

# **BOMBAY HIGH COURT**

Union of India

Vs.

Tata Engineering and Locomotive Co. Ltd

Appeals Nos.33 and 34 of 1971 (Company Petns. Nos.159 and 161 of 1970)

(Mody and S.K. Desai, JJ.)

22.03.1971

## **JUDGMENT**

**Mody, J.**

1. These are two appeals by the Union of India and the Regional Director. Company Law Board, Western Region. Bombay, against a common Judgment but two separate orders passed in Company Petitions Nos.159 of 1970 and 161 of 1970, the first filed by Tata Engineering and Locomotive Company Ltd., hereinafter referred to as "Telco". and the second by the Central Bank of India Ltd., hereinafter referred to as "the old Central Bank", whereby Mr. Justice Nain as the Companies Judge sanctioned under Sections 391 and 394 of the Companies Act, 1956, an arrangement in the nature of a scheme of amalgamation between the two companies, negating the contentions of the appellants that the Court should not sanction the scheme without prior approval of the Central Government as required under Section 23(1) of the Monopolies and Restricted Trade Practices Act, 1969, hereinafter referred to as "the Monopolies Act". We also propose to dispose of these two appeals by a common Judgment as both the matters have been heard together and involve common facts and identical points for consideration.

2. On 1st September 1945 Telco was incorporated as a company under the Indian Companies Act, 1913. Its authorized capital is Rs. 24 crores. Its subscribed capital aggregates to Rupees 18,44,81,325/- composed of Ordinary, Cumulative Preference and Cumulative Redeemable "A" Preference Shares, all fully paid-up. Its main objects are to carry on the business of manufacturing, selling and dealing in locomotives, motor vehicles, trucks, lorries, omnibuses, machinery, tools etc. One of the objects mentioned in the Memorandum contains ancillary objects, one of which is to amalgamate with any Company or companies. Telco has, in fact, been carrying on the business of manufacturing and selling diesel commercial vehicles, excavators, power shovels, industrial shunters, machine tools, industrial tractors, etc. There is no dispute that its gross assets at the material time well exceeded Rs. 120,00,00,000/- and its net assets exceed

Rs. 97,00,00,000/-.

3. On 21st December 1911 the old Central Bank was incorporated under the Indian Companies Act, 1913. Thereafter it carried on banking business. Its business was nationalized by the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1970, succeeded by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, hereinafter referred to as "Act V of 1970". after an attempt to do so by a prior Ordinance and a prior Act which latter two were struck down by the Supreme Court Under the provisions of Act V of 1970, a new corporation called "Central Bank of India", hereinafter referred to as "the New Central Bank", was constituted and all the rights and properties, as also the obligations and liabilities, of the old Central Bank got transferred to the new Central Bank. Upon such transfer as held by the Supreme Court in *R.C. Cooper v. Union of India*<sup>1</sup>. the totality of the assets and liabilities of the old Central Bank vested in the new Central Bank and the only right which the old Central Bank acquired was the right to receive compensation in the sum of Rs. 17.5 crores. Under sub-section (2) of Section 6 of Act V of 1970, the Old Central Bank had an option to receive that amount of compensation in cash or in four and a half per cent per annum promissory notes repayable after ten years or five and a half per cent per annum promissory notes repayable after thirty years in the manner as mentioned in that sub-section. After such acquisition of its business, the Old Central Bank has ceased to carry on banking business.

4. It may be stated that the business of the Old Central Bank got transferred to and vested in the new Central Bank as from 19th July 1969, being the date of the said first Ordinance. It was on 10th February 1970 that the Supreme Court by its said Judgment struck down the earlier ordinance and the earlier Bank Nationalization Act. Under the earlier Ordinance and the earlier Bank Nationalization Act the amount of compensation payable to nationalized Banks was not determined as a fixed amount by the Act itself and entailed calculations to be made for that purpose. As the validity of the first Ordinance and the first Bank Nationalization Act were challenged before the Supreme Court the old Central Bank did not make any move for getting that compensation payable to it ascertained. Then followed the second Ordinance and the Second Bank Nationalization Act No.V of 1970. The latter Act itself fixed the amount of compensation payable to the various nationalized banks.

5. The second Bank Nationalization Act came into force on 31st March 1970. The Board of Directors of the old Central Bank considered how the option to receive compensation payable under Act V of 1970 should be exercised. The old Central Bank exercised its option to take its compensation in the form of Rs. 50,000/- in cash and the balance in the form of five and a half per cent per annum promissory notes of the face value of Rs. 17,49,50,000/-. On an inquiry from Mr. Bhabha, the learned Counsel for the Appellants. Mr. Nariman, the learned Counsel for the Respondents, stated that the old Central Bank actually received the said five and a half per cent per annum promissory notes on 8th May 1970.

6. Thereafter, as appearing from the Report of the Board of Directors of the old Central Bank for the year 1969, the Board applied its mind to the future of that company. Various views in that regard had been discussed at some length at the extraordinary general meeting of the old Central Bank held on 13th January 1970. It was thereafter that the Supreme Court gave its said Judgment. Thereafter, after doing some re-thinking, the Board of Directors reached the conclusion that there were three alternatives before the company, the first being a winding-up of the company, the second being the carrying on

<sup>1</sup> AIR 1970 SC 564

of fresh business as an investment Company or some other activity after obtaining powers by amendment of the company's constitution, and the third being an amalgamation with some other suitable undertaking. The Board then came to the conclusion that amalgamation of the old Central Bank with another company, preferably a large scale industrial undertaking, would be in the best interests of the company and its shareholders because, firstly, it was likely to avoid several implications in regard to the settlement of tax claims of the Company and the shareholders and would enable the carrying on of business pending such settlement; secondly, it would ensure a fair and steady return to the shareholders on their capital along with prospects of reasonable growth; and, thirdly if, as was the intention, the amalgamation was with a company whose shares commanded a ready market, the shareholders of the old Central Bank would be able, if they so chose, to liquidate their holding wholly or partially. The Board had thereafter carried on negotiations with the Directors of Telco and evolved a concrete scheme of amalgamation with Telco. As a matter of fact, on 29th July 1970, the Board of Directors of each of the two companies passed a resolution approving the scheme of amalgamation.

