(1997) 09 NCDRC CK 0035

In the National Consumer Disputes Redressal Commission

DIRECTOR GENERAL OF INVESTIGATION — APPELLANT

Vs

German Remedies Ltd. — RESPONDENT

Date of Decision : 30-09-1997

Acts Referred:

Citation : 1998 3 CPJ 18

Hon'ble Judges : A.N.Divecha , S.Chakravarthy J.

Final Decision : Enquiry discharged

Judgement

1. GERMAN Remedies Ltd., (respondent hereafter) is facing this enquiry which commenced with an application preferred by the Director General of Investigation & Registration (DG for brief) under Section 10(a)(iii) of the Monopolies & Restrictive Trade Practices Act, 1969 (Act for brief). The respondent is engaged in the business of manufacture and sale of pharmaceutical products. For the purpose of sale and distribution of its products, it appointed distributors. The respondent issued circular letters to its distributors informing them of certain bonus schemes/trade offers.

2. THE DG filed an application under Section 10(a)(iii) of the Act alleging that the said circular letters issued to the distributors have certain terms and conditions which are restrictive in nature and which constitute restrictive trade practices under Section 33(1) of the Act. In particular circular letters issued to the distributors on 25th Jan., 1995 relating to "Dulcolax Tablets 100s" and "Proluton Depot 250 mg" offer certain bonuses and benefits in connection with or reason of dealings between the respondent and the distributors attracting Section 33(1)(e) of the Act. Summarising the charges, a Notice of Enquiry (NOE) was issued by the Commission on 15th Jan., 1996 calling upon the respondent to appear in the Commission and submit its defence.

Initially the respondent moved an application on 13th Feb., 1996 stating that in similar enquiries against the same respondent, the Notices of Enquiry were discharged by the Commission and praying that the Notice of Enquiry in this case may also be discharged. Alternatively the respondent prayed that the NOE may be amended by deleting the charges relating to "Dulcolax Tablets 1 00s" which constituted the subject matter of previous enquiries in this Commission.

3. AFTER giving a hearing to the Advocate for the DG and the Advocate for the respondent, the Commission through its order dated 11th Sept., 1996 dropped the charges relating to "Dulcolax Tablets 100s" and directed that the enquiry would proceed further insofar as charge relating to "Proluton Depot 250 mg" is concerned. Accordingly the Notice of Enquiry was amended. The respondent furnished its detailed reply to the NOE. In its reply the respondent has made the following averments: 1. The Commission has held through its order dated 22nd April, 1994 in RTPE No. 1624/87 that the incentive schemes of the respondent were not prejudicial to public interest and, therefore, the NOE should be discharged. 2. The Commission discharged the Notice of Enquiry relating to "Dulcolax Tablets 100s" in an earlier enquiry. 3. Every time a discount scheme is introduced by the respondent which has been already held not to be prejudicial to public interest, it is not fair to expose it to a fresh Notice of Enquiry. 4. The existence of a restrictive trade practice is a condition precedent to the passing of an order by the Commission and in this case the allegations in the NOE do not constitute restrictive trade practices. 5. The NOE does not disclose any cause of action nor does it disclose as to how the alleged trade practices prevent, distort or restrict competition or obstruct the flow of capital or resources into the stream of production or bring about manipulation of prices or conditions of delivery so as to impose on the consumers unjustified costs or restrictions. Nor does it set out the constituent facts or particulars in proof of the alleged restrictive trade practices. 6. The discounts given by the respondent to its distributors are not "in connection with or by reason of dealings" so as to fall within the mischief of Section 33(1)(e) of the Act. Even a single transaction will secure for the distributors the discount. There need not be dealings to earn the discount.

4. DISCOUNTS are available to the distributors on a uniform basis. The value of the incentives is so small that it cannot have any significant impacton competition. Furthermore, incentives are given for the promotion of the specific product in question and will, therefore, fall outside the ambit of Section 33(1)(e) of the Act. The market share of the respondent is merely 1.3% of the All India Pharmaceutical market and thus the impugned scheme of the respondent can have no significant impact on the competition.

5. THE impugned scheme was in force only for 4 weeks and could not have affected competition.

6. THE circular under challenge has specifically required the distributors to pass on the benefit of the trade offer to retail chemists, nursing homes and hospitals. THE patients are the direct beneficiaries. The discounts do not affect inter- brand or intra-brand competition in any way.

Schemes like the impugned scheme are a normal feature in the pharmaceutical trade. Similar schemes are operated by almost all- pharmaceutical manufacturers even today.

