COMPETITION COMMISSION OF INDIA
(Combination Registration No. C-2015/03/257)

Fair Competition For Greater Good

14th July, 2016

Order

Under Section 43A of the Competition Act, 2002 on disposal of the Show Cause Notice dated 20.05.2015 issued to Sundaram Finance Limited

CORAM

Devender Kumar Sikri
Chairperson

S. L. Bunker
Member

Sudhir Mital
Member

Augustine Peter
Member

U. C. Nahta
Member

M. S. Sahoo
Member

G. P. Mittal
Member

Date of Hearing:	08.03.2016
Appearances for the Party:	Mr. Amit Sibal, Senior Advocate Ms. Shruti Dogra, Advocate, Phoenix Legal, and Mr. P. Viswanathan, Secretary & Compliance Officer.

This order disposes of the show cause notice dated 20.05.2015 (SCN) issued by the Competition Commission of India (Commission) to Sundaram Finance Limited (SFL) under section 43A of the Competition Act, 2002 (Act) read with regulation 48 of the Competition Commission of India (General) Regulations, 2009 (General Regulations). The SCN alleges that SFL failed to give notice of a proposed combination to the Commission within the time stipulated under section 6(2) of the Act read with regulation 5(8) of the Competition Commission of India (Procedure in Regard

to the Transaction of Business Relating to Combinations) Regulations, 2011 (Combination Regulations).

2. For the sake of convenience, the provisions of law relevant for disposal of the SCN are reproduced hereunder:

a. Section 6(2) of the Act reads as under:

"(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 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;

(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."*

b. Regulation 5(8) of the Combination regulations at the relevant time read as under:

"(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* ***such a document has not been executed but the intention to acquire is communicated*** *to the Central Government or State Government or a Statutory Authority, the date of such communication shall be deemed to be the date of execution of the other document for acquisition."*

c. The second provision of regulation 5(8), as quoted above, has been replaced subsequently by the following:

*"**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"."

d. Regulation 31 of the Combination Regulations, which has been dropped subsequently, at the relevant time read as under:

"*31.* ***Filing of notice under sub-section (2) of section 6 of the Act.*** *– The notice referred to in sub-section (2) of section 6 of the Act would be applicable as follows:*

(a) for mergers or amalgamations referred to in clause (c) of section 5 of the Act, notice to be filed only in regard to proposals approved by the board of directors on or after the 1st day of June, 2011; and

(b) for acquisitions referred to in clause (a) of section 5 of the Act or acquiring of control referred to in clause (b) of section 5 of the Act, notice need to be filed only, where binding documents(s) is executed, on or after the 1st day of June 2011."

e. Unless specified otherwise, reference to a particular section, regulation or proviso in this order means the section, the regulation or the proviso, as the case may be, in force at the relevant time.

3. The facts leading to the issuance of the SCN are as under:

a. SFL is a non-banking finance company (NBFC) registered with the RBI. At the relevant time, it held 49.9% equity in an insurance joint venture, namely, Royal Sundaram Alliance Insurance Company Limited (Royal Sundaram). It learnt that its other joint venture partner, namely, Royal & Sun Alliance Insurance plc of UK (RSA), was likely to exit from India and in that case, it would sell its stake of 26% in Royal Sundaram. SFL got interested to acquire the same.

b. The Reserve Bank of India (RBI) Master Circular dated 01.07.2014 allows a NBFC to set up a joint venture company for undertaking insurance business. It provides: "*The maximum equity contribution such an NBFC can hold in the joint venture company will normally be 50 per cent of the paid capital of the insurance company. On a selective basis, the Reserve Bank of India may permit a higher equity contribution by a promoter NBFC, pending divestment of equity within the prescribed period.*" In compliance with this Circular, SFL submitted an application dated 13.10.2014 (application) to the RBI seeking permission to increase its shareholding in Royal Sundaram from 49.9% to 75.9% by purchasing 26% equity from RSA. In the said

application, it stated: "... *we anticipate that they (RSA) are likely to exit from India as well and would like to pre-empt an attempt by them to sell their holdings to another investor.*" It also sought approval to retain the excess holding (in excess of 50%) for a period not exceeding five years. Vide its letter dated 14.01.2015, the RBI permitted SFL to acquire 26% shareholding of RSA subject to the condition that SFL would bring down the shareholding to the stipulated norm within a period of three years.

