IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 14.11.2017

Delivered on: 12.12.2017

Coram

The Honourable Mr.Justice V.PARTHIBAN

W.P. No.10439 of 2006 &
WPMP No.11778 of 2006

Sun Pharmaceutical Industries Limited,
having its registered office at SPARC,
Akota Road, Akota, Vadodara and having
its Regional Office at New No.19 Old No.10,
Jeypur Nagar, Chennai-86,
rep. by its Director Mr.S.Mohanchand Dadha ... Petitioner

Versus

1. Union of India,
through its Secretary,
Ministry of Chemicals & Fertilizers,
Department of Chemicals and
Petrochemicals, having its Office at
Janapath Bhavan, 3rd Floor,
B Wing, New Delhi-110 001.

2. The Department of Chemicals &
Petrochemicals,
Ministry of Chemicals & Fertilizers,
Department of Chemicals and
Petrochemicals, having its Office at
Janapath Bhavan, 3rd Floor,
B Wing, New Delhi-110 001. .. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of Writ of Certiorari, to call for the records relating to the impugned notices dated 14.6.2005 and 25.11.2005 issued by the first respondent herein and quash the same.

For Petitioner : Mr.R.Thiagarajan, SC for
M/s.A.Ramesh Kumar

For Respondents : Mr.A.Kumaraguru

ORDER

The present writ petition has been filed, seeking for the following relief:

"To issue of Writ of Certiorari, to call for the records relating to the impugned notices dated 14.6.2005 and 25.11.2005 issued by the first respondent herein and quash the same."

2. The petitioner is a company, incorporated under the provisions of the Companies Act, 1956. Originally, it was known as Tamil Nadu Dadha Pharmaceuticals Limited, formerly Government of Tamil Nadu undertaking, but subsequently, the same was amalgamated with the petitioner company under the provisions of the Companies Act.

3. The petitioner was engaged in the business of manufacturing and marketing various bulk drug and formulations including Bulk Drug Calcium Lactate. The pricing of each drug is regulated by the Drugs (Price Control) Order, 1979 (hereinafter referred to as "DPCO, 1979"). According to the petitioner, this company was a sole manufacturer in the country in regard to Calcium Lactate. The first respondent issued a notification on 24.8.1981 purported to be under the provisions of the DPCO 1979, fixing the maximum sale price of bulk Calcium Lactate at Rs.13.85/- per kg. According to the petitioner, the price fixation under the said notification dated 24.8.1981 did not take into consideration various relevant factors and the same was fixed arbitrarily. According to the petitioner, if the said price had to be applied and marketed, the company would suffer huge loss as the freezing rate for the said drug before the notification, was much higher.

4. Since the petitioner was aggrieved by the notification dated 24.8.1981, a review was filed before the authority concerned under Order 27 of DPCO, 1979. The power to review such pricing is provided for under Order27 of DPCO, 1979, which reads as under:

"27. Power to review.-Any person aggrieved by any notification or order under para. 3,4, 5, 6,7,9, 12, 13, 14, 15 or 16 may apply to the Government for a review of the notification or order within fifteen days of the date of publication of the notification in the official Gazette, or, as the case may be, the receipt of the order by him, and the Government may make such order on the application as it may consider necessary."

5. The petitioner, in the review application, had demanded from the respondents to furnish the basis and criteria evolved for price fixation and also the actual cost of production based on the cost working, etc. According to the petitioner, the respondents did not take into consideration the cost data furnished by the petitioner from time to time and hence the price as such fixed at the rate of Rs.13.85 per kg vide Notification dated 24.8.1981 was unfair, unjust and inadequate.

