(1997) 12 NCDRC CK 0025

In the National Consumer Disputes Redressal Commission

In Re : BLISS CHEMICALS And PHARMACEUTICALS (I) LTD. APPELLANT

Vs

State RESPONDENT

Date of Decision : 31-12-1997

Acts Referred:

Citation : 1998 1 CPJ 12

Hon'ble Judges : S.Chakravarthy , R.K.Anand J.

Final Decision : NOE disposed of

Judgement

1. THIS shall dispose of the Notice of Enquiry (NOE) issued on 30th November, 1992 by the Commission to Bliss Chemicals & Pharmaceuticals (I) Ltd. (respondent 1 hereafter) and Bijay Pharmaceuticals Agencies (respondent 2 hereinafter) charging them of having indulged in certain restrictive trade practices falling within me provisions of Section 33(1)(a). Section 33(1)(e) and Section 33(1)(f) of MRTP Act, 1969. The enquiry was triggered by a complaint received from Central Medical Hall, Chemists and Druggists, Wholesalers and Retailers, Rourkela (complainant hereafter) addressed to this Commission. On receipt of the complaint, the Director General (Investigation and Registration) (DG for brief) was directed to make an investigation and report to the Commission. The DG submitted his investigation report based on which the NOE has been issued against the two respondents mentioned above. Briefly, the facts are as follows :

2. RESPONDENT 1 is a Company engaged in the manufacture of various chemicals and pharmaceuticals and in particular the formulation called "Today" a contraceptive used for family planning. It has a marketing system of supplying its products to retailers through State- wise distributors, and District-wise stockists respondent 2 is one of the distributors of respondent 1. According to the complainant namely Central Medical Hall it was appointed as a stockist of respondent 1 for marketing its product "Today" in the town of Rourkela and it was to get a margin or discount of 10 percent of the value of the product, respondent 2 as the distributor of respondent 1 was advised to supply the

products of respondent 1 to the complainant. The complainant on requesting for the discount of 10 percent was told by respondent 2 that the discount would only be percent for the purchase of one case of the product "Today" and would be 10 percent on purchase of three cases. Furthermore, respondent 2 demanded full payment from the stockist complainant on the ground that respondent 2 had to pay the price of the products in advance to respondent for the supply of goods in question. Aggrieved by this attitude of respondent 2, the complainant approached respondent 1 who refused to intervene pointing out that the action of the distributor (respondent 2) was in accordance with the procedure laid down by respondent 1. The DG in his report has stated that when he referred the matter to respondent 1, the latter had informed that respondent 2 had been granting differential discounts without any authority from it and that consequently respondent had issued a circular to respondent 2 to stop the practice of differential discounts. The DC has stated that after the complainant has been appointed as a stockist it was justified in claiming the margin of 10 percent as indicated in the price list issued by respondent 1 and respondent 1 and respondent 2 "had no business not to pay this discount". The attitude of respondent 2 in offering only 5 percent discount against the full discount, of 10 percent is "highly objectionable". Even if respondent 1 had subsequently issued instructions to respondent 2 regarding the discounts, it does not take away the merit of the allegation at the particular point of time when differential discounts were implemented.

The DG has further stated that not only did not respondents indulge in the restrictive trade practice of refusal to deal with the complainant but had also terminated the stockist ship of the complainant without any justification. Furthermore, there is no provision in the price list of respondent 1 that the distributor, stockist and the retailer can sell the goods in question at prices lower than those mentioned therein. He has, therefore, concluded that the refusal to deal will invite Section 33(1)(a) of the Act, differential discounts will invite Section 33(1)(e) of the Act and the absence of provisions in the price list enabling the distributor, stockist and the retailer to sell at prices lower than those mentioned therein will invite Section 33(1)(f) of the Act. He has recommended that an enquiry may be instituted against the respondents.

