REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 10678 OF 2016

SCM SOLIFERT LIMITED & ANR. ..APPELLANT(S)

VERSUS

COMPETITION COMMISSION OF INDIA ..RESPONDENT(S)

J U D G M E N T

ARUN MISHRA, J.

1. The appellants SCM Solifert Limited and another are in appeal under section 53T of the Competition Act, 2002 (hereinafter referred to as "the Act") as against the final judgment and order dated 30.08.2016 passed in Appeal No.59 of 2015 by the

Competition Appellate Tribunal thereby affirming the order passed by the Competition Commission of India under section 43A of the Act.

2. The Competition Commission of India initiated the proceedings against the appellants on whom due to the failure to notify a proposed combination as required under section 6(2) of the Act, the penalty of Rupees Two crores was imposed under section 43A of the Act. On 3.07.2013, the appellants had purchased 2,89,91,150 shares of Mangalore Chemicals and Fertilisers Limited (in short referred to as “the MCFL”) constituting 24.46 paid up share capital of the MCFL on the Bombay Stock Exchange.

3. The first transaction of the acquisition of the shares was by way of the purchase of shares conducted through bulk and block deals. It was followed by press release dated 3.7.2013 by Deepak Fertiliser and Petrochemicals Corporation Limited filed with the Stock Exchanges, in compliance with the requirements of the Listing Agreement.

4. On the second acquisition of the shares on 23.04.2014 the appellants made a purchase order in the open market for the

purchase of up to 20 lacs equity shares representing 1.7 percent shares of the MCFL. Subsequently, an open offer in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (for short, "the Regulations, 2011") was made for acquiring up to 26 percent of shares of the MCFL.

5. The appellants filed a notice disclosing details of the first acquisition and notifying the second acquisition under Section 6(2) of the Act with the Commission on 22.04.2014 within thirty days of the public announcement pursuant to the Regulations, 2011 for the acquisition of 1.7 percent of the MCFL. The Competition Commission vide its order dated 30.07.2014 under section 31(1) of the Act approved the proposed combination, however, directed to initiate penalty proceedings against the appellants under section 43A of the Act. Pursuant to that, a show cause notice was issued on the ground of failure to notify in accordance to section 6(2) of the Act, in regard to first and second acquisitions of shares.

6. It was the case on behalf of the appellants that first acquisition was made solely for the purpose of investment under Entry I of Schedule I of the CCI (Procedure in regard to the Transaction of Business Relating to Combinations) Regulations,

2011, (hereinafter referred to as "the Competition Regulations"). Thereby, it assumed exemption from the notification. It was also urged that the second acquisition was notified to the Commission within the stipulated time of 30 days as specified in section 6(2) of the Act. The purchase was not consummated because as per the Escrow Agreement dated 28.04.2014, the shares purchased in the second acquisition were credited to a specifically designated Escrow account of J.M. Financial Services Limited. The sole purpose of entering into an escrow agreement was that the transaction was not consummated prior to approval of the Commission. The Commission has imposed the penalty of 2 crores; the appellate tribunal has affirmed the order. The Commission has held that the appellants have violated section 6(2) of the Act by failing to notify the proposed combination.

7. It was urged by learned counsel on behalf of the appellants that first acquisition did not fall within the purview of Entry 1 Schedule 1. The interpretation made by the Commission of the Entry 1 of Schedule 1 is incorrect. With respect to the second acquisition of shares, it was urged that the sole purpose of creation of Escrow Account was to ensure that the appellants could not

exercise the legal and beneficial rights accruing through the shares, as the account was operatable solely on the basis of instructions of the Manager and to the exclusion of the appellants. After approval of the proposed combination, penalty ought not to have been imposed. Violation, if any, was technical, not willful, deliberate or mala fide.

8. *Per contra*, the Commission has rightly imposed the penalty. There was a breach of provisions contained in section 6(2). The penalty imposed is meager. The first acquisition of shares was notifiable. It could not have been termed solely as an investment. Reliance has been placed on Press Release issued on 3.7.2013, which referred investment being "very strategic", and the appellant also notified to the public that they "look forward to working closely with MCFL in the future". The knowledge of acquisition by the Zuari group of 9.72% shares in MCFL on 2.4.2013 was admitted in the reply filed by the appellants. There was the acquisition of a large number of shares on the same day through the block and bulk deals. MCFL was not very profitable. Therefore, purchase of shares could not be said to be a sound investment by a prudent investor.