c. On 18.02.2015, the Boards of SFL and RSA approved acquisition of 26% shareholding of Royal Sundaram by SFL from RSA and a share purchase agreement to this effect was executed among SFL, RSA and Royal Sundaram on the same day. This acquisition amounts to a combination under the Act. Section 6(2) of the Act requires the party who proposes to enter into a combination to give a notice of the same to the Commission within stipulated time. SFL gave a notice dated 16.03.2015 seeking approval of the Commission for the proposed combination.

d. The Commission in its meeting held on 13.05.2015 considered and approved the proposed combination as it was not likely to have appreciable adverse effect on competition. While approving the proposed combination, it observed that section 6(2) of the Act obliges a party to give notice of a proposed combination (acquisition in this case) to the Commission within 30 days of execution of any agreement or 'other document' for acquisition. Second *proviso* to regulation 5(8) of the Combination Regulations specifies that if the 'other document' has not been executed, but the intention to acquire has been communicated to a statutory authority, the date of communication shall be the date of execution of the 'other document' for acquisition. Since SFL, through its application on 13.10.2014 to the RBI, communicated its intention to acquire, it should have given notice of the acquisition to the Commission within 30 days of this communication. However, it gave notice of the acquisition to the Commission on 16.03.2015, much after the statutory time limit of 30 days from the trigger. The Commission held a prima facie view that SFL failed to give notice within the stipulated time and hence the SCN under section 43A was issued.

4. We have considered the following:

a. the show cause notice dated 20.05.2015 issued to SFL,

b. the response dated 09.06.2015 of SFL,

c. the oral submissions made on behalf of SFL at the hearing on 08.03.2016,

d. two compilations submitted on behalf of SFL at the hearing on 08.03.2016, and

e. other material available on record.

5. SFL has submitted that the share purchase agreement was executed on 18.02.2016. The notice under section 6(2) was given to the Commission on 16.03.2016, that is, within thirty days of the said agreement. Hence, there is no failure on its part to give notice within the stipulated time. SFL has made the following submissions in support of its defence:

a. Section 6(2) of the Act empowers the Commission to specify the 'form' and determine 'fees', by regulations, for giving notice of a proposed combination. It does not empower the Commission to enlarge, by regulations, the scope of that section. The second *proviso* to regulation 5(8) of the Combination Regulations, however, enlarges the scope of 'other document' used in section 6(2) of the Act. It enlarges it to the effect that the date of communication of the intention to acquire to a statutory authority is the date of execution of the 'other document'. The vires of said *proviso* is, therefore, questionable and the SCN for failure to comply with the said *proviso* is not sustainable. Further, the said *proviso* has been dropped subsequently. The purpose of the Act is fully advanced even in the absence of the said *proviso*. No obligation can be attached for a failure which does not advance the purpose of the Act. Additionally, the regulations ought to provide competitive neutrality. The trigger for giving notice of a combination needs to be the same for all kinds of enterprises. It distorts competitive neutrality if a NBFC is required to give notice from the date of communication of its intention to acquire to the RBI, while there is no such obligation for a non-NBFC undertaking exactly the same transaction.

b. Section 6(2) of the Act refers to three temporal milestones from which the thirty day period is be be triggered. These are: (a) execution of the agreement, (b) execution of 'other document', and (c) acquisition of control. Since the said section does not provide that the period of thirty days has to be from the first of these temporal milestones, the thirty-day period has to run from the last of the three dates of temporal milestones, given the severe consequences of failure to give notice to the Commission. The agreement for acquisition was entered into on 18.02.2015 and notice was given on 16.03.2015. Thus, there is no failure to give notice within the stipulated period of thirty days. Further, section 6(2) of the Act requires notice to be given to the Commission within thirty days of the execution of any agreement or 'other document' for acquisition. The 'other document' has to be for an acquisition. As required under regulation 5(8) of the Combination Regulations, the

'other document' has to be a binding document. A unilateral letter to the RBI does not meet the requirement of agreement or 'other document' for acquisition. Nor is it a binding document. Hence, it does not trigger notice.