6. Since the review application was not being considered and the petitioner was confronted with the act of manufacturing and supplying the drugs at lower price, the petitioner was constrained to approach the Delhi High Court in W.P.No.2134 of 1981, challenging the Notification dated 24.8.1981. Along with the said Writ Petition, several writ petitions were also filed before the Delhi High Court by different manufacturers/companies, challenging the very same price notification in respect of various other drugs covered under DPCO, 1979. While admitting the Writ Petitions, the Delhi High Court had granted interim stay of implementation of the notification. In the said circumstances, the petitioner continued with the price as prevailing prior to the date of the notification dated 24.8.1981.

7. Before the Delhi High Court, while obtaining the interim order of stay, all the writ petitioners including the writ petitioner herein, had given an undertaking that if the writ petitions are dismissed ultimately, the difference of amount as fixed by the respondent authority and the price of the drug as assessed by the companies, shall be paid to the respondents.

8. The Delhi High Court, after hearing all the parties, has allowed all the Writ Petitions by quashing the orders fixing the price of bulk and formulations. The said order was passed on 17.12.1984.

9. While quashing the orders fixing the prices, the Delhi High Court has also directed the review applications filed by the companies under Order 27 of the DPCO, 1979 to be decided and till then, status quo of the prices in respect of various drugs shall revive.

10. As against the orders passed by the Delhi High Court, the matter was taken on appeal before the Hon'ble Supreme Court of India and the Hon'ble Supreme Court by its judgment, dated 10.4.1987 disposed of the appeals filed by the Union of India, allowing the appeals filed by the Union of India and dismissed the Writ Petitions filed before the Delhi High Court. While holding so, the Hon'ble Supreme Court has directed the Union of India to dispose of the review applications after giving a notice of hearing to the manufacturer. The Hon'ble Supreme Court has also made certain observations that the Government is under obligation to disclose relevant information pertaining to average cost of production of the bulk drug manufactured by the companies and other related details to the aggrieved manufacturers.

11. According to the petitioner, in the counter affidavit filed before the Delhi High Court on behalf of the respondents, it was mentioned that the price in respect of Calcium Lactate was to be fixed at Rs.16.04 per kg with effect from 24.8.1981 with a further escalation in the cost of utilities of Rs.1.67 per kg with effect from 1.1.1982. Therefore, the petitioner's

case was that the price originally fixed at Rs.13.85 per kg was not the correct fixation. In any event, the issue of fixation of price for the subject drug was in the state of fluidity and the same had not attained finality all along as the review application was also pending consideration in view of the pendency of the litigation before the High Court as well as the Supreme Court of India. After the decision rendered by the Hon'ble Supreme Court in the year 1987, a Committee, called "Murthy Committee" was constituted by order dated 14.6.1988 to consider the price review applications pending with the first respondent for the period commencing from 1.1.1984 to 1.1.1987. In addition to the constitution of the Murthy Committee, subsequently, the Government also constituted yet another committee called Drugs Prices Liabilities Review Committee (hereinafter referred to "DPLRC") vide order dated 24.3.1994. During the pendency of the litigation, the DPCO, 1979 was repealed and was replaced by DPCO 1987 and further replaced by DPCO 1995 in March, 1995.

12. In the said circumstances, all the review applications pending finalization of review were referred before DPLRC and the petitioner among others were directed to file their submissions. In response to the directions of DPLRC, on behalf of the petitioner, a detailed representation was submitted on 26.6.1997. An enquiry was conducted and it was fixed on 8.9.1998 and 2.6.1999 and during the hearing, the Committee was impressed upon that the fixation of price for the subject product was not in order, since no proper valuation was made and also there was no intention to make any undue benefit out of the manufacture of the product.

13. After hearing by the Committee in September, 1998 and June 1999, nothing was heard from the Committee nor any communication was sent or received by the petitioner.

