IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Justice Ms. Sana Akram Minhas

Miscellaneous Appeal No. 7 of 2007

Searle Pakistan Ltd. & another
Versus
The Competition Commission of Pakistan

Date of Hearing:	07.05.2024 and 16.05.2024
Appellants:	Through Mr. Jawad A. Qureshi Advocate.
Respondent:	Through Mr. Ijaz Ahmed Advocate along with Mr. Hashmatullah Aleem Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This appeal under section 20 of Monopolies & Restrictive Trade Practices (Control & Prevention) Ordinance, 1970 (MRTPO) was filed, assailing an order of 13.09.2007. The operative part of the order, of which the appellants are primarily aggrieved of, is consisting of paragraphs 34 and 35 which set the tone of the conclusion reached, which will be in discussion later.

Brief facts

2. The facts to understand the whole gamut of dispute, for the purposes of deciding this appeal, which we find necessary, are:

3. The appellants before us are the two entities; though independent corporate entities but beneficially interlinked by way of common directors/shareholders. (This being core bone of contention hence highlighted):

(i) Searle Pakistan Limited (Searle), appellant No.1 and
(ii) International Brands (Pvt.) Ltd. (IBL), appellant No.2.

4. Searle, being a public limited company, is listed on the Stock Exchange and a large number of members of the general public hold its

shares. IBL on the other hand is a private limited company and along with its directors, their associates hold majority shares in Searle. Both the companies i.e. Searle and IBL have been alleged to be associated undertakings and involved in such business practices which is benefitting a set of selective directors/shareholders of one of them, depriving and/or to the prejudice of shareholders of the other's and hence show-cause notice dated 07.02.2007 was issued. The said show-cause was subject matter of the proceedings before the Monopoly Control Authority (Authority). The Authority passed the impugned order, referred above. Accusatorial stance of respondent, being regulator, is that IBL has used its control on Searle to take advantage for itself and its shareholders at the cost of Searle and its minority shareholders.

5. We have heard learned counsel appearing for the parties and perused material available on record.

Relevant Law

6. The relevant provisions of MRTPO that would cover the controversy in hand are Sections 3, 4, 11 and 12 which, for the purpose of convenience are reproduced as under:-

> ***"3. Undue concentration of economic power, etc. prohibited.-*** *There shall be no undue concentration of economic power, unreasonable monopoly power or unreasonable restrictive trade practices.*
>
> ***4. Circumstances constituting undue concentration of economic power.*** *-Undue concentration of economic power shall be deemed to have been brought about, maintained or continued if,---*
>
> *(a) there is established, run or continued an undertaking the total value of whose assets is not less than three hundred million rupees or such other amount as the Authority may by rule prescribe, and which is,---*
>
> *(i) not owned by a public company, or*
>
> *(ii) is owned by a public company in which any individual holds or controls shares carrying not less than fifty per cent., or such other percentage as the Authority may by rule prescribe, of the voting power in the undertaking;*

(b) there are any dealings between associated undertakings which have or are likely to have the effect of unfairly benefiting the owners or shareholders of one such undertaking to the prejudice of the owners or shareholders of any other of its associated undertakings.

....

11. Proceedings in case of contravention of section 3.- *(1) Where the Authority is satisfied that there has been or is likely to be a contravention of the provisions of section 3 and that action is necessary in the public interest, it may make one or more of such orders specified in section 12 as it may deem appropriate.*

(2) Before making an order under subsection (1), the Authority shall,---

(a) give notice of its intention to make such order stating the reasons therefor to such persons or undertakings as may appear to it to be concerned in the contravention to show cause on or before a date specified therein as to why such order shall not he made; and

(b) give the persons or undertakings an opportunity of being heard and of placing before it facts and material in support of their contention.

(3) An order made under subsection (1) shall have effect notwithstanding anything contained in any other law for the time being in force or in any contract or memorandum or articles of association.

12. Order of the authority.- *(1) An order of the Authority under section 11 may,---*

(a) in the case of undue concentration of economic power-

(i) require the firms or companies concerned, not being public limited companies, to the converted, within such time and in such manner as may he specified in the order, into public limited companies;

(ii) require the controlling shareholders of the public limited companies concerned to offer such part of the stocks and shares held by them within such time and in such manner as may be specified in the order to the general public, including the National Investment Trust and an investment institution established or controlled by Government;

(iii) prescribe the circumstances in which and the conditions on which the associated undertakings concerned may deal with each other,

(b) .....