9. To appreciate the rival submissions, it is necessary to refer to certain provisions contained in the Act. Section 6 of the Act deals with regulation of combinations and the same is extracted hereunder:

> "**Section 6: Regulation of combinations**
> (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.
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> (2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, 13 [shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of—
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> (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;
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> (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, whichever is earlier."

10. Any person or enterprise before entering into a combination, has to give notice to the Commission disclosing the details within 30 days of (a) approval of the proposal relating to merger or amalgamation as provided in the Act; (b) execution of any agreement or other document for acquisition referred to in section 5(a) of the Act or acquiring of control under section 5(b). No combination shall come into effect as provided in section 6(2A) until 210 days have passed from the day when notice has been given to the Commission.

11. Section 42 of the Act deals with contravention of the orders of the Commission. Section 43A deals with the power to impose a penalty for non-furnishing of information on combinations. Any person or enterprise who fails to give notice under section 6(2) of the Act to the Commission, the Commission, in such an event, is authorized to impose the penalty which may extend to 1% of the total turnover or the assets, whichever is higher.

12. Section 43A is extracted hereunder:

> "**Section 43A: Power to impose the penalty for non-furnishing of information on combinations**
>
> 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."

13. Regulation 4 of the Combination Regulations deals with categories of transactions not likely to have an appreciable adverse effect on competition in India. Regulation 5 deals with the form of notice for the proposed combination. Regulation 5(8) provides that "other document" in section 6(2)(b) to mean any binding document by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets. Rule 5(8) is extracted hereunder :

"**5. Form of notice for the proposed combination -**

(1) ……

(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 the acquisition of shares, voting rights or control, such public announcement shall be deemed to be the "other document"."

14. Schedule 1 to the Combination Regulations provides that acquisition of shares or voting rights referred to in section 5(a)(i) or Section 5(a)(ii) of the Act does not entitle the acquirer to hold 25% or more of the total shares or voting rights of the company, directly or indirectly. The Explanation makes it clear that the acquisition of less than 10% of the total shares or voting rights of an enterprise shall be treated solely as an investment. Schedule 1 to the Combination Regulations is extracted hereunder:

> "(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%) or more of the total shares or voting rights of 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.

> Explanation:- The acquisition of less than ten percent 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 the 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."

15. The procedure for imposition of penalty is provided under Regulation 48 of the new Regulations. A show cause notice has to be given and thereafter if an oral hearing is granted, then the Commission is empowered to impose the penalty considering the facts and circumstances of the case.

16. First, we deal with the acquisition of the shares of MCFL by the appellants on 3.11.2013. There was the acquisition of 24.46% equity share capital of MCFL on a single day of which 19.9% were acquired through the block and bulk deals. The contemporaneous Press Release dated 3.7.2013 issued by the appellants filed with the stock exchanges, in compliance with the requirement of the

Listing Agreement indicated that the objective was not to make an investment in MCFL. The Press Release referred “investment is very strategic and a good fit with the company’s business”. There was a pointer in the Press Release of its intent when it stated that DFPCL looks forward to working closely with MCFL to “enhance long-term value for the shareholder of both companies”. Not only the appellants but another player Zuari group also made a significant purchase of shares of MCFL i.e. 9.72% on 2.4.2013 is also not in dispute. Thus, it is apparent that the appellant's first acquisition was a part of the long-term plan to try and take over MCFL, which was simply not an investment. The purchase of 24.46% equity stake, vested power to exercise influence as was reflected in Press Release-II also. The acquisition of less than 10% of the total shares or voting rights of an enterprise is solely an investment. It also indicates that beyond this threshold, the transaction is required to be looked carefully. Thus, there was a failure to comply with the provisions of section 6(2) of the Act in regard to the acquisition of 24.46% of the shareholding. The provisions of section 6(2) were not at all complied with.