c. The second *proviso* to regulation 5(8) is in the nature of an exception or *proviso* to the first *proviso* of the said regulation. It is only where the acquisition is without the consent of the parties being acquired or where the 'other document' has not been executed that a reference to a communication to a statutory authority is relevant. In this case, there is consent of the parties and there is no 'other document'. Hence regulation 5(8) has no application in this case. Further, there is an agreement, as required under section 6(2) of the Act. Since an agreement exists, it is not permissible to traverse beyond section 6(2) of the Act and calculate time frame with reference to 'other document' as referred to in regulation 5(8) of the Combination Regulations.

d. SFL filed the application seeking RBI approval to increase its stake in Royal Sundaram from 49.9% to 75.9% on a unilateral basis without the prior knowledge or consent of the selling shareholder (RSA), and of the entity being acquired (Royal Sundaram). There was not even a board resolution at SFL end authorizing any such transaction. The application did not contain details about the type, nature and purpose of the contemplated acquisition. The details required to be provided in the notice as per format under the Act were not available then. The application was made in anticipation of exit by RSA and was made only to comply with the regulatory requirement applicable to acquisitions by a NBFC so that it is not handicapped to purchase the shares vis-à-vis other prospective buyers as and when the opportunity arises. Therefore, no definite intention to acquire was formed by SFL prior to making such application. It was only a desire to acquire shares if RSA wished to sell. If a notice of such desire is given, the Commission would put it out in public domain. When there is no certainty of transaction, this would mislead the investors. That is why notice is required to be given, as specified in regulation 31 of the Combination Regulations, only where binding document is executed on or after 01.06.2011. The application to the RBI is neither an intention to acquire nor a binding document for acquisition to trigger notice under section 6(2) of the Act.

e. Even if hypothetically, there is a non-compliance, it must not warrant a penalty in view of the facts that (a) the non-compliance of second *proviso* to regulation 5(8) is at best technical; (b) SFL gave notice voluntarily and before the consummation of the transaction; (c) the transaction does

not cause any appreciable adverse effect on competition within India; (d) no harm or prejudice has been caused to any party by the alleged late filing of notice, and (e) the penalty, if imposed, will not have any deterrent effect as the *proviso* allegedly violated does not exist anymore.

6. What needs to be determined is: whether the communication of the intention to acquire to a statutory authority trigger notice under section 6(2) of the Act read with the Combination Regulations? According to section 6(2), the trigger for giving notice is the execution of any agreement or 'other document' for acquisition, where acquisition means acquiring or agreeing to acquire shares, voting rights, control, etc. The 'other document' has to be for an acquisition. It has to be a binding document under regulation 5(8). Under regulation 31(b), notice needs to be filed only when binding document is executed. Thus, trigger for notice is the date of execution of any agreement or other binding document for acquisition. However, it is possible that an acquisition happens without the consent of the enterprises (without an agreement), or without execution of the 'other document'. In such cases, second *proviso* to regulation 5(8) is invoked only for the purpose of ascertaining the date of execution of the other document. When there is an agreement for acquisition, it is not permissible to invoke the said *proviso,* unless the communication of the intention to acquire to a statutory authority itself is the 'other document' for acquisition. The second *proviso* to regulation 5(8) now in vogue provides what constitutes the 'other document' for triggering notice under section 6(2) of the Act, while the said *proviso* at the relevant time provided for 'the date of execution of the other document'.

7. Assuming for the sake of argument that the second *proviso* to regulation 5(8) is attracted, it needs to be determined: whether the application made by SFL to the RBI seeking its approval in terms of Master Circular dated 01.07.2014 amounts to communication of an 'intention to acquire' to a statutory authority. It is useful to understand 'intention'. As per Advanced Law Lexicon, 3rd Edition, Reprint 2009, 'intention' means (i) the willingness to bring about something planned or foreseen, (ii) the state of being set to do something, or (iii) foreknowledge of an act, coupled with the desire of it. In 'Criminal Law', 12th Edition, LexisNexis, P. S. A. Pillai writes: "*Intention is the conscious exercise of mental faculties of a person to do an act for the purpose of accomplishing or satisfying a purpose.*" Here we would like to refer to Asquith L.J. in Cunliffe vs. Goodman, (1950) 1 All ER 720, wherein, his Lordship observed: "*An "intention", to my mind, connotes a state of affairs which the party "intending" - I will call him X.- does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies,*

