

In Re: All India Organisation of

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Jan-30-1996

Judge : S Chakravarthy, U Singh

Appellant : In Re: All India Organisation of

Judgement :

1. This enquiry commenced with the issuance of a notice of enquiry (NOE) dated November 24, 1987, by this Commission charging the respondents named above with having indulged in the restrictive trade practice of boycott falling within the meaning of Section 2(o)(ii) of the Monopolies and Restrictive Trade Practices Act, 1969. Anterior to the issuance of notice of enquiry, an investigation was commissioned through the Director-General of Investigation and Registration (DG) on receipt of a complaint preferred by one Dr. S.C. Singhvi that the medicine "Septran" manufactured by Burroughs Wellcome (India) Ltd. was not available in the market.

2. According to the preliminary investigation report (PIR) submitted by the Director-General, the trade association, namely, All India Organisation of Chemists and Druggists, the first respondent named above, the State level association, Rajasthan Chemists Association, the third respondent above, and the district level association, namely, Jodhpur Chemists Association, the second respondent above, indulged in the restrictive trade practice of refusal to deal and discriminatory dealing by organising a boycott of the "Septran" range of products manufactured by Burroughs Wellcome (India) Ltd. by the distributors in the State of Rajasthan during the period September 1, 1985, to May 31, 1986. It would appear that the boycott of the distribution of the said product was at the instance of the first respondent which is the apex body of Chemists and Druggists Associations, in conjunction with the State and District level associations, namely, the third and second respondent, respectively. The Director-General has styled the said restrictive trade practice as "a blatant interference with the working of the competitive forces" and has prayed that an enquiry be instituted against not only the apex body, State body and the district body of chemists and druggists but also the distributors, namely, Medicentre, British Medical Stores and Rajputana Medical Agencies, who are named as the fourth, fifth and sixth respondents above.

3. On being communicated with the notice of enquiry the first, second and third respondents filed their respective replies and the other three respondents furnished more or less similar replies. As the respective responses are different and defensive of their respective stances, they are summarized below separately.

All India Organisation of Chemists and Druggists has presented its reply in the form of an affidavit of its general secretary, Dr.

Sushil Behari Misra. Essentially, the first respondent has averred as follows : (a) The allegation is denied as there is no finding by the Director-General that the boycott of the products of Burroughs Wellcome (India) Ltd. by respondents Nos. 4 to 6 was at its instance.

(b) The preliminary investigation report shows that the first respondent "had been merely using its good offices in trying to sort out the differences in regard to the business dealings between Burroughs Wellcome (India) Ltd. and some of its dealers." (c) The enquiry is based "purely on conjectures and surmises" and has

been instituted after a lapse of more than two years after the alleged boycott.

(d) Article 19(1)(g) of the Constitution confers a fundamental right on every citizen to practise any trade or business and the right to carry on business includes the right not to carry on business and thus the alleged restrictive trade practice cannot be brought under Section 2(o) of the Monopolies and Restrictive Trade Practices Act.

(emphasis* added).

(e) There was a contract between the manufacturer, Burroughs Wellcome (India) Ltd. and its dealers in terms of which the manufacturer was to give a discount of 10 per cent. to the dealers in respect of certain specified products but arbitrarily and unilaterally it reduced the discount to 4 per cent. and thus violated the contract. This made the dealers to discontinue purchase of goods from the said manufacturer.

Jodhpur Chemists Association, the second respondent, has made the following averments in its reply : (a) It had given no boycott call to its members as alleged nor at the instance of any other organisation.

(b) The 400 members of the respondent are free to do what they desire in the course of their trade.

(c) The second respondent has nothing to do with the policy, direction or dictates of the third respondent or for that matter of any other organisation.

(d) In fact, the second and the third respondents have had some differences and their relationship was not happy.

(e) Only after the Commission issued the notice of enquiry, the respondent became aware of the alleged boycott.

(f) During the period in question, "Septran" was available in the market in the District of Jodhpur.

