

2016 CompLR 1111 (CompAT)*

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COMPETITION APPELLATE TRIBUNAL, NEW DELHI

SCM Soilfert Limited, Pune and Anr.

v.

Competition Commission of India, New Delhi

b

APPEAL NO. 59/2015

DECIDED ON: 30.08.2016

Coram

G.S. Singhvi, J. (Chairman), Rajeev Kher and Anita Kapur (Members)

c

Counsel

For Appellant/Petitioner/Plaintiff: Gopal Jain, Sr. Adv., assisted by Chinmayee Chandra and Malvika Lal, Advs.

For Respondents/Defendant: P.S. Narasimha, Additional Solicitor General assisted by Samar Bansal, Vinayak Mehrotra and Amit Agarwal, Advs.

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Cases referred*A.R. Polymers Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.* Appeal No. 34-43/2013 and 08/2014 (Discussed) [p. 1124, para 11.2 a]*Chairman, SEBI v. Shriram Mutual Fund & Anr.* (Appeal (Civil) 9523-9524 of 2003 (Discussed) [p. 1124, para 11.6 i]

e

Hindustan Steel Ltd. v. State of Orissa MANU/SC/0418/1969: AIR 1970 SC 253: 1978 (2) ELT 159 (S.C.): (1972) 83 ITR 26 (SC): (1970) 25 STC 211 (SC): (1969) 2 SCC 627: (1970) 1 SCR 753 (Distinguished) [p. 1123, para 11.1 f]*Thomas Cook (India) Limited and Ors. v. CCI* Appeal No. 48/2014 (Discussed) [p. 1123, para 11.2 h]

f

Acts/Rules/Regulations**Competition Act, 2002****Section 2**

[p. 1117, para 5 b]

Section 2(v)

[p. 1115, para 3.4 f]

g

Section 5

[p. 1116, para 3.4 a]

Section 5(a)

[p. 1117, para 5 f]

Section 5(a)(i)

[p. 1118, para 6 h]

Section 5(a)(ii)

[p. 1118, para 6 h]

Section 5(b)

[p. 1117, para 5 f]

Section 5(c)

[p. 1117, para 5 e]

h

Section 6

[p. 1116, para 3.4 a]

Section 6(1)

[p. 1118, para 6 d]

Section 6(2)

[p. 1114, para 1 c]

Section 6(2A)

[p. 1116, para 3.4 a]

Section 6(2)(b)

[p. 1120, para 8.2 b]

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* MANU/TA/0044/2016

Section 15(D)(b)	[p. 1125, para 11.7 f]	
Section 15E	[p. 1125, para 11.7 f]	<i>a</i>
Section 18	[p. 1118, para 6 c]	
Section 27	[p. 1117, para 5 h]	
Section 28	[p. 1117, para 5 h]	
Section 31	[p. 1117, para 5 h]	
Section 31(1)	[p. 1115, para 3.2 a]	<i>b</i>
Section 32	[p. 1117, para 5 h]	
Section 33	[p. 1117, para 5 h]	
Section 36	[p. 1118, para 6 c]	
Section 39	[p. 1117, para 5 i]	
Section 42	[p. 1117, para 5 g]	
Section 42(2)	[p. 1124, para 11.5 h]	<i>c</i>
Section 42A	[p. 1117, para 5 h]	
Section 43A	[p. 1114, para 1 b]	
Companies Act, 1956	[p. 1114, para 2 c]	
Competition Commission of India (General) Regulations, 2009		
Regulation 48	[p. 1115, para 3.3 b]	<i>d</i>
Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011		
Regulation 4	[p. 1116, para 3.5 d]	
Regulation 5	[p. 1118, para 6 c]	
Regulation 5(8)	[p. 1120, para 8.5 h]	<i>e</i>
Orissa Sales Tax Act, 1947		
Section 25	[p. 1125, para 11.6 a]	
Securities Exchange Board of India Act, 1992	[p. 1125, para 11.6 a]	
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011		
Regulation 3(1)	[p. 1114, para 3.1 h]	<i>f</i>
Regulation 7(1)	[p. 1120, para 8.1 b]	

Issues and Findings

Acquisition – Failure of comply with provisions – Section 6 of Competition Act, 2002 – Whether there was a failure to comply with obligations mandated by Section 6(2) of Act, in regard to acquisition of 24.46 per cent of shareholding of MCFL by Appellant on 3rd July, 2013? *g*

Held, term “other document” as used in Section 6 of Act, and explained in Regulation 5(8) of Combination Regulations will cover any document executed to acquire shares. Even order placed with broker for purchasing shares is “other document”, which becomes a trigger for notice under Section 6(2) of Act. In so far as intention, at time of acquiring shares of MCFL is concerned, the contemporaneous press release is a good evidence to support the view, that objective was not solely to make an investment in a competitor company. A mere investment through stock market, where holders of shares of MCFL i.e., sellers are substituted by buyer, in this case SCM, cannot increase value for shareholders of MCFL, unless buyer planned to play a strategic role beyond a passive investment. Various specifics relating to acquisition, seen not in isolation, but through an economic and commercial perspective, namely, Appellants and MCFL *h* *i*