to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition." Similarly, the Punjab and Haryana High Court in S. Raghbir Singh Sandhawalia vs. The Commissioner of Income Tax, AIR 1958 Punjab 250, observed: "*Intention has been defined as the fixed direction of the mind to a particular object, or a determination to act in a particular manner, and it is distinguishable from "motive", that which incites or stimulates action.*" Thus, intention is a much higher state of mental preparedness in comparison to wish, will, desire, want, motive, exploration, or contemplation. It is a decision to perform the action in question. It is just one step away from the action. It is a 'resolve' or 'determination' to do something or forebear from doing something.

8. The application to the RBI does not reflect any such determination or resolve. There was no understanding whatsoever for acquisition between the parties to this effect. The terms of acquisition were not even visualized then by the parties. The application was only to remain ready to seize an opportunity if and when it arises, as evident from the words in the application: "*..we anticipate that they (RSA) are likely to exit from India....*". If SFL was not a NBFC, it would not have made this application. It made the application to seek the permission, as that permission would put it at the same level playing field with other potential buyers of shares from RSA, and it is not handicapped for want of RBI permission at the material time. Further, the application to the RBI is not an agreement for acquisition. Nor is it a binding document for acquisition. Under the Master Circular, the RBI may permit a NBFC to have higher equity in an insurance venture '*on a selective basis*'. It does not permit higher equity in all cases. The RBI could have refused permission to SFL. It could grant permission with a condition, as happened in the instant case. SFL wanted approval to retain excess holding for five years while the RBI granted excess holding for three years. If the RBI had not granted permission or if three year condition was not acceptable to SFL, that would have put an end to the desire of SFL. Further, RSA may not exit India. It could refuse to sell shares or to sell shares to SFL. Nothing was definite at the time of application to the RBI. Therefore, in the given facts and circumstances, the application to the RBI is not a communication of the intention of SFL to acquire shares of Royal Sundaram.

9. Many other relevant issues have been raised by the learned Counsel for SFL. For example, second *proviso* to regulation 5(8) enlarges the scope of section 6(2), penalty for a *proviso* which does not exist now will not have deterrence, etc. It is not necessary to go into these as the matter gets determined otherwise.

10. In view of the foregoing, we find that SFL gave notice to the Commission within thirty days of the agreement for acquisition. It was not required to give notice within 30 days from its application to the RBI seeking permission to have higher equity stake in Royal Sundram. It did not fail to give notice of the proposed combination within the time stipulated in the Act, as alleged in the SCN, and did not contravene the provisions of section 6(2) of the Act. Thus the SCN is disposed of.

11. The Secretary is directed to communicate this order to SFL accordingly.

DISSENT NOTE

PER

Devender Kumar Sikri
Chairperson

S. L. Bunker
Member

U. C. Nahta
Member

1. It is noted that:

(i) On 16th March, 2015, the Competition Commission of India ("**Commission**") received a notice under sub-section (2) of Section 6 of the Act relating to the acquisition by Sundaram Finance Limited ("**SFL**" or "**Acquirer**") of an additional 26% stake in Royal Sundaram Alliance Insurance Company Limited ("**Royal Sundaram**" or "**Target**") from Royal & Sun Alliance Insurance, Plc ("**RSA**"), as a result of which, the shareholding of SFL in Royal Sundaram would increase from 49.9 percent to 75.9 percent, post-combination and SFL would acquire sole control over Royal Sundaram (SFL and RSA are hereinafter collectively referred to as **"Parties"**).

(ii) The notice under sub-section (2) of Section 6 of the Act was filed pursuant to execution of a Share Purchase Agreement on 18th February, 2015 between SFL, RSA and Royal Sundaram. As per the information provided in the notice, SFL, *vide* its application dated 13th October, 2014, sought approval from the Reserve Bank of India to increase its shareholding in Royal Sundaram from 49.90% to 75.90% ("**RBI Application**").