7. As a preliminary step to effectuate the said amalgamation, the old Central Bank filed in this Court the Company Application No.46 of 1970 on 8th September 1970 and Telco filed the Company Application No.49 of 1970 on 9th September 1970. On 11th September 1970 orders were passed by the Companies Judge on both the said applications calling meetings of the Old Central Bank on 26th October 1970 and of Telco on 27th October 1970. The old Central Bank thereafter issued notices dated 29th September 1970 that such meetings would be held on 29th October 1970. Along with that notice an Explanatory Statement was sent to all its share-holders. In paragraph 5 of the Explanatory Statement it is stated that the Board of Directors had come to the conclusion that it would not be in the best interests of the Company or its share-holders to undertake any other business within the frame work of the Company's Memorandum as, for example, the business of the finance and investment company, because, apart from the difficulties involved in setting up such a unit which would operate in a competitive field, such a business did not appear to ensure prospects of a steady and reasonable return to the share-holders on a par with the return till then yielded on the Company's shares, nor did it inspire any hopes of adequate capital appreciation. It further refers to the proposed amalgamation and the comparative advantage to the Company and its share-holders if the amalgamation became operative.

8. On the same day, i.e., 29th September 1970, the old Central Bank also sent to its share-holders

another notice convening an extraordinary general meeting of the share-holders on 26th October 1970 for the purpose of considering and passing of the two resolutions, the first being for amendment of its Memorandum and the second being to authorize its Board of Directors, in pursuance of Section 293(1)(c) of the Companies Act, 1956, to invest the whole or any part of the amount of compensation of Rs. 17,50,00,000/-, including the sale proceeds of the said five and a half per cent per annum promissory notes, in such securities, investments and fixed and call deposits, including trustee securities, as the Board of Directors may from time to time think fit. An Explanatory Statement was enclosed with that notice. The Explanatory Statement specifically states that the amendments were being proposed in order to enable the old Central Bank to amalgamate with Telco and that the said Second Resolution, which was a special Resolution, was proposed so as to enable the scheme of amalgamation between the two Companies to fructify and if the said second Resolution was passed and implemented it would yield a better return to the Company, particularly in the event the process of amalgamation of the Company with Telco took some time. The extraordinary general meeting of the old Central Bank was held on 26th October 1970. On 26th October 1970 the extraordinary general meeting of the old Central Bank passed both the Resolutions of which the said Notice had been given, approving the amendments in the Memorandum and investing powers in the Board of Directors about the investment as proposed. Thereafter, on the same day, the statutory meeting was held of the share-holders of the old Central Bank in pursuance of the said Order dt.11th September 1970 and the scheme of amalgamation was approved at the said meeting.

9. On 27th October 1970, the statutory meeting of the share-holders of Telco was held pursuant to the said Order dated 11th September 1970 at which meeting the said scheme of amalgamation was approved.

10. The Scheme provides that Telco will issue and allot one Ordinary Share and three 9 per cent cumulative Redeemable "A" Preference Shares out of its authorized but unissued capital as also fifteen 7. 3/4 per cent Convertible Debentures to the members of the old Central Bank against every twenty-five shares in its capital held by them.

11. On an inquiry from Mr. Bhabha, Mr. Nariman, has stated that all the said five and a half per cent per annum promissory notes received as compensation, barring those of the face value of Rs. 1,68,20,000/-, were sold after 26th October 1970. Mr. Bhabha stated that he would accept this statement as true.

12. At the hearing of these appeals before us, by consent of parties, a statement of the deposits made by the old Central Bank has been put in as Ex. No.1. The statement shows particulars of the various amounts of deposits made by the old Central Bank as fixed deposits with diverse banks which aggregate to Rs. 4,96,50,000/- and that with Telco which aggregate to Rs. 11,20,00,000.

13. Telco and the old Central Bank filed the present two Company Petitions on 17th November 1970 and 25th November 1970 respectively. On 8th February 1971 an order was made by the Companies Judge sanctioning the alterations in the Memorandum of the old Central Bank.

14. The Judgment and Orders which are the subject-matter of these appeals were thereafter passed on 17th February 1971.

15. The main dispute between the parties turns on the provisions of Section 23, and particularly of sub-section (1), of the Monopolies Act. Section 23 occurs in Chapter III of the Act, the Chapter heading being "Concentration of Economic Power". There are 11 sections in this Chapter divided under Parts A, B and C. Sections 20 to 26 appear under Part A, Section 27 appears under Part B and Sections 28 to 30 appear under Part C.

16. Section 20 provides :-

"This Part shall apply to-

(a) an undertaking if the total value of

(i) its own assets, or

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

(b) a dominant undertaking-

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

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

X X X X"

Sub-section (1) of Section 23 provides:- .

"23(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,

(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 Section 20 would apply, shall be sanctioned by any Court or be recognized 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."

Section 2 contains definitions. Its opening words are "In this Act, unless the context otherwise requires,-" Clause (d) of Section 2 in so far as it is relevant provides:-

" 'dominant undertaking' means an undertaking which either by itself or along with inter-connected undertakings,-

(i) produces, supplies, distributes or otherwise controls not less than one third of the total goods of any description that are produced, supplied or distributed in India or any substantial part thereof, or

(ii) provides or otherwise controls not less than one third of any services that are rendered in India or any substantial part thereof.

X X X X"

Clause (g) of Section 2 provides:-

" 'inter-connected undertakings' means two or more undertakings which are interconnected with each other in any of the following manner, namely :-

(i) if one owns or controls the other,

(ii) where the undertakings are owned by firms, if such firms have one or more common partners.

