(2000) 02 NCDRC CK 0087

In the National Consumer Disputes Redressal Commission

DIRECTOR GENERAL (INVESTIGATION AND REGISTRATION) APPELLANT

Vs

STERLITE INDUSTRIES (INDIA) LTD. RESPONDENT

Date of Decision : 03-02-2000

Acts Referred:

Citation : 2000 2 CPJ 50

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

Final Decision : NOE disposed of

Judgement

1. THE Director General (Investigation and Regulation) (DG) has made an application under Section 10(a)(iii) of the MRTP Act, 1969 (the Act for brief) charging the respondents with adoption of and indulgence in restrictive trade practices and stating that the respondent No. 1 issued an advertisement in the Hindustan Times of the 10th March, 1994 indicating therein the price of its products and the quantity discounts offered in respect thereof. Respondent No. 1 is a public limited Company under the Companies Act, 1956 and is manufacturing, selling and distributing jelly filled telephone cables, continuous cast "CC" copper rods, ACC/ACSR conductors and aluminium cold rolled products. As prima facie the advertisement attracted the provisions contained in Section 33(1) of the Act relating to restrictive trade practices, the DG took up investigation suo motu. THE charge against the respondent No. 1 is that it is not offering discount and sales commission at a uniform rate but the discounts are linked to quantity off-take. It has been further alleged that from the statement of quantity discounts and sales commissions offered by respondents No. 1 during 1992-93 and 1993-94, it appears that while discount @ Rs. 2.5 per kg. was given to M/s. Finolex Cables Ltd. on a quantity of 258138 kgs., M/s. Vindya Telelink received the same @ 1.5 Rs. 1.5 per kg. on 276234 kgs., M/s. Hindustan Transmission Products got @ 1.00 per kg. On 706673 kgs. Likewise, sale commission was allowed to M/s. Suresh Bansal @ Co. @ Rs. 2.78 whereas M/s. Shivram Amtabhai, M/s. Hindustan Metal, M/s. Tayabi Trust and M/s. Patel Metal Works were allowed @ Rs. 1.50. It has been further complained that M/s. Shreeram and Sons were given commission @ Rs. 0.25. It has been stated by

the DG in his application that these discriminatory rates of discounts and commissions have been offered by respondent No. 1 for reasons of its trade dealings and are violative of the provisions of Section 33(1)(e) of the Act.

2. THE other allegation against the respondent No. 1 is that it entered into an agreement dated the 14th December, 1993 with respondent No. 2 for marketing "CC" copper rods on consignment basis and Clause 1B(XI) of the aforesaid agreement which is reproduced below is violative of Section 33(1)(g) of the Act as it imposes territorial restrictions : "Sterlite shall not appoint selling agents or commission agents for sale in States agreed to with MMTC"

It has been further stated in the application by the DG that the aforesaid trade practices and the above clause in the agreement between respondent No. 1 and respondent No. 2 are deemed to be restrictive trade practices within the meaning of Section 33(1) of the Act as they restrict, distort and impair competition. On the basis of DG''s application, a Notice of Enquiry dated 16/20.8.1996 was issued to the respondents. In reply, respondent No. 1 has denied the allegations stating that discount linked to off-take is a feature of the trade pertaining to copper products and similar discounts are also being offered by other manufacturers of these products. It has also been denied that the impugned Clause 1B(XI) of the agreement is violative of the provisions of Section 33(1)(g) of the Act stating that the relationship between respondent No. 1 and respondent No. 2 is that of a principal and agent and that respondent No. 2 was consignment agent of respondent No. 1 and was entrusted with the responsibility of storage, warehousing and handing of the "CC" copper rods manufactured by it. It has also been stated that Finolex Cables Ltd., Vindhya Telelinks Ltd. and Hindustan Transmission Products Ltd. are not dealers/stockists/distributors of respondents No. 1 but are original equipment manufacturers of jelly filled telephone cables/ enamelled wires and "CC" copper rods were purchased and used by them captively for the manufacture of telephone cables/enamelled wires and that the "CC" copper rods were not resold by the aforesaid three parties but were utilised for the downstream manufacture of cables and wires.

Respondent No. 2 in its reply, has stated that according to the agreement which entered into between the two respondents on 14.12.1993 for a period of three years, it was required to store, handle and market CC Copper Rods manufactured by respondent No. 1 on payment of service charge of Rs. 500/- per MT and that respondent No. 1 had itself decided not to appoint selling agents in the States of North India where respondent No. 2 was its agent. It has been also mentioned by respondent No. 2 that no restrictive trade practices have been adopted or indulged in by it and the aforesaid agreement is no longer operative.

3. ON completion of pleadings, the following issues were framed : (i) Whether the respondents are or have been indulging in restrictive trade practices as indicated in the NOE ? (ii) If the answer to the aforesaid issue is in the affirmative, whether such restrictive trade practices are not prejudicial to the public interest ? While the DG has relied only on an affidavit of evidence and no

oral evidence has been led on his behalf, Shri Mahender Patwari appeared as a witness on behalf of respondent No. 1 and was also cross-examined. No oral evidence was led and no affidavit by way of evidence was also filed on behalf of respondent No. 2 and moreover, as respondent No. 2 was not represented by an Advocate or an authorised representative, it was set ex-parte.