(iii) In terms of sub-section (2) of Section 6 of the Act, any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, disclosing the details of the proposed combination, *within thirty days of 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*. Further, sub-regulation (8) of Regulation 5 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**") explains the nature of documents that would qualify as "*other document*". Sub-regulation (8) of Regulation 5 of the Combination Regulations as applicable at the time of filing notice is reproduced below:

> "*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 such a document has not been executed but the intention to acquire is communicated to the Central Government or State Government or a Statutory Authority, the date of such communication shall be deemed to be the date of execution of the other document for acquisition.*" (Emphasis added).

iv. Thus, in terms of the above provisions, *prima facie,* it appeared that the Acquirer was required to give notice to the Commission within thirty days of the RBI Application. The Commission, in its meeting held on 13th May, 2015, considered and approved the proposed combination under sub-section (1) of Section 31 of the Act. The Commission also decided that separate proceedings be initiated against the Acquirer under Section

43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**").

v. Accordingly, in terms of Section 43A of the Act read with Regulation 48 of the General Regulations, a show cause notice dated 20th May, 2015 was issued to the Acquirer to show cause, in writing, within 15 days of the receipt of notice as to why penalty, in terms of Section 43A of the Act should not be imposed on it for having failed to give notice to the Commission within the time stipulated under sub-section (2) of Section 6 of the Act. The Acquirer filed its response to the show cause notice on 9th June, 2015 ("**Response**"). In the Response, the Acquirer has , *inter-alia*, made the following submissions:

a. That the Acquirer had filed the RBI Application dated 13th October, 2014 seeking RBI's approval to increase its stake in Royal Sundaram from 49.9% to 75.9%, on a unilateral basis. The Acquirer has stated that the RBI Application was merely made in anticipation of a future share purchase and was filed without prior knowledge or consent of the selling shareholder and it was only made to comply with the regulatory requirement applicable to acquisitions of a non-banking financial company registered with the RBI ("**NBFC**"). Further, the RBI Application did not contain details about the type, nature and purpose of the contemplated acquisition, and therefore no definite intention to acquire was formed by SFL prior to making such application;

b. That the sub-regulation (8) of Regulation 5 of the Combination Regulations refers to a "*binding document*" and, in the absence of such a binding document, there is no obligation to submit a notice under sub-section (2) of Section 6 of the Act;

c. That the sub-section (2) of Section 6 of the Act refers to three sets of temporal milestones from which the thirty day period can be triggered and

that since sub-section (2) of Section 6 of the Act does not provide that the period of thirty days has to be reckoned from the first of these temporal milestones, the thirty day period has to run from the last of the three dates of temporal milestones referred in sub-section (2) of Section 6 of the Act;

d. That the regulations relating to sub-section (2) of Section 6 of the Act can only deal with the question of the "form" and the "fee" of filing and that no substantive condition can be added to the Act, either directly or by defining the words used in sub-section (2) of Section 6 of the Act so as to enlarge the scope of the said Section. The Acquirer has submitted that the second *proviso* of sub-regulation (8) of Regulation 5 of the Combination Regulations adds a new condition to sub-section (2) of Section 6 of the Act and that a regulation cannot enlarge the scope of "*other document*" set out in the statue;

e. That the second *proviso* under sub-regulation (8) of Regulation 5 of the Combination Regulations is in the nature of an exception to the first *proviso*, i.e., the second *proviso* is a *proviso* to only the first *proviso* and that communication of an intention to acquire made to Central/State Government or Statutory Authority is only applicable in the case of a hostile takeover (provided for in the first *proviso* to sub-regulation (8) of Regulation 5 of the Combination Regulations); and

f. That an agreement for an acquisition must be an arrangement or understanding or action in concert, as per the definition of "agreement" under sub-section (b) of Section 2 of the Act and the same cannot be a unilateral intention or action. The Acquirer has stated that the RBI Application was not made pursuant to any *decision* taken to acquire the shares from RSA and that the writing of a unilateral letter does not fulfill the requirement of an "*agreement or other document for acquisition*" under sub-section (2) of Section 6 of the Act.