7. The cause triggered at the relevant time when MRTPO was effective with its full force however its successor organization being Competition Commission of Pakistan, has also initially provided such frame to regulate under Section 59 of the Competition Ordinance 2007 (LII of 2007). The Ordinance was succeeded by the Competition Act, 2010 and Section 61 of the Competition Act stands pari materia with Section 59 of the said Ordinance. Again for the convenience to understand the controversy section 61 of the Act is reproduced as under:-

> ***"61. Repeals and savings.- (1)*** *On the commencement of this Act,---*
>
> *(a) the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (V of 1970), hereinafter referred to as the repealed Act, shall stand repealed;*
>
> *(b) the Monopoly Control Authority established under the repealed Act shall stand dissolved;*
>
> *(c) all assets, rights, powers, authorities and privileges and property, movable and immovable, cash and bank balances, reserve funds, investments and all other interests and rights in, or arising out of such property and all debts, liabilities and obligations of whatever kind of the Monopoly Control Authority subsisting immediately before its dissolution shall stand transferred to and vest in the Competition Commission of Pakistan established under this Act;*
>
> *(d) .....*
>
> *(e) .....*
>
> *(f) .... and*
>
> *(g) all suits and other legal proceedings instituted by or against the Monopoly Control Authority before the commencement of this Ordinance shall be deemed to be suits and proceedings by or against the Competition Commission of Pakistan as the case may be and may proceed and be dealt with accordingly."*

8. The gist of the conclusion as drawn by the Authority is summarized in paragraph 34 and 35 of the impugned order which for the purpose of understanding the controversy are reproduced as under:-

> *"34. We have very carefully considered this case in the light of the various submissions made by both parties, the extensive*

deliberations at the hearings, and our own market inquiries. The business relationship between SEARLE & IBL is not the outcome of rational interaction between two economic agents on a level playing field. The content of both distribution agreements and, even more so, the actual dealings of the parties with each other reflect the marked tilt in favour of IBL as compared with most distribution arrangements put in place by major pharmaceutical undertakings in Pakistan. It is self-evident that IBL has been able to use its majority equity interest and control over SEARLE to extract a most favourable arrangement for itself which is way out of line from market practice, and which has greatly disadvantaged the other shareholders of SEARLE. It is difficult to imagine a more glaring manifestation of undue concentration of economic power at play and a more obvious situation to which Section 4(b) of the Ordinance applies….

First….. Consistent with normal market practice, the consignment basis will have to be deemed retrospectively as inoperative with the necessary consequences that follow from this instead of placement with IBL on consignment, each delivery of the products to IBL will be deemed sold to IBL with a 40 day credit period. In this connection, we are of the view, considering the circumstances, that mark-up calculations may be made at the rates stipulated by the parties from time to time since the effect of any reasonable revision of these rates is likely to be marginal:

Second, all amounts charged to SEARLE on account of warehousing stock being not in accord with market practice will need to be reversed;

Third, instead of bearing the cost of transportation up to the ultimate customer which was the case until July 01, 2005 in terms of the Distribution Agreement of July 01, 2000, adjustments will have to be made to ensure that SEARLE does not, in any instance, bear the cost of transportation beyond IBL's location of sale ie, the point from which the products are dispatched to the customer,

Fourth, payment of mark-up to IBL on account of credit availed by institutional sub-distributors (mainly Government institutions) beyond the credit period allowed to IBL is possible only if incontrovertible evidence exists on record to show that the transaction occurred "on the discretion and approval of SEARLE" as has been specified in both the distribution agreements. Also, the rate of mark-up allowed to IBL must not exceed the rate of mark up payable by IBL to SEARLE on account of payments received after the credit period allowed to IBL; and

Fifth, being not in keeping with market practice, it is not possible to allow reimbursement of miscellaneous expenses (such as telephone/fax charges, vehicle hiring charges etc allegedly incurred by SEARLE field staff) unless (i) incontrovertible evidence is on record to unquestionably demonstrate pre- authorization by SEARLE in each case; and (ii) it can be irrefutably shown that the expense in question was not incurred to assist or facilitate IBL in fulfilling its contractual obligations to SEARLE, whether directly or indirectly. We are, however, prepared to allow payment of charges on account of group corporate services to the extent of approximately

Rs.300,000 out of Rs. 1,600,000 for the entire group (ie. about 18.75%) specified in the submissions of both SEARLE and IBL dated May 04, 2007, as this appears reasonable.

"35. In the light of the foregoing, we direct and order as follows:

(i) the principles and specifications enshrined in para 34 will apply henceforth to all dealings between SEARLE and IBL and will supersede as well as take precedent over any distribution agreement or other understanding between these parties, whether written or verbal.