3. ON the basis of the report of the DG, the NOE as stated earlier was issued on 30th November, 1992. NOE was communicated alongwith a copy of the DG''s report to the respondents, respondent submitted a detailed reply. But respondent 2 failed to appear at the hearings and the proceedings continued ex-parte against it. The reply of respondent 1 is summarised herein below : Preliminary Objections 1. The Commission has no jurisdiction to is sue the Notice of Enquiry and the facts and circumstances of the case do not warrant an enquiry. 2. The alleged trade practices do not constitute restrictive trade practices within the meaning of Section 2(o) of the Act. The NOE does not disclose any ground or cause of action to warrant or justify an enquiry. 3. The allegations are vague and ambiguous and do not contain necessary material particulars. 4. Respondent 1

does not control even 8-10 percent of the supply of contraceptive in the organised sector and thus the alleged trade practices cannot have any impact on competition. 5. In the present case, there is no concluded contract between the complainant and the respondents. The complainant had got appointed as a stockist "by giving incorrect information".

The terms and conditions of stockist ship nowhere stipulates that the discount is linked to the quantity off take.

4. RESPONDENT 1 ''s price lists have clearly recommended four different prices for the ultimate consumers, retailers, stockists and distributors. Defence on merits Respondent l has not indulged in the restrictive trade practice falling under Section 33(1)(e) and Section 2(o) of the Act. There is no collusion between respondent 1 and respondent 2 in offering differential discounts linked to the quantum of off take. respondent 1 after being informed of the alleged trade practice had written to respondent 2 asking it to desist from the practice of giving differential discounts. Now that the differential discount scheme has been discontinued, no enquiry can lie in respect of actions in the past.

5. RESPONDENT 1 however, allows discounts for bulk orders from the distributors. All stockists get discount at the same rate. Discount is allowed to bulk order purchasers as supply of bulk orders results in savings relating to packing, handling and freight charges.

6. THE price lists issued by respondent 1 do not "curtail the liberty of the distributors/stockists to sell the product below the prices indicated" and as such they will not attract Section 33(1)(f) of the Act. There is alreadya stockist in RourkeIa. respondent 1 has no objection to induct the Central Medical Hall, the complainant as an additional stockist but keeping in view of the small turnover of this low value product it would be unjust for the existing stockist who is working for quite some time.

Respondent 1 is entitled to the gateways provided in Section 38(1) of the Act and the balance of convenience lies in its favour that the alleged trade practices be continued in public interest.

7. IF the alleged trade practices are said to be restrictive in nature, the DG will be putting an unreasonable restriction on respondent 1 ''s fundamental right to carry on trade which will be violative of Article 19(1)(g) of the Constitution. After the pleadings were completed the following issues were framed : 1. Whether the enquiry is not maintainable on the grounds stated in the reply as preliminary objections? 2. Whether the respondent is or has been (sic) indulging in the restrictive Trade Practices as indicated ? 3. IF the answer to the foregoing issue is in the affirmative whether the restrictive trade practices are not prejudicial to public interest ? 6. The DC filed a notice for interrogatories and discovery of documents. On respondent 1 furnishing its reply to the same, DC adduced the evidence of the Raj kumar Shah, partner of the complainant Central Medical Hall. The witness was cross-examined by the Advocate for respondent 1. 7.