vi. On the request of the Acquirer, the Commission heard the authorised representatives of the Acquirer in its meeting held on 8th March, 2016, wherein the following additional submissions were made by the Acquirer:

a. The Acquirer filed the RBI Application seeking permission of the RBI to acquire 26% shareholding of RSA held in Royal Sundaram. The RBI Application written by the Managing Director of the Acquirer was solely to explore the opportunity of increasing its shareholding in Royal Sundaram. As the Acquirer is an NBFC, RBI permission is required for acquiring any further shares in Royal Sundaram under section 45(I)(a) of the Reserve Bank of India Act, 1934 ("**RBI Act**"), read with the Master Circular dated 1st July, 2014 issued by the RBI;

b. RBI approved the proposed acquisition of 26% shareholding in Royal Sundaram by the Acquirer on 14th January, 2015;

c. Only subsequent to receipt of the RBI's approval on the 14th January, 2015, did the Acquirer start negotiations with Royal Sundaram and RSA for the acquisition of shares of Royal Sundaram;

d. The board of directors of the Acquirer and Royal Sundaram approved the proposed acquisition only on 18th February, 2015 and a Share Purchase Agreement was executed amongst the Acquirer, Royal Sundaram and RSA on 18th February, 2015;

e. An application was filed by Royal Sundaram with the Insurance Regulatory and Development Authority ("**IRDA**") on 20th February, 2015 seeking approval for the transfer of shares by RSA to SFL;

f. The RBI Application (filed in terms of regulatory requirements of RBI) is substantially different from that of an application filed with other authorities such as Foreign Investment Promotion Board. At the time of filing the RBI Application, SFL could not have formed its intention to make a binding offer to a prospective seller without obtaining the approval of the RBI to exceed 50% shareholding in a Target i.e., Royal Sundaram;

g. SFL was of the *bonafide* view that in the event RBI grants its approval for further acquisition of shares in Royal Sundaram by SFL, only then would SFL crystallize its intention or decision to acquire shares in Royal Sundaram from RSA;

h. SFL did not pass a board resolution prior to filing the RBI Application. In this regard, SFL relied on Sections 179, 180 and 188 of the Companies Act, 2013, to state that there was no requirement to pass a board resolution for the purposes of filing the RBI Application;

i. Further, it has been submitted that the RBI application was merely an expression of desire by SFL to acquire shares in Royal Sundaram, which cannot be regarded as intention to acquire shares in Royal Sundaram; and

j. Finally, the Acquirer relied upon the Competition Appellate Tribunal's judgement in *Thomas Cook (India) Limited v CCI* (Order dated 26th August, 2015 in Appeal No. 48/2014) to state that penalty cannot be imposed where violations of provisions of the Act are merely technical in nature.

2. The majority of the learned Members of the Commission has come to the conclusion that the Acquirer has not contravened the provisions of sub-section (2) of Section 6 of the Act. We are not in a position to agree with the majority Members of the Commission. Therefore, we are writing a separate dissent note.

3. In order to determine whether the Acquirer failed to give notice of the proposed combination to the Commission in accordance with sub-section (2) of Section 6 of the Act read with sub-regulation (8) of Regulation 5 of the Combination Regulations (as applicable at the time of RBI Application), the following three facts are required to be established:

   i. The Acquirer had an intent to acquire shares in the target;
   ii. The Acquirer communicated such intent to a Statutory Authority / Central Govt. / State Govt.; and
   iii. The Acquirer failed to give notice to the Commission within thirty days of communication of such intent to the Statutory Authority / Central Govt. / State Govt.

4. In the present case, the RBI Application seeking permission of RBI to increase the shareholding of SFL in RSA from 49.90% to 75.90% in accordance with the RBI's Master Circular dated 1st July 2014 qualifies as an intent to acquire. Further, the Acquirer communicated this intent to the RBI, which is a statutory authority established under the RBI Act. Accordingly, making of the RBI Application constitutes a valid trigger for filing a notification with the Commission under sub-section (2) of Section 6 of the Act. Thus, in accordance with the timelines provided in sub-section (2) of Section 6, the notice ought to have been given to the Commission by 12th November, 2014.