(ii) SEARLE and IBL will procure that the statutory auditors of SEARLE (or alternatively, a firm of Chartered Accountants approved by the Authority) examine all transactions between these undertakings since July 01. 2000 to date in the light of our observations in para 34 above and determine the net amount due from IBL to SEARLE after adjusting for payments already made. Any clarification needed in this respect will be provided by the Chief (Investigation) of the Authority or such other person as may be designated by the Authority for this purpose. This task must be completed within 90 days of the date of this Order and settlement for the net amount determined as due and payable must be effected to the satisfaction of the Authority within 120 days of the date of this Order;

(iii).....”

9. Essentially the authority was of the view that the distribution agreement between Searle and IBL has the effect of unfairly benefiting shareholders of IBL to the prejudice of shareholders of Searle (minority shareholders) and, therefore, needs to be grind away, in terms of paragraph 34, as reproduced above whereas the directions of the authority to settle the monopolistic approach, being unfair with a set of shareholders, to be resolved are stipulated in the subsequent paragraph i.e. paragraph No.35, as reproduced above. (The rights of minority shareholders under Companies Ordinance, 1984 or Companies Act, 2017 are not under consideration here.)

10. Based on the questions as raised in the show-cause notice and devised by the Authority under the law, the appellants raised few questions to throw a challenge over the Authority’s predatorial approach, as attempted by Mr. Jawad Qureshi in his arguments; which are summarized as under:-

- that the issue of extended credit period was not confronted in the show-cause notice, while the impugned order has reduced the credit period;
- the agreement relied upon by the authority to determine the market price were not confronted to the appellants and such agreements are not representative of market price;
- that the impugned order could have only implemented the measures provided in the impugned order prospectively and could not have applied to the benefits already accrued to be reversed as this gives the order retrospective effect.
- Again section 11 of MRTPO can only be given effect in the public interest, as pleaded.
- Performance increased via agreement.

Scope of Appeal

11. Before responding to the questions raised by the appellants we may first understand the scope of appeal itself provided under MRTPO, as it then was applicable, in terms of Section 20. Section 20 provides that any person aggrieved by an order of the Authority under section 11 or Section 19 may within 60 days of the receipt of such order appeal against it to the High Court on the ground which are summarized therein:

i) That the order is contrary to law or to some usage having the force of law;
ii) That the order has failed to determine some material issue of law or usage having the force of law;
iii) That there has been a substantial error or defect in following the procedure provided in the Ordinance which may possibly have produced error or defect in the order upon merits.

12. With these contours, available to the aggrieved person, learned counsel for respondent has resorted to Section 100 of Code of Civil

Procedure, 1908 and submitted that Section 100 is pari materia to Section 20 of MRTPO which provides Second Appeal on the point of law only. The legislature while carving out the provision of appeal under MRTPO knew as to the nature of appeal being provided to the aggrieved person under MRTPO. The scope of the appeal is thus limited to the question of law as is available to the aggrieved person under section 100 CPC having identical frame; though this appeal (under MRTPO) is the first appeal which impugns the order of the Authority but the law has limited its scope to the extent of frame of Section 20 of MRTPO pari materia to Section 100 CPC. Thus, our findings would be keeping in mind the above frame of law.

Maintainability of appeal
on the count of "Aggrieved person"

13. It is claimed that IBL has its control on Searle to take advantage for itself and its shareholders at the cost of Searle and its minority shareholders. This constitutes undue concentration of economic power under section 4(b) of MRTPO and such undue concentration of economic power is prohibited under section 3 of MRTPO. Although we would independently deal with the undue concentration of economic power but for the purposes of maintainability of this appeal since it is attempted that Searle is not shown to be an aggrieved party, Mr. Ijaz Ahmed, learned counsel for the respondent in this regard, has initially raised objections as to its maintainability perhaps to the extent of appellant No.1.

14. A bare perusal of impugned order, particularly paragraph 34, would reveal that the arrangement between Searle and IBL was inclined in favour of IBL and therefore, IBL benefited from this arrangement at the cost of minority shareholders of Searle. The impugned order is an attempt to rectify and set the score at a balance and required IBL to

remediate undue benefits that it has received from Searle. Hence, Searle would be an outright fiscal beneficiary. Question before us is, would that alone be a tool to adjudge a corporate entity or an individual having no grievance against impugned order?

15. Aggrieved person not necessarily be one facing financial losses; a person/entity feels and considers a process as an intervention to business decisions and actions are being an intervention to business decisions, it can qualify as basis of being an aggrieved person. To be an aggrieved, you do not have to show yourself in a frame of financial loss alone. An attempt to justify that intervention to the business understanding is unnecessary by regulator, notwithstanding financial gains, the intervention can be objected by objector as being aggrieved person. We now deal with the questions raised by appellant's counsel.

