the matter in a nutshell: The sugar unit of the appellant was an undertaking of the appellant. Even if the proposal to acquire 100 per cent shares in Shahjahanpur Sugar Private Limited is considered to be a proposal to acquire either Shahjahanpur Sugar Private Limited or its sugar unit, since neither Shahjahanpur Sugar Private Limited nor its sugar unit as an enterprise owned by it had gone into H production of goods, the proposal did not involve the acquisition of an undertaking. Until the object in the memorandum of association

(1) A. I. R. 1973 Mysore 95.

of Shahajahanpur Sugar Private Limited was realized by the sugar unit going into production on behalf of the new company, it cannot be said that either Shahjahanpur Sugar Private Limited or the sugar unit transferred to it was an 'undertaking'. An entity which is not engaged in actual production of goods or supply of services is of no economic significance and has to be excluded from the purview of the Act. Hence, what may be done by an individual, firm or company in future has no present economic significance. Therefore, even if it be assumed that acquisition of 100 per cent shares could result in the acquisition of the new company or of an undertaking, the appellant was not acquiring an 'undertaking' as defined in the Act as the new company would not be engaged in production of goods etc. at the time of the acquisition of the shares by the appellant and s. 23(4) of the Act would not be attracted.

We also think that by the proposal to acquire the 100 per cent shares in Shahjahanpur Sugar Private Limited or by the actual acquisition of the shares, the appellant acquired only the control and the right to manage the company. The word 'undertaking' in the latter part of s. 23(4) denotes an enterprise which is considered as an entity engaged in the production of goods, etc. By getting 100 per cent shares in Shahjahanpur Sugar Private Limited, the appellant never acquired that undertaking owned by the new company by purchase, take over or otherwise. The undertaking remained the undertaking of Shahjahanpur Sugar Private Limited. In other words, the purchase of 100 per cent shares in Shahjahanpur Sugar Private Limited cannot be equated to the purchase of the undertaking owned by Shahjahanpur Sugar Private Limited. What s. 23(4) requires is the acquisition by purchase, take over or otherwise of an undertaking. As we said, by getting the 100 per cent shares in Shahjahanpur Sugar Private Limited, the appellant only acquired the control and the right of management of Shahjahanpur Sugar Private Limited; but that will not amount to a purchase of the undertaking owned by that company. It is well settled that a company has separate legal personality apart from its shareholders and it is only the company as a juristic person that could own the undertaking. Beyond obtaining control and the right of management of Shahjahanpur Sugar Private Limited, the purchase of 100 per cent shares had not the effect of an acquisition of the undertaking owned by it. No doubt, on a dissolution of the company, the shareholders would be entitled to a distributive share of the assets of the company. But it does not follow that while the company is a going concern, the shareholders are the owners of its assets including any undertaking. It is the company as a separate entity which alone can own the undertaking and the purchase by the appellant of 100 per cent shares did not make it the owner of the undertaking. We are aware that we are dealing with an economic legislation calculated to give effect to the Directive Principles of State Policy set out in clauses (b) and (c) of Article 39 of the Constitution and that the purpose of the legislation should be kept in mind in interpreting its provisions; but we are not prepared to assume that the legislature has, by a side-wind, swept away the well established fundamental legal concepts of the law of corporation in making the legislation. We do not pause

A to consider whether the circumstances which the Central Government took into account in passing the order were germane in the light of the provisions of s. 28 of the Act as we hold that s. 23(4) has no application at all to the facts of the case.

No arguments were addressed at the bar as to whether the facts of the case would attract the provisions of s. 22. We, therefore, think B it not proper to express any definite opinion about the applicability of that section and we refrain from doing so. If, however, the facts of the case attract the provisions of s. 22, it goes without saying that the appellant will have to apply and obtain the approval as visualized in that section.

C We allow the appeal but make no order as to costs.

KRISHNA IYER, J.—I have had the advantage of perusing the judgment of my learned brother, Mathew J. but, while concurring in the conclusion, desire to append a separate opinion since the strands of my reasoning differ. Mathew, J.'s judgment presents the necessary D facts in the simplest form, sets out the scheme and the object of the Monopolies and Restrictive Trade Practices Act (for short, the Act) whose construction falls for decision, but perhaps tends to petrify the pivotal concepts of 'undertaking' defined in s. 2(v) and *acquisition* in the context of Part A of Chapter III of the Act, if I may say so with respect. Perhaps we are hearing the first case in this Court under this 'economic' legislation, although three rulings from two High Courts, E having some bearing on the controversy before us, were cited at the bar.

