

In Re: Johnson and Johnson Ltd. and

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Jul-29-1986

Reported in : (1988)64CompCas394NULL

Judge : Author: S Manchanda

Appellant : In Re: Johnson and Johnson Ltd. and

Judgement :

1. A complaint was received from M/s. S.M.B. Corporation of India, Ahmedabad (SMB), containing the allegation that M/s. Johnson and Johnson Ltd., Bombay (J&J), and M/s. Weavesurge International, Delhi (Weavesurge), were indulging in predatory pricing in their quotations for their products to the Director-General, Armed Forces Medical Services (DG AFMS) and the Armed Forces Medical Services Depot, Delhi Cantonment, with a view to eliminating competition from small manufacturers like the complainant. As the petitioner was not a trade or consumer association having a membership of not less than 25 persons, the Commission proceeded under Section 10(a)(iv) of the Monopolies and Restrictive Trade Practices Act, 1969, and directed the then Additional Director-General (Investigation) to investigate and submit a preliminary report within 60 days, vide its order dated July 11, 1985, under regulation 19(2)(c) of the Monopolies and Restrictive Trade Practices Regulations, 1974. This order was, however, revised on August 26, 1985, under which 26 cases pending with the Additional Director-General (Investigation), including the present case, were transferred to the Director (Research). The Commission has since received the preliminary

investigation report from the Director (Research) and the supplementary report which was specially asked for to obtain the data of cost of production of the petitioner as well as the complainees.

2. The petitioner and the first complainee are engaged in the manufacture of surgical sutures whereas the second complainee is one of the authorised dealers of the first complainee operating in the Delhi area. Sutures are used for wound closure mostly during surgery. This is a drug within the meaning of the Drugs and Cosmetics Act and manufactured under drug licence. Surgical sutures are basically of two types : (i) absorbable surgical sutures, and (ii) non-absorbable ones.

Absorbable sutures are made of silk, nylon, polyester, polypropylene, stainless steel, etc. There are more than 300 varieties/sizes of sutures, and M/s. Johnson and Johnson manufacture nearly all the varieties using modern/technology and expertise and quality control under the technical guidance of world-renowned "Ethicon". M/s. SMB is a small scale unit manufacturing only non-absorbable sutures with 100% indigenous technology having a nominal share in the market.

3. The complainant's charge of predatory pricing is based on the assertion that "M/s. Johnson and Johnson has been under-quoting prices in response to tender enquiries by various Defence establishments and the Director-General, Supplies and Disposals "... with a view to eliminating competition and throw out of trade the small manufacturers of sutures like the complainant". In this connection, the complainant has given instances of prices quoted by M/s. Johnson and Johnson in response to the four tenders floated by the Director-General, Armed Forces Medical Services, the Armed Forces Medical Services Depot, Delhi Cantonment and the Director-General, Supplies and Disposals, Madras, on January 15, 1983, August 25, 1984, November 9, 1984, and November 13, 1984. The details, furnished by the complainant with regard to these tenders indicate that the prices quoted by M/s, Johnson and Johnson/Weavesurge were lower than the prices charged by the former from the dealers and that the under-quotations ranged from 7.54% to 34.64%.

4. The Director (Research) has found that the details furnished by the complainant are substantially correct. But the question is whether quoting lower prices than the prices charged from the dealers amounts to predatory pricing. This Commission has taken the view that the essence of predatory pricing is pricing below one's cost with a view to eliminating a rival. Reference is made to this Commission's order dated January 16, 1980, in the matter of Tri-Surya India, Bombay, In re [1981] Tax LR 2403 (MRTPC) in Restrictive Trade Practices Enquiry No. 8 of 1978 where the following undertaking given by the respondent was accepted (at page 2404): " The respondent undertakes not to sell its closures at a price below the cost price determined on established principles....." 5. The same view was taken by the Commission in its order dated December 26, 1980, in Hyderabad Asbestos Cement Products Ltd., In re, [1981] 6 Com NR 134 (MRTPC) in Restrictive Trade Practices Enquiry No.18 of 1977.

6. It was in the context of this view that the Director (Research) was asked to submit a special report about the cost of production of M/s.

