



In re:

Case No.30/2011

M/s. Peeveear Medical Agencies, Kerala - Informant

And

All India Organisation of Chemists and Druggists (AIOCD)

Janssen Cilag Pharmaceuticals(A Division of M/s Johnson & Johnson Ltd.),
Mumbai

All Kerala Chemists & Druggists Association (AKCDA)

All Kerala Chemists & Druggists Association (Affiliated to AIOCD)

Organisation of Pharmaceutical Producers of India (OPPI)

Indian Drug Manufacturers Association (IDMA) - Opposite Parties

Case No. 41/2011

M/s. Sandhya Drug Agency - Informant

And

Assam Drug Dealers Association (ADDA)

Barpeta Drugs Dealers Association (BDDA)

All India Organisation of Chemists & Druggists (AIOCD)

Indian Drug Manufacturers Association (IDMA)

Organisation of Pharmaceutical Producers of India (OPPI)

Alkem Laboratories Limited, Mumbai (ALL) - Opposite Parties

Per Justice (Retd.) S.N. Dhingra, Member

ORDER

I had the privilege of going through the orders passed by my learned colleagues. However, I have different opinion on certain issues and position of law as stated in the majority orders, therefore this common order. For the sake of brevity, the facts of the cases are not being repeated unless required in the context as all the facts have elaborately been brought out in the majority orders.



2. Before dwelling on the facts of the cases, I consider it necessary to have a look on the competition impediments in the pharmaceutical sector in India. A report on this subject was prepared by Natasha Naik with the support of Ministry of Corporate Affairs. This report has gone into the current scenario prevalent in the country in respect of pharmaceutical sector. While dealing with key competition concerns, the report observed as under:-

“2.4 Key Competition Concerns

1. Anti-competitive practices along the pharmaceutical value chain for profits and high trade margins.

A survey conducted on the doctors, pharmaceutical industry, consumer organizations, hospitals and the pharmacists in India bring to light various facts about collusion along the pharmaceutical distribution chain the ground level.

In a CUTS study, the majority of the pharmaceutical companies claimed awareness with respect to the existence of collusive practices in the pharmaceutical industry and a high 32.2 per cent of respondents asserted that such practices prevail in the industry to a great extent. Some of these unethical practices were pertaining to irrational drug prescriptions by doctors motivated by kickbacks received from pharmaceutical companies. As a result they prescribe expensive drugs that may not be necessary either. What encourages such rent seeking behavior is the information asymmetry and low elasticity of demand to changes in prices because here the doctors are the influencers and not the consumers. Collusion also takes place along with the distribution between drug companies, stockists, retailer, Medical Representatives (M.R.) which disproportionately inflates the cost of medicines & the overall treatment. Consumers have little or no choice in such a ‘rigged’ market and buy what is prescribed by Doctors or what are sold by Chemists (Sengupta, 2010)

Below is a study that throws light on such exorbitant trade margins.



COMPANY	BRAND	MRP (In Rupees)	PURCHASE PRICE OF RETAILERS (In Rupees)
Ranbaxy	Stannist	26	1.80
Cadila Healthcase	Ceticad	26	1.60
Cipla	Cetcip	27.5	2.00
Lupin	Lupisulide	24	1.94
Wockhardt	Setride	25.2	1.70
Lyka Labs	Lycet	25	1.44
Ranbaxy	Pyrestat-100	25	1.50
Welcure Drugs	Omejel Caps	33	4.50
Wockhardt	Merizole-20	39	6.48

3. The report further observed that most pharmaceutical companies in India are Members of the Trade Associations. AIOCD controls 95% of the India’s pharmaceutical trade having 5.5 lakh members and almost 64.25% of Pharmacists are members of AIOCD. AIOCD is known to manage Chemists & Druggists against drug companies in order to grab higher profit margins. The suffering lies with the consumers ultimately.

4. Similarly, a study was conducted in respect of Health Care in India by Ujwal Kumar and this study showed that health was a state subject in India and the State Governments were not able to provide budgetary support to the patients at the level required and to the extent required. There were malpractices and cuts and commissions available to Doctors (both public and private) for referring patients to a particular chemist, pathologist, laboratory and other tests and there was collusion between Doctors and Pharma companies whereby former get commission in cash or kind for prescribing its product. This practice has become a norm rather than exception and the effect of this makes pharmaceutical market an imperfect market where generic competition become meaningless for consumers who almost are totally dependent on Doctors’ prescription and advise. Moreover, practitioner are obliged by giving gifts, travel facilities, hospitality, cash etc. by pharma



companies which is also a violation of the code of conduct formulated for them by MCI. The report also mentions that Parliamentary Standing Committee on Health & Family Welfare in its 45th Report had suggested that since MCI did not have jurisdiction over pharma companies, the Govt. should take action against such companies who try to woo Doctors and in this regard a code of marketing practice for Indian pharmaceutical industry has been formulated by Department of Pharmaceutical. This code has not yet been enforced and the Committee impressed upon the Govt. to enforce this code. The Committee called upon to check collusion between Doctors and Pharmaceutical companies, Doctors and Pathologists, Pharma companies and retailers for whole of India and it observed that it would mitigate harm to consumers to a great extent. The report has found that there was collusion between private hospitals and drug companies to exploit consumers. A case of private hospital entering into a contract with drug manufacturer to supply drugs to the hospital at prices above the market price was dug out and reported. 27.2% of the hospitals surveyed confirmed of entering into such agreements with drug manufacturers to exploit the consumers. The report also dwelled upon the issue of public health requirement and recommended several steps which the State should take for procuring the drugs and also enumerated suggestions for pharmaceutical procurement.