Shri Gupte, appearing for the appellant, posed the issue in a neatly simplistic way when he assailed the order of the Central Government under s. 23(4) of the Act on the score that, absent acquisition of an 'undertaking' in terms of s. 2(v), the order was devoid of jurisdic- F tion. This provision deals with concentration of economic power whose inhibition is one of the paramount purposes of the statute. Section 23 falls within Chapter III, Part A, of the Act. Section 20 states that that Part shall apply only to certain types of undertakings. Admittedly, the appellant is a big, plural undertaking falling within this Part and proposes to make over the sugar unit (which is one of the enterprises of this large multi-production concern) to a new company to be G floated. This latter company is to have 100% of its shares owned by the appellant and, what is more, by a process of inflated valuation of the assets of the sugar unit, the appellant will also appear to be advancing a loan of several lakhs of rupees to it. According to the respondent (the Union of India) and the State of U. P., this new scheme is dubious in many ways and more sinister than seems on the surface. We need not go into the details except to state that if the facts urged H by counsel for the respondent were true, it is a high risk to the community to approve of the proposed scheme from the point of view of the purposes of the Act and the Directive Principle enshrined in Art. 39(c) of the Constitution.

It is unfortunate that in cases where the economic object and impact of special types of legislation call for judicial interpretation, the necessity for a detailed statement of the background facts and supportive data, apart from some sort of a Brandeis brief illuminating the social purpose of the statute, is not being fully realised by the State. In the present appeal materials were read out from the files which disturbed me but no comprehensive affidavit marshalling the social and economic facts relevant to the case and the statute was filed. (At least copies of the Monopolies Inquiry Commission's Report, extracts from the draft Bill, Notes on Clauses and the Objects and Reasons of the Act were made available while arguments started). Even so, the Court should hesitate to upset the Central Government's order without a strong case of glaring error on the merits and clear excess or absence of jurisdiction being made out by the appellant.

Shri Gupte, has, however, by-passed the controversial area of facts by a line of legal reasoning which is attractive but specious. He contents that s. 23(4) cannot apply save where the dominant undertaking (in this case, the appellant) proposed to acquire 'the whole or part of an *undertaking* which will or may result either in the creation of a undertaking to which Part A will apply or in the undertaking becoming an inter-connected undertaking of an undertaking to which Part A applies'. Therefore, runs the argument, what is sought to be acquired must be an *undertaking*. In the present case the sugar unit is already an asset of the appellant's concern and what is proposed is nothing more than to float a new company whose shares will be acquired *in toto* by the appellant. Only when that company goes into production it becomes an 'undertaking' and only then can s. 23(4) possibly cover the case, the reason being that an 'undertaking', by definition in s. 2(v), 'means an undertaking which *is engaged in* the production.... of goods....'. The accent placed by counsel is upon '*is engaged in the production*'. He submits that the new company does not become an 'undertaking' until is is 'engaged in the production of goods'. What is not *in esse* but only *in posse* is not an undertaking. So much so the application of s. 23(4) is premature and the Central Government's order is illegal. Moreover, no acquisition of the new company is contemplated, the owning of 100% shares thereof not being in law an acquisition of the undertaking as such by the appellant. I concede there is force in this argument.

The crucial submissions of counsel for the appellant, however, stand exposed to the criticism made by Shri P. P. Rao for the respondent that they turn more or less on a play of words in the definition of 'undertaking' in s. 2(v) and legal ingenuity about *acquisition* thereof. Is there substance in these contetions or are they legal subterfuges to escape from the statutory meshes ?

The law is not 'a brooding omnipotence in the sky' but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad

A master to dictate. Notwithstanding the traditional view that grammatical construction is the golden rule, Justice Frankfurter used words of practical wisdom when he observed : (1)

> "There is no surer way to misread a document than to read it literally".