Johnson and Johnson as well as of M/s. SMB. The Director (Research) found that the cost records were not maintained by M/s Johnson and Johnson, that the Central Government had not prescribed the manner of maintenance of cost records under Section 209(1)(b) of the Companies Act, and that the plant of M/s. Johnson and Johnson was a composite plant manufacturing large varieties of products including hundreds of varieties of sutures for which it had incurred common expenses on overheads like wages, electricity, etc. In these circumstances, the Director (Research) found it "impossible to arrive at the exact cost of each and every item of sutures". However, an attempt was made to arrive at the cost of production in respect of each type of suture for which M/s. Johnson and Johnson had submitted quotations to various authorities during 1984 on the following basis: (i) Material cost and excise duty in respect of each type of suture was taken from the factory records of the company.

(ii) Common expenses like wages, etc., allocated to various items/ products in the same proportion as sale of each item to total sale.

7. The emerging picture showed that in no case quotations had been given at a price below the cost price.

8. The Director (Research) found that the complainant was also not keeping proper accounting records. However, the Director (Research) made an attempt to calculate the cost of production of some of the items and found that it was higher than the cost of production of Johnson and Johnson in respect of the same items. The Director (Research) opined that this was attributable to the higher cost at which SMB obtained its raw materials, as compared to the cost incurred by M/s. Johnson and Johnson.

9. In regard to the practice of quoting rates lower than normal rates and on certain other relevant aspects, the Director (Research) has made the following observations: "In tender enquiries, it is a well accepted business practice to quote a lower rate than normal selling price. The trade practice is not unreasonable but is in consonance with well-recognised commercial practice. In the present case, quoted prices are always above the cost of sales. Moreover, the sutures are sold to Defence for use in hospitals. Those are not meant for re-sale. It is rather in public interest to offer some thing to Government at a concessional rate. Another important aspect is that the total sale to Defence is a very small portion as compared to other sales. No other tender enquiries are objected to by the complainant as those are on normal rates. Bulk of the sale is through authorised dealers.

In the circumstances, to sell a small portion in public interest to Government cannot be treated as a restrictive trade practice of predatory pricing particularly when the rates are always above cost of sales." 10. I have noted that in a recent case (order dated December 29, 1983, in Rallis India Ltd., In re--Restrictive Trade Practices Enquiry No. 5 of 1982 [1984] Tax LR 2128 (MRTPC)), the Commission has gone to the extent of saying that (at page 2132): " it is difficult to pronounce that the respondent is indulging in a restrictive trade practice of predatory pricing or of discriminatory pricing with a view to eliminating others from competition merely because the respondent is selling a small portion of its production to the Governments at rates lesser than its cost of sale or cost of production. " 11. The

following observations of the Commission from the aforesaid order are very relevant (at page 2132): "The respondent's explanation for the low quotations to the Government cannot be dismissed as unmeritorious. Sale to the Governments at rates lower than the market rates is not an unusual trade practice and it is usually in public interest and also in the interest of the particular manufacturer who derives the advantage of advertisement and publicity through the Governments."

12. These observations are reinforced in the present case by the fact that the item falls in the category of life-saving drugs and has been supplied to Defence Forces and other Government Departments for use in hospitals.

13. It is no doubt true that the complianant, a tiny unit, is pitted against a monolithic competitor, but the Commission can step in to help the former only if the Utter flouts the rules of the game. The preliminary investigation reports of the Director (Research) have given a clear finding that the quotations of M/s. Johnson and Johnson are not below its cost of sales. In this context, therefore, Johnson and Johnson and Weave-surge cannot be charged with the restrictive trade practice of predatory pricing. The lower rates quoted by the two complainees discriminate in favour of Defence establishments or Government hospitals which cater to the needs of the Armed Forces or the general public. This discrimination promotes public interest. If there is diminution of competition, it is only in respect of a small area and both Clause (h) and the balancing clause of Section 38 of the Monopolies and Restrictive Trade Practices Act will apply even if, by any stretch of imagination or logic, the charge of predatory pricing could be proved. In the circumstances, therefore, I hold that no useful purpose would be served by continuing with the proceedings which are accordingly directed to be closed.

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