(a) The alleged boycott was between September, 1985, and May, 1986, but in as much as it had ended by May, 1986, the present proceedings after the event are not competent in law.

(b) Because of the manufacturer's illegal refusal to pay 10 per cent. discount to its stockists, the alleged non-co-operation was resorted to.

(c) There is a network of 50 dealers working under the three respondents 4, 5 and 6, all of whom suffered as a consequence of the reduction in the discount and in order to get their legitimate demand, they resorted to the alleged non-co-operation. This will not amount to a restrictive trade practice.

(d) The alleged boycott was not in respect of any life saving drug and was confined only to the "Septran" range of products. There are other pharmaceutical companies manufacturing the same medicine and thus no inconvenience was caused to the public.

(e) The gateways provided in Section 38(1)(b) and (h) of the Monopolies and Restrictive Trade Practices Act are available to the third respondent.

These three respondents who are the distributors of Burroughs Wellcome (India) Ltd, have made more or less the following common averments : (b) The present proceedings having commenced after the boycott had ended, are not competent in law.

(c) The alleged non-co-operation was resorted to because of the arbitrary and unilateral reduction of the discount payable to the dealers by the manufacturer, Burroughs Wellcome (India) Ltd. (d) Gateways provided in Section 38(1)(b) and (h) of the Monopolies and Restrictive Trade Practices Act are available to the respondents.

4. The rejoinders of the Director-General to the replies of the respondents are merely reiterations of the contents of the preliminary investigation report and the stated position of the Director-General.

1. Whether respondents Nos. 1 to 6 are or have been indulging in the restrictive trade practices as stated in the notice of enquiry 2. If reply to issue No. 1 is in the affirmative, whether the aforesaid trade practices are not prejudicial to the public interest 5. The Director-General got six letters issued by the first respondent to Burroughs Wellcome (India) Ltd. of dates January 4, 1986, January 28, 1986, March 1, 1986, March 27, 1986, April 26, 1986, and May 30, 1986, admitted by the respondent and got them marked in the court records as exhibits A-1 to A-6. A letter issued by the fourth respondent to the Director-General on October 4, 1986, was marked as exhibit A-7. Exhibit A-7 was admitted by the fourth respondent but the execution of the enclosures was denied. The Director-General did not adduce any oral evidence. The following witnesses were examined on behalf of the respondents : 3. Shri Devi Lal Chingani, partner of Ambika Medical Agency on behalf of respondent No. 2.

4. Shri Surendra Mehta, partner of respondent No. 4 and secretary of respondent No. 3.

6. We gave a hearing to Shri O.P. Dua, counsel for the Director-General, Shri Mariarputham, counsel for the first respondent and Shri Vinod Sethi, counsel for respondents Nos. 3 to 6. Shri B. L.

Panwar, counsel who represented the second respondent was not present at the hearings and, therefore, an intimation was sent to the second respondent of the date fixed for hearing the arguments. None represented the second respondent, on the day, arguments were heard, namely, January 3, 1996.

7. The essence of the controversy hinges around whether any or all of the first three respondents issued any boycott call on the dealers and stockists restraining them from purchasing the "Septran" range of products from the manufacturer, Burroughs Wellcome (India) Ltd. 8. A boycott is nothing but a concerted refusal to do business with a particular person or manufacturer in order to obtain concessions. The objective may also be to express displeasure with certain acts or practices of the said person or manufacturer. (Barry v. St. Paul Fire and Marine Insurance Company (555 F. 2d-3, 7). By an association or associations giving a call for boycott, it may constitute a group boycott which essentially signifies the observance of the boycott by the members of the association or associations. In other words, a group boycott could mean a concerted refusal to deal by traders, dealers or stockists with the intent or foreseeable effect of exclusion from the market of a manufacturer. By directing member dealers and stockists and inducing them not to purchase certain specific goods of a manufacturer with which the association or the dealers and stockists have a grievance, the association triggers a group boycott to hurt or injure the manufacturer's interest.