(iii) where the undertakings are owned by bodies corporate,-

(a) if one manages the other, or

(b) if one is a subsidiary of the other, or

(c) if they are under the same management within the meaning of Section 370 of the Companies Act, 1956, or

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

(iv) where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm.-

(a) hold, directly or indirectly, not less than fifty per cent, of the shares, whether preference or equity, of the body corporate, or

(b) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate,

(v) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management within the meaning of the said Section 370,

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

(vii) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses."

Clause (r) of Section 2 provides:-

" 'service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, insurance, transport, supply of electrical or other energy, board or lodging or both, entertainment, amusement

or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service."

Clause (v) of Section 2 provides :-

" '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."

17. There is no dispute that Telco, is an undertaking engaged in the production, supply and distribution of goods, that it is an undertaking within the meaning of clause (v) of Section 2, that the total value of its own assets is very much more than Rs. 20 crores and it is therefore an undertaking to which the provisions of Part A of Chapter III of the Monopolies Act apply.

18. Mr. Bhabha contended that the old Central Bank is also an "undertaking" within the meaning thereof under clause (v) of Section 2 of the Monopolies Act. In support of his contention he relied upon several facts. He stated that it is true that after the business of the old Central Bank was nationalized, its then existing banking business got transferred to and vested in the new Central Bank, but that even thereafter the old Central Bank could carry on even banking business by obtaining a license under Section 22 of the Banking Regulation Act, 1949. He then invited attention to the Memorandum of the old Central Bank as it existed before its amendment in 1970. He contended that under sub-clause (c) of Clause III it can carry on investment business, under sub-clause (d) it can carry on the business of underwriting and under sub-clause (c) it can carry on the business of guaranteeing. He further pointed out that the provision at the very end of Clause III provides that in the interpretation of that clause the meaning of the Company's objects 'shall not be restricted by a reference to any other object or by the juxtaposition of two or more objects and that in the event of any ambiguity the clause shall be construed in such a way as to widen and not restrict the powers of the company. He contended that this provision requires each of the sub-clauses of Cl.III to be read independently. He contended that therefore although the banking business was acquired as aforesaid, a power survived in the old Central Bank, and it was open to it, to carry on the businesses mentioned, for example, in the said sub-clauses (c), (d) and (q) of clause III of the unamended Memorandum itself. He then contended that as a matter of fact the old Central Bank did carry on business after 19th July 1969. He pointed out that the Balance-sheet of the old Central Bank of the year 1969 shows that its Directors were paid remuneration which indicates that Board meetings were being held and the Directors were acting on behalf of the Old Central Bank. The old Central Bank through its directors acted and exercised the option as aforesaid and obtained the compensation in the Cash sum of Rs. 50,000/- and in the five and a half per cent per annum promissory notes of the face value of Rs. 17,49,50,000/-. The old Central Bank through its Board also considered the three alternatives for carrying on business for earning profits. It also through its Board carried on negotiations with Telco for amalgamation. He contended that these acts show that the old Central Bank was carrying on business through its Board of Directors. He further relied on the fact that it sought alterations to its Memorandum

with a view to make its objects identical with those of Telco. According to him, the very fact of seeking and securing alteration in its Memorandum shows that it carried on an activity and that it had therefore not ceased to exist. He further commented that its Memorandum was already altered and its objects entitled it to carry on the business of production of certain goods and that if the amalgamation with Telco fell through, the old Central Bank would nonetheless remain entitled to carry on all the businesses which were included in the amendments to its Memorandum. He further pointed out that as shown in the said Director's Report for the year 1969 the old Central Bank has, after 18th July 1969, allotted 184 shares to the former shareholders of the Jodhpur Commercial Bank Ltd. and that it proposed to make a further allotment of shares to those of the former share-holders of that Bank who had not exercised the option to receive cash and who had accordingly become entitled to the shares of the old Central Bank of equivalent value. He relied upon the facts that the old Central Bank had also sold most of its said five and a half per cent per annum promissory notes, made deposits out of the sale proceeds thereof and thereby earned profits in the nature of interest earned thereon. Mr. Bhabha concluded that these facts show that the substratum of the old Central Bank had not gone and that under its Memorandum it had power to carry on business and particularly the business of investment, underwriting and guaranteeing under even its original unamended Memorandum and that such business would amount to making "provision of service" within the meaning thereof in clause (v) read with clause (r) of Section 2 of the Monopolies Act. He contended that because of these actual acts of the Old Central Bank it was, at all material times. i.e., at the date of the petition and the order thereon, "engaged in" the provision of service and was therefore an undertaking as defined in the said clause (v) of Section 2.

19. Now it is true that under the Memorandum, before its amendment, the old Central Bank had the power to carry on the business of investment, underwriting and guaranteeing. It is also true that after the amendment of its Memorandum it has power to carry on business of producing certain kinds of goods. Mr. Bhabha has contended that if the amalgamation does not fructify, the old Central Bank will still remain entitled to carry on the business of producing goods. On the other hand, Mr. Nariman contended that in spite of these amendments having been made, in view of the provisions of Section 17(1)(g) of the Companies Act, 1956, if the object of amalgamation falls through, the enlarged scope of its objects would not remain operative. In our opinion, it is unnecessary to decide whether the amendments made in its Memorandum would or would not survive the falling through of the proposed amalgamation. It should however, be noted that a Memorandum of a company registered under the Indian Companies Act, by itself, confers merely a power to carry on business, but whether such power is thereafter exercised for carrying on business is a question of fact and only if such facts exist then it can be said that the company, "is engaged in" carrying on business of producing goods or making provision for service. A memorandum is a pre-requisite to the registration of a company under the Companies Act. It is common knowledge that in the case of many companies they do not carry on any business after they are registered for a number of years and sometimes at no time during their entire existence. It is a still more common experience that numerous objects are provided for in the Memorandum

