(2008) 04 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No. 4264 of 2003

N.R. Jet Enterprises Ltd. APPELLANT

Vs

National Pharmaceutical Pricing Authority and Union of India (UOI) RESPONDENT

Date of Decision : 15-04-2008

Acts Referred:
Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3, 7A

Citation : (2008) 3 ALLMR 711 : (2008) 110 BOMLR 1444 : (2008) 6 MhLj 206

Hon'ble Judges : V.M. Kanade, J;D.K. Deshmukh, J

Bench : Division Bench

Advocate : N. Sirwai and M.S. Doctor, instructed by Crawford Bayley and Co. and Sham Mehta, instructed by Madhusudan Gawde, for the Appellant; S.M. Shah and Nisha Walani, for the Respondent

Judgement

D.K. Deshmukh, J.—In both these petitions, the same order is challenged and therefore, both the petitions can be conveniently disposed of by common order.

2. By the order dated 12.6.2003 which is impugned in these petitions, M/s. Johnson & Johnson Ltd. which is petitioner in writ petition No. 4556 of 2003 and M/s.N.R. Jet Enterprises Ltd. which is petitioner in writ petition No. 4264 of 2003 have been jointly and severally held liable to deposit an amount of Rs. 25,00,78,500/- (Rupees Twenty five crores seventy eight thousand five hundred only) under para 13 of DPCO''95 and interest amount of Rs. 12,97,41,819/- (Rupees Twelve crores ninety seven lakhs forty one thousand eight hundred nineteen only) u/s 7A of the Essential Commodities Act, 1955. As a result of written submissions filed on behalf of the respondents, now it is an admitted position that instead of Rs. 25,00,78,500/- the correct amount to be recovered is Rs. 22,35,72,889/(Rupees Twenty two crores thirty five lakhs seventy two thousand eight hundred eighty nine only). It is also a common ground that this amount has actually been deposited by Johnson & Johnson Ltd. It was also stated before us that Johnson & Johnson Ltd. is not interested in claiming back

that amount. Therefore, in these petitions the only question that is to be considered is whether by the order impugned, the petitioners in these petitions could have been jointly held liable for payment of amount of Rs. 12,97,41,819/- as interest u/s 7A of the Essential Commodities Act, 1955. Johnson & Johnson Ltd. is a pharmaceutical company incorporated under the provisions of the Companies Act, similarly N.R. Jet Enterprises Ltd. (hereinafter referred to as N.R. Jet) is also a pharmaceutical company incorporated under the provisions of the Companies Act. The present proceedings relate to the formulation known as Raricap 40''s tablets In exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955, the Central Government from time to time made various drugs (price control) orders. The order with which we are concerned in these petitions is the drugs (price control) order 1995. The Raricap 40''s Tablet was originally manufactured by M/s. Ethnor Limited which was amalgamated with Johnson & Johnson Ltd. in the year 1994. The Government of India in exercise of its power under para 8 of DPCO,1995 fixed the maximum retail selling price for Raricap Tablet at Rs. 16.24 for 40 tablets by order dated 7.8.1996. At the time when the order was made that drug was manufactured by Johnson & Johnson Ltd. The Johnson & Johnson Ltd. did not abide by the order and continued to sell the drugs at the rate of Rs. 24.57 for a packet of 40 tablets. It appears that Johnson & Johnson Ltd. stopped manufacturing the drug from 31.3.1997 and from 1.4.1997 N.R.J. started manufacturing and selling that drug. It appears that Johnson & Johnson Ltd. had transferred the production rights and trade mark of Raricap 40''s tablets to N.R. Jet in July,1996. It also appears that Johnson & Johnson Ltd. has filed a writ petition in Delhi High court challenging the price fixation order and that petition is pending before the Delhi High Court. The order which is impugned in these petitions has been made pursuant to show cause notice dated 30.10.2002. The show cause notice dated 30.10.2002 was issued by the Director of Respondent No. 1 to Johnson & Johnson Ltd. and N.R. Jet. stating therein that Raricap tablets were being sold initially by Johnson & Johnson Ltd. until March,1997 and subsequently by N.R. Jet which is a unit of Johnson & Johnson Ltd., at a price higher than which is fixed by the order dated 7.8.1996. It was claimed that Johnson & Johnson Ltd. and N.R. Jet in collusion have violated DPCO''95 by selling the drug at higher price. It was claimed that N.R. Jet is nothing but an unit of Johnson & Johnson Ltd. The share holding pattern of N.R. Jet was mentioned in detail in the notice and it was shown that N.R. Jet is completely owned and controlled by Johnson & Johnson Ltd. Therefore, both the petitioners were asked to show cause why overcharged amount should not be recovered from them under the Essential Commodities Act and why amount of interest on that overcharged amount should not be recovered from them. Reply was submitted to the show cause notice. The reply submitted by Johnson & Johnson Ltd. was mainly that the order fixing maximum price of the drug is invalid and is not binding on it. The reply submitted by N.R. Jet was basically that it is not an unit of Johnson & Johnson Ltd. and it is an independent entity and that the order fixing maximum price is not binding on it because the order has not been made against it but it has been made against Johnson & Johnson Ltd. only. N.R. Jet and Johnson & Johnson both also denied their liability to pay interest on the overcharged amount. The respondent No. 1 made a detailed order dated 12.6.2003 holding that N.R. Jet is nothing but the unit of Johnson & Johnson Ltd. and therefore, the order fixing maximum price made against Johnson & Johnson Ltd. was binding on N.R. Jet and therefore, both Johnson & Johnson Ltd and N.R. Jet are liable to pay the overcharged amount. It was also held that they are also liable to pay interest on the overcharged amount.

