

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

REVIEW PETITION NO.38 OF 2017
IN
WRIT PETITION NO.98 OF 2014

Biochem Pharmaceutical Industries
Ltd.

.... Review Petitioner

Vs.

Union of India & Others

.... Respondents

Mr. Navroz Seervai, Senior Counsel with Ms Vanditha Malhotra-Hegde, Ms Gulnar Mistry, Ms Sayli Tomey & Ms A. Thomas i/by Singh & Singh & Malhotra & Hegde for the Review Petitioner.

Dr. G.R. Sharma, Special Counsel with Mr. D.P. Singh for Respondent Nos.1 & 2.

Mr. U.S. Upadhyay, AGP, for Respondent Nos.3 & 4.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

DATE : OCTOBER 06, 2017

P.C:

1. We have heard Mr. Seervai, learned Senior Counsel appearing for the review petitioner. He would submit that the petition on which the Judgment under review is passed was heard along with Writ Petition No.2880 of 2015 {filed by

M/s. Franco Indian Remedies Private Limited} and two other petitions {filed by M/s. Franco Indian Pharmaceuticals Private Limited}.

2. The Writ Petition No.98 of 2014, which also is disposed of in terms of the Judgment under review, did not contain an identical challenge save and except the common legal question.

3. In fact a separate list of dates and events was handed over as far as Writ Petition No.98 of 2014 is concerned and the Court was informed that the petitioner, M/s. Biochem Pharmaceutical Industries Limited, does not wish to go into the other aspects at that stage. However, at no point of time it was conceded that the factual position was identical to M/s. Franco.

4. The formulations manufactured by the review petitioner were different. One of the points may be that the respondents are seeking to recover allegedly the over-charged amount in respect of the petitioner's formulations culminating in

the demand notices but the case of the petitioner was not that price determined for one of the formulations could be applied to the other. Therefore, the paragraph of the Judgment under review, namely, paragraph 68 itself starts with an erroneous premise that there is no distinction in the two scheduled formulations in M/s. Biochem. It is that premise or foundation which vitiates the latter conclusion. Further, the petitioner had sought to point out that the Notification dated 7-2-2006, and particularly Item No.28, was wholly erroneous and it was inapplicable to the product of the review petitioner. The subsequent Notification dated 14-2-2007 also should have been taken into consideration to hold that there is no over-charging. These facts have not been set out and once the foundation of the Judgment under review is that there is no distinction between the product of the other petitioners and M/s. Biochem, then, the subsequent paragraphs and the conclusions are not sustainable.

5. Further, the petitioner paid not Rs.14 Crores but Rs.14,54,266/- and that was also under protest. These amounts or these payments having been tendered or made does not mean

that the case on merits was not pressed. Thus, these are serious errors and apparent on the face of the record. Therefore, the order to the extent it disposes of the petition of M/s. Biochem, be reviewed.

6. On the other hand, Dr. Sharma, appearing on behalf of respondent Nos.1 and 2, would submit that all these petitions were argued together. There was no objection raised to a common Judgment being delivered. Apart therefrom, the Court has found that all the notices of demand could be sustained as there is no distinction permissible only on the basis of formulations and medicines/drugs manufactured/produced by the petitioner M/s. Biochem. Hence, this is not a case for review. However, Dr. Sharma would submit that any typographical error may be changed and the figure may be corrected by denoting it in lakhs and not crores.

7. After having heard both sides, we find that the broad challenge or the legal question was admittedly identical. Now a distinction is sought to be made in relation to M/s. Biochem. It is

urged that the formulations or the medicinal preparations are not one and the same. It is, therefore, urged that this Court should have granted opportunity to M/s. Biochem to make a distinction on facts .

8. We do not think such an opportunity can now be granted for the simple reason that once factual position was noted in all the matters only in the backdrop of a common legal challenge, that legal challenge has been considered and decided. The conclusion in respect thereof would apply also to M/s. Biochem. Concededly, that is not the ground of review. The review is sought to make a factual distinction between the formulations and the medicinal preparations of M/s. Biochem. Surely that would require the whole writ petition being reheard. That would also require this Court to go behind the Judgment under review and permit the petitioner to point out that the demand notices cannot be sustained as far as the petitioner's (M/s. Biochem) product as that is distinct from M/s. Franco. Once in the case of M/s. Franco the demands were sustained, the Court found that barring the names and some contents of

the formulations everything else is identical to the case of M/s. Franco, then, we do not see any reason to allow a second opportunity to the review petitioner. Barring correcting the typographical error and pointing out that the figure mentioned in paragraph 68 should read as Rs.14,54,266/-, we proceed to dismiss this petition. It is accordingly dismissed.

9. At the request of Mr. Seervai and as the review petition is heard after a long duration, we continue the ad-interim order in this review petition for a period of four weeks.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)