

(2011) 05 DEL CK 0054

In the Delhi High Court

Case No : Writ Petition (C) 639 of 2009

Best Laboratories Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-05-2011

Acts Referred:

Essential Commodities Act, 1955 — Section 7A

Citation : (2011) 6 AD 118 : (2012) 187 DLT 434 : (2011) 124 DRJ 390 :
(2011) 6 RCR(Civil) 942

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : S. Ganesh and Shobhit Chandra, for the Appellant; Ruchir Mishra, Sandeep Bajaj and Neha Rastogi, for the Respondent

Judgement

S. Muralidhar, J.

CM No. 20784 of 2010 (for amendment)

The amendments prayed for are with respect to addition of two grounds which raise questions of law. For the reasons stated therein, the application is allowed. The writ petition is permitted to be amended. The amended writ petition is taken on record.

The application is disposed of.

W.P. (C) 639 of 2009 Background Facts

1. Best Laboratories Pvt. Ltd. ("BLPL") challenges an order dated 7th February 2006 issued by the National Pharmaceutical Pricing Authority ("NPPA") Respondent No. 2 herein under Paragraph 9(1) of the Drugs (Prices Control) Order, 1995 ("DPCO 1995") fixing ceiling prices for certain multi-vitamin formulations and the consequential demand dated 27th November 2008 issued by the NPPA requiring the Petitioner to deposit Rs. 1,41,57,104/- towards overcharging amount and interest up to October 2008.

2. BLPL is registered as a small-scale industrial unit. BLPL claims that it is entitled to exemption by an order dated 2nd March 1995 issued by the Ministry of Chemicals and Fertilisers under Para 25 of the DPCO 1995. BLPL states that in terms of the above exemption order every Drug Manufacturing Unit was entitled to exemption from the operation of Para 8 of the DPCO 1995 relating to the fixation of retail price of Scheduled Formulation, if it was not covered under a notification issued by NPPA under Para 9 of the DPCO 1995. BLPL was, inter alia, manufacturing and marketing Riconia tablet under its own brand name under a valid drug licence. By an order dated 25th August 1999 issued under Paras 9(1) and (2) of the DPCO 1995, the NPPA fixed the ceiling prices of certain Scheduled Formulations, which were at Serial Nos. 1 and 2 of the said order. The ceiling price would not apply to those formulations having compositions different from those at Serial Nos. 1 and 2 of the said order and the Note thereunder. According to BLPL, in view of the exemption available to it as a small-scale industrial unit the tablet Riconia was entitled for exemption in terms of exemption application No. 23985. Orders dated 24th December 2002, 7th February 2006 and 11th July 2006 were issued under Paras 9(1) and 9(2) of the DPCO 1995 fixing the ceiling prices of formulations at Serial Nos. 1 and 2 of the Order. Note IV was also inserted. By orders dated 7th February 2006 and 11th July 2006, the NPPA fixed the ceiling prices of formulations to cover more bulk drugs. Note IV was inserted to the order dated 7th February 2006. Note IV envisaged that for different/compositions and packing material used or any specific feature claimed, the drug manufacturing companies had to approach the NPPA for approval of the fixation of specific prices. BLPL contends that the order dated 7th February 2006 and the subsequent order dated 11th July 2006 were not applicable to BLPL in view of the exemption to small scale industrial units. Further, tablet Riconia contained Vitamin K which was not an ingredient mentioned in the Order dated 7th February 2006 including the Note thereunder.

3. BLPL states that it was surprised to receive a notice dated 6th November 2006 from the NPPA stating that Riconia was covered under the Notification dated 7th February 2006 read with Note I to IV thereunder, and that therefore there was a price ceiling applicable to it. BLPL replied on 24th November 2006 clarifying that it was not producing any formulation with the composition specified in the Notification dated 7th February 2006 and was therefore not covered by the said Notification. By a letter dated 3rd January 2007 the NPPA directed BLPL to furnish all the requisite information and documents. BLPL replied on 15th January 2007 and requested for a personal hearing. A personal hearing was thereafter given to BLPL and written submissions were also filed by it. By an order dated 16th April 2008 the NPPA raised a demand in the sum of Rs. 1,07,03,216/- on the alleged ground of overcharging by BLPL in terms of the DPCO 1995. BLPL protested against the demand by its letter dated 6th May 2008. Thereafter various demands were sent by the NPPA to BLPL reiterating the demand alongwith interest. By the impugned demand dated 27th November 2008 NPPA required BLPL to deposit a sum of Rs. 1,41,57,104/-. This was

followed by the Respondents sending a request to the Assistant Collector, New Delhi who in turn sent a notice to BLPL asking it to deposit Rs. 1,43,57,790/- within seven days failing which it would be recovered as arrears of land revenue. BLPL thereafter filed the present Petition challenging the demand dated 27th November 2008 and the Notification/Order dated 7th February 2006 issued under Paras 9(1) and 9(2) of the DPCO 1995.