- a being competitor enterprises, timing of acquisition i.e. bulk/block deals following rival acquiring shares in MCFL, size of equity stake acquired, public announcement made through press release, likely low return on price paid for shares, conclusively establish that shares were not acquired "solely as an investment". Therefore, Appellants were not entitled to exemption by virtue of item 1 of Schedule to Combination Regulations. Thus, there was a failure to comply with obligations mandated by Section 6(2) of Act, in regard to acquisition of 24.46 per cent of shareholding of MCFL by Appellant on 3rd July, 2013.
- b

Failure of comply with provisions – Section 6 of Competition Act, 2002 – Whether Section 6(2) of Act, mandates *ex-ante* notification?

- c Held, use of words "proposes to enter into a combination" while referring to person and enterprise, on whom duty of giving a notice to Commission is imposed, supports premise of prior notification. Further, details to be disclosed in notice to Commission are of "proposed combination". Section 6(2A) of Act, also validates prior notification requirement by stipulating that no combination shall come into effect until 210 days have passed from date on which notice was given to Commission or passing of order under Section 31 of Act, by Commission, whichever is earlier. Legislative intent is to give the Commission an opportunity to assess whether a proposed combination is likely to cause an appreciable adverse effect on competition, which would be defeated if combination is notified to Commission after it has taken effect. Shares were admittedly acquired by Appellants and these shares carried voting rights. Creation of an escrow account and covenant by Appellants of their own volition to abstain from exercising voting rights, do not eliminate statutory requirement of prior notice. Therefore,
- d notification under Section 6(2) of Act, has to be *ex-ante*.
- e

Jurisdiction – Sections 6, 31 and 43A of Competition Act, 2002 – Whether imposition of penalty under Section 43A of Act, for failure to give notice to Commission under Section 6(2) of Act, is exigible when transactions admittedly "did not adversely effect" competition in India?

- f Held, Sections 31 and 43A of Act, operate in two different fields. Commission has power to approve a combination under Section 31 of Act, and such approval neither obliterates nor condones contravention, for which penalty is to be imposed under Section 43A of Act. Approval under Section 31 of Act, is not even listed as a mitigating circumstance under Regulation 48 of General Regulations which deals with procedure for imposition of penalty. Accordingly, penalty under Section 43A of Act, is leviable, even if, combination has no appreciable adverse effect on competition.
- g

Penalty – Sections 6 and 43A of Competition Act, 2002 – Whether imposition of penalty under Section 43A of Act, is justified when contravention of Section 6(2) of Act, is purely technical and there is no willful or deliberate breach?

- h Held, use of words "shall impose" in Section 43A of Act, has a significant bearing on interpreting this provision. Section 43A of Act, has no requirement of establishment of mens rea. Legislature has not used phrase "willful failure". Failure simpliciter has penal consequences. Further, Appellants cannot escape rigor of provision by attributing failure to a *bona fide* interpretation constituting a reasonable cause.
- i Imposition of penalty under Section 43A of Act, is on account of breach of a civil obligation, and proceedings are neither criminal nor quasi criminal. Once it is

established that there was a failure to notify proposed combination as required under Section 6(2) of Act, penalty has to follow. Commission has a discretion regarding quantum but cannot exculpate Appellants from their failure. Regulation 48 of General Regulations, stipulates that quantum has to be decided based on facts and circumstances of case. Commission has taken facts and circumstances of case in consideration while imposing penalty of INR two crores and there is no reason to interfere. Claim of Appellants that quantum exceeds maximum limit has not been corroborated. Appeal dismissed.

ORDER

1. This appeal is directed against the order dated 10th February, 2015 passed by the Competition Commission of India (for short "the Commission"), under Section 43A of the Competition Act, 2002 (for short "the Act"), imposing a penalty of INR 2,00,00,000 (INR Two Crores Only) on the Appellants for failure to give notice under Sub-section (2) of Section 6 of the Act.

2. Appellant No. 1, SCM Soilfert Limited (SCM) and Appellant No. 2, Deepak Fertilizers and Petrochemicals Corporation Ltd. (DFPCL) are companies registered under the Companies Act, 1956. DFPCL manufactures and trades in industrial chemicals and fertilizers and is a listed company and SCM, which trades in fertilizers, is its wholly owned subsidiary.

3. The admitted facts of the case are that on 3rd July, 2013, SCM purchased 2,89,91,150 shares of Mangalore Chemicals and Fertilizers Limited (MCFL), on Bombay Stock Exchange. MCFL is engaged in the manufacture of fertilizers and chemicals and is a listed company. The shares constituted 24.46 per cent of the paid up capital of MCFL. 19.9 per cent of these shares were acquired through block deals and the rest through bulk deals. DFPCL issued a press release dated 3rd July, 2013, which was filed with the Stock Exchanges, in compliance with the requirements of the Listing Agreement. In the Press release it was, *inter alia*, stated that given DFPCL's "considerable strengths in the fertilizer business", the purchase of 2,89,91,150 equity shares amounting to 24.46 per cent of the share capital of MCFL was a "very strategic and a good fit with the company's business". The press release further stated that DFPCL looked forward to working closely with MCFL to "enhance long term value for the shareholders of both companies". This acquisition was not notified to the Commission under Section 6(2) of the Act.