7. OFFERING free products under the impugned scheme reduces the average price of the product benefiting the consumers. Respondent is entitled to gateways under Sections 38(1)(a), (b), (c), (d), (h) and (k) of the Act. After the pleadings were completed the following issues were framed : (i) Whether the respondent has indulged in the restrictive trade practice relating to product "Proluton Depot 250 mg" ? (ii) Whether the alleged restrictive trade practices are not prejudicial to public interest ? In the Commission''s order dated 11th Sept., 1996 it had been indicated that some of the preliminary objections of the respondent, general in nature, would be dealt with in adjudicating the first issue listed above. We gave a hearing to Mr. V.T. Korde, Advocate for the DG and Mr. H.D. Pithawala, Advocate for the respondent. Our answers to the above two issues are as follows: 1. No. 2. Does not arise, but we answer the issue in the affirmative. Our analysis in arriving at the conclusions above are addressed in the following paragraphs.

7. At the very outset, Mr. V.T. Korde, Advocate for the DG and Mr. H.D. Pithawala, Advocate for the respondent addressed the implication and the applicability of a decision of the Hon''ble Supreme Court in Voltas Ltd. v. Union of India & Ors., in Civil Appeal No. 2252 of 1994 (Company Cases 1995 Vol. 83 page 228). In interpreting Section 33(1) of the Act, the Hon''ble Supreme Court made certain significant observations. Prior to the amendment to the Sub- section (1) of Section 33 of the Act w.e.f. 1st August, 1984, an agreement relating to a restrictive trade practice falling within one or more of the categories specified in the said sub- section was compulsorily required to be registered. After the amendment, w.e.f. 1st August, 1984 which introduced a deeming clause, an agreement falling within one or more of the categories mentioned in the said sub-section "shall be deemed for the purposes of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration". The Hon''ble Supreme Court has observed in the Voltas case, supra, as follows : "It can be said that Parliament after having examined different trade practices, has identified such trade practices which have to be held as restrictive trade practices for the purposes of the Act. To keep such trade practices beyond controversy in any proceeding, a deeming clause has been introduced in Sub-section (1) of Section 33, saying that they shall be deemed to be restrictive trade practices. In this background, according to us, there is not much scope for argument that although a particular agreement is covered by one or the other clause of Sub-section (1) of Section 33, still it shall not amount to an agreement containing conditions which can be held to be restrictive trade practices within the meaning of the Act."

8. While the legal fiction in Sub-section (1) of Section 33 of the Act has been clearly interpreted by the Apex Court, a further question, which came up for consideration before it, was the scope of enquiry by the Commission. The answer to the question given by the Apex Court is, with respect, very incisive. The

Hon''ble Supreme Court observed as follows: "As such persons who have got their agreements registered on their own in order to escape prosecution, although in such agreements, there may not be any clause relating to restrictive trade practices, cannot urge before the Commission, after having got the agreements registered, that they do not contain any clause relating to any restrictive trade practice. On the other hand, persons who for one reason or other have not got their agreements registered under Section 35, will be in an advantageous position inasmuch as in respect of their agreements, the Commission will have to examine both aspects (i) whether the agreement relates to any restrictive trade practice, (ii) even if it relates to restrictive trade practice, whether the said practice is prejudicial to the public interest. It is true that under Section 37, the Commission has been vested with the power to inquire in respect of agreements which have been registered under Section 35 as well as those which have not been registered. But the fact remains that once the Commission is satisfied that a particular agreement which has not been registered under Section 35, falls within any of the Clauses from (a) to (1) of Sub-section (1) of Section 33, then no further enquiry is to be done as to whether such agreement relates to restrictive trade practices or not."