B Indeed, this case really turns on the Court's choice of the correct canon of construction as between two alternatives. Is an 'undertaking' an economic enterprise which is actually producing goods ? Here we over-stress the '*in praesenti*' aspect and thereby undermine the legislative object. On the contrary, is an 'undertaking' used in its economic sense and in its wider connotation of embracing not merely factories which have been commissioned but projects which are embryonic and designed to go into production immediately formal legal C personality is acquired and statutory approval under the Act secured ? In the present case there is already a sugar unit which is working and this mill is being transferred as the asset of the new company. The new company, immediately it is registered and the Central Government's approval under s. 23(4) obtained, will go on stream since the mill's wheels will continue to turn regardless of the legal metempsy- D chosis of ownership. In such a case it would be abandoning commonsense and economic reality to treat the proposed undertaking as anything less than an 'undertaking' (as defined in the Act) because it is only in immediate prospect. For certain purposes, even a child in the womb is regarded as in existence by the law and I cannot bring myself to an understanding of the definition which will clearly defeat E the anti-concentration-of-economic-power objective of the legislation. Moreover, 'to undertake' is to set about; to attempt to take upon oneself solemnly or expressly; to enter upon; to endeavour to perform (see Black's Law Dictionary). If what the appellant intends to acquire or establish is as undertaking *in fact and* therefore *in law*, the transformation device and the refuge in grammar cannot help him, the expression being capable of taking in not merely what *is*, but what F *is about to be*. An 'undertaking' is defined as an undertaking...... which itself discloses the difficulty felt by the draftsmen in delineating the precise content. Obviously, a dynamic economic concept cannot be imprisoned into ineffectualness by a static strict construction. 'Is engaged in production', in the context, takes in not merely projects which have been completed and gone into production but also blueprint stages, preparatory moves and like ante-production points. It G is descriptive of the series of steps culminating in production. You are engaged in an undertaking for production of certain goods when you seriously set about the job of getting everything essential to enable production. Economists, administrators and industrialists understand the expression in that sense and oftentimes projects in immediate prospect are legitimately set down as undertakings engaged in the particular line. Not the tense used but the integration of the steps is what is H decisive. What will materialise as a productive enterprise *in futuro* can be regarded currently as an undertaking, in the industrial sense. It is not distant astrology but imminent futurology, and the phrases

(1) *Massachusetts B. & Insurance Co.* v. *U. S.* 352 U. S. 128, 138.

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of the statute are amenable to service of the purposes of the law, liberally understood. Likewise, *acquisition* of an undertaking is to be viewed not in a narrow sense but as a broad business operation. Surely, the new company is an undertaking which, by the vesting of 100% of its share-holding in the appellant, is going to belong to the latter. It is either acquiring or establishing the new adventure. That is the plain truth and law must accord with it. After all, a broadened, sophisticated and spectral sense must be given to these words of economic connotation without being hide-bound by lexicography or legalism. Of course, any infant in law knows that holding shares is not acquiring the company with its distinctive personality. But any adult in corporate economics knows that controlling the operations of an industrial unit is to acquire or *establish* it for all economic purposes—depending on whether that one is *new* or pre-existing.

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The word 'undertaking' takes in also enterprises attempted (See Webster's Dictionary on 'undertaking', the meaning having received judicial approval in AIR 1960 Bom. 22 at p. 24, paragraph 4). This Court in *Gymkhana Club*(1) has accepted the meaning given in Webster. Similarly, 'engaged in' takes within its wings 'embarking on' (Vide : Stroud's Judicial Dictionary, 4th Edn. Vol. 2, p. 909).

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If the language used in a statute can be construed widely so as to salvage the remedial intendment, the Court must adopt it. Of course, if the language of the statute does not admit of the construction sought, wishful thinking is no substitute and then, not the Court but the Legislature is to blame for enacting a damp squib statute. In my view, minor definitional disability, divorced from the realities of industrial economics, if stressed as the sole touchstone, is sure to prove disastrous when we handle special types of legislation like the one in this case. I admit that viewed from one standpoint the logic of Shri Gupte is flawless, but it also makes the law lifeless, since the appellant is thereby enabled neatly to nullify the whole object of Chapter III which is to inhibit concentration of economic power. To repeat for emphasis, when two interpretations are feasible, that which advances the remedy and suppresses the evil, as the legislature envisioned, must find favour with the Court. Are there two interpretations possible? There are, as I have tried to show and I opt for that which gives the law its claws.

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I am alive to and have kept within the limitations of judicial options indicated by Cardozo in a different context :

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> "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by

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(1) [1968] 1 S. C. R. 742.

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> analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains."