Respondent 1 had originally desired to adduced the evidence of one Shri Suhas Kulkarni, its Assistant Manager (Admn.). But a she was not in the employment of respondent 1, when the matter came up for cross-examination of the said witness, respondent 1 adduced the evidence of Shri Dinesh Shetty, its Commercial Executive. It needs to be noted here that the affidavit of the said witness was furnished by way of examination-in-chief in which it was stated that the documents filed with the affidavit of Shri Suhas Kulkarni, the originally cited witness of respondent 1 may be treated as a part of the affidavit of the substitute witness, Shri Dinesh Shetty. We gave a hearing to Mr. Badri Nath Babu, Advocate for the DG and Mr. K.C. Dua, Advocate for respondent 1. 8. The first issue for adjudication need not detain us as the preliminary objections in respondent 1''s reply have not been pressed or articulated, after the said reply was filed. However, a perusal of the preliminary objections, which we have summarised earlier in this order dearly shows that they are all based on certain averments on the part of respondent 1 like the NOE being vague and ambiguous, like NOE not disclosing any ground or cause of action to justify an enquiry and like its statement that it has not indulged in any restrictive trade practice. All these objections do not become hostile to the maintainability of the enquiry. In terms of the procedure followed by the Commission, opportunities were made available very liberally to both the parties to adduce their evidence and to state their stand without any fetter. The fact that the entire investigation report of the DG had been made available to the respondents and in particular to respondent 1 alongwith the NOE shows that there is nothing vague or ambiguous about the charges. The only other objection of respondent 1 is that the complainant Central Medical Hall had misled respondent 1 to believe that there was no existing stockist at Rourkela thereby making respondent 1 appoint the complainant as its stockist. We see no logic in this objection coming in the way of maintainability of the enquiry. Even if the complainant had misled respondent 1, it is for the letter, during the cross examination of the partner of the complainant (DG''s witness) to discredit the allegations of the complainant. In the premises, we decide the first issue against the respondents and hold that the enquiry is eminently maintainable. The first issue is, therefore, decided in the negative. 9. Now to the second issue. The first limb of the charges relates to the refusal on the part of the respondents to deal with the complainant without any justification. The NOE has categorically indicated that the restrictions on the part of respondent 1 against the right of distributor respondent 2, in the appointment of stockists is a restrictive trade practice. Thus, the first limb of the charge according to the NOE attracts Section 33(i)(a) of the Act. 10. In his deposition Shri Raj kumar Shah, partner of the complainant firm. Central Medical Hall has reaffirmed the con tents of his complaint petition addressed to the Commission. The said complaint petition dated 16th March, 1991 (Ex. AW 1/1) has alleged that the termination of the stockist ship of the complainant was due to its demand of discount at 10 percent and due to respondent 1''s desire to protect the interests of its distributor respondent 2. During his testimony Shri Rajkumar Shah produced the original letter of appointment of the complainant as a stockist of respondent 1 which has been marked Ex. AW1/2. The said document states that the complainant has been appointed as a stockist by respondent 1 on standard terms and conditions. This appointment letter is of the date 1st October, 1990. 11. From a perusal of the evidence on record, it transpires that me complainant through his letter dated 3rd November, 1990 requested respondent 1 to advise respondent 2 to allow discount @ 10 percent, while agreeing to pay 50 percent of the price in advance towards the purchases to be made from respondent 2. The said letter of the complainant was triggered by a letter received from respondent 2 by the complainant of date 12th October, 1990 in which a discount of only 5 percent was indicated for the contraceptive "Today". A reply was given by respondent 1 to the complainant on 17th November, 1990 stating that it did not have any discount system but only a discounted price list. respondent 1 added that there was another stockist in Rourkela and that if the complainant wanted to operate "on a semi-wholesale basis" it could do so. There was a further letter from respondent 1 to the complainant dated 27th November, 1990 to the effect that in view of another stockist in existence in Rourkela it would not be advisable for respondent 1 "to entertain another party on the same stockistship terms". When this was objected to by the complainant in its letter date 12th December, 1990, respondent 1 informed the complainant that the existing stockist was functioning satisfactorily and that it found "no justification in replacing or adding another". This was on 15th December, 1990. All the above documents are a part of Ex. AW 1/1 and its annexures. 12. The above documents clearly prove that after appointing the complainant as a stockist, respondent 1 had reneged on its obligations in conjunction with respondent 2. The defence taken by respondent 1 that the complainant had misled respondent 1 into appointing the complainant as a stockist on the ground that the complainant did not bring it to its notice that there was already a stockist has no force whatsoever, as respondent 1 should know who its stockists are. It is certainly not the obligation of the complainant who was an applicant for stockistship to inform respondent 1 as to who are the other stockists in Rourkela. Furthermore, the stockistship agreement was on standard terms and conditions for any stockist. For respondent 1 to say that it would not be able to entertain the complainant on the said stockistship terms is a clear case of refusal to deal. There is nothing in the stockist agreement in support of a discount of less than 10 percent offered to all stockists, respondent 2 has also thus refused to deal with the complainant on the same standard terms and conditions. 13. What emerges is that both respondent 1 and respondent 2 had refused to deal with the complainant after the complainant has been appointed formally as a stockist for respondent 1 on the standard terms and conditions (Ex. AW 1/2 refers). The first limb of the charge is proved. Both the respondents are guilty of the restrictive trade practice under Section 33(1)(a) of the Act. 14. The second limb of the charges relates to differential discounts. We have already noted while discussing the first limb of the charges that the stockistship agreement does not provide for any discount less than 10 percent. It is respondent 2 which through its letter dated 1st November, 1990 addressed to the complainant indicated differential discounts linked to off take. The said document says that the discount would be 5 percent for the purchase of one case, 7 percent for the purchase of two cases and 10 percent for the purchase of three cases, respondent 1 on being informed of this advised respondent 2 to desist from the practice of differential discounts (Document No. 27 dated 6th May, 1991 in the list of documents furnished by respondent 1''s witness Shri Dinesh Shetty, its Commercial Executive refers). In the said document, respondent 1 had specifically desired respondent 2 to confirm that the latter would not be deviating from the standard terms and conditions, respondent 1 has also mentioned this aspect in its reply to the NOE.

