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In the Delhi High Court

Case No : Writ Petition (C) No. 10700 of 2005

Ranbaxy Laboratories Limited — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 13-07-2005

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

Citation : (2005) 121 DLT 526 : (2005) 83 DRJ 301

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Rajeev Nayyar and Nalini Sud, for the Appellant; P.P. Malhotra, ASG and Gaurav Duggal, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.

CM No. 7859/2005

Allowed, subject to all just exceptions.

WP(C) No. 10700/2005 & CM No. 7858/2005

1. In this Petition a challenge has been laid to the Demand dated 13.6.2005 of Rs. 4,65,08,333/- on the subject of -

"Recovery of overcharged amount under Para 13 of DPCO''95 read with section 7A of Essential Commodities Act'' 1955-Cloxacillin based formulations."

2. It has been observed by the Hon''ble Supreme Court in Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., , "It is primarily from the consumer public''s point of view that the government is expected to make its enquiry. The need of the consumer public is to be ascertained and making the drug available to them at a fair price is what it is all about. ... In fixing the price of a bulk drug, the government is expressly required by the Order to take into

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account the average cost of production of such bulk drug manufactured by "an efficient manufacturer" and allow a reasonable return on ''net worth''. For this purpose too, the Government may gather information from any source including the manufacturers". The Court also opined that price fixation under the Drugs (Prices Control) Order, 1979 is a legislative activity and not a quasi judicial activity.

3. Mr. Nayyar, learned Senior Counsel for the Petitioner, has very forcefully contended that the Respondents have been shifting their stands from year to year and are attempting to make recoveries from the Petitioner, although fully aware that if any liability has been incurred, it must be laid at the doors of Oscar Laboratories (P) Ltd. (not imp leaded as a party). It has also been contended that no notice has been issued to Oscar Laboratories (P) Ltd.; Mr. P.P. Malhotra, learned Additional Solicitor General, has countered that notices were not sent out but the Report stated that the factory had closed down.

4. The salient legal provisions referred to by learned counsel for the parties of the Drugs (Prices Control) Order 1995 are reproduced for facility of reference:

"Dealer" means a person on the business of purchase or sale of drugs, whether as a wholesaler or retailer and whether or not in conjunction with any other business and includes his agent.

"Distributor" means a distributor of drugs or his agent or a stockist appointed by a manufacturer or an importer for stocking his drugs for sale to a dealer.

"Wholesaler" means a dealer or his agent or a stockist appointed by a manufacturer or an importer for the sale of his drugs to a retailer, hospital, dispensary, medical, educational or research institution purchasing bulk quantities of drugs.

8. Power to fix retail price of Scheduled Formulations:

1. The Government may, from time to time, by order, fix the retail price of a Scheduled formulation in accordance with the formula laid down in paragraph 7.

2. Where the Government fixes or revises the price of any bulk drug under the provisions of this Order and a manufacturer utilizes such bulk drug in his Scheduled formulations he shall, within thirty days of such fixation or revision, make an application to the Government, in Form-III for price revision of all such formulations and the Government may, if it considers necessary, fix or revise the price of such formulation.

3. The retail price of a formulation once fixed by the Government under (1) and (2) shall not be increased by any manufacturer the prior approval of the Government.

4. Any manufacturer, who desires revision of the retail price of a formulation fixed under sub-paragraph (1), shall make an application to the, Government in Form III or Form IV, as the case may be, and the Government shall after making

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such enquiry, as it deems fit within a period of two months from the date of receipt of the complete information, fix a revised price for such formulation or reject the application for revision for reasons to be recorded in writing.

5. Notwithstanding anything contained in the foregoing sub-paragraphs, the retail price of a Scheduled formulation, of a manufacturer shall until the retail price thereof is fixed under the provisions of this Order,be the price which prevailed immediately before the commencement of this Order, and the manufacturer of such formulation shall not sell the formulation at a price exceeding the price prevailing immediately before the commencement of this Order.

6. No manufacturer or importer shall market a new pack, if not covered under sub-paragraph 3 of para 9, or a new formulation or a new dosage form of his existing Scheduled formulation without obtaining the prior approval of its price from the Government.