(Benjamin Cardozo's 'The Nature of the Judicial Process'—Yale University Press (1921). While judicial review, at least on processual issues, is the hallmark of fair dealing with rights of persons in a Republic, there are expanding areas of economic and technological codes where the adjudicator has to tread warily and pause circumspectly, especially because the expertise needed to unlock the statute is ordinarily unavailable to the judicial process and the subject matter is too sensitive and fundamental for the uninstructed in the special field to handle with confidence. The Constitution, in its essay in building up a just society, interdicting concentration of economic power to the detriment of the community, has mandated the State to direct its policy towards securing that end. Monopolistic hold on the nation's economy takes many forms and to checkmate these manouvres, the administration has to be astute enough. Pursuant to this policy and need for flexible action, the Act was enacted. A variety of considerations (set out in s. 28) amenable to subtle administrative perception and expert handling but falling beyond the formalised processes unaided by research and study that the Court is prone to adopt, may have to be examined before reaching a right decision to allow or disallow seemingly innocuous but really or potentially anti-social moves of dominant undertakings. It is well-known that backdoor techniques, and corporate conspiracies in the economic sense but with innocent legal veneer, have been used by oligopolistic organisations and mere juridical verbalism cannot give the Court the clue unless there is insightful understanding of the subject which, in specialised fields like industrial economics, is beyond the normal ken or investigation of the Court or the area of traditional jurisprudence. I must however emphasize that Court supervision and correction, within well-recognised limits, is not an expendable item since the rule of law is our way of constitutional life. In our jural order, 'the ethos of adjudication' on independent court scrutiny is too quintessential to be jettisoned without peril to those founding values of liberty, equality and justice, even though Judges considering complex and technical legislations, may often leave the Executive and other specialised bodies as the 'untouchable' Controllerate. There is power for the Court to interfere, but it will be exercised only when strong circumstances exist, or other basic guidelines for control come into play.

Even so, this function, so vital to cry a halt when executive powers exceed their bounds or are obliquely, oppressively or illegally used, has meaningful dimensions and creative directions when disputes dealing with intricate economic legislation fall for consideration. The absence of research or assessor assistance with special skill, knowledge and experience in fields unfamiliar for jurists is a handicap which demands attention for the sake of competent justice being administered by superior Courts. After all, law must grow with life, if it is to do justice to Development, especially in developing countries.

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Here we come upon one of the basic deficiencies of our law studies which do not yet take within their sweep, apart from jurisprudence, economics, politics and sociology. These are distinct enough at the core but shade off into each other. As Roscoe Pound observed : "All the social sciences must be co-workers, and emphatically all must be co-workers with jurisprudence". Georges Gurvitch supplemented the statement by observing : "A little law leads away from sociology but much law leads back to it". The desiderata are neither novel nor detractory but a recognition of the new status of Law *vis a vis* Development in the context of the Court's high function of keeping the Executive and allied instrumentalities wisely within the leading strings and formidable grip of the law. Anthony Dickey, in a University of London Public Lecture in Laws, advocates the need for making judicial review of administrative action more of a reality than it is as present and adverts to the court having to possess 'adequate background training' and 'first class research assistance'. In another article,(1) the same author explains the permissibility in English Courts of the practice of seeking assessor-assistance where specialist knowledge and expert advice are called for in complex case situations.

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These observations are made by me to clear the ground for approaching an *'economic' lis* of a complex nature in a socio-legal way and not in the traditional litigative style. So viewed, what does an 'undertaking' mean in s. 23(4) of the Act? Surely, 'definitions in the Act are a sort of statutory dictionary to be departed from when the context strongly suggests it. The central problem on which Shri Gupte, appearing for the appellant, staked his whole case largely is as to whether an undertaking covers only a going concern, a running industry and not one in the offing or process of unfolding.

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The decisions of the High Courts cited before us do not convince me. On the other hand, the reasoning based on the present tense is faulty as already elaborated. If this Court accepts the legalistic connotation of 'undertaking' a disingenuous crop of new companies with ulterior designs may well be floated taking the cue—a consequence which this Court should thwart because thereby the law will be condemned to a pathetic futility. But in the view I take, may be s. 22—though not s. 23(4)—is possibly attracted.

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I have already indicated my view on this issue. In the instant case, the move is to de-link the sugar unit and re-incarnate it as the Shahjahanpur Sugar (P) Ltd. We have two provisions which come up for consideration in this expansionist and acquisitive situation. Section 22 reads :

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"22(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 inter-connected undertaking of an undertaking to which clause (a) of section 20 applies, except under, and in accordance with, the previous permission of the Central Government.