but most companies do not carry on all the businesses so provided for. If in the latter case the company carries on only one of such businesses, it cannot be said that the company is, by reason of a mere provision in that behalf in its Memorandum, engaged in carrying on the other businesses so provided for in its Memorandum. Legal capacity to carry on business must be clearly distinguished from the company being at any particular time actually 'engaged in' carrying on the business authorized by its Memorandum. It should be noted that Mr. Bhabha has not contended that the old Central Bank is "engaged in" producing goods. All that he has contended is that it "is engaged in" making provision of service because it has power in its Memorandum to do so and because of the aforesaid acts of the old Central Bank relied upon by Mr. Bhabha. Now the act of exercising its option and obtaining the five and a half per cent per annum promissory notes cannot be treated as a part of investment business. Act No. V of 1970 took away the old Central Bank's entire undertaking including banking and gave to it only compensation. Exercising an option for obtaining such compensation cannot form part of carrying on business. The act of selling the promissory notes and making deposits out of the sale proceeds thereof is also not carrying on business. Mr. Bhabha's contention that even under the unamended Memorandum the old Central Bank could carry on banking business after obtaining the requisite licence is an hypothetical argument, because it has not, as a matter of fact, applied for any such licence. An undertaking which carries on investment business may, of course, carry on the business of inviting deposits to be made with it and/or itself making deposits with outsiders and in such a case it would be carrying on the business of an investment company. But making deposits with banks and other institutions can be made by other persons who have spare money to invest. If a lawyer or a doctor or even a businessman makes deposits out of his savings, it cannot be said that by such investment he is carrying on a business of investment. It would be a question of intention in each case. For illustration, a person may buy shares of Joint Stock Companies and, depending on his intention, which is to be gathered from actual facts of his dealing with shares he buys, he may have done so either as and by way of pure investment or by way of operating in shares by way of business. The distinction in the concepts is clear, although in some cases it may be difficult to ascertain it from a given set of overt acts. In the case of the old Central Bank, on the compulsory acquisition of its business, it had no option left but to take compensation as provided under Act V of 1970. Compensation was payable in certain alternative ways. Exercising an option in selecting the five and a half per cent per annum promissory notes or, for the matter of that, any of the three alternatives provided by that statute, certainly does not disclose an intention to acquire them for doing business as an undertaking carrying on investment business. The old Central Bank subsequently sold the said five and a half per cent promissory notes and made deposits out of the sale proceeds thereof. The intention of so doing has been specifically and clearly stated in the Explanatory Statement which is an annexure to the said notice dated 29th September 1970 convening the extra-ordinary general meeting to be held on 26th October 1970. The Explanatory Statement clearly shows that a change of investment was made only because it was apprehended that the final fructification of the scheme of amalgamation might take some time and it was desired that a little higher return should be secured on the investment. It was by way of a mere change of investment and not by way of

doing business. Under the proposed scheme of amalgamation which has already been approved by both the Companies, the compensation or what was received by way of sale proceeds of the five and a half per cent per annum promissory notes as compensation was to be the property of Telco and the shareholders of the old Central Bank were to be entitled to receive shares of Telco in certain proportion in exchange of the original holding of shares in the old Central Bank. The scheme further provides for payment of dividend on shares so received in exchange from 1st October 1970 and it is but natural that it would be felt that the share-holders of the old Central Bank would participate in the profits of Telco by reason of the acquisition of shares of Telco in exchange who, in their turn, should try to secure the best return on the funds of the old Central Bank which were to go to Telco. The investment by way of deposits was not intended to be of any appreciable duration but only pending the finalisation of the scheme of amalgamation and that it was so is made clearer by the Statement Ex.No.1 which shows that all the deposits with Banks were for a comparatively short period of 91 days. The fact of selling the promissory notes and making such deposits does not, in our opinion, evince any intention on the part of the old Central Bank to carry on investment business.

20. Mr. Bhabha referred to the said Directors' Report of the old Central Bank for the year 1969 and pointed out that remuneration was paid to the Directors and that it must, therefore, be concluded that the Directors had held meetings and had held a meeting to decide for exercising the option in respect of the taking of compensation and also held meetings in respect of the negotiations with Telco and also in connection with the alteration of the Memorandum. Now, the old Central Bank is a company, it has a corporate existence and the process of making up its mind is by way of a discussion and the passing of a resolution at the meeting mostly of Directors and occasionally of the general body of share-holders. The work done at the Board meeting referred to by Mr. Bhabha is merely in the process of the making up of the company's mind and arriving at a decision. The process is similar to what goes on in the mind of a human being when he considers a problem and arrives at a decision. The mere fact of holding of these meetings of the Board of Directors does not, by itself, amount to carrying on business. What happened at the Board meetings would merely disclose the intention of the company. But in the present case no intention is disclosed to carry on any activity of the nature of a business.

21. Mr. Bhabha also pointed out from the said Directors' Report of the Old Central Bank for the year 1969 that the Directors had also allotted 184 shares after 18th July 1969. The Statement in the Report, however, clearly shows that these shares were allotted in pursuance of an obligation which existed prior to the nationalization of its banking business. Allotment of its own shares by a company is not a business. It is only an incidental function of its corporate existence.