4. On 2nd February 2009 while directing notice to issue in the writ petition, this Court passed the following interim order:

Issue notice, returnable on 17.04.2009. Mr. Gaurav Duggal, Advocate accepts notice. Let reply be filed within four weeks and rejoinder, if any, two weeks thereafter.

The Petitioner was directed to deposit payment for the sum of Rs. 1,07,03,216/- as principal amount and Rs. 36,54,574/- as interest totaling Rs. 1,43,57,790/-. It is contended that the determination, under the Drug (Prices) Control Order, 1995 and further notifications issued under the Drugs and Cosmetics Act, 1940 was arrived at erroneously. Learned Counsel highlighted that the impugned conditions included in the order dated 07.02.2006, point to overriding application of Note 1. It is, therefore, submitted that since Vitamin-K was introduced by notification dated 06.11.2006, no demand for any prior period could have been made.

Learned Counsel for the Respondents contends that the order of the authorities is legal and justified. It was submitted that the mere inclusion of one ingredient, where other ingredients fulfilled the description in the notification could not detract from the application of note 3. Learned Additional Solicitor General has also relied upon the Division Bench judgment in Glaxo SmithKline v. Union of India (LPA No. 1786-1787), decided on 04.12.2008.

Having considered the facts and circumstances, the Respondent No. 3 is hereby restrained from proceeding to take coercive steps for recovery of the determined amount. This is subject to the Petitioner depositing sum of Rs. 1 crore within four weeks with the Respondent No. 1 and also furnishing bank guarantee for the balance amount within the same period, to the said Respondent's satisfaction. In the event of the Petitioner succeeding, the Court will determine the rate of interest to be paid on these amounts by the Respondents at the final stage, while refunding any amount. The pleadings shall be completed by the parties, before the next date. Order dasti.

Submissions of Counsel

5. Mr. S. Ganesh learned Senior counsel appearing for the Petitioner at the outset submitted that BLPL was not questioning the applicability of the Notification dated 7th February 2006 to it and that it was confining its submissions to the two grounds which were permitted to be urged by means of the amendment to the writ petition. The first was that in terms of the judgment dated 20th April 2010 of the Allahabad High Court in Writ Petition (Civil) Nos. 33753 and 7400 of 2009

(T C Healthcare Pvt. Ltd. v. Union of India) the amount of trade margin and commission which the manufacturer was liable to allow to the retailers under Para 19 DPCO 1995 must necessarily be deducted, because the amount constituting such trade margin and commission has not accrued to the manufacturer. He also pointed out that although T.C. Healthcare preferred an SLP in the Supreme Court against the said judgment of the Allahabad High Court, the Union of India had not. Consequently, the decision of the Allahabad High Court on the issue of trade margin had to be taken to have been accepted by the Union of India. He prayed that on this aspect the matter should go back to the NPPA for a fresh determination.

6. The second ground was that interest u/s 7A of the Essential Commodities Act, 1955 ("EC Act") can be levied only where there is a failure by the manufacturer to pay the demand within the time granted for the purpose and cannot therefore relate to a period prior thereto. Reliance is again placed for this aspect on the decision of the Allahabad High Court in T.C. Healthcare and on the judgment dated 19th May 2010 of this Court in Writ Petition (Civil) No. 9699 of 2004 (Ranbaxy Laboratories Pvt. Ltd. v. Union of India).

