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भारतीय प्रतिस्पर्धा आयोग
Competition Commission of India



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SYMBIOSIS
LAW SCHOOL, NAGPUR

1st CCI-Symbiosis Law School, Nagpur National Moot Court Competition, 2023 on Anti- Trust Laws

Moot Proposition





SYMBIOSIS LAW SCHOOL, NAGPUR

Symbiosis International (Deemed University), Pune
(Established under Section 3 of the UGC Act, 1956)

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1. The Republic of Free Minds (RFM) enacted the Legislation on Sale and Purchase of Sulphur Candles (LSPSC) in 2013, bringing under it the entire gamut of sale and purchase of chemically manufactured scented candles containing sulphur compounds.
2. LSPSC became a hot electoral topic in the 2012 national general elections in RFM when in the States of Ultapur and Sanghpur more than 9000 people suffered from acute respiratory distress syndrome (ARDS), resulting in death toll of upwards of 7000 people. The Investigation Directorate (ID), an autonomous investigation authority in RFM, released an investigation report in late 2012 (ID Report), attributing the injury and death to the heavy use of scented candles, emitting carcinogenic and noxious sulphur fumes.
3. Scented candles had recently become popular in RFM after the controversial promotion of a specific brand 'Faral', an international brand of scented candles by multinational conglomerate AD Group, by some high-ranking members of the ruling political party 'Progressives', as an aid to meditation and spiritual practices. Soon after, numerous local manufacturers entered the scented candles market, flooding the markets of RFM with cheap imitations of Faral, using cheap alternative chemical compounds for the manufacturing. The ID Report while attributing the large-scale injury and death to the manufacturing and sale of such chemically manufactured candles containing sulphur compounds, also attributed the increase in sale and demand in RFM to the promotion by some members of the Progressives. The ID Report was used by the national opposition political party – the Nationalists, to sway the public opinion against the ruling Progressives in the 2012 national general elections.
4. The Nationalists, as declared in their election manifesto, passed and enacted the LSPSC in 2013. The rules enacted thereunder set the national quality standards and sought to regulate the manufacturing process, the testing requirements and approval conditions for chemically manufactured scented candles.
5. The legislation LSPSC in its limited operation appointed a central government entity, the RFM Health Agency, and provided it the sole control over the purchasing of scented candles for the sale to general public through retailers and distributors. The RFM Health Agency procures the scented candles from the manufacturers and determines the sale price for each category of the product manufactured. For price increases of the products, the manufacturers are required to make annual representations before the RFM Health Agency, with evidence for justifying the price increase sought. The increase if approved by the RFM Health Agency is provided to the manufacturers from the next procurement cycle.
6. Notably, post the tragic incident of early 2012, certain large manufacturers of scented candles, led by the AD Group, had come together to draft and propose certain self-administrative guidelines for the scented candles industry (SA Guidelines). These guidelines proposed manufacturing standards, testing standards as well as certain safeguards for distributors and retailers against imitation products, not compliant with the standards in the market. While the SA Guidelines were seen as an attempt by the AD Group to distance themselves and their brand Faral from the incident, the same was adopted by the newly formed industry body – Association of Scented Candles Manufacturers (ASCM). The LSPSC had borrowed various provisions from the SA Guidelines, specifically providing a clause that provided for the legislation to be updated based on the guidelines and the evolving nature of the market.



7. ASCM comprised of roughly 28 manufacturers, ranging from large manufacturers such as the AD Group, the Traditional Heritage Group (TH Group), Vedic Foundations Pvt Ltd. (VF), Augustus Pvt Ltd. (Augustus) etc. (having national domestic presence); various smaller manufacturers (limited to distribution and sale to certain geographical regions of RFM) as well as certain international manufacturers with only exports (without manufacturing) to the domestic market, viz. the May Flower Group (MF Group), Jubliant Scents N.V. etc. While the AD Group was an international conglomerate, headquartered in France, it had established various manufacturing units in the States of Uttar Pradesh and Sanghpur, attracting government subsidies and promotion by the then ruling Progressives.