22. It is, therefore, clear that old Central Bank was not at any time from the date of the nationalization of its banking business till the date of the orders under appeal engaged in the provision of service of any kind. A company continuing to exist with power in its Memorandum

to do a business is totally different' from a company engaging in that business. The facts earlier stated clearly show that the amalgamation was in alternative to the old Central Bank carrying on, by itself, some business. To amalgamate was an alternative to itself carrying on business and the decision which chose the alternative of amalgamation clearly negatives that it itself wanted to carry on any business. The facts further show that till the date of the orders under appeal the old Central Bank intended and as a matter of fact, made all necessary preparations and even an application to the court for the proposed amalgamation with Telco which discloses a definite intention that on amalgamation materializing it intended to carry on no business, but would, as a matter of fact, even cease to exist as a separate company. Because of the intention of amalgamation the old Central Bank did not consider, much less decide, what it should do if the amalgamation did not for any reason materialize. It was, therefore, not engaged in the provision of service of any kind at any time after bank nationalization till the date of the petition or the Order thereon. It must, therefore, be held that the old Central Bank was not engaged in production, supply, distribution or control of goods of any description or provision of service of any kind at any material time and that it therefore did not fall within the definition of "undertaking" in clause (v) of Section 2 of the Monopolies Act.

23. Mr. Palkhiwala and Mr. Nariman had argued that in order that an undertaking should fall within clause (v) of Section 2 of the Monopolies Act the undertaking must, firstly, have capacity, i.e., legal competence, to produce goods or render services as mentioned in that clause, as also, secondly, that the under taking must be actually engaged in such production of goods or making provision of service. They further contended that the undertaking must have actually engaged in such activity prior to the material time. i.e., the date of the application under Sections 391 and 394 of the Companies Act, 1956, and the order thereon and that although it may not have done so immediately prior to the material time and may not be doing so and may be in hibernation as it were at the material time, it may yet fall within the definition of the said clause (v) if it continued to have a capacity and an intention to do so at a convenient time after the material date. If an undertaking was, as a matter of fact, engaged in production of goods or provision of service but because of some reason like strike, lock-out or non-availability of raw materials, it was not actually so engaged at the material time but it intended to resume such activity in future upon the reason for the cessation of its activity disappearing, it can still be said to fall within the phrase "is engaged in" occurring in the said clause (v) of Section 2 of the Monopolies Act. In short, a legal capacity to carry on the activity and an intention to carry it on, on the cessation of the period of inactivity must co-exist. Mr. Bhahha, however, on the other hand, argued that if the capacity, i.e., legal competence, exists, it is sufficient to attract the definition of the said Clause (v) irrespective of the fact whether the undertaking is or is not carrying on that activity at the material time. We are of the opinion, however, that the existence of mere legal capacity is not sufficient. Such a test would apply only to a company which is a juridical person and its legal capacity to carry on activity is circumscribed by its Memorandum, but an individual or a firm or a Hindu joint family has the capacity. If it has the money, to carry on any business permissible in law. Mere legal capacity by itself cannot be relied upon to be a test whether one "is engaged in"

the activity as mentioned in the said clause (v). In view of this conclusion which we have reached, it is unnecessary to refer to authorities cited in connection with construing the phrase "is engaged in" and the effect of the use of the present tense in that phrase. We have held that the investment in fact made by the old Central Bank was not by way of a business activity and that the negotiations and the decision for amalgamation and the steps taken to implement that decision do not amount to being engaged in any activity mentioned in the said clause (v) and it is, therefore, unnecessary to decide whether any activity which was open to the old Central Bank to carry on under its Memorandum would amount to service as defined under clause (r) of Section 2. We are of the opinion that a mere capacity or a mere intention to carry on such activity in future without its being so done in the present, i.e., at the material date, nor some time in the past, i. e., before the material date, cannot at all give rise to a consideration whether an undertaking is engaged in any activity as contemplated under the said clause (v). We are not called upon to decide in this case, and we do not decide, in what circumstances activity of the nature mentioned in the said clause (v) would fall within the phrase "is engaged in" if the activity had ceased for some time before the material date.

24. The next point turns on the construction of sub-section (1) of Section 23. In clause (a) of Section 23(1) occur the words "an undertaking to which this Part applies". It is Section 20 which lays down to which undertakings Part A of Chapter III applies. The word "undertaking" occurs in the said clause (a) of Section 23 first in the said phrase quoted above and thereafter in the phrase "any other undertaking". At an activity in future upon the reason for the cessation of its activity disappearing, it can still be said to fall within the phrase "is engaged in" occurring in the said clause (v) of Section 2 of the Monopolies Act. In short, a legal capacity to carry on the activity and an intention to carry it on, on the cessation of the period of inactivity must co-exist. Mr. Bhahha, however, on the other hand, argued that if the capacity, i.e., legal competence, exists, it is sufficient to attract the definition of the said Clause (v) irrespective of the fact whether the undertaking is or is not carrying on that activity at the material time. We are of the opinion, however, that the existence of mere legal capacity is not sufficient. Such a test would apply only to a company which is a juridical person and its legal capacity to carry on activity is circumscribed by its Memorandum, but an individual or a firm or a Hindu joint family has the capacity. If it has the money, to carry on any business permissible in law. Mere legal capacity by itself cannot be relied upon to be a test whether one "is engaged in" the activity as mentioned in the said clause (v). In view of this conclusion which we have reached, it is unnecessary to refer to authorities cited in connection with construing the phrase "is engaged in" and the effect of the use of the present tense in that phrase. We have held that the investment in fact made by the old Central Bank was not by way of a business activity and that the negotiations and the decision for amalgamation and the steps taken to implement that decision do not amount to being engaged in any activity mentioned in the said clause (v) and it is, therefore, unnecessary to decide whether any activity which was open to the old Central Bank to carry on under its Memorandum would amount to service as defined under clause (r) of Section 2. We are of the opinion that a mere capacity or a mere intention to carry on such activity in future without its being so done in the

present, i.e., at the material date, nor some time in the past, i. e., before the material date, cannot at all aise (v). In view of this conclusion which we have reached, it is unnecessary to refer to authorities cited in connection with construing the phrase "is engaged in" and the effect of the use of the present tense in that phrase. We have held that the investment in fact made by the old Central Bank was not by way of a business activity and that the negotiations and the decision for amalgamation and the steps taken to implement that decision do not amount to being engaged in any activity mentioned in the said clause (v) and it is, therefore, unnecessary to decide whether any activity which was open to the old Central Bank to carry on under its Memorandum would amount to service as defined under clause (r) of Section 2. We are of the opinion that a mere capacity or a mere intention to carry on such activity in future without its being so done in the present, i.e., at the material date, nor some time in the past, i. e., before the material date, cannot at all give rise to a consideration whether an undertaking is engaged in any activity as contemplated under the said clause (v). We are not called upon to decide in this case, and we do not decide, in what circumstances activity of the nature mentioned in the said clause (v) would fall within the phrase "is engaged in" if the activity had ceased for some time before the material date.