7. No person shall sell or dispose of any imported Scheduled formulation without obtaining the prior approval of its price from the Government.

9. Power to fix ceiling price of Scheduled formulations:

1. Notwithstanding anything contained in this Order, the Government may, from time to time, by notification in the Official Gazette, fix the ceiling price of a Scheduled formulation in accordance with the formula laid down in paragraph 7, keeping in view the cost or efficiency, or both, of major manufacturers of such formulations and such price shall operate as the ceiling sale price for all such packs including those sold under generic name and for every manufacturer of such formulations.

2. The Government may, either on its own motion or on application made to it in this behalf by a manufacturer in Form III or Form IV, as the case may be, after calling for such information as it may consider necessary, by notification in the Official Gazette, fix a revised ceiling price for a Scheduled formulation.

3. With a view to enabling the manufacturers of similar formulations to sell those formulations in pack size different to the pack size for which ceiling price has been notified under the sub-paragraphs (1) and (2), manufacturers shall work out the price for their respective formulation packs in accordance with such norms, as may be notified by the Government from time to time, and he shall intimate the price of formulation pack, so worked out, to the Government and such formulation packs shall be released for sale only after the expiry of sixty days after such intimation.

Provided that the Government may, if it considers necessary, by order revise the price so intimated by the manufacturer and upon such revision, the manufacturer shall not sell such formulation at a price exceeding the price so revised.

Explanation. For the purpose of this paragraph the "Scheduled formation"

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includes single ingredient formulation based on bulk drugs specified in the First Schedule and sold under the generic name.

13. Power to recover Overcharged Amt.:

Notwithstanding anything contained in this order, the Government shall by notice, require the manufacturers, importers or distributors, as the case may be, to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government under the provisions of Drugs (Prices Control) Order, 1987 and under the provisions of this Order.

14. Carrying into effect the price fixed or revised by the Government, its display and proof thereof:

1. Every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as the case may be, as fixed by the Government from time to time, within fifteen days from the date of notification in the Official Gazette or receipt of the order of the Government in this behalf by such manufacturer or importer.

2. Every manufacturer, importer or distributor of a formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation, notified in the Official Gazette or ordered by the Government in this behalf, with the words `retail price not to exceed'' preceding it and "local taxes extra" succeeding it, in the case of Scheduled formulations.

Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the prorata retail price of the main pack rounded off to the nearest paisa.

3. Every manufacturer or importer shall issue a price list and supplementary price list, if required, in Form V to the dealers, State Drugs Controllers and the Government indicating reference to such price taxation or revision as covered by the order or Gazette notification issued by the Government, from time to time.

4. Every retailer and dealer shall display the price list and the supplementary price list, if any, as furnished by the manufacturer or importer, on a conspicuous part of the premises where he carries on business in a manner so as to be easily accessible to any person wishing to consult the same.

16. Control of sale prices of bulk drugs and formulations:

No person shall sell any bulk drug or formulation to any consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof, whichever is less, plus excise duty and all local taxes, if any, payable in the case of Scheduled formulations and maximum retail price inclusive of all taxes in the case of non-Scheduled formulations.

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19. Price of formulations sold to the dealer:

1. A manufacturer, distributor or wholesaler shall sell a formulation to a retailer, unless otherwise permitted under the provisions of this Order or any order made there under, at a price equal to the retail price, as specified by an order or notified by the Government, (excluding excise duty, if any) minus sixteen percent thereof in the case of Schedules drugs.

2. Notwithstanding anything contained in sub-paragraph (1), the Government may by a general or special order fix, in public interest, the price of formulation sold to the wholesaler or retailer in respect of any formulation the price of which has been fixed or revised under this Order.

5. Mr. Nayyar has drawn attention to the Respondents'' letter dated 4.9.2000 in which the Respondents have invoked Clause/Paragraph 13 of DPCO'' 1995 and has directed the Petitioner to deposit the "overcharged amount" of Rs. 1,99,62,708/-, without prejudice to any further amount that may be assessed in those provisions read with the Essential Commodities Act, 1955. In its Reply dated 18.9.2000 the Petitioner had denied its liability and has asserted that it had not manufactured bulk Cloxacillin or Roscilox formulations and does not also own the brand names.