7. Mr. Ruchir Mishra, learned Counsel appearing for the Respondents submitted that the trade margin is included in the Maximum Allowable Post-Manufacturing Expenses ("MAPE") upto 100%. According to him the ceiling prices fixed by the NPPA include 16% as trade margin available for dealer and retailer. It is submitted that if the manufacturer is allowed to deduct 16% as trade margin for the purpose of computing the overcharged amount on the ground that is not accrued to the manufacturer under Para 13 of the DPCO 1995 then it will act as an incentive to a manufacturer to print a higher maximum retail price ("MRP") than the ceiling price fixed by the NPPA to earn unauthorised higher trade margin to escape the rigours of the price control regulations. It may be intentionally charging higher MRP which is against public interest and would defeat the DPCO 1995 and the EC Act. Reliance is placed on the observation in the decision dated 30th March 2011 of the Supreme Court in Civil Appeal No. 497 of 2002 (Union of India v. Glaxo SmithKline Ltd.). Reliance is also placed on the judgment in Secretary, Ministry of Chemicals and Fertilizers Government of India Vs. Cipla Ltd. and Others, wherein the Supreme Court permitted the statutory authority to recover 50% of the overcharged amount pending fresh determination by the Court. As regards Section 7A of the EC Act, reference is made to the judgment dated 15th April 2008 of the High Court of Bombay in Writ Petition (Civil) Nos. 4556 and 4264 of 2003 (Johnson & Johnson Ltd. and NR Jet Enterprises Pvt. Ltd. v. NPPA) which held that it was in public interest to permit the Respondents to levy interest for the entire period beginning with the date of default. It is stated that in the SLP (C) Nos. 15350-51 of 2008 filed against the said order, the Supreme Court directed the Petitioner company in that case to deposit the interest amount.

Trade margin

8. As regards the trade margin, and the consequent computation of the overcharged amount, a reference may be made to Para 7 of the DPCO 1995 which gives the formula for calculating the retail prices of formulations. Retail price = (marginal cost + conversion cost + cost of packing) x (1+MAPE/100) + excise duty (where MAPE is Maximum Allowable Post-manufacturing expenses). MAPE has been defined to mean "all costs incurred by a manufacturer from the stage of ex-factory cost to retailing and includes trade margin and margin for the manufacturer and it shall not exceed one hundred per cent for indigenously manufactured Scheduled formulations." Under Para 13 of the DPCO 1995, the Government can require the manufacturers to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government under DPCO 1987 or under the DPCO 1995. Para 19 of the DPCO 1995 which is relevant for the present case reads as under:

19. Prices of formulations sold to the dealer:

1. A manufacturer, distributor or wholesaler shall sell a formulation to a retailer, unless otherwise permitted under the provisions of this Order or any order made thereunder at a price equal to the retail price, as specified by an order or notified by the Government, (excluding excise duty, if any) minus sixteen percent thereof in the case of Scheduled drugs.

2. Notwithstanding anything contained in sub-paragraph (1), the Government may by a general or special order fix, in public interest, the price of formulation sold to the wholesaler or retailer in respect of any formulation the price of which has been fixed or revised under this Order.

9. The Division Bench of the Allahabad High Court had occasion to interpret with the above provisions in T.C. Healthcare Pvt. Ltd. One of the contentions in the said case, which challenged two different Notifications issued under Paras 9 and 11 of the DPCO 1995 fixing the ceiling prices of two formulations, concerned the trade margin of 16% which according to the Petitioner in that case was never received by it and, therefore, could not be included while computing the overcharged amount. Referring to Para 13 of the DPCO 1995, the Court observed that the manufacturer is liable to deposit "the amount accrued due to overcharging of prices higher than those fixed." Dwelling on the words "accrued" and "overcharge" the Court pointed out that the amount accrued had "to be determined and realized" in order to determine whether there had been "overcharging". Further under Para 19(1) there was a compulsion on a manufacturer to sell a formulation to a retailer at a price notified by the Government (excluding excise duty, if any) "minus sixteen percent thereof in the case of Scheduled drugs." The Court in T.C. Healthcare observed:

Under paragraph 19 of the DPCO 1995 the manufacturer is obliged to sell a retailer at a price equal to the retail price as specified by an order or notified by the Government minus 16% thereof in case of scheduled drug. For example, retail price of a drug is Rs. 100/-, the manufacturer is obliged to sell the drug to

retailer for an amount of Rs. 84/- as 16% has been treated to be trade margin. The amount of 16% which is statutorily provided as trade margin for a retailer cannot be said to be accrued to the manufacturer. Thus while computing the overcharge amount the allowance of amount of 16% as provided under subparagraph (1) of Paragraph 19 has to be given to the manufacturer. The amount which has never accrued to the manufacturer cannot be recovered as overcharge amount. Thus the submission of the Petitioners that while calculating the overcharge amount 16% has to be deduced, which had never accrued to the manufacturers, is accepted.