9. Boycotts are nothing but refusal to deal, plain and simple which is statutorily recognised to be per se a restrictive trade practice under Section 33(1)(a) of the Monopolies and Restrictive Trade Practices Act.

But it is the pejorative impact on competition brought about by boycotts that has been meriting attention not only in India, but elsewhere particularly the American courts. The Sherman Anti-Trust Act holds group boycotts illegal per se (Jones Knitting Corpn. v. Morgan (D. C. Pa. 244F supplement 235, 238). Concerted action by businessmen and dealers resulting in or having the potential of ousting the product of a particular manufacturer from the market constitutes a group boycott (Washington State Bowling Proprietors Asso. v. Pacific Lanes, Inc. (CA 9 Wash) 356 F2d 371 cert den 384 US 963 16 L Ed 2d 674, 86 S Ct. 1590).

10. While boycotts are actions constituting refusal to deal and thus attract Section 33(1)(a) of the Monopolies and Restrictive Trade Practices Act, it has to be seen whether they also fall within the mischief of Section 2(o) of the Act. At the outset, we would like to confirm that they do. This is the reason why the said Section 2(o) of the Act figures in the notice of enquiry itself. Support for this is available in at least three cases adjudicated upon by this Commission in terms of which a boycott by a group of traders falls squarely within the ambit of restrictive trade practices as defined in Section 2(o) of the Act. It is not a mere coincidence that in all the three cases also the respondents were associations of chemists and druggists. In RTPE No. 4 of 1981, the

Commission in its order dated April 30, 1983, held that boycott by the Retail and Dispensing Chemists Association is a restrictive trade practice. In another order pronounced on September 25, 1984, in RTPE No. 14 of 1982, the Commission made the following observations, which tend to home in the conclusion that group boycott is a restrictive trade practice : "We have examined the point urged by counsel for the Director-General (I & R) but we find that although the weight of judicial authority in the USA is in favour of per se approach to group boycott, several lower courts have distinguished those cases and refused to apply the per se rule in cases where the boycotting group has acted pursuant to some noncommercial motives. Thus even in USA 'while the general rule applicable to group boycott is that they are per se unlawful the precise scope of activities falling within this rule has not been firmly delineated.' (Page 2 of the Guide to Legislation on Restrictive Business Practices--Volume IV, published by the Organisation for Economic Co-operation and Development, Paris). We also feel that it is not necessary for us to give a definite finding on this issue considering that in the context of the particular facts of the present case we have already shown how the boycott resorted to by the chemists of Rajasthan against the products of respondent No. 2 has adversely affected competition and the availability of the products to the consumer".

11. In the third case, in RTPE No. 9 of 1983, the Commission in its order dated July 26, 1985, took the stand that group boycott is a restrictive trade practice.

12. A three-member Bench in RTPE No. 10 of 1984, on November 11, 1985, came to a similar conclusion that the boycott of the products of Food Specialities (India) Ltd. is a restrictive trade practice falling within the mischief of Section 2(o) of the Monopolies and Restrictive Trade Practices Act.

13. More recently, the Commission in its order dated June 25, 1993, in RTPE No. 37 of 1983 placed the law on the subject in a proper perspective and posited that each case will have to be examined on its own facts, the crucial question being whether in the constellation of facts surrounding a boycott, it has the effect of distorting, preventing or restricting competition within the meaning of Section 2(o) of the Act.

14. We now proceed to look at the material available, evidence on record and the arguments advanced by learned counsel representing the parties. Instead of dealing with each ground advanced by the respondents in their replies, it may be more convenient to deal with the broad issues that emanate from the said grounds.

15. An argument advanced by Shri Mariarputham, counsel for the first respondent, is that Section 2(o) of the Act must be read subject to Article 19(1)(g) of the Constitution. He emphasised that the right to carry on business on the part of the dealers includes the right not to carry on business. In other words, it is a fundamental right vested in the dealers to discontinue business, if they choose to do so.