6. Thereafter, by letter dated 2.9.2003 the Respondent had demanded a sum of Rs. 99,81,354/-, being fifty per percent of the previous demand. It is quite clear that the previous demand had not been given up or reduced; all that was done was to make compliance with the following observations of the Hon''ble Supreme Court in Secretary, Ministry of Chemicals and Fertilizers Government of India Vs. Cipla Ltd. and Others, :

11. The appeals are accordingly allowed without costs. We also consider it just and proper to give liberty to the appellant and the statutory authorities concerned to recover 50% of the "overcharged" amounts pending fresh determination by the High Court. Accordingly, we direct stay of recovery of 50% of the "overcharged" amounts subject to the payment of remaining 50% within the period of four weeks from the date of communication of the amount payable by each of the writ petitioners.

7. Mr. Nayyar has also drawn attention to the fact that in its letter dated 25.11.2003 the Respondents have only demanded a sum of Rs. 15,99,369/-, being the sum allegedly overcharged for Cloxacillin based formulations from July, 2000 to July, 2003. In its letters dated 30.9.2003 and 5.12.2003 the Petitioner has reiterated its earlier stand. Thereafter, by letter dated 15.12.2003 the Petitioner has asserted, inter alia, that - "The product list published by Ranbaxy in Form V makes mention of the price of the product Roscilox which is circulated amongst the stockists and distributors and that "merely by publishing the product in the price list will not confer the product rights of the said product on Ranbaxy". The question that immediately arises is who is responsible or eligible to file Form-V.

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8. Thereafter, in its letter dated 20.1.2004 the Respondents have specifically stated that the subject product was manufactured by Oscar Laboratories (P) Ltd., Medak Distt., Andhra Pradesh in March, 1999 and that the said company had amalgamated with Ranbaxy Holding Company. It has been stated that Oscar Laboratories (P) Ltd. was fully owned and controlled by the Petitioner who had acted as the distributor of the said product; that in nexus with Oscar Laboratories (P) Ltd. the Petitioner had violated the provisions of DPCO'' 95; and that the Petitioner along with Oscar Laboratories (P) Ltd. is jointly and severally liable to pay the overcharged amounts under Para 13 of DPCO''95. However, Mr. Nayyar has vehemently contended that even if the entire case of the Respondents is to be accepted, the claim of Rs. 4,65,08,333/- raised on 13.6.2005 is incorrect and excessive.

9. In its letter dated 8.2.2005 the Respondents have asserted that the DPCO''95 was enacted u/s 3 of the Essential Commodities Act, 1955 making every manufacturer, importer, distributor, dealer or retailer duty-bound to adhere to the price fixed/notified by the Government. The Respondents have further asserted that from the details and submissions made by the company, it is clearly established that the Petitioner willfully chose to market/sell the said formulations at a price higher than the ceiling prices. Hence, the Petitioner had acted against the larger public interest to gain unauthorized benefit at the cost of consumer. It was, Therefore, required to make a deposit under Para 13 of the DPCO''95. The Respondents rejected the Petitioner''s contention that ceiling prices are not required to be enforced by dealers. Mr. Nayyar emphasized the mention of Para 19 of DPCO''95 but I fail to appreciate its significance.