Credit period v/s commission

16. Follow up of impugned order reveals that Securities & Exchange Commission of Pakistan (SECP) had also initiated proceedings against the directors and chief executive of Searle for violation of Section 208 of Companies Ordinance, 1984. The SECP also concluded the transactions between Searle and IBL beyond the normal trade understanding and the normal trade credit, as seen in other identical situation, and such deviation of the normal trade credit would require approval of the shareholders of Searle which could have been the beneficiary of such amount, had it been passed on to Searle at the earliest. There is no such approval, as not demonstrated by the appellants, hence would spill over the requirement of Section 208 of Companies Ordinance, 1984 (as it then was). Having seen such effect, SECP imposed penalty on the directors and chief executive and directed recovery of outstanding balance from IBL with further directions to reduce credit period and commission to bring it in line with the market practice.

17. Although Searle, being aggrieved of the findings of SECP filed a revision application (being a statutory remedy), but the same was later on withdrawn; this would demonstrate Searle having conceded to the facts, at least. The facts, as narrated by SECP, are identical and similar to the facts determined by the Authority under MRTPO as impugned in this appeal.

18. We would now see that veracity of the charges leveled. In order to understand the gravity of the violation, as highlighted by the Authority in the impugned order, we must understand the normal course of business being practiced by the principals and their distributors, which was taken into account by the Authority. The terms and conditions of this agreement, which was subjected to scrutiny in the impugned order, can be compared with the earlier distribution agreement with Muller & Phipps which were Searle's previous distributor for nearly two decades; the only difference was that the two parties i.e. Muller & Phipps vis-à-vis Searle were totally independent of each other and hence the Searle was conscious of their rights while entering into such agreement with an understanding i.e. Muller and Phipps would not get any undue advantage while the Searle fought for their rights against Muller & Phipps; they seems to have surrendered all such rights when IBL became their distributor, the directors of which in fact owns majority shares of Searle.

19. Comparative summary of key terms to make us understand the controversy is described as under:-

Term	M&P Agreement 24. 07-1975	IBL Agreement 05-07-93	IBL Agreement 01-01-2000	IBL Agreement 01-07-2005
Commission/ margin	Clause 3 - 11%	Clause 4 – 10% pharma and 15% non-pharma	Clause 4 – 10% pharma and 12% non-pharma	Clause 4 – 10% pharma and 3 to 12% non-pharma

Credit period	Clause 7 – 40 days	Clause 6 – weekly basis after actual sale in the market	Clause 6.1 and 6.2-75 days commencing from actual sale in the market. The period was increased to 120 days by Amendment No. 1 dated 01-07-2003	Clause 6.1 – 120 days commencing from actual sale in the market.
Stock level	Clause 5 – 6 weeks	Clause 2.2 – 4 weeks	No specific requirement provided in the agreement	No specific requirement provided in the agreement
Basis of sale	Clause 7 – outright sale on dispatch	No outright sale provided in the agreement	Clause 2.2 – IBL to hold inventory on account of Searle	No specific requirement provided in the agreement
Delivery by Searle	Clause 4 – Main Distribution Depot of M&P	Clause 5 – IBL branches	Clause 5 – IBL branches/network	Clause 5 – IBL branches/ network

20. Reading the above table carefully it may be noted that the rates of commission/margin are comparable, however, M&P has much shorter credit period of 40 days from date of dispatch as compared to IBL which has 120 days from the date of actual sale to its customers.

21. As to the credit period, Clause 7 of the M&P agreement provides that goods will be provided by Searle to M&P on the basis of an outright sale and credit period is 40 days from the date of dispatch of goods. M&P therefore has to make payment within 40 days whether or not it is able to sell the goods within the same period. On the other hand, IBL is only obliged to pay after the actual sale of the goods and the agreements dated 1.7.2000 and 1.7.2005 provide for 120 days credit period. This effectively, means that even when IBL has sold the goods and recovered the price from the customer, it can still hold Searle's fund for 120 days and benefit from the same as against shareholders of Searle to whom money belongs. This practice is also contrary to the market practice as shown by the agreements of the comparable and compatible distributors

and suppliers as noted in paragraph 23 of the Impugned Order and as observed by SECP in its order. In fact, SECP has noted that the credit period has been extended upto 136 days in the year 2005-2006.

22. For the stock level, M&P agreement requires it to hold a stock equal to at least 6 weeks requirements. Since M&P's credit period starts from the date of dispatch, it has to maintain this stock at its own risk. IBL on the other hand, has been holding stock on behalf of Searle, which means that IBL does not bear any risk for holding such stock and in fact Searle even pays warehouse rent to IBL as admitted by the Appellants in paragraph 6(b) of their letter dated March 2, 2007 and paragraph (1) of their letter dated March 27, 2007, both letters available. This found contrary to normal and general practice prevailing.