24. The next point turns on the construction of sub-section (1) of Section 23. In clause (a) of Section 23(1) occur the words "an undertaking to which this Part applies". It is Section 20 which lays down to which undertakings Part A of Chapter III applies. The word "undertaking" occurs in the said clause (a) of Section 23 first in the said phrase quoted above and thereafter in the phrase "any other undertaking". At an earlier stage Mr. Bhabha contended that the word "undertaking" in the said first phrase has the meaning not as defined in Section 2(v) but has its common or dictionary meaning. At a later stage he specifically stated that he abandoned that contention and accepted that the word had the same meaning as defined in Section 2(v). There is no dispute between the parties that Telco is an undertaking to which Part A of Chapter III applies. Mr. Bhabha, however, contended that the word "undertaking" in the said second phrase "any other undertaking" would, if his earlier contention about the construction of the word "undertaking" under Section 2(v) was not accepted - and we have earlier in this Judgment not accepted it - have its ordinary, i.e., dictionary meaning, because of the context in which it occurs not only in the case of an inclusive definition but also in the case of an exhaustive definition like the one in Section 2(v). It would be possible in law to read a word, even if defined in the Stat contended that the word "undertaking" in the said first phrase has the meaning not as defined in Section 2(v) but has its common or dictionary meaning. At a later stage he specifically stated that he abandoned that contention and accepted that the word had the same meaning as defined in Section 2(v). There is no dispute between the parties that Telco is an undertaking to which Part A of Chapter III applies. Mr. Bhabha, however, contended that the word "undertaking" in the said second phrase "any other undertaking" would, if his earlier contention about the construction of the word "undertaking" under Section 2(v) was not accepted - and we have earlier in this Judgment not accepted it - have its ordinary, i.e., dictionary meaning, because of the context in which it occurs not only in the case of an inclusive definition but also in the case of an exhaustive

definition like the one in Section 2(v). It would be possible in law to read a word, even if defined in the Statute, in a modified sense if the context so requires. He supported this contention by citing authorities. But we do not refer to them, as for the purposes of this case, we accept the principle which he canvasses for. But nonetheless there must be something in the Act itself, and not de hors the Act, which would make the meaning of a word or phrase statutorily defined by that Act, which would be for the purposes of that Act, repugnant in the context in which it is used and furnishes a strong and compelling reason to discard it in favor of what would be its ordinary dictionary meaning.

25. Mr. Bhabha contended that the provisions of Section 23(1), like the other provisions in Sections 23(4), 21, 22 and 24, which all occur in Part A of Chapter III, have the same object and intention of controlling the undertakings defined in Section 20, which he, for the sake of emphasizing the concept, referred to as "giants". To ascertain that intention he referred to the preamble of the Monopolies Act and the heading of Chapter III. The preamble reads: "An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto." The first object viz., to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, is the object which is relevant in this case. The Chapter heading of Chapter III, is: "Concentration of economic power". Chapter III contains provisions relating to that object. Chapter IV contains provisions relating to the other objects mentioned in the preamble of controlling monopolistic trade practices and Chapters V and VI deal with the object of controlling certain restrictive trade practices. Mr. Bhabha contended that the object and intention of preventing concentration of economic power require that emphasis should be placed on, and the problem should be viewed in the light of, controlling an undertaking to which Part A applies and that it must be considered that the mention of "any other undertaking" is merely incidental, i.e., to achieve, that object. He contended that in order that, that object may be achieved, the word "undertaking" as occurring in the second phrase "any other undertaking" must be interpreted, not as defined in Section 2(v) which gives to it a restricted meaning in the way in which we have already construed it, but in its ordinary dictionary meaning, which is wider. He contended that it is to prevent concentration of economic power that clause (a) of Section 20 provides that the provisions of Part A shall apply if the value of the assets of an undertaking is not less than Rs. 20 crores and clause (b), which has to be read with clause (d) of Section 2, provides that such value must be not less than one crore of rupees and then enacts the limitation on such giants as contained mainly in Sections 21, 22, 23 and 24 but also the other provisions of Part A, the provisions of Parts B and C being merely in the nature of machinery sections.

26. Now in Section 20 occur the words "undertaking" and "its assets". "Its assets" must mean the assets of the undertaking. But does it mean the assets of the undertaking itself or does it mean the assets of the owner of the undertaking? An undertaking may be owned by a body corporate, i.e.,

a company, or by an individual or by a firm or even by some other owner like, for example, an association of individuals. If the company is the owner, the company may be conducting more than one undertaking, in which case can all the assets of the company be treated as the assets of every one of its undertakings? Or are the assets to be apportioned to each of the undertakings according to what assets are, at any particular time, actually used for it? and if the undertaking is owned by an individual, are all the assets of the individual to be deemed to be the assets of the undertaking if he owns but one undertaking? and similarly if the undertaking is owned by a firm, are the assets of all the individual partners to be deemed to be the assets of the undertaking? The definition of "undertaking" in clause (v) of Section 2 suggests that the word "undertaking" is meant to refer to that entity itself which is engaged in production of goods or provision of service. The Monopolies Act, however, does not appear to always distinguish between an "undertaking" and its "owner". As a matter of fact, many provisions of the Monopolies Act are extremely difficult to construe. The language used at a large number of places in the Monopolies Act clearly suggests a distinction between an "undertaking" and its "owner". Examples of it can be found in the following:-

Section 2(g)(ii), (iii)(a), (b) and (d), (iv), (v) and (vi); Section 3; Section 22 (1); Section 23(1).