16. While no one can take exception to the fact that the Constitution of India is supreme and any legislation will have to be within its four corners, no legislation--the Monopolies and Restrictive Trade Practices Act in this case--can transcend the contours limited by the Constitution. While Article 19(1)(g) of the Constitution provides the right to carry on business, it may, by necessary implication, provide the right not to carry on business but this does not imply that the right not to carry on business exercised by a dealer in concert with fellow dealers can be exercised with the purpose of boycotting someone's product to that person's detriment. Boycott of product will result in the evaporation of the product from the market to the detriment of the consumers and thus to the detriment of public interest. In this context, therefore, the boycott of a product which has the potential of hurting the consumer interest can not be justified in terms of any fundamental right that is available to a citizen to carry on business. The Monopolies and Restrictive Trade Practices Act is a beneficial and social legislation designed to engender competition and protect the consumer interest. By no stretch of imagination can such a legislation be allowed to taunt the Constitution. We are unable to agree with Shri Mariarputham.

17. The next important argument advanced by not only Shri Mariarputham, counsel for the first respondent, but also by Shri Vinod Sethi, counsel for respondents Nos. 3 to 6, is that boycott implies that there is an existing obligation to deal in the products but that in this case there is none. Shri Mariarputham, forcefully

argued that Burroughs Wellcome (India) Ltd. unilaterally changed the discount dispensation and that thus any obligation on the part of the dealers to deal with its products naturally did not survive. In fact, this argument is writ large in the replies of the respondents which have been summarised earlier. An associate argument put forth by Shri Mariarputham is that in terms of Section 51 of the Indian Contract Act, 1872, if a contract consists of reciprocal promises to be performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. He added that in terms of Section 37 of the same Act, the parties to a contract are obliged to perform their respective promises. He sought to conclude that if at all, action will lie under the Indian Contract Act rather than the Monopolies and Restrictive Trade Practices Act.

18. While in the case of a breach of contract between two parties, Section 51 or for that matter Section 37 of the Indian Contract Act will certainly be relevant, we are now considering the case of a boycott which has the character of an action in concert. A group of dealers coming together and acting in concert on some common grievances can not take shelter under either Section 51 or Section 37 of the Indian Contract Act. An added dimension to be kept in view is that the Monopolies and Restrictive Trade practices Act is a code in itself and is in addition to and not in derogation of any other law for the time being in force. This is what Section 4 of the Monopolies and Restrictive Trade Practices Act declares. Even for the sake of argument, if a boycott is a consequence of a common grievance brought about by a breach of a contract, it has to be examined whether it endangers competition and hurts consumer interest to ascertain if it constitutes a restrictive trade practice. This is what a Bench of this Commission in RTPE No. 37 of 1983 supra ruled that every case has to be examined on the entire constellation of facts surrounding the practice of boycott. We are afraid we can not agree with Shri Mariarputham on his argument leaning on the Indian Contract Act.

19. Be that as it may, the six documents admitted by the respondents and marked as exhibits A-1 to A-6 provide us with a clue regarding the nature of boycott. Exhibit A-1 which is a letter written by the first respondent to the manufacturer, Burroughs Wellcome (India) Ltd., simply seeks enlightenment regarding the commission allowed to stockists, distributors and wholesalers. Exhibit A-2 complains of the reduction in the discount and seeks action on the part of the manufacturer to set right the situation. Exhibit A-3 is similar in its contents to exhibit A-2. Exhibit A-4, again a letter from the first respondent to the manufacturer laments about the reduction in discount and seeks remedy.

Exhibits A-5 and A-6 run on the same lines as the previous exhibits.

20. One thing which is very clear from the above exhibits is that the first respondent has not called for a boycott of the manufacturer's product by its members. The evidence of Shri Dilip Mehta, treasurer of the first respondent clearly shows that the alleged boycott was not at its instance. During the cross examination Shri Mehta stated that the first respondent was not even a party to any settlement between the manufacturer and the third respondent. He has added that the first respondent only used its good offices to sort out the problem of discounts. In his affidavit he has stated that the manufacturer Burroughs Wellcome (India) Ltd. had approached the first respondent "to use its good offices and help resolve the differences between the company and its dealers".