3. The learned Counsel appearing for petitioners raised basically two submissions. Firstly, relying on the provisions of paragraph (8) of DPCO''95 it was submitted that in order that the order can bind an entity, a specific order fixing maximum price has to be made in relation to that entity. It was submitted that so far as the N.R. Jet is concerned, admittedly, there is no such specific order made fixing maximum price and therefore, it cannot be said that N.R. Jet had sold the drug at a price which is more than the maximum price fixed at DPCO''95. In so far as Johnson & Johnson Ltd. is concerned, it was claimed that the order fixing maximum price is invalid. The validity of that order is challenged in Delhi High Court. It was also submitted that the respondent No. 1 was not justified in holding that N.R. Jet is nothing but a unit of Johnson & Johnson Ltd. It is submitted that N.R. Jet is an independent company incorporated under the Companies Act, and therefore, in order that the price control order made under paragraph (8) of DPCO''95 can bind N.R. Jet, the order has to be made specifically against that Company. It was further submitted by referring to the provisions of Section 7A of the Essential Commodities Act that for entitlement to charge interest over the amount arises only when default is made and the default must be by a person who is legally liable to make that payment. According to the petitioners, the liability to pay must be founded on a legally valid, justifiable and sustainable demand or claim. It was submitted that as the demand of excess amount itself is illegal and therefore, there is no liability to pay, consequently there is no question of any default. It was further submitted that under paragraph (13) of DPCO 1995 the Government can by notice require the manufacture, importer or distributor to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government. It is submitted that for an amount to have accrued, the liability must have been finally determined and only then it can be said that the liability has accrued and become due and payable. In the present case, the liability has been finally determined by the respondents by the impugned order dated 12.6.2003, and therefore, interest if at all can be charged only from that date and not from any date anterior to that. The principal submission on behalf of the respondents is that looking to the conduct of the petitioners this is not a fit case in which this Court should exercise its extraordinary jurisdiction under Article 226 of the Constitution of India in favour of the petitioners. It is submitted that when the order fixing maximum price was made, Johnson & Johnson Ltd. was manufacturing the drug; immediately after the order was made the trade mark