(Emphasis added) 9. Thus the interpretation of Sub-section (1) of Section 33 of the Act is to the effect that the Commission is vested with the power to enquire in respect of agreement, whether registered or not, under Section 35 of the Act. The Commission according to the ruling of the Apex Court, stands admonished to examine in every case falling under Section 33(1) of the Act, whether the agreement relates to any restrictive trade practice and whether the said practice is prejudicial to public interest. But once the Commission is satisfied that a particular agreement falls within Section 33(1), then no further enquiry needs to be done as to whether such agreement relates to restrictive trade practices or not. 10. Mr. V.T. Korde, Advocate, for the DG sought to argue that once the NOE is issued, the satisfaction of the Commission obtains that the respondent has indulged in restrictive trade practices in terms of Section 33(1) of the Act and that, therefore, no more enquiry needs to be done by the Commission except to examine the prejudice to public interest angle. He added that in examining the prejudice to public interest angle, the Commission needs to analyse just the pleadings and evidence of the respondent on the gateways it is entitled to, under Section 38(1) of the Act. 11. Mr. H.D. Pithawala, Advocate for the respondent, on the other hand, argued that NOE by itself is not constitutive of the satisfaction of the Commission that the respondent has indulged in the restrictive trade practices under Section 33(1) of the Act. NOE is like a charge sheet and the principles of natural justice will not and should not permit such a Notice of Enquiry to be constitutive of the satisfaction of the Commission that the respondent had indulged in the restrictive trade practices. 12. We have given anxious consideration to the contentions of both the parties on this issue. We have extracted the observations of the Hon''ble Supreme Court in the Voltas case (supra) relevant to our discussion. It is manifest that the Hon''ble Supreme Court has posited that satisfaction of the Commission is a condition precedent before proceeding to the examination of the prejudice to public interest angle and the availability of the gateways under Section 38(1) of the Act. The moot question before us is, therefore, whether issuance of NOE constitutes satisfaction. Here again, this particular question came up for consideration by this Commission in the matter of the Director General (I & R) v. Kothari Electronics & Industries Ltd., RTPE No. 162/88 dated 6.12.1996, (1997) 5 CTJ 89 MRTPC. In the said case the Commission observed as follows: "1. A NOE is essentially a charge sheet instituting an enquiry. 2. To conclude that by issuance of a NOE, the allegations fall under Section 33(1) of the Act would not subserve the principles of natural justice. 3. However, notwithstanding what is stated at item 2 above, if the NOE spells out such satisfaction in clear and unambiguous terms that the allegations fall under Section 33(1) of the Act, then the inference of satisfaction of the Commission may be deemed to obtain. 4. If such satisfaction is not clearly spelt out in the NOE, it would be fatal to the principles of natural justice to indict an errant party by way of inference, of being guilty of the restrictive trade practices outlined in Section 33(1) of the Act. 5. If the NOE does not categorically spell out such satisfaction that the allegations clearly fall under and attract Section 33(1), it is open to the Commission to indicate such satisfaction at any stage of the enquiry, particularly before framing the issues so that no more enquiry after that stage would need to be done as to whether the allegations fall under Section 33(1) of the Act."

13. We have gone through the record and in particular the NEO and find that the Commission has not expressed its satisfaction that the respondent has indulged in the alleged restrictive trade practices falling within the provisions of Section 33(1) of the Act. All that has been stated in the NOE is a reiteration of the facts as furnished by the DG in his application. The NOE has called upon the respondent to enter appearance and furnish its defence against the charges listed therein. Leaning on the Hon''ble Supreme Court''s decision in the Voltas case (supra) and this Commission''s observations in the Kothari Electronics & Industries Ltd. case (supra), we are inclined to agree with Mr. H.D. Pithawala, Advocate for the respondent, that the Commission has to be satisfied that the respondent has perpetrated certain restrictive trade practices falling within Section 33(1) of the Act and that such satisfaction does not obtain by mere issuance of the NOE. 14. This leads us to the first issue namely whether the respondent has indulged in the restrictive trade practice relating to product "Prolution Depot 250 mg." 15. Some of the preliminary objections summarised earlier from the reply of the respondent at items 1 to 5 do not require any discussion as they were neither pressed nor articulated at the time of arguments. Some of those objections have already been dealt with in this Commission''s order dated 11th Sept., 1996. Suffice it to say, that the preliminary objections of the respondent do not have any substance as to render this enquiry not maintainable. In the Commission''s order dated 11th Sept., 1996, it has been held that the charges relating to "Proluton Depot 250 mg" need to be enquired

into and consequently issues were framed. In this view of the matter, the preliminary objections are rejected and we proceed to deal with the main controversy.