3.1 On 23rd April, 2014, SCM placed a purchase order in the open market for the purchase of upto 2000000 equity shares representing 1.7 per cent of the shares of MCFL pursuant to which it acquired 1001309 equity shares representing 0.8 per cent of the equity shares of MCFL. This purchase aggregated with the existing share holding of 24.46 per cent, entitled SCM to exercise more than 25 per cent of the voting rights in MCFL and required SCM, as acquirer and DFPCL as person acting in concert, to make an open offer in terms of Regulation 3(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (henceforth referred to as "Takeover Code"). SCM and DFPCL, accordingly intimated the Stock Exchanges concerned under the Takeover Code about the acquisition on 23rd April, 2014 and on 8th May, 2014 filed a draft document with SEBI seeking approval of an open offer for acquiring upto 26 per cent of paid up equity shares of MCFL.

3.2 SCM filed a notice disclosing details of the combination under Sub-section (2) of Section 6 of the Act with the Commission on 22nd May, 2014 i.e., within 29 days of the

- a acquisition of shares beyond 25 per cent of the shares of MCFL. The Commission, *vide* its order dated 30th July, 2014 under Section 31(1) of the Act, approved the proposed combination as it was of the opinion that the proposed combination was not likely to have appreciable adverse effect on competition in India. The Commission however, *inter alia*, observed that its approval was without prejudice to the proceedings under Section 43A of the Act.
- b 3.3 The Commission in its meeting held on 30th July, 2014 directed that penalty proceedings under Section 43A of the Act may be initiated against the Appellants. Accordingly, a Show Cause Notice under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (General Regulations) was issued to the Appellants on the ground that they had failed to give notice in accordance with Section 6(2) of the Act in regard to the market purchase consummated on 23rd April, 2014 as well as the acquisition made in 2013.
- c The Appellants filed their submissions on 1st September, 2014 and sought an oral hearing which was accorded to them on 30th October, 2014. Additional submissions in relation to the Show Cause Notice were filed on 3rd November, 2014.
- d 3.4 In its submissions, the Appellants averred that the acquisition in 2013 was made 'solely for investment' purpose as understood under item 1 of Schedule 1 to The Competition Commission of India (Procedure in regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (for short, the Combination Regulations) and hence, did not require notification to the Commission. It was further submitted that the market purchase of 0.8 per cent was notified to the CCI within the statutory time limit of 30 days specified in Section 6(2) of the Act and the purchase was not consummated, because as per the escrow agreement dated 23rd April, 2014, the shares
- e purchased were credited into a specifically designated escrow account with JM Financial Institutional Securities Limited, the manager to the Open Offer and JM Financial Services Limited, Escrow Agent. The plea of the Appellants was that as per the escrow agreement, the operation of the escrow account was to be solely on the basis of instructions of the manager and to the exclusion of SCM and SCM was not to exercise its legal and beneficial rights accruing upon the acquisition of shares,
- f till the time shares were held in the escrow account. It was emphasized that the escrow agreement stated that the manager shall instruct the escrow agent only if SCM had obtained the requisite approvals, including from the Commission and fulfilled its obligation relating to the open offer. Appellants underlined that since, the definition of the term "shares" under Section 2(v) of the Act refers to "shares in the share capital of a company carrying voting rights" and SCM was unable to
- g exercise its voting rights because of the escrow agreement, consummation of a transaction for acquisition of shares did not happen. It was explained that the 2013 acquisition was made as an investment because block of shares in MCFL had become available at an attractive price, and there was no intention of entering into a strategic partnership at the time of making the acquisition and the acquisition did not confer
- h on them control over MCFL from a corporate governance perspective and they did not have the ability to govern or steer the business strategy and management of MFCL in any manner. It was argued that if SCM had the intention of undertaking anything more than a financial investment in MCFL at the time of making the 2013 Acquisition, it would have acquired such additional number of shares that would have triggered an open offer in terms of the SEBI Takeover Code to acquire additional
- i 26 per cent shares in MCFL, and concurrently filed a merger notification with the Commission under Section 6(2) of the Act. It was asserted that internationally, merger control regulations account for the special characteristics of on-market share

purchases in takeover situations and allow for special dispensations in the context of standstill obligations (such as that under Section 6(2A) of the Competition Act). Reference was made in this context to the European Union Merger Regulation and Hart Scott Rodino Act of USA and it was submitted that the Commission should interpret the provisions under Sections 5 and 6 of the Act and Combination Regulations in the light of the provisions under the EU and USA laws.