23. On the term basis of sale, Clause 7 of M&P agreement provides that the goods are being provided on the basis of outright sale which transfers all risks to M&P. However, IBL agreements are either vague or provide that the goods will be held on account of Searle, which has also been the practice between the parties. If these risks are ensured, then M&P will bear the cost while in case of IBL since the goods belong to Searle, such cost will be borne by Searle.

24. Under the M&P agreement, Searle had an obligation to deliver at the main depot of M&P while in case of IBL, Searle has taken the responsibility to deliver to IBL's branches and network locations.

25. It may also be noted that Searle has been paying substantial amounts under the head of various expenses, which in accordance with industry practice, should be borne by the distributor. The IBL agreements have been purposely kept vague in this regard and so-called MOU dated 01-07-1993 was signed separately to provide for this. Appellant surely has not demonstrated that such understanding has improved the sale of the product tremendously.

26. The first point in relation to credit period is also claimed to have not been demonstrated or identified in the show-cause notice. We have perused the show-cause notice. In our understanding a show-cause doesn't need to be an encyclopedia; it just has to show that the point is taken which could be lawfully stretched and hence required a response. A perusal of show cause notice would further reveal that the same point is clearly stated. IBL was being paid commission at a rate higher than the market rate; it doesn't have to be as demonstrative as the impugned order is. During the proceedings and based on the information provided by the Appellants as well as other information gathered by the Authority from the market, it appeared to authority that there was a reciprocal relationship between the rate of commission and the credit period i.e. where the rate of commission is higher, the credit period is shorter and vice versa. A table summarizing the terms of the agreements from various pharmaceutical companies is set out in paragraph 23 of the Impugned Order.

27. The Appellants were confronted with these facts and were fully aware of the same. This is reflected from their letter dated May 4, 2007 and the Appellants acknowledged as follows:

> *"In continuation of our client's letter dated March 20, 2007 and with reference to the hearing proceedings we attended on April 20, 2007, wherein you gave us further opportunity to provide further details and explanations in support of our contentions, we are pleased to provide the following*
>
> *1. ....*
>
> *2. No specific shareholders' approval for enhancement in credit period from 40 days to 120 days was obtained in the year 2005. The reason being it was not considered as an agenda item for general body. The original agreement, as required, is enclosed for your perusal. The industry trend is generally 45 days credit which again is linked with the number of days inventory is required to be held by the distributor."*

28. Appellants were therefore not only aware that credit period is one of the consideration for justifying of the rate of commission being

offered with “relaxed” credit period but were also given the opportunity at the hearing and submissions also.

29. In view of the aforesaid submissions of the Appellants, the choice before the Authority was to either reduce the commission rate and maintain the long credit period of more than 120 days or maintain the commission rate and reduce the credit period to bring it close to the market practice but such cannot work together for an economic concentration, being watched under the ibid provisions.

30. The Appellants' submission in their letter dated May 4, 2007 that the market trend was 45 days credit period showed that credit period of 120 days being allowed to IBL was completely out of line with the admitted market practice. However, even 45 days credit period was not supported by the evidence of the agreements of the entities that according to the Appellants were of comparative stature, which is apparent from the table given in paragraph 23 of the Impugned Order and is summarized as follows:

> *(a) five agreements of Muller & Phipps provide commission rate of 7% to 10% and the credit period of 15 to 40 days and only one agreement provided for 120 days but with the commission rate of 5%;*
>
> *(b) two agreements of UDL provided 7% commission rate and credit period of 15 days:*

31. It is also pertinent to mention here that Muller & Phipps remained distributor of Searle from 1975 till 1993, when IBL group emerged from itself (Searle) took over control of Searle and the credit period allowed in the distribution, via agreement dated July 24, 1975 was 40 days as provided in clause 7 of the said agreement, which provide as follows:-

> *7. The sale of Products by SEABLE to M&P will be on the basis of outright sole at the prices fixed by Searle from time to time and payment of the price of the goods supplied to M&P shall be made by M&P to Searle within 40 days from the date of dispatch of the goods from Searle's warehouse."*

32. There is, therefore, no ambiguity; Searle itself had followed the practice of credit period of 40 days for nearly two decades. The Authority therefore acted totally reasonably and allowed the credit period of 40 days and did not reduce the commission rate.