8. With the enactment of the LSPSC, the ASCM passed a resolution adopting the LSPSC as the governing legislation for the purposes of industrial standards for quality, manufacturing, testing, distribution and sale, and the SA Guidelines to be an evolving set of guidelines, to be revised by the ASCM as per the changing circumstances of the markets, technological innovations and legislative mandates of RFM. The governing body of the ASCM comprised of the four largest manufacturers, AD Group, TH Group, VF and Augustus, with the position of the chairperson being elected annually. The chairperson position of the governing body of the ASCM (hereinafter referred to as 'the Governing Body') had rotated between the four manufacturers periodically from the inception of the ASCM (i.e., since 2013 to 2018), with the AD Group holding the chair for two years, 2013 and 2017. The representation in the ASCM was made by the Chief Executive Officer of the respective manufacturer members, with the Governing Body meeting bi-annually for discussion regarding industry issues.

9. With the enactment of the LSPSC and the annual guidelines from the ASCM, the domestic scented candles market grew exponentially, with the CAGR increasing from 5.7% to 7.5% between 2013 and 2018. The AD Group, leading the industry, exhibited a growth rate of 3.2% for the same period. While the market positions of the leading industry players varied, the names in the top four spots in manufacturers remained rotating between the AD Group, TH Group, VF and Augustus. Given that there was stringent control of the regulatory authorities in the sale of scented candles, the market did not witness any sudden increase in the prices of the candles or decrease in the quality.

10. The scented candles industry witnessing a healthy growth attracted various international conglomerates and manufacturers to increase their presence in RFM. The success of AD Group's Faral and the return of the investments being reaped by them was another driving factor for a series of investments in the domestic industry. The Nationalists, governing political party of RFM, taking benefit of the evolving industry, capitalized on the growth of foreign exchange in RFM as one of their election narratives for the 2019 general elections.

11. Alongside various smaller consolidations in the market, certain larger entities such as the MF Group entered the domestic manufacturing market by their acquisition of Augustus. The acquisition of Augustus was blessed by the approval from the market regulator of RFM, the Competition Commission of Republic of Free Minds (CCRFM) in January 2019. Following the acquisition of Augustus, the MF Group undertook a detailed internal regulatory compliance investigation for the operations of Augustus. The internal investigation and the



materials found therein were presented to the newly constituted board of directors of Augustus, which vide resolution dated 28 February 2019, approved a detailed internal investigation of the affairs of the company under the former management by external counsels.

12. Meanwhile, the AD Group underwent an internal restructuring exercise, combining its scented candles and consumer fragrance manufacturing businesses under one vertical. During the restructuring process, the diligence team of AD Group found several instances of information exchange between certain former key managerial personnel of the company with their counterparts from competing manufacturers. Making timely use of the leniency program under the Competition Act of 2002 (Competition Act), the AD Group submitted a leniency application before the CCRFM in early March 2019. Based on the leniency application and the evidence submitted by the AD Group, the CCRFM passed an order dated 15 March 2019, directing the Director General Competition Commission of RFM (DG) to investigate whether there was any contravention of the Competition Act in furtherance of cartelization by certain manufacturers of scented candles. The CCRFM order noted the top four manufacturers – AD Group, TH Group, VF and Augustus (now part of the MF Group) and directed the investigation of the practices and conduct of the entities from 2013 to 2018.

13. During the progress of the internal investigation of the records by the MF Group, the DG conducted a dawn raid at the premises of the manufacturing units and corporate offices of Augustus, seizing various materials (including certain materials and records unearthed during the internal investigation). An entire set of incriminating emails from Mr. Shayama Nand, the former CEO of Augustus, was seized from the premises of his personal residence. Dawn raids were also simultaneously conducted at the premises of the AD Group, TH Group, and VF.

14. The MF Group, based on their internal investigation, submitted a leniency application before the CCRFM on 23 March 2019 and subsequently submitted further evidence and material in support of their application on 02 April 2019. Leniency applications under the Competition Act were also submitted by VF and the TH Group vide applications dated 03 April 2019 and 07 April 2019, respectively.