3.5 The Commission opined that the phrase “solely as an investment” indicated “passive investment” as against a “strategic investment”. The Commission considered the press release issued on the day of acquisition of 24.46 per cent of the share capital of MCFL as indicative of the fact that the said acquisition was neither made solely as an investment nor in ordinary course of business. The Commission was of the view that on a dividend yield basis, the acquisition did not seem to be a sound investment, since as per the information available in public domain, MCFL declared a dividend of only 12 per cent on face value of INR 10 for the Financial Year 2012-2013, which on absolute terms came to less than 2 per cent approximately as the average price paid for each share was more than INR 60. Moreover, the Commission noted that as per the media reports, the Appellants and the Zuari Group had been in a takeover bid for MCFL since April, 2013 and Zuari Group had also purchased shares amounting to 16.43 per cent of MCFL’s share capital just before the Appellants made the first acquisition. The Commission, therefore, rejected the contention that exemption from notification in terms of Sub-section 2 of Section 6 of the Act read with Regulation 4 and Schedule to the Combination Regulations, was available to the Appellants. As regards the second acquisition, the Commission held that the Act and the Combination Regulations do not exempt, from the purview of the provisions of the Act in general, and Section 43A of the Act in particular, a situation, where a buyer acquires shares but decides not to exercise legal/beneficial rights in them,. Therefore, the contention of the Appellants that the second acquisition was not consummated, as the shares were kept in an escrow account and they were not entitled to exercise any legal or beneficial rights over them till approvals of regulatory bodies were obtained, was not considered tenable under the law. The Commission held that in view of the admitted position that the shares constituting the second acquisition carried voting rights, these were “shares” as defined under Section 2(v) of the Act, despite the Appellant’s subsequent self-imposed contractual obligation of not exercising voting rights associated with such shares for a limited period of time. The Commission concluded that the Appellants had consummated the second acquisition twenty-nine (29) days prior to giving the notice in terms of Section 6(2) of the Act, thereby contravening the provisions of Section 6(2) of the Act. However, considering the fact that the Appellants had disclosed the requisite information and given the quantum of turnover of the proposed combination, the Commission considered it appropriate to impose a nominal penalty of INR Two Crores (INR 2,00,00,000 only) on the Appellants.

4. The Appellants have challenged the imposition of penalty on facts and in law. The issues arising for consideration in this appeal are as follows:

- (i) Whether the first acquisition of 24.46 per cent shares of MCFL by the Appellants on 3rd July, 2013 was “solely as an investment” and hence, not a notifiable transaction as it fell in the category of transactions mentioned in Regulation 4 read with Schedule 1 of the Combination Regulations;
- (ii) Whether Section 6(2) of the Act mandates *ex-ante* notification or *ex-post facto* notification;

- a* (iii) Whether imposition of penalty under Section 43A of the Act for failure to give notice to the Commission under Section 6(2) is exigible when the transactions admittedly "did not adversely effect" competition in India; and
- (iv) Whether imposition of penalty under Section 43A of the Act is justified when contravention of Section 6(2) is purely technical and there is no willful or deliberate breach.
- b* 5. The provisions of the Act which are relevant for adjudicating the aforesaid issues, are extracted below:

Section 2 of the Act:

2. Definitions.- In this Act, unless the context otherwise requires,—

...(v) "shares" means shares in the share capital of a company carrying voting rights and includes—

- c* (i) any security which entitles the holder to receive shares with voting rights;
- (ii) stock except where a distinction between stock and share is expressed or implied;

Section 6 of the Act:

Regulation of combinations

- d* 6(1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.
- (2) Subject to the provisions contained in Sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which
- e* may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of—
- (a) approval of the proposal relating to merger or amalgamation, referred to in Clause (c) of Section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
- f* (b) execution of any agreement or other document for acquisition referred to in Clause (a) of Section 5 or acquiring of control referred to in Clause (b) of that Section.
- (2A) No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under Sub-section (2) or the Commission has passed orders under Section 31,
- g* whichever is earlier.

Section 42 of the Act:

Contravention of orders of Commission

- h* 42. (1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act. (2) If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under Sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lac for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine. (3) If any person does not
- i* comply with the orders or directions issued, or fails to pay the fine imposed under Sub-section (2), he shall, without prejudice to any proceeding under Section 39, be punishable with imprisonment for a term which may extend to

three years, or with fine which may extend to rupees Twenty-Five Crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit: Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

Section 43A of the Act:

Power to impose penalty for non-furnishing of information on combinations

43A. If any person or enterprise who fails to give notice to the Commission under Sub-section(2) of Section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination."

6. Various Regulations which have a bearing on the issues read as follows:

Regulations 4 and 5 of the Combination Regulations:

4. Categories of transactions not likely to have appreciable adverse effect on competition in India.—

In view of the duty cast upon the Commission under Section 18 and powers conferred under Section 36 of the Act, and having regard to the mandate given to the Commission to, *inter-alia*, regulate combinations which have caused or are likely to cause appreciable adverse effect on competition in terms of Sub-section (1) of Section 6 of the Act, it is clarified that since, the categories of combinations mentioned in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under Sub-section (2) of Section 6 of the Act need not normally be filed.