Agreements not confronted

33. As to the second argument of the appellants, which is in relation to the market practice based on agreements, which was not confronted and hence not representative of the market practice, it seems that the only defence that they have extended was that it can only be compared between distributor of their stature. It is appellants' understanding that the Authority relied on the facts relevant to the distributors that were chosen by the appellants themselves. The appellants were fully aware of the relevant facts relating to the distribution agreement relied upon in the impugned order, as is clearly apparent from their letters dated 20.02.2007 and 02.03.2007 where they had stated the one rate applicable to these distributors i.e. 10 to 12 percent and their letter dated 04.05.2007 where they had quoted the applicable credit period of 45 days, though 45 days credit period was not substantiated from any of the documents submitted by them.

34. They seem to have enough opportunities while the appellants were given chances to respond to the questions raised in the show-cause notice and they failed with regard to the agreements being compared by the Authority as described in the relevant paragraphs of the impugned order. No material is stated to have been presented to this Court alone.

35. The conclusion drawn by the Authority is almost similar as reached by SECP. The credit period in the pharmaceutical industry was around eight to ten days which is much shorter than 40 days in consideration of other agreements which constitute market practice as considered by the Authority.

Retrospective effect

36. The next argument of learned counsel for the appellants is the retrospective effect as given in the impugned order. The Appellants have submitted that the Impugned Order can only be effective from its date in respect of future dealings and cannot require IBL to disgorge the gain that it had made at the cost of Searle and its shareholders on account of their conduct before the date of the Impugned Order. This argument is entirely fallacious and if it is accepted then it will mean that the Appellants (and other persons in similar position) will have the liberty to violate the law until they are caught by the regulator and will be able to benefit from their illegal conduct until an order is passed by the regulator. This definitely cannot be the intent of the law.

37. A bare perusal of the Section 11 of MRTPO, reproduced above, would show that the power of the Authority is in no manner restricted to future transactions only. The power to pass an order can be exercised if "there has been" a contravention i.e. if the past conduct of the parties constitutes a contravention of the law and also if there “is likely to be a contravention" i.e. the future conduct of the parties. The Authority cannot only pass an order directing the future course of action, but can also correct the past unlawful conducts and direct the person, found to be in breach of the law, to return the benefit that has been siphoned wrongfully. If this is not done, then the person violating the law would be unjustly enriched and this will defeat the very purpose of the law. It is also important to mention that section 11(3) of the MRTPO contains a non obstante clause whereby the order passed under section 11 has been given overriding effect even on any other law.

38. It may also be observed that the appellants stated that their conduct after the Impugned Order was passed is in accordance with the terms of such order and they also accepted the order passed by SECP

which also came to conclusions similar to the Impugned Order. It is thus obvious that they accepted that their conduct was not in accordance with the law. Having accepted the aforesaid position, it is wholly untenable for the Appellants to argue that IBL should be allowed to retain the unlawful gain made by them

39. More importantly, the proceedings pursuant to the show cause notices showed that the actual conduct of the Appellants was even more favourable to IBL than it was provided in the Agreement. The Appellants therefore have misrepresented to the Authority by only filing the Agreement dated July 1, 2000 as this was vague and did not correctly reflect the arrangements between them, which were being actually followed. Even the alleged addenda signed later on were not filed with the Authority. The Appellants therefore cannot be allowed to benefit from their own deceptive and unlawful conduct.

40. It is also important to mention that there is no time limitation given in section 11 of the METPO. In the absence of any statutory limitation, the Impugned Order cannot be set aside on the ground that it has been passed in respect of the years prior to initiation of the proceedings. Show-cause notices are being issued not in anticipation of unlawful action likely to be taken in future but in consideration of past actions.

41. The Hon'ble Supreme Court of Pakistan in the case of Pakistan Mobile Communication (Pvt.) Limited v. The Commissioner of Income Tax (C.A. No. 1081-1092 of 2009), while examining the question as to whether any limitation can be read into section 52 of the Income Tax Ordinance, 1979, when there is no limitation provided in the said section, observed as follows:

> *9. The language as employed in the above mentioned section is unambiguous, plain and hardly needs any scholarly interpretation. It can safely be inferred from the language of Section 52 of the*

Repealed Ordinance that action can be initiated where any person fails to pay the requisite tax or which cannot be deducted or collected and can be termed as an assessee in default and further action can be taken. Neither any bar whatsoever has been imposed in such like cases nor any period of limitation has been specified which means that concerned functionaries can Initiate action if circumstances as mentioned in Section 52 of the Repealed Ordinance so justify. In our considered view, it is a deliberate omission by the legislature so that there could be no possibility of evasion or failure to assess the requisite tax which can be deducted at any point of time. Had there been stipulated period, the tax evasion could have been made easily and no action could have been taken against the delinquents which in our view cannot be the object of legislature. The provisions as enumerated in Section 52 of the Repealed Ordinance are independent and therefore, cannot be stretched in such a manner to incorporate the period of limitation as mentioned in section 156 of the Repealed Ordinance as it would be a farfetched interpretation which would not be in consonance with the well entrenched principles of interpretation....."

