
(2003) 12 NCDRC CK 0069

In the National Consumer Disputes Redressal Commission

DIRECTOR GENERAL (INVESTIGATION AND REGISTRATION)	APPELLANT
Vs	
PARKE DAVIS INDIA LTD.	RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Citation : 2004 1 CLT 47 : 2004 1 CPC 289 : 2004 1 CPJ 15

Hon'ble Judges : R.K.Anand , R.L.Sudhir J.

Advocate : C.M.Sharma , S.K.Sharma , H.D.Pithawala , V.K.Aggarwal

Judgement

1. MONOPOLIES and Restrictive Trade Practices Commission (referred to as "the Commission" hereafter) received a reference dated 8.9.1994 from the Department of Chemicals and Petrochemicals, Ministry of Chemicals and Fertilizers, Government of India, alleging that the respondent, namely, M/s. Parke Davis (India) Ltd. has been indulging in restrictive trade practices by marketing some of the formulations manufactured by small scale units and, thereby, circumventing the need for obtaining prior approval for price fixation under the Drugs Price Control Order (DPCO). It has been further stated that the price list of March, 1992 reveals respondent's indulgence in restrictive trade practices by marketing certain categories of formulations manufactured by the small scale units. Based on the aforesaid reference, the Commission ordered a preliminary investigation to be carried out by the Director General (Investigation and Registration) (DG for short). Pursuant to this order, the DG enquired into the allegations and submitted a Preliminary Investigation Report (PIR) dated 29.10.1997. Based on the PIR filed by the DG, the Commission issued a Notice of Enquiry (NOE) dated 5.2.1996 to the respondent under Section 10(a)(iv) read with Sections 33(1), 2(o)(ii) and 37 of the MONOPOLIES and Restrictive Trade Practices Act, 1969 (referred to as "the MRTP Act" hereafter).

2. IN its reply to NOE the respondent has denied the allegations of restrictive trade practices and has explained the facts and circumstances justifying the impugned marketing arrangement. The respondent No. 1 has specifically stated in its reply that the Loan Licence Agreement dated June 27, 1989, between

respondent No. 1 and respondent No. 5, on the basis of which the DG has based his allegations, has no relevance to the present inquiry inasmuch as the products covered by the said Loan Licence Agreement are different from the products which form the subject-matter of the present inquiry. It has denied that the respondent circumvented the need to obtain price approval under DPCO under the said arrangement.

On completion of pleading, the following issues were framed : (1) Whether the inquiry is maintainable in view of the preliminary objections taken by the respondents in their reply to the NOE ? (2) Whether the respondents have been indulging in restrictive trade practices as alleged in the NOE ? (3) Whether the alleged restrictive trade practices are not prejudicial to the public interest ?

3. PARTIES filed their respective affidavits of evidence and supporting documents. DG's application for substituting Shri M.S. Balasubramanian in place of Shri S.K. Gupta as a witness was allowed by the Commission but eventually the witness failed to appear for cross-examination. Hence, DG's evidence was closed. The respondents filed their respective affidavits of evidence and also led oral evidence, which is on record. Arguments were finally heard on 7.11.2003. On behalf of the respondents, written submissions were also filed, which have been taken on record. Learned Counsel for the DG referred to the PIR filed by the DG and submitted that in view of the facts stated therein, there is every reason to believe that the respondent had entered into Loan Licence Agreement with the small scale industrial units for manufacturing the impugned formulations with the sole purpose of circumventing the need to obtain prior approval of price fixation under the DPCO. Such an act, he stated amounts to restrictive trade practice within the meaning of Section 2(o)(ii) and Section 33(1)(c) of the MRTP Act. He further submitted that as a result of the said restrictive trade practice, the respondent No. 1 has put unjustified costs on the consumers, by avoiding price approval under the DPCO. By way of example, the learned Counsel for the DG submitted that the purchase order dated 17.2.1997 reveals that the respondent company had purchased Tadrol SA strip of 4 tablets at a price of Rs. 1.429 per strip which is being sold in the market at a price of Rs. 5.03 per strip. From this, he concluded that the respondent was getting such formulations manufactured by the SSI units with a view to circumventing the need for prior approval of prices under DPCO. Further by selling these formulations at a higher price, the respondent company is earning profit and thereby imposing unjustified costs on the consumers, which is a restrictive trade practice within the meaning of Section 2(o)(ii) of the MRTP Act.

4. LEARNED Counsel for the respondent refuted the allegation made by the DG that the impugned trade practice attracts the provisions of Section 2(o)(ii) of the MRTP Act. He referred to the order of the Hon'ble Supreme Court in Rajasthan Housing Board v. Smt. Parvati Devi, reported in III (2000) CPJ 9 (SC)=VII (2000) SLT 50=2000 CTJ 165 (SC) (MRTP), which clearly shows that Clause (ii) of Section 2(o) cannot be read in isolation. The main ingredient set out in Section

2(o) which requires that the alleged trade practice can be called a restrictive trade practice only, if it has the effect of preventing, distorting or restricting competition, has to be satisfied. In the instant case, he argued, DG has failed to establish this. He also referred to the MRTP Commission's order in DG v. Heinz India Ltd., reported in 2001 CTJ 205 (MRTP), in which a similar view was taken in pursuance of the aforesaid decision of the Hon'ble Supreme Court. He further submitted that the respondent Nos. 2 to 5 are manufacturing various products independently and not on behalf or at the behest of respondent No. 1. These respondents have a right to use the formulation as well as the trademark of their own choice. He further submitted that the prices of the products manufactured by them on their own account are also fixed by themselves. He also invited our attention to the fact that the products manufactured by the aforesaid respondents are sold to various parties and not to respondent No. 1 alone. Therefore, he argued, there is no question of there being any attempt to avoid price fixation by the DPCO. He further submitted that matters relating to contravention of DPCO are to be looked into by the Drug Controller and not by the MRTP Commission. As regards pricing of drugs, he stated that there is a separate Authority appointed by the Government of India, called the National Pharmaceutical Pricing Authority (NPPA), which is competent to look into the allegations of excessive pricing of all drugs. He referred to the MRTP Commission's order in DG v. Knoll Pharmaceuticals reported in III (2001) CPJ 50 (MRTP)=2001 CTJ 250 (MRTP), and stated that in the aforesaid case, the MRTP Commission has observed that since a separate authority (NPPA) has been created for monitoring the retail prices of drugs, the Commission would not go into this question. LEARNED Counsel for the respondent further submitted that as per DG's allegation, the products under consideration are manufactured by respondent Nos. 2 to 5 under a Loan Licence from respondent No. 1. The fact of the matter is that there is no Loan Licence Agreement between the respondents for any of the products covered under this inquiry. He referred to the affidavit filed by Shri M.G. Subramaniam and his cross-examination and stated that the agreements with the respondents are in respect of products other than those covered under the present inquiry. In the end, the learned Counsel for the respondent submitted that the market share of the respondent is less than 2%. This fact, he said, is confirmed by the witness who produced the ORG figures where market share of the respondent is shown as 1.4%. In view of this, he contended, the respondent is entitled to pass the gateways provided for under Section 38(1)(h) of the MRTP Act. In the light of the aforesaid discussion, we are of the view that no case of restrictive trade practice is made out against the respondent. The complaint petition is, accordingly, dismissed and the NOE is discharged with no order as to costs. Complaint dismissed.