5. Form of notice for the proposed combination.—

(1) Any enterprise which proposes to enter into a combination shall give notice of such combination to the Commission in accordance with Sub-section (2) of Section 6 of the Act and these Regulations.

(8) The reference to the "other document" in Clause (b) of Sub-section (2) of Section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets:

Provided that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights shall be the "other document":

Provided further that where a public announcement has been made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the "other document."

Schedule 1 to the Combination Regulations:

(1) An acquisition of shares or voting rights, referred to in Sub-clause (i) or Sub-clause (ii) of Clause (a) of Section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25 per cent) or more of the total shares or voting rights of

- a* the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a share holders agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.
- b* Explanation:— The acquisition of less than ten per cent of the total shares or voting rights of an enterprise shall be treated as solely as an investment: Provided that in relation to the said acquisition,- (A) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and (B) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.
- c*

.....
Regulation 48 of the General Regulations

48. Procedure for imposition of penalty under the Act.—

- d* (1) Notwithstanding anything to the contrary contained in any regulations framed under the Act, no order or direction imposing a penalty under Chapter VI of the Act shall be made unless the person or the enterprise or a party to the proceeding, during an ordinary meeting of the Commission, has been given a Show Cause Notice and reasonable opportunity to represent his case before the Commission.
- e* (2) In case the Commission decides to issue Show Cause Notice to any person or enterprise or a party to the proceedings, as the case may be, under sub-regulation (1), the Secretary shall issue a Show Cause Notice giving not less than fifteen days asking for submission of the explanation in writing within the period stipulated in the notice.
- f* (3) The Commission shall, on receipt of the explanation, and after oral hearing if granted, proceed to decide the matter of imposition of penalty on the facts and circumstances of the case.

- g* 7. The issues framed in paragraph 4 are adjudicated in seriatim in succeeding paragraphs. Sh. Gopal Jain, learned senior advocate appearing for the Appellants made detailed oral submissions on 2nd August 12, 2016. Sh. Narsimhan Additional Solicitor General, appearing for the Commission was also heard on the same day. The learned Counsels were permitted by us to file written synopsis which was done by them on 4th August, 2016 and 5th August, 2016.

- h* 8. The Appellants argued that the first acquisition of 24.46 per cent of shares of MCFL was exempted from notification under Regulation 4 of the Combination Regulations read with Item 1 of Schedule 1 to the Combination Regulations as all the three conditions were fulfilled;

- (i) Acquisition was less than 25 per cent shares in the MCFL
- (ii) Control was not acquired
- (iii) Acquisition was solely as an investment

- i* 8.1 It was claimed that notwithstanding the statement made by the Appellant No. 2 to BSE in the press release, the purchase of share by the Appellants was merely a form of investment as was evident from the following facts:

(i) At the time of acquisition, the Appellants did not enter into any strategic relationship with MCFL.

(ii) The Appellants acquired a pure shareholding stake in MCFL and this did not confer on them any control over MCFL.

(iii) If the intention of the Appellants was anything more than a financial investment in MCFL, the Appellants would have acquired such additional number of shares that would have triggered an open offer in terms of Takeover Code. [*i.e.* 26 per cent mentioned under Regulation 7(1) of the Takeover Code"]

8.2 Further, it was contended that at the stage of first acquisition, there was no violation of the SEBI Takeover Code and since, there was no agreement or any other document referred in Section 6(2)(b) of the Act, there was no notice required to be filed with the Commission, till 25 per cent shares of MCFL were acquired.

8.3 The Respondent relied upon the following facts to assert that the first acquisition was strategic and not solely an investment:

(i) The wording of the press release issued on 3rd July, 2013, specifically referred to investment being "very strategic" and "a good fit with the company's business", and how Appellants "look forward to working closely with MCFL in the future;

(ii) A large number of shares were acquired by the competing Zuari Group around the same time and knowledge of such acquisition was expressly admitted in the Appellants' reply;

(iii) Appellants acquired large number of shares on the same day through block and bulk deals;

(iv) MCFL was not very profitable and, therefore, purchase of shares could not be termed to be a sound investment by a prudent investor.

8.4 The proposition that acquisition was not solely for investment was stated to be supported by international practice. Reference in this context was made to the "solely as an investment" exemption finding mention in the Hart Scott Radino Act, 1976 ("HSR Act"), which is the parallel legislation governing merger/combination regulation. It was pointed out that as per the official interpretation of this Exemption given in the Federal Register, which is the authoritative statement issued by the Federal Trade Commission, USA for the HSR Act, it has been noted that "*being a competitor of the issuer*": (such as MCFL in the instant case) is inconsistent with the purpose of being "investment only". Further, it was argued that the OECD in a Note titled "The Concept of a Merger Transaction" has noted that "*a similar approach to minority shareholdings can be seen in India where the recently introduced merger review regime appears to largely follow the U.S. model with respect to the definition of a merger transaction... Under a Regulation issued by the Indian Competition Commission, share acquisitions of up to 25 per cent are exempted if they are solely for investment purposes..... Not covered by this exemption are minority share acquisitions in a competitor.*"