Public interest

42. Fourth argument of learned counsel for the appellants is in respect of public interest as required in terms of Section 11 of MRTPO. Laws are made to protect public interest and the enforcement of such laws is in eminent public interest. The distribution arrangement between Searle and IBL has unfairly benefitted IBL and its shareholders to the prejudice of Searle and its shareholders which include minority shareholders from the general public. The general public minority shareholders have no other appropriate remedy through which they could have corrected such arrangement or recovered their losses. It is therefore a matter of public interest that action should have been taken by the Authority to redress the situation.

43. The principle of law is settled in this regard that where an action is to be taken in public interest, it does not mean that such action must be in advancement of public interest, what is required is that it should not harm or prejudice the public interest. For this purpose, reliance is placed on division bench judgment of this Hon'ble Court in the case of

Ashiq Ali Bhutto us President Summary Military Court and others (reported as PLD 1979 Karachi 814). The Court was considering the exercise of power under paragraph 3 of Martial Law Order No. 4, which is reproduced as under:

> *"5. Initially we propose to consider the question in regard to the power vesting in the Martial Law Administrator to transfer such a case to a Military Court which was pending before the Tribunal constituted for trial of offences under Foreign Exchange Regulation Act. In such regard reference may initially be made to paragraph 3 of Martial Law Order No. 4 issued by the Chief Martial Law Administrator on 5.7.1977. This paragraph was subsequently substituted by Martial Law Order No.37 issued by the Chief Martial Law Administrator on 19th June, 1978. Paragraph 3 as it now stands and stood on 30.5.1979, when the order of transfer was passed by the al Martial Law Administrator, reads as follows:*
>
> > *"3. (1) A Martial Law Administrator of a Zone, if he is of the opinion that it is necessary for maintenance of law and order, or public tranquility or for expeditious disposal of any case in public interest, may within the Zone concerned, order that any case pending before an ordinary criminal Court be transferred to a Military Court and dealt with as provided for in sub-paragraph (1) of paragraph 2 and on the making of an order under this paragraph such case shall stand so transferred forthwith:*
> >
> > *Provided that the Military Court to which a case is transferred under this paragraph, shall not be bound to recall and rehear any witness who has already given any evidence and may act on the evidence given or produced before the criminal Court from which such case is so transferred.*
> >
> > *(2) The provisions of this paragraph shall be in addition to and not in derogation of the provisions of paragraph.*
> >
> > *An argument was raised a case could only have been transferred under the aforesaid provision when it was established that it was in public interest."*

44. The learned Division Bench was further pleased to observe as follows:

> *"13. Mr. Rasheed Akhund has next submitted that transfer would be ordered on ground of expeditious disposal only when public interest was involved. In other words his argument is that mere expeditious disposal is not the requirement underlying transfer of a case but public interest should be involved in the case. The words "public interest" are not capable of a exact definition but these words have to be differentiated from the words "public purposes". In the case of Haji Hashmatullah and others v. Karachi Municipal Corporation their Lordships of the Supreme Court considered the*

> *scope of the words "public interest" vis-a-vis provision relating to employees under Municipal Administration Ordinance. Their Lordship expressed that since these words had not been defined in that Ordinance recourse could be made to general principles. Their Lordships did observe that "this does not mean that the object must be one which should advance the public purposes and all that is required is that it cannot be prejudicial or harmful to the public interest". On a reading of these words it would appear the words used in the relevant Martial Law Orders have also to be interpreted in their general sense and consistent with the observation of their Lordship of the Supreme Court..."*

45. We are, therefore, of the view that the words "in the public interest" have to be interpreted to mean that the action will not harm the public interest. The appellants have failed to show as to how the impugned order has prejudiced public interest.

46. The matter can also be looked at from another angle i.e. would the public interest be served by passing the impugned order or refraining from passing such order. It is fairly simple that had the impugned order not been passed, IBL would have retained the unlawful gain and the appellants could have continued with their admittedly unlawful practices to the continued prejudice of Searle and its shareholders. This state of affairs was definitely not in the public interest and therefore taking action and passing the impugned order was entirely in public interest.