17. Coming to the second acquisition of shares of 0.8% equity

shares of MCFL, the dispute is as to whether the notifying within 30 days of the purchase was compliance of the provision as per provisions of section 6(2) it should have been notified before the acquisition. As a corollary, it was also argued that the equity shares purchased second time were placed in the Escrow Account. The appellants could not have exercised the beneficial rights until the Commission made the approval of the proposed combination. What was essential under section 2(e) was the voting rights and the appellants could not have exercised voting rights by placing shares in the escrow account.

18. We find no merits in the submissions raised. It is apparent from section 6(2) of the Act that the proposal to enter into combination is required to be notified to the Commission. The legislative mandate is apparent that the notification has to be made before entering into the combination. The Preamble of the Act contains that the Commission has been established to prevent practices having an adverse effect on the competition. The combination cannot be entered into and shall come into effect before order is passed by Commission or lapse of certain time from date of notice is also apparent from the terminology used in section

6(2A) which provides that no combination shall come into effect until 210 days have passed from the date of notice or passing of orders under section 31 by the Commission, whichever is earlier. The provisions made in Regulation 5(8) also buttresses the aforesaid conclusion. Notice of Section 6(2) is to be given prior to consummation of the acquisition. Ex post facto notice is not contemplated under the provisions of section 6(2). Same would be in violation of the provisions of the Act.

19. The expression "proposes to enter into a combination" in section 6(2) and further details to be disclosed in the notice to the Commission are of the 'proposed combination' and the specific provisions contained in section 6(2A) of the Act provides that no combination shall come into effect until 210 days have passed from the date on which notice has been given or passing of orders under section 31 by the Commission, whichever is earlier. The intent of the Act is that the Commission has to permit combination to be formed, and has an opportunity to assess whether the proposed combination would cause an appreciable adverse effect on competition. In case combination is to be notified ex-post facto for approval, it would defeat the very intendment of the provisions of

the Act.

20. When the transaction has been completed and acquisition has been made and the latter transaction has exceeded holding more than 25% by the second purchase, obviously prior permission was required, as discussed hereinabove, as its total shareholding increased to 25.3%. Thus, we have no hesitation to hold that the notification under section 6(2) of the Act has to be ex-ante.

21. The factum of the approval of the combination subsequently by the Commission is not going to provide an insulation when the provisions of the Act have been violated and prior notice had not been given under section 6(2). It was open to impose a penalty under section 43A. Merely by grant of approval by the Commission violation of provisions does not become condonable ipso facto.

22. The provisions contained in section 43A make it clear that the Commission shall impose the penalty which may in its discretion extend to 1% of the total turnover or the assets, whichever is higher, of the combination. It has been found on facts that the turnover of the combination was Rs.3322 crores per annum, 1% of which would be Rs.33.22 crores. The Commission had imposed a

nominal penalty of Rs.2 crores which amounts to only 0.06% of the total turnover. In the facts of the case, information was disclosed belatedly. The imposition of penalty was warranted due to the violation of the provision and it was rightly imposed.

23. There was no requirement of *mens rea* under section 43A or an intentional breach as an essential element for levy of penalty. The Act does not use the expression "the failure has to be willful or mala fide" for the purpose of imposition of penalty. The breach of the provisions of the Act is punishable and considering the nature of the breach, it is discretionary to impose the extent of penalty. *Mens rea* is important to adjudge criminal or quasi-criminal liability, not in case of violation of the civil statutory provision. In *Hindustan Steel Ltd. v. State of Orissa* AIR 1970 SC 253, with respect to the failure to comply with the civil obligation this Court has laid down thus:

> "In our opinion, mens rea is not an essential ingredient for contravention of the provision of a civil Act. In our view, the penalty is attracted as soon as a 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 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. The penalty has to follow and only the quantum of penalty is discretionary "
>
> In our considered opinion, the 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 men's rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15(D) (b) and Section 15-E of the Act, there is nothing which requires that men's rea must be proved before a penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow."

24. 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. Thus, a penalty has to follow. Discretion in the provision under section 43A is with respect to quantum. Thus, we find that in view of the submissions made by learned counsel for the appellants no case for our interference is made out.

25. The judgment and order passed by the Commission as affirmed by the appellate tribunal are in accordance with law. The appeal being devoid of merit, deserves dismissal and is hereby dismissed. No costs.

……………………………….J.
(ARUN MISHRA)

……………………………….J.
(NAVIN SINHA)

NEW DELHI;
APRIL 17, 2018.