8.5 In our view, the term "other document" as used in Section 6 and explained in Regulation 5(8) of the Combination Regulations will cover any document executed to acquire the shares. Even the order placed with the broker for purchasing shares is "other document", which becomes a trigger for notice under Section 6(2). In so far as the intention, at the time of acquiring the shares of MCFL is concerned, we find that the contemporaneous press release is a good evidence to support the view, that the objective was not solely to make an investment in a competitor company. The press release noticeably referred to the acquisition as a "very strategic and a good fit with the company's business". There is also a significant pointer in the press release of

- a the intent when it states that DFPCL looked forward to working closely with MCFL to “enhance long term value for the shareholders of both companies”. A mere investment through the stock market, where holders of the shares of MCFL i.e., sellers are substituted by the buyer, in this case SCM, cannot increase the value for shareholders of MCFL, unless the buyer planned to play a strategic role beyond a passive investment. It’s an admitted fact that Zuari Group, another player in the fertilizer business made significant purchase of shares of MCFL around the same time. The fertilizer business of MCFL was apparently a target of acquisition of the Zuari group and the Appellants and the first acquisition was part of the long term plan to try and takeover MCFL. In a listed company, with dispersed shareholding, 24.46 per cent equity stake vests power to exercise influence, which the Appellants planned to do, as was obvious from the press release. The fact that Explanation to Item 1 of Schedule I (ibid) deems acquisition of less than 10 per cent of the total shares or voting rights of an enterprise “solely as an investment”, *albeit* with certain riders, is suggestive of acquisitions beyond this threshold to be evaluated carefully considering all the surrounding specifics and circumstances.
- b 8.6 The various specifics relating to the acquisition, seen not in isolation, but through an economic and commercial perspective, namely, the Appellants and MCFL being competitor enterprises, the timing of the acquisition i.e. bulk/block deals following the rival acquiring shares in MCFL, size of equity stake acquired, the public announcement made through press release, the likely low return on price paid for the shares, conclusively establish that shares were not acquired “solely as an investment”. Therefore, the Appellants were not entitled to exemption by virtue of item 1 of Schedule to the Combination Regulations. The argument that there was no violation of Takeover Code has no bearing on compliance requirements under the Act, which is a self-contained legislation imposing its own obligations. Thus, we hold that there was a failure to comply with the obligations mandated by Section 6(2) of the Act in regard to the acquisition of 24.46 per cent of the shareholding of MCFL by the Appellant on 3rd July, 2013.
- c d e
- f 9. In regard to the second issue pertaining to the acquisition of 0.8 per cent of the equity of MCFL, the dispute is as to whether the notification to the Commission under Section 6(2) of the Act within 29 days of the purchase, meets the statutory requirement in regard to its timing i.e., whether the notification should have been made before the acquisition or could be made within 30 days of the acquisition. The position of the Appellants is that Sub-section 2 of Section 6 does not require a prior notice and the notice is to be filed within thirty day period and the use of word “within thirty days” of execution of any agreement or other document for acquisition, denotes the requirement of an ex-post facto filing of a notice. It was contended that in regard to acquisition of shares from the stock exchange, a prior intimation to the Commission cannot be mandated. It was also emphasized that the business of hostile purchase is affected by day to day rates and the same having been undertaken by the Appellants without any agreement, notice under Sub-section 2 of Section 6 was to be made within 30 day period of the purchase, which had been done. It was pleaded that in any case the acquisition was not consummated as the escrow agreement ensured that the legal or beneficial rights including voting rights on such shares could not be exercised by the Appellants, until the approval of the proposed combination by the Commission. Our attention was drawn to the meaning of the term “share” under Section 2(v) of the Act as “shares in the share capital of a company carrying voting rights” to substantiate the stance that as the Appellants were unable to exercise their voting rights, mere transfer of shares from one owner to another could not be viewed as consummation of transaction for acquisition of shares.
- g h i

9.1 The Respondent contended that *ex-post facto* notification of combinations cannot be countenanced for the following reasons:

(i) The use of the word "proposed" in juxtaposition to combination in Section 6 (2)(b) reveals the legislative intent for notification to be *ex ante* in nature, before completion.
 (ii) The *ex ante* nature of Commission's duty to monitor "proposed combinations" is also indicated by the Preamble to the Act which refers to "*establishment of a Commission to prevent practices having adverse effect on competition*".

(iii) The *ex ante* nature of notification under Section 6(2) is buttressed by a reading of Section 6(2A) which deliberately used the phrase "*no combination shall come into effect*" until 210 days from date of notice, or passing of order under Section 31.

(iv) This reading is further clarified by the Second Proviso to Regulation 5(8) of the Combination Regulations, which deems the "Public Announcement" in terms of Takeover Code to be "*other document*" in Section 6(2), which serves as a trigger for Notification of combinations in open offers. As "Public Announcement" is always given prior to placing of purchase order, this confirms that the Section 6(2) Notification is to be given prior to consummation of acquisition.