Agreement benefiting Searle

47. The last argument of appellants' counsel is that the distribution agreement with IBL benefited Searle. In an attempt to demonstrate the last argument that Searle in fact has benefited from such distribution agreement, counsel has to show that there progress and achievements are far beyond the achievements of other pharmaceutical companies vis-à-vis their distributors. We have noticed that in fact the Authority, which passed the impugned order, has demonstrated that in a much restricted space the pharmaceutical companies, other than Searle, have

achieved similar or better benefits than in a situation being governed by the subject distribution agreement between Searle and IBL. The fallacy of the argument is also apparent from the findings of the SECP (reported as 2008 CLD 17), which observed as follows:

> *"The contention of Searle that raise of sale of Searle is mainly due to IBL's distributorship and that the IBL has a country wide network, also could not be treated as correct due to the reason that as per the following analysis, Gross Profit Margin of Searle is almost equivalent to sector average, whereas other ratios i.e. Net profit Margin, EPS and financial charges to Sales of Searle appears to be abnormal in comparison with the sector averages...."*

48. SECP compared the performance of Searle with sector averages and came to the conclusion that Searle's performance is not even at par with the sector averages. SECP concluded that:

> *i) gross profit margin of Searle was 32% in 2005 and 35% in 2006 while sector average was 38% in both years. Searle's gross profit margin was therefore 6% and 3% lower than the sector averages in the year 2005 and 2006 respectively.*
>
> *ii) net profit margin of Searle was 3% in 2005 and 2006, while sector average was 13% in 2005 and 14% in 2006. Searle's net profit margin was therefore 10% and 11% lower than the sector averages in the year 2005 and 2006 respectively.*
>
> *It is also important to mention that in case of Searle net profit margin (i.e. 3%) is 9.4% and 8.6% of its gross profit margin while sector average (of 13% and 14%) of net profit is 34.2% and 36.8% of gross profit margin, which means that Searle's sales and other expenses are far higher than the sector averages. Majority of these expenses are the benefits that were being passed on to IBL*
>
> *iii) EPS (earning per share) of Searle 3.19% and 3.52% as opposed to sector average of 15.95% and 17.18% in the years 2005 and 2006. Searle's performance on this account is also far lower than the sector average.*
>
> *iv) financial charges to sales ratio of Searle is 3% during the year 2005 and 2006 while sector average is 0.29% and 0.48% during the said years. This is nearly 6 times higher for Searle as compared to sector averages. This clearly reflects the effect of long credit period allowed to IBL and that too after the actual sale of the product in the market.*

49. SECP also concluded that Searle has suffered significant loss on account of this arrangement with IBL. SECP observed as follows:

> *"(ii) Whether Searle has suffered any loss due to violation of section 208?*
>
> *Having established the fact that sale of products through IBL and receivables from IBLHC are not in the nature of normal trade*

credit, and is a violation of Section 208 of the Ordinance; it is to be determined whether the Searle has suffered loss due to the action of directors. From the details given in the above para it can safely be concluded that Searle's Net Profit Margin, EPS which are far below the sector averages and Financial charges on sales are higher than the sector average and all this mainly attributes to the preferential trade arrangement with IBL. On the other hand IBL utilizes the benefit of this arrangement and made sales to market on cash basis and to government institution on credit basis. Such types of arrangement by Searle for IBL have the effect of siphoning off of the gains of the shareholders accruable on the aforesaid arrangement to IBL. This is obviously unfair to the shareholders of investing company as benefit to the shareholders of the associated company was provided at the cost of the shareholders of the investing company. This undue advantage given to IBL, an associated undertaking resulted into loss to the Searle and its shareholders and is an unwarranted benefit to the shareholders of associated undertaking.."

50. SECP also concluded that transactions between Searle and IBL have been prejudicial to the interest of shareholders of Searle. SECP observed as follows:

"(iii) Whether such transactions have been prejudicial to the interest of its shareholders?.

Having discussed that Searle has suffered loss on transaction with IBL and IBLHC, it would be easy to conclude as to whether these transactions have been prejudicial to the interest of its shareholders. The value of the shareholding of its members has diminished by conducting transaction on the terms and conditions other than industry practice with IBL and IBLHC. This, therefore, has seriously jeopardized the interest of its shareholders. Looking from the point of a reasonable bystander, the investments resulting into loss to Searle are unfairly prejudicial to the interest of its shareholders. Also the course of conduct of directors constitutes mismanagement of affairs, which again is prejudicial to the interest of the shareholders."

51. Having seen the conclusion drawn by the Authority passing the impugned order and with a limited scope under section 20 of MRTPO, the limited scope of this appeal as described above, we are not inclined to interfere in the conclusion drawn in the impugned order and no transgression of authority is found, hence we dismiss this appeal along with listed application.

Dated: J U D G E

J U D G E