14. While matters stood thus, vide letter dated 14.6.2005, an official of the respondent department informed the petitioner that DPLRC has submitted a report to the Government on 29.11.2004 and on the basis of the report, liability of the petitioner was fixed towards overcharging of bulk drug and quantified the same at Rs.1,20,90,689/-. As per the breakup figure, Rs.38,42,157 being liability and the remaining Rs.82,48,532/- being the interest upto 31.10.2004. The total liability of the company was quantified at Rs.1,30,34,184/-. At this, the petitioner requested the authority concerned for furnishing of a copy of DPLRC report, since the very basis of the assessing liability is in pursuance of the report of the DPLRC. Thereafter, the report of the DPLRC was furnished to the petitioner which report was actually dated 24.3.2000 and was furnished to the petitioner after a period of more than five years. Subsequent to the issue of notice of demand dated 14.6.2005, another demand notice was issued on 25.11.2005. Both the notices are put to challenge in this Writ Petition.

15. Mr.R.Thiagarajan, learned senior counsel appearing for the petitioner would vehemently contend that the demand as such in respect of interest part of it, is unsustainable both in law and on facts for the reason that the liability of the petitioner arose only when the same crystallized and such crystallization had taken place only after the Committee submitted its report on 29.11.2004 and thereafter, the liability was assessed by the respondents only on 14.6.2005. Till such period, the review application filed by the petitioner was under consideration before the then Murthy Committee and subsequently before the DPLRC which was constituted in 1994 and deliberations were protracted and concluded in 1999 and the report was finally furnished to the respondents only on 29.11.2004. Therefore, he would contend that in such scenario, the question of charging interest for the period from 1981 or thereafter till the issuance of demand dated 14.6.2005 does not arise at all.

16. According to the learned senior counsel if at all interest if any is to be levied, it should be after the report was furnished to the Government by the DPLRC dated 29.11.2004 and after final liability was assessed vide demand notice dated 14.6.2005. If the present demand is to be accepted including the interest portion of it, according to the learned senior counsel, it would tantamount to be a penalty as provided under Order 29 of the DPCO, 1979. Order 29 of DPCO reads as follows:

> 29. Penalties.- Any contravention of any of the provisions of this Order shall be in accordance with the provisions of the Essential Commodities Act, 1955 (X of 1955)"

17. In support of his contentions, learned senior counsel would rely upon the order passed by the Hon'ble Supreme Court reported in AIR 1970 SC 253 (M/s.Hindustan Steel Ltd versus The State of Orissa). He would draw the attention of this Court, particularly, para 7 of the judgment which reads as follows:

> "7. Under the Act penalty may be imposed for failure to register as a dealer: s. 9(1) read with s. 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all

the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.”

18. Therefore, the learned senior counsel would contend that the petitioner cannot be found guilty of contumacious conduct or acted deliberately in defiance of order or law. Admittedly in the instant case, a review application filed by the petitioner has been pending since 1981 and thereafter much water had flowed under the bridge by the reason of pendency of litigation before the Delhi High Court and the Hon'ble Supreme Court. Thereafter, committees were appointed one after the other and finally, the issue had been settled only in 2004/2005. Such being the case, the levy of interest for the entire period from 1981 till date of issue of demand notice, is completely without justification and the same cannot be countenanced both in law or on facts.

19. Learned senior counsel would also fairly not contest the liability portion of it, since he could not do so even otherwise in view of clear directions passed by the Delhi High Court when interim orders were granted in favour of the petitioner herein and other writ petitioners.

20. Per contra, the learned counsel appearing for the respondents would submit that the petitioner having overcharged the price of bulk drug, was liable to pay interest for the period in question and therefore, he cannot be allowed to question the interest portion of it, particularly when the petitioner had no issues with the liability part of it. According to the learned counsel for the respondents, the petitioner without awaiting the disposal of the review application, had hurriedly approached the Delhi High Court and challenged the fixation of price order dated 24.8.1981. Ultimately, the Hon'ble Supreme Court has held that the power to fix price for various drugs cannot be questioned and therefore, upheld the action of the Government by over turning the judgment of the Delhi High Court in a batch of writ petitions. He would therefore submit that the petitioner having violated the price fixation, is liable to pay interest and mere pendency of review application cannot be the reason for absolving the petitioner from the liability of interest.