10. Mr. P.P. Malhotra, learned ASG has drawn attention to the demand made by the Petitioner in its letter dated 18.1.2005 to the effect that - "Consequent to its purchase, we offer the product both as wholesalers and dealers nationally through our locations to persons who may be authorized to purchase the same i.e. dealers/wholesalers who hold valid Drug License for purchase and storage and subsequent sale as well to actual consumer .... Thus we are a dealer". The learned Additional Solicitor General has also relied on the admission made by Ranbaxy Holding Company in its letter dated 29.1.2004 that Oscar Laboratories (P) Ltd. had amalgamated with it, effective 26.8.1999. Learned Additional Solicitor General has handed over photocopies of letters by the Petitioner dated 8.2.2000 and 7.6.2001 forwarding the consolidated Price List of Roscilox. He has underscored that in June 2003 - "by letter dated 27.6.2003 the petitioner had enclosed Form-V indicating the price of Roscilox". He has also filed Trade Literature of May, 1996, December, 1998, June, 2000, July, 2000, December, 2000, July 2003 and March, 2005. He has submitted that through the stratagem of the liquidation of the sister/subsidiary manufacturer company, namely, Oscar Laboratories (P) Ltd., the manufacturer of the said formulation, the public has been cheated.

11. The extraordinary powers possessed by the High Courts under Article 226 of

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the Constitution are not meant to assist a dishonest litigant. By virtue of paragraphs 8 and 9 of the DPCO''95 the Government possesses the power to fix scheduled retail price as well as the ceiling price of Scheduled Formulations. The avowed purpose of this exercise is to ensure that the public does not suffer from extortionist prices of drugs, as observed by the Hon''ble Supreme Court in Union of India vs. Cynamide India Ltd. (supra). It is necessary to record that the Petitioner has not contended that there were no recoveries made in excess of the ceiling price fixed under Paragraphs 8 and 9 of DPCO''95. Para 13 empowers the Government to recover dues pertaining to overcharging of prices higher than those fixed or notified by the Government from manufacturers, importers, or distributors. Para 14(3) envisages a manufacturer or importer to issue a Price List in Form-V to the dealers; there would scarcely have been any need for the Petitioner to fill-up Form-V if it did not consider itself to be the manufacturer or the distributor. Paragraph 19(1) contains a prohibition against a manufacturer, a distributor, or even a wholesaler from selling any formulation to a retailer in excess of the retail price. The Trade Literature discloses that Roscilox was being manufactured/produced by Ranbaxy as far back as in May 1996, and thereafter post the liquidation of Oscar Laboratories (P) Ltd.

12. From the conspectus of the material placed before the Court there is prima facie reason to believe that there was a nexus between Oscar Laboratories (P) Ltd. and the Petitioner. In Rejoinder Mr. Nayyar has drawn attention to an Order dated 2.3.1995 where an exemption had been granted to Oscar Laboratories (P) Ltd. from the operation of Para 8 of DPCO''95. This, however, related to the fixation of retail price of Scheduled Formulations not covered under Para 9. Mr. Nayyar has drawn attention to this Order to make good his submission that the primary liability for the over-pricing lay on Oscar Laboratories (P) Ltd. and that since this Company had been granted an exemption the Respondents were unfairly and illegally making recoveries only against the Petitioner. However, the exemption, if it is at all relevant, would only have been in respect of formulations marketed in its own brand names and trademarks by the exempted entity ?" namely Oscar Laboratories (P) Ltd. and not those marketed by the Petitioner which is not a small scale industry unit.

13. It is also sanguine for the Petitioner to assert that it has no nexus whatsoever with Oscar Laboratories (P) Ltd.. Prima facie, the evidence indicates to the contrary and if the corporate veil is pierced it may disclose the presence of the Petitioner. All these matters need to be proved by the Petitioner before it can successfully say that it has no connection with Oscar Laboratories (P) Ltd. Resort shall have to be made to ordinary civil proceedings.

14. A consideration of all the relevant facts shows that the gravamen behind the Essential Commodities Act, 1955 as well as DPCO''95 has been circumvented, if not violated by the Petitioner and the objectives of the law have been frustrated. The public has had to pay prices in excess of those fixed either for the sale of the bulk drugs or in the course of its retail. The Petitioner has not succeeded in

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proving that it is not the manufacturer through its defunct and resolved subsidiary, Oscar Laboratories (P) Ltd. It has certainly not succeeded in showing that it is not the distributor of the said drug/formulation. It is not possible to equate the Petitioner''s role to that of a retailer.

15. This is not a case warranting the exercise of extraordinary jurisdiction under Article 226 of the Constitution.

16. Dismissed.

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