(v) It is essential that the Commission receive prior/*ex-ante* Notification of proposed combinations in order for it to effectively prevent anti-competitive acquisitions and mergers. A contrary reading of the Section so as to permit *ex post facto* notification would render the same nugatory. Unless the Commission has a chance to examine the anti-competitive effects of the proposed combination before it is consummated, it will lead to a scenario where an anti-competitive acquisition has already been given effect to, thereby making unraveling of the transaction complex, or in some cases impossible where the acquisition of shares was done from the open market, as the sellers of the shares in such cases are anonymous and the shares cannot be returned to them.

(vi) The aforementioned position is similar to international best practices adopted in the USA as well as the EU. In the USA, an almost identical policy of mandatory notification prior to consummation is set out in the Hart Scott Radino Act, 1976. There is no policy of exemption from the prior notification requirements even in cases of time sensitive market acquisitions. These rules were brought in specifically to combat situations where large acquisitions were given effect to overnight in order to bypass anti-trust security "*because it is harder to overturn a fait accompli*". Article 4 of the EU Merger Regulations contemplates a prior notification requirement for acquisitions over a certain threshold, and the prior notification requirements have been stated to "*justify the existence of the Regulation*".

9.2 We agree that use of the words "proposes to enter into a combination" while referring to the person and enterprise, on whom the duty of giving a notice to the Commission is imposed, supports the premise of prior notification. Further, the details to be disclosed in the notice to the Commission are of the "proposed combination". Section 6(2A) also validates the prior notification requirement by stipulating that no combination shall come into effect until 210 days have passed from the date on which notice was given to the Commission or passing of the order under Section 31 by the Commission, whichever is earlier. The legislative intent is to give the Commission an opportunity to assess whether a proposed combination is likely to cause an appreciable adverse effect on competition, which would be defeated if the combination is notified to the Commission after it has taken effect.

9.3 The shares were admittedly acquired by the Appellants and these shares carried voting rights. The creation of an escrow account and the covenant by the Appellants

a of their own volition to abstain from exercising the voting rights, do not eliminate the statutory requirement of the prior notice. Therefore, we agree with the Respondent that the notification under Section 6(2) of the Act has to be ex-ante.

b 10. The third issue is whether the approval of the combination by the Commission can confer immunity to the Appellants from being penalized under Section 43A of the Act. The argument of the learned Counsel for the Appellant is that the Commission did not have the jurisdiction to grant approval with the rider of penal consequences under Section 43A. On the other hand, learned Counsel for the Respondent argued that the penalty was imposed with a view to deter non-compliance of ex-ante notification requirement and, as such, final approval of the proposed combination cannot be a ground for waiver of penalty, which can be imposed under Section 43A.

c 10.1 We are in complete agreement with the learned Counsel for the Respondent. Sections 31 and 43A of the Act operate in two different fields. The Commission has the power to approve a combination under Section 31 and such approval neither obliterates nor condones the contravention, for which penalty is to be imposed under Section 43A. Approval under Section 31 is not even listed as a mitigating circumstance under Regulation 48 of the General Regulations which deals with the procedure for imposition of penalty. Accordingly, in our view Penalty under
d Section 43A of the Act is leviable even if the combination has no appreciable adverse effect on competition.

11. The fourth issue is regarding imposition of penalty when the contravention of Section 6(2) is claimed to be purely technical and not willful or a deliberate breach.

e 11.1 The Appellants have claimed that violation, if any, of Section 6(2) of the Act was purely technical because the transactions admittedly did not adversely effect competition in India and the same did not warrant imposition of penalty under Section 43A of the Act. Besides, it was asserted that the amount of penalty was draconian in nature and was beyond the maximum limit allowed by the Act and no basis for calculation of the penalty was provided by the Commission. In this context, the Appellants relied upon the judgment of the Hon'ble Supreme Court in the case of
f *Hindustan Steel Ltd. v. State of Orissa*¹ [1970] SC 253, holding that:

g An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted on conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so.
h Whether penalty should be imposed for failure to perform a statutory obligation is a matter or discretion of the Authority to be determined by the circumstances. Even if a minimum penalty is prescribed, the Authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute.

11.2 They also relied upon the judgment of this Tribunal in the case of *Thomas Cook (India) Limited and Ors. v. CCI* (Appeal No. 48/2014, decided on 26th August, 2015) whereby penalty was set aside for the reason that there was no valid ground or justification for sustaining the penalty because the violation, if any, of Section 6(2)

i ¹ Ed.: MANU/SC/0418/1969: 1978 (2) ELT 159 (S.C.): (1972) 83 ITR 26 (SC): (1970) 25 STC 211 (SC): (1969) 2 SCC 627: (1970) 1 SCR 753

was purely technical. Furthermore reference was made to paragraph 28 of the judgment dated 12th April, 2016 of this Tribunal in the case of *A.R. Polymers Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.* (Hindustan Steel Appeal No. 34-43/2013 and 08/2014), extracted below:—

28. Since the legislature has not laid down any criteria for imposing penalty, the Commission is duty bound to consider all the relevant factors like-nature of industry, the age of industry, the nature of goods manufactured by it, the availability of competitors in the market and the financial health of the industry etc. and also take note of the law laid down by the Supreme Court, the High Courts and the Tribunal.