5. With respect to the submissions of the Acquirer, as mentioned above, we observe as under:

   a. With respect to the contention of the Acquirer that the RBI Application did not constitute its intention to acquire but was merely an expression of a desire to acquire, it is noted that a company would not be expected to seek permission from statutory authority (in this case, RBI) in regard to an acquisition, unless it had formed an intention to acquire. In this regard, the term "*intention*" has been defined in Black's Law Dictionary (Eighth edition) as "*the willingness to bring about something planned or forseen; the state of being set to do something*". "*Intention*" is further explained in Black's Law Dictionary as "*the purpose or*

design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, inasmuch as they fulfil themselves through the operation of the will."(Emphasis added). SFL has itself submitted that the RBI Application was made in pursuance of its *desire* to increase its shareholding in Royal Sundaram. Thus, the act of making the RBI Application, coupled with the Acquirer's admitted desire to acquire shares of RSA, constitutes the Acquirer's intention to acquire shares in RSA;

b. It is highly unlikely that a statutory authority such as RBI would entertain speculative enquiries as regards the relaxation of a regulatory requirement such as maximum share holding of NBFC in an insurance company. Nevertheless, even assuming though not admitting that the Acquirer's application to RBI was a precursor to crystallization of its final intention to acquire additional stake in RSA, it is noted that sub-regulation (8) of Regulation 5 of the Combination Regulations does not distinguish between the degrees of intention to acquire. It inherently presumes that communication of intention to a statutory authority is manifestation of desire to acquire. Having established that the Acquirer has communicated its intent to a statutory authority, in this case RBI, it is clear that all the three ingredients required to establish the fact that the Acquirer had contravened the provisions of sub- section (2) of section 6 of the Act read with sub regulation 8 of regulation 5 of the Combination Regulations (as applicable at the time of RBI Application) have been met.

c. With regard to the submission of the Acquirer that the RBI Application was made on a unilateral basis and was neither an agreement nor a binding document and therefore the Acquirer was not under an obligation to give notice under sub-section (2) of Section 6 of the Act read with sub-regulation (8) of Regulation 5 of the Combination Regulations (as applicable at the time of RBI Application) , it is observed that the term "other document" used in sub-section (2) of Section 6 of the Act subsumes documents which convey an intent of the Acquirer to

consummate the transaction and would include, *inter alia,* unilateral communication of intention to statutory authorities such as RBI and/or unilateral board resolutions such as in case of hostile acquisitions. Therefore, the argument put forth by the Acquirer regarding unilateral communication not constituting valid trigger cannot be accepted. Further, the contention of the Acquirer that RBI Application did not contain sufficient details as regards acquisition are not relevant as the RBI Application included details about the shareholding to be acquired and the entities involved in the transaction. Further, as held by the Commission in the *GE-Alstom case*[1], the Combination Regulations provides for a situation where parties to the combination can inform the Commission about the changes in the proposed combination and in fact, even perceives the possibility of a notified combination undergoing subsequent changes even to the extent of rescinding the very transaction. However, these provisions are of no relevance to determine the obligation of the parties to a combination to give notification to Commission under sub-section (2) of Section 6 of the Act.

d. Clause (b) of sub-section (2) of Section 6 of the Act provides that notice in respect of an acquisition is required to be given to the Commission within thirty days of execution of any agreement or other document for acquisition. Further, sub-regulation (8) of Regulation of 5 of the Combination Regulations provides that the reference to "*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. The first *proviso* to sub-regulation (8) of Regulation 5 of the Combination Regulations covers a situation of hostile takeovers. The second *proviso* (as applicable when the RBI Application was made) provides that even when there is no binding document but there is a communication of intention to acquire, *inter alia*, to a statutory authority, the date of such communication shall be deemed to be the date

[1] *Order under Section 43A passed in Combination Registration No. 2015-01-241*

of execution of other document. Thus, it is amply clear that the notification was triggered upon RBI Application.

e. The Acquirer has submitted that the second *proviso* to sub-regulation (8) of Regulation 5 of the Combination Regulations applies to the first *proviso* therein and not the main enactment (in this case, the regulation). However, the Hon'ble Kerala High Court in *Mathew Philip and Ors. v. Malayalam Plantations (India) Ltd. and Anr*[2] has held that the use of the word "further" in a second *proviso* to a section of the Act does not indicate that the said *proviso* is an additional provision in relation to the situation contemplated under the first *proviso*[3]. The Hon'ble Supreme Court in the case of *S.Sundram Pillai &Ors.v. V.R. Pattabiraman &Ors*[4] has held that the proper function of a *proviso* is that it qualifies the generality of the main enactment and is used as an aid or guide to the main enacting section and thus, it must be construed with reference to the preceding parts of the clause to which it is appended. The existence of a second *proviso* is not to qualify the first *proviso*;