8. ONE of the lines of defence taken by Mr. Pithawala, Advocate for the respondent is that the discounts/incentives in the impugned circular are not "in connection with or by reason of dealings" so as to fall within the mischief of Section 33(l)(e) of the Act. He drew our attention to the impugned circular and argued that every single transaction of a purchase of 60 boxes of ten ampoules of "Proluton Depot 250 mg" will earn free supply of 6 boxes of 10 ampoules of that product. He added that the impugned circular calls upon the distributors to pass on the benefit of the trade offer to all retail chemists, nursing homes and hospitals. Every customer placing an order for a minimum of 2 boxes will also be entitled to receive 2 ampoules free. The respondent''s argument, therefore, is that there ie no discrimination in the incentives/discounts being available to distributors. We note that there is no discrimination at the distributors'' level as most of them can be expected to have the financial strength to purchase 60 boxes of 10 ampoules, which is not requiring of any big investment. In a manner of speaking, even Mr. V.T. Korde, Advocate for the DG, agreed that a distributor is generally capable of investment for 60 boxes of 10 ampoules of the product in question. But then there can always be a situation when a distributor, not well endowed, may not be able to invest on 60 boxes of 10 ampoules but may place an order for a smaller quantity. Mr. H.D. Pithawala, Advocate for the respondent cited a decision of this Commission, more than 2 decades ago in RTPE No. 6/1972 dated 6th September, 1974, to argue that it is not each and every practice of giving allowances, discounts, rebates or credits in the course of trade or business that can become a subject matter to fall under Section 33(1)(e) of the Act and that it is only when by any of those forms or manners the concessions or benefits are sought to be allowed are granted in connection with or by reason of dealings, that the said clause will be attracted. In other words, if concessions or benefits are granted in a particular or individual transaction of sale or purchase, they will not fall within the scope Section 33(1)(e) of the Act.

9. SINCE the aforesaid decision cited by Mr. H.D. Pithawala, the subject matter in its comprehensive perspective has been examined in two cases namely Saraikella Glass Works (P) Ltd., RTPE No. 32/85 dated 10.5.1993 and the DG (I & R) v. Rajshree Cement Ltd., RTPE No. 124/88 Dated 31.5.1994. The Commission laid down the following postulates in the aforesaid cases : "First, differential or discriminatory incentive, bonus or discount based on quantity is a restrictive trade practice within the meaning of Section 2(o), inasmuch as such discounts would reduce the opportunities of the smaller dealers in being able to compete with the bigger ones and this would have the effect of preventing, distorting or reducing competition between them; Second, such a practice is a concession, benefit, allowance, discount or rebate in connection with or by reasons of dealings within the meaning of Section 33(1)(e) of the Act; Third, the manufacturers or producers may however be allowed to pass through the

gateways under Section 38(1)(h), if they establish that me differential discount is negligible or so insignificant that it is not likely to affect the competition to any material degree."

10. IN terms of the first postulate we have already noted that the incentive/ discount is not discriminatory in nature as the benefits are essentially targeted for the distributors who are generally well endowed financially to go in for purchase of 60 boxes of 10 ampoules of the product in question. As Mr. H.D. Pithawala, Advocate for the respondent pointed out, the impugned circular itself enjoins the distributors to pass on the benefit of the trade offer to all retail chemists, nursing homes and hospitals. INdeed the benefits have been made available to individual customers who place orders for just 2 boxes. In so far as the second postulate is concerned the impugned circular does not suggest that there should be "dealings" to avail of the benefit. Mr. H.D. Pithawala, Advocate for the respondent pointed out that every transaction in which a distributor purchases 60 boxes will be entitled to 6 free boxes. In other words there is no need for a series of transactions to constitute "dealings" to earn the benefit. We agree with him.

Insofar as the third postulate is concerned, it is on record in the reply to the NOE, that the market share of the respondent is merely 1.3% of the All-India Pharmaceutical Market. Mr. V.T. Korde, Advocate for the DG pointed out that it is immaterial what the respondent''s share is in the total pharmaceutical market and that what is material is its share in the market for the product in question namely "Proluton Depot 250 mg". The clue to this question was pointed out by Mr. H.D. Pithawala, Advocate for the respondent in the deposition of Mr. V.K. Sharma, its Executive Manager, who stated that the sales turnover of the said product of the respondent constitutes around 8% of its sales turnover. But this answer is not strictly relevant as what is required is the share of the respondent in the market for the product in question and/or competitive products. In his affidavit (Ex. RW 1/ E) Mr. V.K. Sharma, Executive Manager of the respondent has categorically stated that its share of the product "Proluton Depot 250 mg" among competitive products in the Indian market is less than 9%.

11. IN this view of the matter, we agree that the impugned scheme of the respondent can have no significance on competition and cannot prevent, distort or restrict competition, thus making available to the respondent the gateway provided in Section 38(1)(h) of the Act. In sum, we are of the considered view that the respondent has not indulged in the restrictive trade practices alleged in the NOE and mat it is entitled to the gateway provided in Section 38(1)(h) of the Act. The first issue is, therefore, answered in the negative and second issue in the affirmative in favour of the respondent. The NOE shall stand discharged. There shall be no order as to costs. Enquiry discharged.