4. WE have heard the Advocate for the DG as well as the Advocate for respondent No. 1 at the stage of final arguments and perused the relevant record. The advertisement issued by respondent No. 1 in the newspaper on the basis of which an investigation was taken up by the DG is quite clear and is indicative of the objectionable trade practice of offering quantity based discounts. The rate of discount indicated therein for lifting 50 MT but less than 100 MT is Rs. 500/- per MT while it is Rs. 1,000/- for 100 MT and more. It is not denied by the respondent No. 1 that quantity based discounts were offered during 1992-93 and 1993-94 as has been alleged in the DG''s application. The contention of the respondent No. 1 is that grant of discount or rebate based on off-take of "CC" copper rods can''t be construed to be restrictive trade practice as the parties to whom these discounts were given have not used the "CC" copper rods for resale to a third party but for captive consumption and for the manufacture of down stream products like telephone cables, enamelled wires etc. It has also been contended that these discounts were granted to the manufacturers of down stream products and the same represent cost saving and were then passed on ultimately to the consumers of these products. The above contention is not tenable as from the advertisement issued by respondent No. 1 as well as the statements of quantity discounts for the years 1992-93 and 1993-94, it appears that respondent No. 1 appointed agents, stockists etc. for marketing/sale of its "CC" copper rods and gave discounts and rebates at different rates linked with performance in terms of quantity off-take. The statements of discounts of these two years by themselves attract the provisions of Section 33(1)(e) of the Act and the respondent No. 1 can be deemed to have adopted and indulged in restrictive trade practices. It has to be borne in mind that various trade practices enumerated under Section 33(1) of the Act are deemed to be restrictive trade practices as is obvious from the wording of the opening part of Sub-section (1) which states that for the purposes of MRTP Act, it is to be deemed or taken for granted that the practices mentioned in Clauses (a) to (l) of Section 33 are restrictive trade practices. It is also not denied or disputed that these discounts have been given in connection with or for reasons of dealings between Respondent No. 1 and the parties shown in the statements of 1992-93 and 1993-94. The other contentions of respondent No. 1 are that its rival Hindustan Copper Ltd. an undertaking of the Government of India also follows the same practice of granting discounts based on off-take of its products and that it faces stiff competition from imported products which are cheaper than the products manufactured by respondent No. 1, and discounts have necessarily to be offered in order to sell its products are also not tenable as two wrongs do not make one right. The trade practice of quantity based discounts and varying rates of

discounts to various parties are deemed to be restrictive trade practices unless the respondent pleads any of the gateways under Section 38 of the Act. Respondent No. 1''s contention that it is a trade practice followed by its rival is not supported by any reliable evidence and if Hindustan Copper Ltd. is indulging in restrictive trade practices, it will also be dealt with under the relevant provisions of the Act and it is no ground for respondent No. 1 to adopt or indulge in restrictive trade practices which are per se restrictive trade practices and are violative of the provisions of this Act.

5. THE explanation of respondent No. 1 that the parties to whom discounts were offered were original equipment manufacturers and "CC" copper rods were used by them captively does not cut much ice as ultimately these were used for commercial purposes by them and the discounts were given to them for reasons of trade dealings and are deemed to be restrictive trade practices and fall within the ambit of the relevant provisions of Section 33(1) of the Act.

6. AS regards the agreement between Respondent No. 1 and respondent No. 2 with regard to the restrictions of territory, Clause 1B(XI) per se is violative of the provisions of Section 33(1)(g) of the Act. AS stated above, trade practices falling under Clauses (1) to (l) of Section 33(1) are deemed to be restrictive trade practices, unless the respondent charged with adoption of these trade practices pleads gateways and in the present case, no such plea has been taken. The onus is on the respondent to show how the alleged restrictive trade practices are not prejudicial to public interest. The contention of Respondent No. 2 that the agreement incorporating the Clause 1B(XI) was at the instance of respondent No. 1 or that the agreement has since come to an end, does not absolve respondent No. 2 of the charge of adoption of and indulgence in the alleged restrictive trade practices. In view of the above discussion, there is no escape from the conclusion that the charge of adoption of and indulgence in restrictive trade practices within the meaning of Sections 33(1)(e) and (g) of the MRTP Act has been established against the respondent No. 1 and accordingly, it is directed to discontinue the aforesaid restrictive trade practices and also not to repeat the same or similar restrictive trade practices in future. AS regards respondent No. 2, as the impugned agreement containing the objectionable clause has since expired and is no longer operative, it is not necessary to pass a cease order but to forestall its repetition in future, a desist order is called for. Accordingly, respondent No. 2 is directed not to repeat same or similar restrictive trade practice in future. An affidavit by way of compliance shall be filed by the respondents within six weeks from the date of pronouncement of this order. NOE disposed of.

