

(2004) 03 NCDRC CK 0148

In the National Consumer Disputes Redressal Commission

DIRECTOR GENERAL (INVESTIGATION AND REGISTRATION)

APPELLANT

Vs

German Remedies Ltd.

RESPONDENT

Date of Decision : 12-03-2004

Acts Referred:

Citation : 2004 3 CPJ 7

Hon'ble Judges : C.M.Nayar , Moksh Mahajan J.

Final Decision : N.O.E. discharged

Judgement

1. DIRECTOR General (Investigation and Registration) (hereinafter referred to as DG) has filed an application under Sections 10(a)(iii) and 36B(c) of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as Act) alleging that the respondent namely M/s. German Remedies Limited, Mumbai has adopted and indulged in both unfair and restrictive trade practices under Sections 36A and 2(o)(ii) of the Act. It is prayed that inquiry be held in such prohibited trade practices under Section 37(1) of the Act and cease and desist order be passed against the respondent.

2. IT is the contention of the DG that on inquiry it is found that subsequent to the lifting of the price control vide Drug Price Control Order, 1995 (hereinafter referred to as DPCO, 1995) the respondent offered free strips/bottles of Amoxil 250mg./500mg. capsules and dry syrup during the period from 15.11.1995 to 14.12.1995 to its distributors/retailers. The circular issued to its Distribution Department for onward communication of the trade offer to distributors/retailers was dated 6th November, 1995. The circular reads as under : AMOXIL 250mg./500mg. Distributors : 1 box free on every purchase of 10 boxes Retailers/Wholesalers/Nursing Homes/Hospitals : : 1 strip free on purchase of 1 box (10 strips) AMOXIL DRY SYRUP Distributors : 5 bottles free on every purchase of 50 bottles Retailers Wholesalers/Nursing Homes/Hospitals : 1 bottle free on every purchase of 10 bottles. Analysis of cost data furnished by the respondent along with its reply dated 11th April, 1997 in respect of Amoxil 250 mg. capsules, Amoxil 500 mg. capsules and Amoxil Dry Syrup showed that

maximum retail price included cost of samples offered free to the distributors/dealers/retailers thereby passing the cost to the consumers to their prejudice. Offering of gifts/prizes with the intention of not providing them or creating an impression that something is being given free of charge constitutes an unfair trade practice, contended the DG. Further more in terms of DPCO, 1995, the respondent is statutorily required to provide a total trade margin not exceeding 30% of the price excluding excise duty to the stockists and retailers. This has been circumvented inasmuch as the free offer has led to the increase in the trade margin beyond the statutory limit of 30% resulting in undue enrichment of dealers/distributors of the formulation in question. By this an unjustified cost has been imposed on the consumers covering the case under Section 2(o)(ii) of the Act. Similarly, in case of Jonac tablets of 50 mg. while the ex-factory cost was decreased from March, 1995 to May, 1996, the profit margin increased three times within a period of less than one and half years from the notification of DPCO, 1995. Apparently, the respondents have taken advantage of price decontrol policy of the Government by manipulating the price and conditions of delivery, contended the Director General (Investigation & Registration).

Pursuant to the issuance of Notice of Enquiry, the respondent denied the charges that maximum price/retail price of the said formulations included the expenditure towards free samples and bonus offered to the distributors/retailers. The details in regard to the cost incurred on the medicines in question were given as a result of information sought on behalf of the DG. It was vehemently denied that there was any increase in the price of the products covered by the scheme. It was also clarified that there is no ceiling of 30% trade margin in respect of non-scheduled drugs (namely the products in question). It is stated that the free samples and the bonus were offered uniformly to each and every distributor and retailer and the goods were sold to the consumer at a price lower than its maximum retail price. As regards drug Jonac, it is stated that there are more than 50 competing brands of the product i.e. Diclofenac Sodium and decontrolled price of the respondent's product is amongst the lowest, if not lowest of the competing brands. In any case contended the respondent, the Government is empowered to take appropriate measures to reclamp price control on such products. Therefore, the NOE issued against the respondent should be discharged, contended the respondent. After the pleadings were complete, the following issues were framed : (1) Whether the present enquiry is maintainable in view of the preliminary objection taken by the respondent in its reply? (2) Whether the respondent has been indulging in restrictive/unfair trade practices as alleged in the Notice of Enquiry? (3) Whether the alleged restrictive trade practices are not prejudicial to the public interest? (4) Whether the alleged unfair trade practices are prejudicial to the interest of consumer or consumers generally?

3. AFFIDAVITS by way of evidence were filed on both sides along with their supporting documents and Shri V.K. Sharma and Shri M.V. Gazinkar deposed on behalf of the respondent. It is not disputed that the free strips/bottles of Amoxil 250mg./500mg. capsules and dry syrup were offered from 15.11.1995 to

14.12.1995 to the distributors and retailers (Annexure VI-B). Perusal of the trading account of products, Amoxil 250 mg., Amoxil 500 mg. and Amoxil Dry Syrup and Jonac tablets for the period 1.4.1994 to 5.12.1994 showed that the cost of samples and bonus is included in the total expenses while working out of the retail price inclusive of excise duty. As per the notes appended to the trading account "the sample and bonus per cost pack is derived by dividing total sample and bonus cost of the product during the year by domestic sales quantity of the respective year". The fact remains that despite denial of the allegations by the respondent that such cost is not included in the total cost, the same is not supported by the material brought on record. While it is not disputed that free samples and bonus is given to the distributors/retailers, it is not certain whether the benefit of bonus is passed on to the consumers. The assertion of Shri V.K. Sharma, Executive Manager of the respondent company in his statement that the medical representatives who visit the distributors and retailers ensure that the bonus offered is passed on to the consumer is neither here nor there. The admission that there is no such machinery available with the respondent company to ensure this makes the explanation unacceptable. Therefore, to say that scheme initiated did not cause any prejudice to the consumers is not correct. The scheme was certainly prejudicial to the interest of consumers.

4. WE, however, find that the scheme introduced was only for a short period i.e., from 15.11.1995 to 14.12.1995. There is no material on record to show that the same scheme was continued and was introduced in the subsequent years also, though it has not been so denied categorically. WE, however, find that such like schemes have been introduced by other companies like Cipla etc. This is supported by the circulars placed on record. Thus it reflects the market practice prevalent in the industry which is not peculiar to the respondent alone. Apart there is force in the argument of the respondent that this is the area where DPCO can take a suitable action. In this context we find that the market share of the respondent in the said products is about 4% which does not affect the competition to an extent so as to cause prejudice to the consumers. At this stage, we may also remind ourselves of the decision of the Hon'ble Supreme Court in case of Rajasthan Housing Board v. Smt. Parvati Devi, reported in III (2000) CPJ 9 (SC)=VII (1999) SLT 50=2000 CTJ 165 SC (MRTPC) which clearly lays down that Clause (ii) of Section 2(o) cannot be read in isolation. The DG has failed to establish the main ingredient set out in Section 2(o) that before a trade practice can be called a restrictive trade practice it is to be shown that it has effect of preventing, distorting or restricting competition. The statement that free samples or bonus is provided to the distributors/retailers reflects the misleading declaration on the part of the respondent so as to constitute unfair trade practice. However, in view of the fact that it only lasted for a short period and there is no material brought on record to hold that such like schemes were introduced subsequently too. It would not be appropriate to pass adverse order against the respondent specifically so when as contended the said trade practice has also been followed by others in the industry. In view of the facts as discussed

above, NOE is hereby directed to be discharged. N.O.E. discharged.