and right to manufacture the drug were transferred by Johnson and Johnson Ltd. to N.R. Jet which is a fully owned and controlled subsidiary of Johnson & Johnson. Even before the transfer was made to N.R. Jet, Johnson & Johnson continued to sell the drug at higher price till 31.3.1997. It is submitted that though in the present proceedings Johnson & Johnson has been claiming that it is not liable to pay overcharged amount and that N.R. Jet is not its subsidiary and unit, the overcharged amount of Rs. 22,35,72,889/- is paid by Johnson & Johnson itself. It is submitted that, therefore, there is no substance in the submission made on behalf of the petitioners that the price fixation is not binding on N.R. Jet because it is not an unit of Johnson & Johnson. So far as the aspect of charging interest is concerned, it is submitted that as N.R. Jet is nothing but an unit of Johnson & Johnson, the price fixation order was binding on it, and therefore, it will be liable to pay interest from the date on which it recovered the amount by overcharging. It was submitted that the dominant purpose of the provisions of Drugs Price Control Orders is to ensure availability of essential drugs to the consumers at a fair price and for that purpose the price control order fixing maximum price was made. Johnson & Johnson and N.R. Jet in collusion with each other violated that order and defeated the scheme and therefore, according to the respondents, this Court should not interfere in favour of the petitioners.

4. Now firstly it was the case of the petitioners that the amount of Rs. 25,00,78,550/- has been wrongly calculated by the respondent No. 1 and therefore, according to the petitioners, they can be directed only to pay lesser amount. Now as a result of the written submissions filed in these petitions it is clear that the overcharged amount is not Rs. 25,00,78,550/- but it is actually Rs. 22,35,72,889/-, and therefore, the order impugned in the petition stands modified to that extent. However, so far as the amount of interest is concerned, no such grievance of the mistake in calculation has been made. Really speaking, so far as the overcharged amount is concerned, there is no dispute between the parties in these petitions because that amount admittedly has been deposited by Johnson & Johnson Ltd. and a statement was made before us that Johnson & Johnson does not intend to claim back that amount. Therefore, the only question to be considered in these petitions is whether the respondent No. 1 was justified in calculating the interest on the overcharged amount even from the date anterior to the date on which the order was made. For that purpose, it becomes necessary to decide whether the order fixing the price can be said to bind N.R. Jet. Admittedly, the order fixing the price was made on 7.8.1996 at that time Johnson & Johnson Ltd. was manufacturing and selling the drug and therefore, the order was undoubtedly binding on Johnson & Johnson Ltd. Though the order was made on 7.8.1996, Johnson & Johnson Ltd. continued to sell the drug at a higher price than the maximum price fixed by the order dated 7.8.1996 till 31.3.1997 and after 1.4.1997 N.R. Jet also continued to sell the drug at a price higher than the maximum price fixed by the order. The conclusion of the respondents that N.R. Jet is nothing but a unit of Johnson & Johnson Ltd. is