15. During the ongoing investigation by the DG, the TH Group announced the winding up of their RFM operations and the sale of their remaining interests in RFM to the MF Group. According to the agreement between the MF Group and the TH Group, the liabilities arising from the ongoing investigation were to be subsumed by the MF Group as part of the consideration to be paid to the TH Group for the acquisition of their limited RFM operations.

16. The DG investigation was completed in February 2021 and the report (DG Report) concluded the contravention of provisions of the Competition Act, by cartelization among three of the four scented candle manufacturers, with the exception of VF. The DG Report noted that while VF had also engaged in information exchange as part of the Cartel, the instances of such information exchange and cooperation to the activities of the Cartel were not significant enough to consider any contravention of the Competition Act. The DG Report also concluded the AD Group to be the ringleader of the cartel and the period of offence to be 2013 to 2018. The evidence relied by the DG to conclude the contravention of the Competition Act by the manufacturers, heavily relied over the set of emails seized from Mr. Shayama Nand of Augustus. A sample of evidence from 2018 regarding the five states of RFM where allegations of cartelization exist, as compiled, and relied by the DG (obtained from the email set seized from the personal computer of Mr. Shayama Nand, seized from his personal residence) has been annexed to this problem as Annexure A.



17. The DG Report also concluded the involvement of the industry body ASCM and the specific role of the Governing Body in the cartelization. The DG Report while did not assign liability on the ASCM, it recommended that the Governing Body be brought under the governance and authority of the RFM Health Agency or any other authority of the State. The evidence relied by the DG, apart from the email set seized from the residence of Mr. Shayama Nand, included instances of exchange of historical data concerning the sale and price list of the manufacturers, the intended price increase sought to be requested from the RFM Health Agency, the justifications sought to be relayed for requesting the price increase and discussions surrounding the collective boycott of certain regional markets (on denial of price increase sought and its imparity with the expenses born by the manufacturers in supplying their products in such regions of RFM).

18. While the AD Group accepted to the contravention of the Competition Act as concluded in the DG Report, by indulgence in cartelization, the MF Group (through Augustus and the TH Group) as well as ASCM, vehemently argued against the conclusions of the DG Report before the CCRFM. In their written submissions disputing the DG Report, the MF Group heavily relied over the infraction of the warrant issued by the Chief Metropolitan Magistrate and the illegality of the evidence sized from the personal residence of Mr. Shayama Nand, when the scope of the warrant did not include the personal residences of any personnel. The MF Group had further substantiated their averment arguing that the CCRFM must not take the evidence obtained through the illegal search and seizure operation and since it forms the hilt of the conclusion in the DG Report, the DG Report's conclusions should not be taken into consideration.

19. Another averment proceeded by the MF Group hinged on the regulation of the industry and the aspects of pricing by the LSPSC and that the authority to fix prices was retained by the State authorities. The MF Group had argued that, given that the prices were never in control of the manufacturers, the instances of information exchange between the manufacturers did not give rise to any anti-competitive consequences for the domestic market and therefore, should not amount to cartelization under the Competition Act (thereby not attracting any penalty for the conduct of information exchange).

20. Further arguments from the MF Group included averments on the requirement by the RFM Health Agency for a collated price increase request, which necessitated the information exchange between the manufacturers. This was necessitated by the untimely and often rare opportunity provided by the RFM Health Agency to the manufacturers for increasing the prices of their products. MF Group had averred that while the LSPSC provided for annual price increases, there was discretion with the RFM Health Agency which more often did not grant any increase in prices. The MF Group presented the annual prices of its scented candles (along with the products of Augustus and TH Group) which depicted only an increase of FM\$ 10 in the last 6 years, with increases only in 2015 and 2018. The MF Group thus had submitted that the RFM Health Agencies discretion to increase the price, the practice of untimely and arbitrary increase forced the manufacturers to exchange certain information and be on the same page in order to maximize their chance of gaining an increase.