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(1) P. 497 Modern Law Review. Vol. 33, September 1970.

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(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 and shall set out in such application information with regard to the inter-connection, if

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any, of the new undertaking (which is intended to be established) with every other undertaking, the scheme of finance for the establishment of the new undertaking and such other information as may be prescribed. (emphasis, mine)

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Section 23 (4) runs :

"If an undertaking to which this Part applies proposes to *acquire by purchase, take-over or otherwise the whole or part of an undertaking* which will or may result either—

(a) in the creation of an undertaking to which this Part would apply; or

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(b) in the undertaking becoming an inter-connected undertaking of an undertaking to which this Part applies,

it shall, before giving any effect to its proposals, make an application in writing to the Central Government in the prescribed form of its intention to make such acquisition, stating

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therein information regarding its interconnection with other undertakings, the scheme of finance with regard to the proposed acquisition and other information as may be prescribed." (emphasis, mine)

The sections when placed in juxtaposition, suggest that the appellant's operation is to *establish* a new undertaking (out of its old sugar

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unit, though) which, in view of the share-holding, will inevitably become an inter-connected undertaking of Carew & Co. (the original undertaking, i.e., the appellant). Not so much to *acquire* an existing undertaking as to *establish*, by a concealed expansionist objective, a new undertaking with sugar manufacture is the core of the operation. Therefore, it is not s. 23(4) that magnetizes the appellant's proposal but, *prima facie*, Sec. 22. The special provision must exclude the gene-

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ral and, in this view, the acquisition of an *existing* undertaking stands repelled. The scheme of the Act deals both with *establishing* a *new undertaking* and acquiring (by contrast) an existing undertaking. So I agree with my learned brother Mathew J. that the order under s. 23 (4) is beyond its pale but add that this looks like a case for the application of s. 22. If the appellant intends to go ahead with the new adventure, he is trying to establish, he may, *prima facie* have to apply

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for and get the previous permission of the Central Government under s. 22. I am not pursuing this aspect of the application of Sec. 22 as that will be decided, if found necessary, after fuller investigation from the angle of that provision.

The problem of interpretation of statutes raised in this case is far too important for me to ignore the manner in which jurists have been viewing the question in Anglo-Saxon jurisprudence. I therefore extract relevant excerpts from Harry Bloom who wrote on this topic in the Modern Law Review, p. 197, Vol. 33, March 1970 :

> "The Law Commission (of England) and the Scottish Law Commission have dealt with one aspect of this problem, but on the whole they have prudently steered clear of wider issues. Their White Paper is a trenchant essay on the shortcomings of the present techniques & rules of interpretation, and a mild rebuke of judges who are still too faithful to the Literal Rule. Its main burden, however is to make the case for the use of extraneous documentary aids to interpretation, and it does so, I should think, in a way that puts the answer to this long-debated question beyond doubt. Among the recommendations (summed up in draft clauses at the end of the Report) are that courts when interpreting statutes, should be allowed to consider the following :
>
> (a) all indications provided by the Act as printed by authority including punctuation and side-notes, and the short title of the Act;
>
> (b) any relevant report of a Royal Commission, Committee or other body which has been presented or made to or laid before Parliament or either House before the time when the Act was passed;
>
> (c) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time;
>
> (d) any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time;
>
> (e) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purpose of this section."
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> x x x x
>
> "In time, however, somebody will have to tackle the basic question—how long can we sustain the fiction that when the legislature prescribes for a problem, the court, when confronted with a difficult statute, merely uses the techniques of construction to wring an innate meaning out of the words?
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> One cannot, these days, approach the problem of statutory interpretation in isolation from the legislative process. And I do not think the proposal to allow the court to consult parliamentary documents meets this objection. As long as the fiction persist that the courts merely 'interpret' statutes, Parliament will continue to put out legislation of ever increasing

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> detail and complexity in the belief that it must provide a complete set of answers. This is a self-defeating ambition. Where does one look for the intention of the legislature in today's monster Acts, with their flotillas of statutory instruments and schedules, the plethora of boards, tribunals and committees, with delegated powers, which they set up, the myriad of subjects they deal with, their confusing cross-references to other statutes, and their often opaque and tortured language that defies translation into intelligible ideas?"