based on the admitted positions viz. (i) N.R. Jet Enterprises has a paid up capital of Rs. 50,000/- divided in 5000 equity shares of Rs. 10/each; (ii) these 5000 shares are equally held (i.e.1250 shares each) by four fully owned subsidiary companies of M/s. Johnson & Johnson Ltd.,30, Forjett Street, Bombay-36 namely (a) M/s. Loyalty Investments and Enterprises Ltd, (b) M/s. Suryalay Investment and Trading Co. Ltd, (c) M/s. Key to Riches Investments and Leasing Ltd, (d) M/s. Deshraj Investment and Leasing Company Ltd. The address of Johnson & Johnson Ltd. and the four companies who amongst themselves hold fully owned share capital of N.R. Jet is same viz. 30, Forjett Street, Bombay-36. In the Director''s report of these four companies, it is mentioned that none of these companies have any employees to conduct the day to day business activities. All the four companies are investment companies and they are fully owned and controlled by Johnson & Johnson Ltd. Thus, N.R. Jet is fully owned and controlled by the four afore mentioned companies who are fully owned and controlled by Johnson & Johnson. These facts are admitted and are not disputed by anybody. Despite raising a defence that N.R. Jet is not an unit of Johnson & Johnson and that admittedly the drug was manufactured and sold by N.R. Jet after 1.4.1997, the entire overcharged amount of Rs. 22,35,72,889/- has, admittedly, been paid by Johnson & Johnson Ltd. In our opinion, these facts leaves one in no doubt that N.R. Jet is nothing but a outfit owned and controlled by Johnson & Johnson Ltd. What is further to be seen here is that the price control order was made against Johnson & Johnson Ltd. when it was manufacturing and selling the drug, obviously therefore, the order was binding on Johnson & Johnson Ltd. Johnson & Johnson transferred its trade mark of the drug and right to manufacture that drug to N.R. Jet. Thus, N.R. Jet is merely an assignee of Johnson & Johnson Ltd. If because of the order made fixing maximum price, the right of Johnson & Johnson Ltd. to manufacture and sell the drug was circumscribed by the requirement of selling the drug at the price fixed by the order then merely because right to manufacture and sell the drug is transferred by Johnson & Johnson Ltd. to N.R. Jet will not take away the requirement of the assignee being bound by the said restriction. Being assigner Johnson & Johnson Ltd. could have transferred and N.R. Jet could have received only those rights which Johnson & Johnson Ltd. had. All other things being the same, N.R. Jet would be entitled to manufacture and sell the drug subject to same restrictions which were binding on Johnson & Johnson. It is thus, clear that the order fixing the maximum price was binding on Johnson & Johnson Ltd as also on its unit viz. N.R. Jet, therefore, both were under liability to sell the drugs only at the price fixed in the order. Admittedly, they have overcharged and therefore, they become liable to pay interest on overcharged amount from the date on which they have overcharged the amount. As we have found that N.R. Jet is nothing but an unit of Johnson & Johnson and from day one it started selling the drug at a price higher than the one fixed in the order, and therefore, when it sold the drug at higher price and did not pay that amount to the Government on recovering higher amount, it becomes liable to pay interest on that amount. Thus, we do not find any reason to vary or set aside the order directing the petitioners to pay interest.

5. In our opinion, the respondents are also justified in saying that looking to the conduct of Johnson & Johnson Ltd and N.R. Jet this Court should decline to interfere in favour of Johnson & Johnson Ltd. and N.R. Jet in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The whole scheme of transferring right to manufacture and trade mark to N.R. Jet was created by Johnson & Johnson only to bypass the statutory order made by the authority fixing the maximum price at which the drug was to be sold. The purpose of the order fixing maximum price of the drug is to make the drug available to the consumer at a fair price. The order, therefore, obviously was in public interest. Therefore, the whole scheme was created by Johnson & Johnson Ltd. and N.R. Jet in collusion with each other to defeat the order made in public interest and to defeat the public interest. In our opinion, therefore, their conduct dis-entitles them to any relief which is in the discretion of this Court. Technically speaking N.R. Jet is a company incorporated under the Companies Act, and therefore, if manufacturing and selling of the drug was taken up by the N.R. Jet independently, it would have been necessary for the authority under the drug price control order to make separate order fixing maximum price of the drug in relation to N.R. Jet. But as we find that N.R. Jet was merely a unit of Johnson & Johnson Ltd. and the whole scheme of manufacturing and selling of the drug by N.R. Jet was a scheme employed by Johnson & Johnson Ltd. to defeat the provisions of drug price control order, in our opinion, no interference at the hands of this Court in its extraordinary jurisdiction is called for in favour of Johnson & Johnson Ltd. and N.R. Jet. The Supreme Court in the judgment in the case Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, has held that High Court was justified in declining to exercise jurisdiction under Article 226 of the Constitution of India even after finding that the order that was challenged before the High Court in a petition filed under Article 226 of the Constitution of India was illegal. The Supreme Court has held that when the High Court finds that justice has been done by the order impugned before it in a petition filed under Article 226 of the Constitution of India, the High Court will be justified in declining to exercise its jurisdiction under Article 226 of the Constitution of India. Both the petitions, therefore, are disposed of. The order impugned in the petitions is not interfered with, save and except it is declared that instead of the amount Rs. 25,00,78,500/ the correct amount is Rs. 22,35,72,889/-. Rest of the order is confirmed. Rule is disposed of accordingly. No order as to costs.