Some other provisions of the Monopolies Act further suggest an undertaking to be itself, an owner, the undertaking being identified with its owner, be the owner one or more human beings or a juridical person like a company. Examples of the latter type are to be found in the following sections:- Section 20, sub-section (1), when it uses the phrase "its own assets". (Here does the phrase mean the assets in use of or appertaining - to the undertaking or all the assets of its owner?) Section 21(1) which contemplates "issue of fresh capital" by the undertaking and as this phrase is apt in connection with a company it appears to identify the undertaking with the company.

Section 48(2), Cls.(a), (b) and (c).

Clause (d) of Section 2 provides the test of not less than one-third of the total goods of any description that are produced in India. Here the reference to the total goods must, because of the qualifying phrase "of any description", mean the goods of a particular kind. If the same owner is producing two different kinds of goods, say, textiles in a factory at Bombay and sanitaryware in another factory at Madras and the latter falls under clause (d) of Section 2, "its assets" under clause (a) of Section 20 would require "its assets" to be interpreted to mean the assets of the undertaking which provides sanitaryware and not the assets of the owner. It would appear that the provisions of clause (b) of Section 20 also would require each of the different activities or businesses of the same owner to be considered separate undertakings.

27. In our opinion, in view of this confusion "undertaking" should not be identified with its owner unless the context in which it occurs requires it to be so construed. In clause (a) of Section 20 "its assets" must be construed in its natural or grammatical sense and the phrase must mean assets employed in the conduct of the activity of a particular undertaking.

28. The avowed object and intention of the Monopolies Act as disclosed in its preamble and the heading of Chapter III is to prevent concentration of economic power. The object is sought to be achieved by the Act mainly by the provisions contained in Sections 20, 21, 22, 23 and 24. Section 20 lays down the tests for determining what Mr. Bhabha referred to as "giant" undertakings. Section 22 prevents such giant undertakings to be brought in existence. Section 23, by clause (a) of its sub-section (1), seeks to exercise control by preventing merger or amalgamation of another undertaking with an existing giant. The object and intention of sub-section (1) of Section 23 under its clause (a) is to exercise control by preventing merger and amalgamation of an existing giant undertaking with another undertaking and under its Clause (b) to prevent a giant undertaking being formed, the object underlying sub-section (4) of Section 23 appears to be to control further acquisition by a giant undertaking so as to prevent it from becoming still larger, although its construction does not appear to be easy, because, if the undertaking is already an undertaking to which Part A applies, how can it again become an undertaking to which Part A applies as contemplated in its clause (a)? The object underlying the provisions of Section 21 is to control the expansion of such a giant undertaking by the issue of fresh capital or by the installation of new machinery or other equipment or in any other manner. The actual provisions of these sections all show that the object sought to be achieved is to prevent concentration of economic power. But the language used in these sections frequently varies. The obvious inference is that to the extent that the language varies, the extent to which the object is sought to be achieved and the method by which it is sought to be achieved was intended to correspondingly vary. We will proceed to examine the provisions of these sections from this point of view.

29. The phrase "issue of fresh capital" used in sub-section (1) of Section 21 is appropriate to a company. Therefore in the case of a company the provision in this sub-section would apply only when the company proposes to issue fresh capital, but it would not apply when the company obtains funds in any other way, by, for example, taking a loan. Therefore Section 21(1) does not contemplate any method, other than issue of fresh capital, to control such a giant undertaking acquiring funds and the intention of the Legislature does not appear to be to prevent the company from acquiring funds otherwise than by issue of fresh capital. The reason can be found in the other provision of sub-section (1) of Section 21 by which control is provided for being exercised when such a giant undertaking, be it a company or other than a company, proposes to expand its production of goods or provision of service with such further funds. The conclusion is that Section 21 does not prevent such a giant undertaking from acquiring funds as distinguished from acquiring new machinery or other equipment, which latter only is sought to be controlled by Section 21, and the object of the preamble and the Chapter heading of preventing concentration of economic power is not intended to prevent such a giant undertaking, even when it is a company, from acquiring funds otherwise than by issue of fresh capital. Moreover, "issue of fresh capital" would not be apt in the case of an undertaking which is not owned by a company and the Legislature has not at all controlled, so far as Section 21 is concerned, the acquisition by such an

undertaking of further funds and has introduced control only when, with the additional funds, it proposes to instal new machinery or other equipment. The point to be noted is that in sub-section (1) of Section 21 the method of exercising control appears to be, not by controlling, except by issue of fresh capital by a company, the acquisition of more funds which would be only a means to acquire new machinery or other equipments but by controlling the actual installation of new machinery or other equipments which would result in the expansion of its activities.

30. Sub-section (3) of Section 23 provides:-

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

The opening words "Nothing in sub-section (1) or sub-section (2) shall apply" show that sub-section (3) carves out an exception out of the general provision which is contained in sub-sections (1) and (2). From the very fact that an exception has been carved out, whatever be the ambit of that exception, shows that in trying to achieve the avowed object and intention of the Monopolies Act, the Act makes a distinction between an undertaking and an undertaking.

31. Now the undertakings to which Part A applies would, under Section 29, read with clause (d) of Section 2, divide themselves into four classes, the four classes being:-

- (1) An undertaking which by itself is engaged in producing goods;
- (2) An undertaking which along with inter-connected undertakings is engaged in producing goods;
- (3) An undertaking which by itself is engaged in provision of service, and
- (4) An undertaking which along with inter-connected undertakings is engaged in provision of service.