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> "What exactly are the respective roles of Parliament and the courts as regards legislation? Since it is a fiction that the courts merely seek out the legislative intent, there must be a margin in which they would or 'creatively' interpret legislation. The courts are 'finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing,' said Donaldson J. in *Corocraft Ltd.* v. *Pan American Airways, Inc.*, (1968 3 W.L.R. 714, 732) and indeed it is no secret that courts constantly give their own shape to enactments."

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> "How do the present rules help, when a statute passed *ad-hoc,* to deal with a situation clearly envisaged by the legislature, is then applied to a whole new state of affairs that were never originally contemplated?"

To conclude on the point with which I began, 'undertaking' is an expression of flexible sementics and variable connotation, used in this very statute in different senses and defined in legal dictionaries widely enough. In sum, what the appellant proposed to the Central Government was to establish a new undertaking, if we throw aside legal camouflages built around a verb and pierce the corporate veil. Therefore, while jurisdiction in the respondent to apply s. 23(4) of the Act is absent, the appellant may caught within the spider's web of s. 22—I do not express myself finally. The appeal must now succeed, but the legal drama may still have its fifth Act for the appellant—I cannot be futuristic as the full facts will first be examined by Government for that purpose in case he chooses to apply.

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For these reasons I allow the appeal but, in the circumstances, make no order as to costs.

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FAZAL ALI, J.—I agree with my brother Mathew, J., that s. 23 of the Monopolies and Restrictive Trade Practices Act, 1969—hereafter to be referred to as 'the Act'—has absolutely no application to the facts and circumstances of the present case. In this view of the matter the impugned order of the Central Government must, therefore, be quashed. Section 23 of the Act would apply only if the undertaking sought to be acquired is in actual and physical existence and has gone into actual production. The scheme which is the subject-matter of this case is merely a proposal and unless the undertaking is in existence and doing business it will not fall within the meaning of s. 2(v) of the Act which defines an "undertaking".

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I, however, entirely agree with my brother Krishna Iyer, J., that on the facts disclosed in the appeal the Scheme propounded by the appellant may *prima facie* fall within the four corners of s. 22 of the Act. The resolution passed by the appellant for setting up a new Company may be extracted thus :

> "RESOLVED that the Board of Directors be and is hereby authorised to form a separate Company to be called "SHAHJAHANPUR SUGAR (PRIVATE) LIMITED", as a wholly-owned subsidiary of this Company, to ultimately take over and operate the Sugar Factory undertaking of this Company at Rosa (Uttar Pradesh) as a going concern.
>
> FURTHER RESOLVED that the transfer of the assets of the Sugar Factory undertaking to the newly formed subsidiary, viz. "SHAHJAHANPUR SUGAR (PRIVATE) LIMITED", be made on the basis of the valuation of the respective assets made by Messrs. LEES & DHAWAN, Chartered Surveyors on May 29, 1970."

This resolution unmistakably reveals the following essential features :

(1) that the appellant intended to establish a new Company and this proposal was approved by virtue of the resolution quoted above;

(2) that the new Company was to be floated by transferring 100 per cent shares from the Sugar Unit of the Company so that the appellant could retain effective control over the new Company;

(3) that the new Company after being established was to be known as "SHAHJAHANPUR SUGAR (PRIVATE) LIMITED"; and

(4) that after the establishment of the new Company the appellant would become the owner of the new Company as well as Carew Company Ltd. and thus the proposed new Company would be an inter-connected undertaking of the appellant.

These facts, therefore, may attract the essential ingredients of s. 22 of the Act and, if so, the appellant cannot be allowed to float a new Company without complying with the statutory requirements of s. 22 of the Act in which case fuller facts may have to be investigated for that purpose.

The object of the Act in my opinion appears to be to prevent concentration of wealth in the hands of a few and to curb monopolistic tendencies or expansionist industrial endeavours. This objective is sought to be achieved by placing three-tier curb on industrial activities to which the Act applies, namely :—

(1) By providing that if it is proposed to substantially expand the activities of a Company by issue of fresh capi-

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tal or by installation of new machinery, then notice to the Central Government and its approval must be taken under s. 21 of the Act.

(2) In the case of establishment of a new Company by insisting on the previous permission of the Central Government under s. 22 of the Act.

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(3) In the case of acquisition of an existing Company by another Company by requiring the sanction of the Central Government to be taken by such Company under s. 23 of the Act.

The present case, in my opinion, may fall within the second category mentioned above.

V.M.K. *Appeal allowed.*