10. It has not been shown by the Respondents how vis-?-vis the manufacturer, the overcharged amount can be calculated with reference to the printed MRP when Para 19 (1) DPCO 1995 makes it incumbent on the manufacturer or the wholesaler as the case may be to sell the product to the retailer at the retail price minus 18%. This is plain from the wording of Para 19(1) that a manufacturer, distributor or wholesaler "shall sell a formulation to a retailer" at a price "excluding excise duty, if any, as specified by an order or notified by the Government, minus sixteen percent thereof in the case of Scheduled drugs." By definition under the DPCO 1995 the "retail price" includes the ceiling price. Likewise, under Para 19(2) DPCO 1995, the central government can fix the price at which the formulation can be sold to the retailer. Mr. Ganesh pointed out that the trade margin to be provided to the retailer was determined at 8% which was exclusive of the 16% margin to be allowed to the wholesaler under Para 19(1) DPCO 1995. Merely stating, as the Respondents have in their written submissions, that the trade margin is already included in the 100% MAPE which is factored in the ceiling price fails to explain whether in the calculation of the overcharged amount the trade margins mandated in terms of Paras 19 (1) and 19 (2) DPCO 1995 have been accounted for. The statement by the Respondents in their written submissions that: "If the manufacturers are not made to pay for the higher MRP there will be a definite attempt on the part of the manufacturers to provide higher MRP on the label with higher trade margins than permitted" is based on conjecture and fails to explain the statutory requirement of the manufacturer having to allow trade margins in terms of Paras 19 (1) and 19 (2) DPCO 1995. In fact there is no reply to the assertion by BLPL that the MRP less the mandated trade margins have alone accrued to it as the manufacturer.

11. The Respondents have also no reply to the submission that the case of BLPL stands covered by the decision of the Allahabad High Court in T.C. Healthcare. The said decision, to the extent it decides the two issues urged by BLPL, i.e. trade margin and interest u/s 7A EC Act, is not shown to have been challenged by the Union of India. Consequently, this Court is inclined to follow the reasoning adopted by the Allahabad High Court in T.C. Healthcare and hold that the impugned demand raised by the NPPA against BLPL requires to be re-worked after accounting for the trade margin allowed by BLPL to its wholesalers and retailers. It will of course be incumbent upon BLPL to demonstrate this to the satisfaction of the NPPA.

Interest u/s 7A EC Act 12. As regards charging interest u/s 7A EC Act, the Division Bench of the Allahabad High Court in T.C. Healthcare pointed out that the liability to pay simple interest shall arise after a default is committed in making payment of the demanded amount within the time stipulated therein. The wording of Section 7A EC Act makes it clear that the interest has to be paid in the event of default committed by the drug manufacturer in not paying the demand within time. When a fixed time is prescribed for making payment of demand, as has been done in the instant case by the impugned demand letter dated 27th November 2008 which requires BLPL to make payment by 5th December 2008, the failure to pay the amount will arise only after the expiry of that date and not earlier. In the instant case therefore interest in terms of Section 7A EC Act could have been charged only for the period after 5th December 2008. This conclusion is consistent with the decision in T.C. Healthcare and Ranbaxy Laboratories Pvt. Ltd.

Conclusion

13. For the aforementioned reasons, the impugned demand dated 27th November 2008 issued by the NPPA is hereby set aside. The matter is directed to be placed before the NPPA for re-calculation of the overcharged amount and consequent demand in light of this judgment i.e. after accounting for the trade margins allowed by BLPL in terms of Paras 19(1) and 19(2) DPCO 1995 for which, within a period of four weeks from today, BLPL will furnish to the NPPA the relevant data if not already provided. BLPL will thereafter, within a period of four weeks, be afforded a hearing by the NPPA on a date to be communicated to BLPL by NPPA at least ten days in advance. The amount found due if any, after deducting the amount deposited by BLPL pursuant to the interim order passed by this Court on 2nd February 2009, will be communicated to BLPL within two weeks thereafter. If aggrieved by such decision it will be open to the BLPL to avail of such appropriate remedies as are available to it in law.

14. The writ petition is disposed of in the above terms, but in the circumstances, with no order as to costs.