21. In view of this, the charge against the first respondent does not survive. The Director-General has not furnished any evidence that the first respondent was instrumental in giving the boycott call or had actually given a boycott call. The notice of enquiry shall stand discharged against the first respondent.

22. The second respondent in its reply to the notice of enquiry has stated that it came to know of the charge only after receiving papers from this commission, meaning, thereby, the notice of enquiry. Here again we are unable to find any material or evidence that the second respondent had given a call for boycott to the dealers of "Septran".

We, therefore, direct that the notice of enquiry shall stand discharged against the second respondent also.

23. On the other hand, the replies of respondents Nos. 3, 4, 5 and 6 to the notice of enquiry clearly show that in order to focus the "legitimate demands" of the dealers, the alleged non-co-operation was resorted to. In paras 4 and 1, the third respondent has practically admitted the charge of boycott, even though it has sought to defend and justify the boycott that it did not inconvenience the public. Similar submissions have been made by respondents Nos. 4, 5 and 6.

24. One undercurrent that runs in the replies of respondents Nos. 3, 4, 5 and 6 and in the evidence of Shri Bheem Raj Gandhi (secretary of the second respondent), Shri Devi Lal Chingani, (partner, Ambika Medical Agency) and Shri Surendra Mehta (secretary of the third respondent) is that because of the downward revision of the discount, the dealers were agitated which resulted in non-co-operation and boycott by them in so far as the purchase of "Septran" range of products was concerned. Shri Vinod Sethi, counsel for respondent No. 3 to respondent No. 6, tried a feeble argument that the respondents had admitted only the alleged boycott and not the boycott. He also tried to argue that no circular had been issued calling a boycott. We are unable to appreciate the above arguments of Shri Sethi. There is nothing called admitting the alleged boycott and not the boycott itself. Furthermore, boycott can be, by way of an understanding among those perpetrating it or by word of mouth among them. Merely because of the absence of any circular, it cannot be said that there was no boycott. We repeat for emphasis that the said four respondents, namely, respondents Nos. 3, 4, 5 and 6 have also explicitly and implicitly admitted the charge of boycott in their replies to the notice of enquiry.

25. In an important decision of this Commission in RTPE No. 131 of 1985, dated June 17, 1993 Young Medicos Cultural Organisation v. Pharmaceuticals Wholesalers' Association, [1993] 3 Comp LJ 123 (MRTPC), it was held that the boycott of the life saving drugs brought about by the active connivance and encouragement of the errant parties is a restrictive trade practice as it causes to consumers and general public considerable suffering because of non-availability of the medicines. In the said ruling, the Commission rejected the argument of the charged parties that the boycott was only a non-co-operation movement. The boycott was held to be a clear restrictive trade practice warranting a cease and desist order applying Section 2(o) and Section 37 of the Act.

26. Likewise we hold that respondents Nos. 3 to 6 have indulged in the restrictive trade practice of boycott which impairs competition and results in the non-availability of "Septran" range of products in the market and through affectation of consumer and public interest. That "Septran" was sold by some dealers, as Shri Sethi would have us believe, is not an argument in refutation of the charge that some, if not many, dealers refused to deal in "Septran", causing inconvenience to consumers and the public. Thus issues Nos. 1 and 2 are decided against respondents Nos. 3, 4, 5 and 6. We direct, therefore, that the said respondents Nos. 3, 4, 5 and 6 shall discontinue the practice and not repeat the same in future. In as much as the boycott ended on May 31, 1986, the emphasis in this direction is that the said respondents shall not indulge in the said restrictive trade practice or repeat the same in future. They shall file an affidavit in compliance with the above direction within six weeks from the date of this order.

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