From the above it is obvious that it is respondent 2 which set up a differential discount scheme and not respondent 1. In the light of the categorical letter of respondent 2 addressed to the complainant of date 1st November, 1990 (a part of Ex. Aw 1/1 and its Annexures,) respondent 2 is guilty of the restrictive trade practice falling under Section 33(1)(e) of the Act. respondent 1 is not guilty of this offence.

8. THE third limb of the charges is the absence of liberty in the price lists of respondent 1 to the stockists to sell the products at prices lower than what are indicated therein. Shri Dinesh Shetty, respondent 1''s Commercial Executive, during his cross-examination, stated as follows : "According to our Company''s practice we allow 7% margin to distributor, 10% to stockist and 20% to retailers. Price list and percentage of margin are indicated in Document 23 which are part of additional documents".

A perusal ofdocument 23, clearly shows that the retail price, stockist price and distributor price are all specifically fixed. There is nothing in the price list which gives liberty to the retailers, stockists or distributors to charge prices lower than those in the price list. Section 33(1)(f) of the Act clearly renders it a restrictive trade practice if there is "any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged". Thus, the said Document 23 itself establishes the charge of resale price maintenance and falls foul of Section 33(1)(f) of the Act. respondent 1 is guilty of the third limb of the charges, respondent 2 is also guilty of the charge as it has followed the price list of respondent 1. In the final analysis, respondent 1 is guilty of the offences under Section 33(1)(a) and Section 33(1)(f) of the Act. respondent 2 is guilty of offences under Section 33(1)(a) & Section 33(1)(e) and Section 33(1)(f) of the Act. The second issue is, therefore, answered in the affirmative as indicated above. The third issue is answered in the negative against the respondents as the aforesaid restrictive trade practices are clearly prejudicial to public interest. Section 38(1) of the Act declares as also Section 33(1) of the Act, that restrictive trade practices are deemed to be prejudicial to public interest. respondent 1 in its reply has merely pleaded gateways under Section 38(1) of the Act but neither in its evidence nor through any other document has established that any particular gateway is available to or invokable by it. The onus of proving gateways is clearly on respondent 1. respondent 2 by absenting itself in the proceedings has furnished no defence against the charges whatsoever. In fact, proceedings have been ex-parte against it. The respondents are directed to cease the restrictive trade practices proved against them and to desist from indulging in the same in future. They are further directed to file an affidavit in compliance within six weeks of the date of this order. NOE disposed of.