21. The MF Group also based their contentions on the SA Guidelines which were revised in 2016, following the representations made to the Central Government for providing greater control of the manufacturers on the pricing of their products. The revised guidelines sought for the collective representation to the government and the RFM Health Agency for periodic review of the prices of the products and the expenses faced by the manufacturers. There was no amendment made to the LSPSC following the representations of 2016, however, the RFM Health Agency, through press



release dated 20 June 2016, informed the constitution of an internal core team for consideration of the demands of the manufacturers and engaging in increased consultation with the manufacturers for proper administration of the industry. While the representations for greater autonomy on pricing failed, the Governing Body of the ASCM adopted another guideline in January 2017, expressly calling for increased representation to the government and unity among the manufacturers for increase in the growth of the industry. The MF Group has submitted before the CCRFM that the information exchange between the manufacturers was pursuant to the revised guidelines calling for greater consultation between the manufacturers and the RFM Health Agency and the same requiring consultation between the manufacturers.

22. The MF Group, while disputing the charge of contravention of the Competition Act, has further averred in its submissions before the CCRFM that in the instance that the CCRFM finds the conduct of the manufacturers in violation of the Competition Act, the leniency status for the AD Group should be revoked by the CCRFM, given the conclusion of the DG regarding its involvement in the cartel and its active ringleader status. The AD Group has accepted the charges and liability as in the DG Report, with the exception of the use of the term 'ringleader' by the DG Report. The AD Group has claimed that the filing of the leniency application is synonymous to the contravention being established and therefore, as per the procedures of the Competition Act and the rules and regulations thereunder, should be followed by the CCRFM in granting leniency status. The AD Group further averred that the ringleader status is not a legislative factor in considering the leniency status of applicants and the same should be disregarded by the CCRFM as instance of overreach by the DG.

23. The CCRFM, after taking into consideration the responses submitted by the manufacturers to the DG Report, fixed the date for oral hearing and consideration of the averments. ASCM had been directed to present its averments to the DG Report in written form, given that the DG Report did not recommend any liability to the industry body but depicts it as the facilitator of the cartel and the original matter did not have ASCM as a party before the CCRFM.

24. The CCRFM heard the parties concerned and directed the industry body ASCM, AD Group and the MF Group to cease and desist from the contravention of the Competition Act. Further, the CCRFM imposed penalty over the cartel participants to the tune of –

- 1) The MF Group – 10% of Relevant Turnover – FM\$ 300 Cr.
(The TH Group – FM\$ 200 Cr. and Augustus – FM\$ 100 Cr.)
- 2) The AD Group – 10% of Relevant Turnover – FM\$ 350 Cr.

25. The CCRFM rejected the contentions of the MF Group thereby holding the evidence obtained through the search and seizure operation as valid. The CCRFM further rejected the contention of the MF Group accepting the contention of the AD Group, that once an application under the lesser penalty regulations is filed with the CCRFM, the parties cannot contend that there was no contravention of the Competition Act. The CCRFM further held that the concept of ringleader of a cartel, while is attractive in proposition, the same cannot be supported by legislative intent or power of the CCRFM. Therefore, the CCRFM awarded leniency as per the status markers given as per their order of filing. The AD Group, having filed before others was awarded 100% leniency whereas, the MF Group (by the virtue of application status of Augustus and the TH Group) was given an aggregate leniency percentage, making the imposed penalty FM\$ 190 Cr. The final penalty after deduction stood as –

- 1) The MF Group – FM\$ 190 Cr.
- 2) The AD Group – Nil.



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26. The MF Group has appealed as per the provisions of the Competition Act before the appellate authority, National Company Law Appellate Tribunal (NCLAT). The procedural steps having been complete, the NCLAT has listed the matter for 'hearing and final adjudication'. Given that the submissions of the AD Group are the same as the submissions of the CCRFM, the NCLAT has directed oral submissions to be made by the AD Group (which would be same for the CCRFM and therefore not necessary to repeat).

27. The laws in RFM are parametria to the laws in India, with the Competition Act of RFM being modeled on the Competition Act, 2002 of India. The precedents and law laid down by the Competition Commission of India and the courts in India would have persuasive value before the NCLAT. Averments are to be presented before the NCLAT on the issues delineated from the perspective of the MF Group and the AD Group with averments involving the merits of the matter, the penalties imposed and the lesser penalty applications. The averments taken before the CCRFM are also made by the parties before the NCLAT, with the NCLAT directing the issue of invalid evidence to be addressed before the averments on merits.