21. This Court considered the submissions of the learned senior counsel appearing for the petitioner and also the learned standing counsel appearing for the Government.

22. As rightly contended by the learned senior counsel appearing for the petitioner, the entire issue of price fixation in respect of the bulk drug of Calcium Lactate manufactured by the petitioner company was hanging fire till 2004/2005. The issue was either before the Courts or before the Review Committee from 1981 onwards and finally, the liability was fixed only under the impugned demand notice dated 14.6.2005. Although the hearing was completed before DPLRC as early as in 2009, in view of the protracted correspondence between the Government and the Committee, the report was finally submitted on 29.11.2004. Therefore, it cannot be the fault of the petitioner for such delay that had occurred in finalizing the liability of the petitioner.

23. Moreover, it has to be seen that the petitioner has no issues with the assessment of liability as such and what is questioned before this Court during the course of argument is only the interest portion of it, which was levied for the period up to 2005. As rightly contended by the learned senior counsel for the petitioner that the entire liability became crystallized only on 29.11.2004 and subsequently, by demand notice dated 14.6.2005, hence, any interest liable to be charged, should be only from the date of assessment of the demand i.e. 14.6.2005 and not earlier than that. Such argument advanced by the learned senior counsel is to be accepted for the reason that the payment of interest would arise only when there was a clear liability fastened on the petitioner. In the instant case, such liability arose only after the recommendations of the DPLRC on 29.11.2004 and thereafter, vide demand notice dated 14.6.2005. Until then, the petitioner's review was kept alive and pending which means that there was no finalization of price of the subject product.

24. Moreover, as rightly contended by the learned senior counsel that the amount towards interest for the period as mentioned in the demand notice dated 14.6.2005 is claimed, the same would tantamount to penalty as provided for under Order 29 of the DPCO, 1979. The reliance placed upon by the learned senior counsel on the judgment of the Supreme Court as aforementioned, would squarely support the contention of the learned senior counsel that there was no deliberate act in defiance of order or legislation. The petitioner therefore cannot be said to be guilty of contumacious conduct. Hence, there is absolutely no willful or deliberate violation of DPCO by the petitioner in order to attract any penal provision.

25. Learned senior counsel howsoever admitted that the petitioner is liable to pay interest after the submission of the report by the DPLRC on 29.11.2004 till date of payment. His

opposition is only to levy of interest for the pendente lite period.

26. In the light of the above discussion and narrative, this Court is of the considered view that the demand as made in the impugned orders dated 14.6.2005 and 25.11.2005 insofar as it levied interest up to 31.10.2004 on the liability, is set aside as being illegal and unjust. It is made clear that in the absence of challenge to the liability, the petitioner is liable to pay interest as admissible after 29.11.2004 till date of payment. The respondents are therefore, directed to pass orders afresh after recalculating the liability of the petitioner by calculating the interest payable after 29.11.2004 till date of the order.

27. With the above observation, the Writ Petition stands allowed. No costs. Consequently, connected WPMP is closed.

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Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To
1. The Secretary,
Union of India,
Ministry of Chemicals & Fertilizers,
Department of Chemicals and
Petrochemicals, having its Office at
Janapath Bhavan, 3rd Floor,
B Wing, New Delhi-110 001.

2. The Secretary Department of Chemicals &
Petrochemicals,
Ministry of Chemicals & Fertilizers,
Department of Chemicals and
Petrochemicals, having its Office at
Janapath Bhavan, 3rd Floor,
B Wing, New Delhi-110 001.

+1cc to Mr.A.Ramesh Kumar, Advocate SR.No.88214
+1cc to Mr.A.Kumaraguru, Advocate Sr.No.89175

order in
W.P.No.10439 of 2006

RJ(CO)
sm:21.12.2017