f. As regards the submissions of the Acquirer that Combination Regulations cannot enlarge the scope of the Act, it is noted that sub-regulation (8) of Regulation 5 does not enlarge the scope of sub-section (2) of Section 6 of the Act but on the contrary, clarifies and explains the term"*other document*" which finds place in sub-section (2) of Section 6 of the Act. The objective of sub-regulation (8) of Regulation 5 of the Combination Regulations is to provide clarity and certainty to the stakeholders with respect to triggering of obligation to file notice under the provisions of the Act and it is for this purpose that the regulations specifies the circumstances in which notification would be triggered, *inter alia*, in the two *provisos* to sub-regulation (8) of Regulation 5 of the Combination Regulations.

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[2] *(1994)81 Comp Cas 38(Ker)*
[3] *Regional Director, Company Law Board, Government of India v. Mysore Galvanising Co. Pvt. Ltd. and Ors*, (1976) 46 Comp Cas 639 (Kar), *Sugarcane Growers and Sakthi Sugars Shareholders' Association v. Sakthi Sugars Ltd.*, (1998) 93 Comp Cas 646 (Mad), In Re: *Marybong and Kyel Tea Estate Ltd.* (1977) 47 Comp Cas 802 (Cal).
[4] 1985 Vol 1 SCC 591 (SC).

The erstwhile second *proviso* to sub-regulation (8) of Regulation 5 of the Combination Regulations (as applicable when the RBI Application was made) states that even in absence of a binding document, the date of communication of intention, *inter alia*, to a statutory authority shall be deemed to be the date of execution of other document for acquisition.

6. We do not agree with the opinion of the majority that communication of intention to acquire to a statutory authority cannot be a trigger for filing notice under sub-section (2) of Section 6 of the Act in a situation where there exists a binding agreement to acquire. It is amply clear from the provisions of sub-regulation (8) of Regulation 5 of the Combination Regulations (as applicable at the time of RBI Application) that the date of communication of intent to a statutory authority would be deemed to be the date of execution of the "*other document*" and therefore would trigger notification to the Commission. This is regardless of whether or not an agreement for acquisition is executed subsequently. This is also consistent with the Commission's decision in *Tesco/Trent* (Case No. C-2014/03/162). Further, the Commission has, in the past, accepted notifications based on this understanding, such as in *Prime Focus/Reliance Media Works* (Case No. 2014/08/1980*) and Dunearn/Intas* (Case No. C-2014/06/184). It is observed that even though the amendment to sub-regulation (8) to Regulation 5 of the Combination Regulations narrows the scope of the regulations, it still provides that the public announcement 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, shall be deemed to be the "*other document*" for the purpose of triggering notification under sub-section (2) of Section 6 of the Act. This is regardless of whether the public announcement is followed necessarily by an agreement or not. It is noted that the said amendment has been made with the intention to provide certainty to the stakeholders as regards the date of notification in the case of acquisitions which trigger public announcements as it is not necessary that such public announcement for acquisition of shares of a listed company would be followed or preceded by an agreement; for example, such acquisition can take place through allotment or market purchases also.

7. Thus, in terms of sub-section (2) of Section 6 of the Act and sub-regulation (8) of Regulation 5 of the Combination Regulations (as applicable when the RBI Application was made), the Acquirer ought to have filed a notice with the Commission within thirty days of the RBI Application, i.e., by 12th November, 2014. However, the notice was filed by the Acquirer with the Commission on 16th March, 2015. We are therefore of the opinion that the Acquirer failed to give notice to the Commission in accordance with sub-section (2) of Section 6 of the Act read with sub-regulation (8) of Regulation 5 of the Combination Regulations (as applicable when the RBI Application was made), which attracts penalty under Section 43A of the Act.

8. However, acknowledging that the provisions of sub-regulation (8) of Regulation 5 of the Combination Regulations were subsequently amended in January 2016 *vide* the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016, such that the requirement to file notice within thirty days of communication of intention to statutory authority (other than to Securities and Exchange Board of India in case of a public announcement) has been removed and considering the facts and circumstances of the case, we are not inclined to impose any penalty on the Acquirer in terms of Section 43A of the Act.

9. It is ordered accordingly.