11.3 The thrust of the submissions of the Appellants is that since there is no finding regarding willful or deliberate breach or contumacious conduct and the Commission has held that the combination is not likely to have any appreciable adverse effect on competition, penalty cannot be sustained.

11.4 The Respondent urged that the use of the words “shall impose” in Section 43A of the Act makes it clear that whenever there was a failure to give prior notice in accordance with Section 6(2), the Commission was mandated to impose a penalty which may, at its discretion, extend to one per cent of the total turnover or the assets, whichever is higher, of the combination. It was submitted that in the present case, the total turnover of the combination was Rs. 3322 Crores, 1 per cent of which worked out to Rs. 33.22 Crores and the Commission had imposed nominal penalty of Rs. 2 Crore on Appellants which was 0.06 per cent of total turnover and the impugned order recorded reason for imposition of nominal penalty, namely that Appellants disclosed some information, albeit belatedly. The Respondent highlighted that while the second transaction was notified, the first transaction, was only mentioned in passing as a *fait accompli*, and that differentiated the present case from the Thomas Cook case (ibid), as in that case the detailed 6(2) Notice extracted in the order clearly set out all transactions, whether considered notifiable or non-notifiable by the Appellants therein. The supposition was that only in light of such full *uberrima fides* disclosure, this Tribunal set aside the penalty under Section 43A.

11.5 We agree that the use of words “shall impose” in Section 43A of the Act has a significant bearing on interpreting this provision. Besides, in the language employed in the section, there is no requirement of mens rea or intentional breach, as essential elements for the levy of penalty. Power to impose penalty under Section 43A as per the header of the said Section, is for non-furnishing of information on combination and such non-furnishing is explained in the body of the Section i.e., if any person or enterprise “fails to give notice to the Commission “under Section 6(2) of the Act. The Act does not indicate that the failure has to be willful or *mala fide*. There is also no escape from penal consequences of such failure on grounds of a *bona fide* interpretation of statutory provision imposing civil obligations. In this context, it is relevant to juxtapose the language of Section 42(2), which deals with contravention of orders of the Commission, with the language of Section 43A of the Act. The concept of failure “without reasonable cause” is specifically incorporated for imposition of fine under Section 42(2) while the crucial words “without reasonable cause” are missing from Section 43A.

11.6 The reliance of the Appellants on the judgment of the Supreme Court in the case of *Hindustan Steel Ltd. v. State of Orissa* (ibid) is misplaced. This was a case under the Sales Tax Act, 1947 and is inapplicable in cases relating to imposition of civil liabilities as confirmed by the Supreme Court *vide* their judgment dated 23rd May, 2006, in the case of *Chairman, SEBI v. Shriram Mutual Fund & Anr.* (Appeal (Civil))

9523-9524 of 2003. In this judgment, while dealing with a case of non compliance of certain provisions of SEBI Act and Regulations, it was held that-

- a The Tribunal has erroneously relied on the judgment in the case of *Hindustan Steel Ltd. v. State of Orissa* AIR 1970 SC 253 which pertained to criminal/quasi-criminal proceeding. Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of Imprisonment up to six months and fine for the offences under the Act. The said case has no application in the present case
- b which relates to imposition of civil liabilities under the SEBI Act and Regulations and is not a criminal/quasi-criminal proceeding.

11.7 The issue as to whether imposition of penalty becomes a *sine qua non* of the failure to comply with a civil obligation, was also decided by the Hon'ble Supreme Court in the case cited above in the following words:

- c In our opinion, mens rea is not an essential ingredient for contravention of the provisions of a civil act. In our view, the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty
- d irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. This apart that unless the language of the statute indicates the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. penalty has to follow and only the quantum of penalty is discretionary...
- e In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence intention of the parties committing such violation becomes wholly irrelevant..... We also further hold that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of
- f Section 15(D)(b) and Section 15E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence, once the contravention is established then the penalty is to follow.

11.8 Section 43A similarly has no requirement of establishment of mens rea. The legislature has not used the phrase "willful failure". Failure simpliciter has penal consequences. Further, the Appellants cannot escape the rigor of the provision by attributing failure to a *bona fide* interpretation constituting a reasonable cause. The imposition of penalty under Section 43A is on account of breach of a civil obligation, and the proceedings are neither criminal nor quasi criminal. Once it is established that there was a failure to notify the proposed combination as required under Section 6(2) of the Act, penalty has to follow. The Commission has a discretion regarding the quantum but cannot exculpate the Appellants from their failure.

h Regulation 48 of the General Regulations, stipulates that the quantum has be decided based on the facts and circumstances of the case. The Commission has taken the facts and circumstances of the case in consideration while imposing penalty of INR two crores and we see no reason to interfere. The claim of the Appellants that the quantum exceeds the maximum limit has not been corroborated.

- i 12. Appeal is dismissed.