32. The exception in Section 23(3) applies to the scheme of merger or amalgamation "of such inter-connected undertakings as .....". Undertakings only of the second and fourth of the above four classes are inter-connected undertakings and those of the first and third are not and the exception does not apply to the latter two.

33. Thereafter in Section 23(3) there occurs the phrase "undertakings as are not dominant undertakings and as produce the same goods". This is an additional requirement to make an undertaking to fall within the exception in sub-section (3) of Section 23. It requires, that the undertaking must be an interconnected undertaking which is a dominant undertaking but must yet not be engaged in the activity of producing goods. It excludes the said second class.

34. Conversely stated, the exception would apply only to an undertaking which is an inter-connected undertaking which is a dominant undertaking engaged in the provision of service, that is, an undertaking of the said fourth class. The language of the sub-section appears to be a little

involved but its meaning is clear. Instead of providing affirmatively that the exception applies only to undertakings of the said fourth class, it uses negative language to exclude the said first three classes leaving, as a result, only the said fourth class to fall within the exception. The effect is that from the application of the general provisions contained in sub-sections (1) and (2) of Section 23, sub-sec (3) excludes inter-connected undertakings which are dominant undertakings engaged in the provision of service. This interpretation yields the conclusion that although the object and intention of the Legislature, generally speaking, is to prevent concentration of economic power, in making the actual provisions in the statute the method is not identical when dealing with different cases for certain purposes, even when it is identical for other purposes.

35. The above discussion shows that although the preamble and the heading of Chapter III shows the object and intention of the Legislature to be to control concentration of economic power, the Legislature has, while enacting the Monopolies Act, made distinctions between like entities in respect of the application of certain provisions of Chapter III itself at least in the two cases referred to above.

36. Mr. Bhabha wanted us to reject the meaning of "undertaking" as defined in Section 2(v) on the only ground that the object and intention of the Monopolies Act as gathered from the preamble and Chapter III heading is to control concentration of economic power. That object, however, must be gathered from the actual provisions contained in the Act itself and it would not be permissible to add to or subtract from such actual provisions. One would have been justified in accepting Mr. Bhabha's contention if the actual context so required it by reason of the meaning of "undertaking" as defined in Section 2(v) creating any repugnancy or inconsistency when it has been used in the phrase "any other undertaking" in Section 23(1). No repugnancy or inconsistency exists and Mr. Bhabha has not even pointed out any. He had, of course, pointed out that even a company in liquidation can, in view of the provisions of Section 394 of the Companies Act, be a party to a merger or amalgamation with an undertaking to which Part A applies, but the former in most cases would not be "engaged in" production of goods or provision of service and would be excluded from the operation of Section 23(1) although it may have machinery and equipment for doing so. We are not required to consider such a case. Now it may be that such a case may require it to be held in its case that the context otherwise requires such a company to be included in the phrase "any other undertaking" in Section 23(1). But there can be another view, which would possibly be a better view to take, that the merger or amalgamation of a company in liquidation is a rarity and the Legislature did not intend to control it.

37. Mr. Bhabha put a poser as to how would the meaning of "undertaking" as defined in Clause (v) of Section 2 apply in the case of a new undertaking for the purpose of consideration under Section 22 because the undertaking would not at that stage have been established and therefore it cannot be said in the case of such an undertaking that it "is engaged in" production of goods or provision of service. Now the obvious answer is that the context of Section 22 definitely requires that the word "undertaking" as used in Section 22 should not be construed and as a matter of fact

cannot be construed to have the same meaning as contained in the definition in clause (v) of Section 2. In Section 22 itself there is overwhelming material to justify holding that the context so otherwise requires, because the words used are not "any undertaking" but are "any new undertaking" in sub-sections (1) and (2) of Section 23 and moreover in Sub-Section (2) the adjectival phrase "which is intended to be established" has been used to qualify the phrase "new undertaking". The latter adjectival phrase would clearly show that the use of the phrase "which is intended to be established" would be totally inconsistent with the concept of an undertaking which, as required by Section 2(v), "is engaged in" production of goods or provision of service.

38. We, therefore, reject Mr. Bhabha's present contention under consideration and hold that in the phrase "any other undertaking" occurring in sub-section (1) of Section 23 the word "undertaking" is used in the meaning given to it in clause (v) of Section 2 and that the context does not require any departure being made from it. We further hold that the learned Judge was, therefore, right in according sanction to the scheme, although the merger or amalgamation formulated in the Scheme is not sanctioned by the Central Government under the Monopolies Act. The appeals, therefore, fail and are dismissed with costs.

39. Mr. Bharucha, the learned Counsel for the respondents in both the petitions, states that notwithstanding the order for costs in favor of the respondents the respondents will not enforce that order if the appellants inform the respondents in writing within eight weeks from today that the appellants have not filed and do not intend to file an appeal against this Judgment and Order to the Supreme Court.

40. It is necessary to record that although the Memorandum of Appeal in both the matters makes a grievance against the learned Judge not having ordered the appellants to be made parties to the petitions, before him, Mr. Palkhiwala stated that the respondents in both the matters waive their objection as to the maintainability of the appeals. In view of this statement of Mr. Palkhiwala we did not even consider it necessary to grant to the appellants their request to us for granting them leave to file these appeals which they applied for. Mr. Bhabha stated that he made this application because of the reason that they were not parties to the two petitions but only notices had been served upon them. Neither of the parties before us in either of the petitions has argued that point as they did not intend to take a decision on that point We have therefore not at all dealt with the point and make it clear that the parties have intended and we have accepted that the point should not be deemed to have been decided but is left open and should not serve as a precedent.

41. On Mr. Mukhi's application for stay, after some arguments are advanced, Mr. Bharucha states that the respondents in the two appeals will not take any steps to implement the order sanctioning the scheme of amalgamation on or before the 24th April 1971.

Appeals dismissed.