5. I consider that the Commission has to keep in view the ground realities prevalent in this country while considering cases of pharma sector. The investigation done by DG in the above cases in fact supports the study reports conducted by Natasha Naik and the health sector report of Ujwal Kumar. Although, the Commission in its earlier orders in case No.C-127/2009 MRTPC & 20/2011 had held that the practice of forcing PIS on Pharma companies by Chemists & Druggists Associations, practice of issuance of NOC/LOC by Chemists & Druggists Association as well as insistence on obtaining NOC/LOC by Pharma firms, making boycott calls against those not following dictates of Associations of Chemists & Druggists, fixing margins and similar other actions of Chemists & druggists Associations were violative of the Competition Act, but it seems that this legal position has not been absorbed by different players in the market and nor is being followed. Although, MOU between IDMA/OPPI & AIOCD does not seem to have been



renewed in writing but the practice of obtaining NOC and LOC, coerced contribution to PIS and other practices still continue. The investigation also showed that the boycott of pharma firms, stockists, chemists and other players, at the instance of Chemists & Druggists Associations was very much prevalent and the Pharma firms also insist upon NOC/LOC for resuming supply or starting supply to the chemists or continuing supply to the chemists. This is clear from the evidence which came on record of DG in respect of OP-2 in case No. 30/2011 that the supply of drugs to the informant was stopped and admittedly resumed on passing of an interim injunction order by the Commission.

6. The practices which are anti competitive and which are not in conformity with the act are applicable to all the players in the market and no player can take excuse that he was not aware of the law. Ignorance of law is no excuse and showing deliberate ignorance is a malicious act. General principles of competition law and the interpretation given by the Commission to different provisions of the Act are to be understood and followed by all the concerned players. Merely non renewing of written MOU but in fact continuing the practice is a violation of law. An agreement can be oral or written. An oral agreement substituting the written agreement does not make the parties less liable under the law.

7. The majority order in this case has not found a violation of section 3, sub section 3 of the Act. However, I had observed in my earlier decision in case No. C-127/2009-MRTP (Varca Drugs & Chemists & Ors vs. Chemists & Druggists Association, Goa (CDAG) and Case No.20/2011 (Santukha Associates Private Ltd. vs. AIOCD & Ors) that an association, formal or informal, becomes a cartel if the members of the Association take joint decisions in respect of maintaining prices or refuse entry into the market to others and thereby limit supply of drugs in the market. A decision of Association to boycott, to penalize those who do not fall in line, to refuse NOC/LOC, to maintain minimum discount margin for stockist/retailers & decisions not to give discount to consumers are decisions of members of the association and each member benefits from these decisions. It is admitted case of the associations of chemists & druggists at all levels that one of their objectives is to maximise the profits of members. Thus these associations are



in the nature of a cartel and should be treated as such. In case No.C-127/2009/MRTPC & Case No.20/2011, I had observed as under:-

“13.Formation of an association is a fundamental right of people of India, but no association can be formed for illegal purposes or to perpetuate illegality. A perusal of minutes of AGM of OP would show that the whole effort of the OP has been to protect the sizeable profit margin of its members, whether wholesalers or retailers. OP had no business to regulate the profit margins or issue letter of consents or NOCs to persons for doing business in wholesale or retail supply line of drugs/medicines. Only few professions have been given responsibility of keeping a watch on the professionals by legislature by enacting necessary statutes. The elected bodies of Advocates, CAs, CSs, ICWAs & Doctors have been given statutory powers to regulate the profession. No such power has been given by legislature to chemists & Druggists Associations either at state level or national level to regulate business, fix margins & ensure profits or to regulate the entry and exit of the person in this business or to fix norms of minimum turn over etc. The entry into this business is regulated by a host of central rules and regulations and a complete administrative structure is there at state and central level under Drugs & Cosmetic Act & Rules. It is the state which grants or revokes licence to do trade in this field. No association can super impose its own dictate over retailers or wholesalers about whether they can open shop in an area or not. The business person itself has to decide whether he wants to enter the field and compete with others or not. CDAG or any other association of existing retailers or whole sellers cannot decide nor has business to decide whether a new entrant in the field should be there or not. There can be no worse anti competitive act than denial of market access to a person.

14. Section 3 of the Competition Act (the Act) provides that where an agreement is entered into between enterprises or association of enterprises etc. etc. or a practice is carried on or a decision is taken by any association or enterprise or association of persons including



cartels engaged in identical or similar trade of goods or provision of service, which directly or indirectly causes or likely to cause an appreciable adverse effect on the competition within India, such an agreement shall be void. Section 3(3) provides that if decision or practice determines purchase or sale price, it shall be presumed to have an appreciable adverse effect on competition. Similarly, if the actions or decisions or practices limit or control production/supply, market of provision of services, it shall be presumed to have appreciable adverse effect on competition. Section 3 prohibits an agreement in respect of supply, production, distribution, storage, acquisition or control of goods which causes or is likely to cause an appreciable adverse effect on competition within India.

15. *Cartel is defined under section 2(c). Cartel includes an association of producers, sellers, distributors, traders or service providers who by agreement among themselves limit, control or attempt to control production, distribution, sale or price of, or trade in goods or provision of services.*

16. *In order to form a cartel, it is not necessary that a formal association should be got registered. A cartel can be formed by an informal association of enterprises as well as by a formal registered Association of enterprises. The coordination between the enterprises can be achieved through medium of either of the associations. Formation of a trade association becomes handy where cartel consists of a large number of firms. In such cases where trade associations are formed for the purpose of cartelization, the compliance of the rules made by the cartel needs to be monitored and is monitored through the Executive Committee or the members of the Association. Where only a few firms unite to form a cartel, it is relatively easy for each firm to monitor one another. However, where large numbers are there, this monitoring and penalizing is done through reporting by the members. The members keep on giving information to the Executive Committee about the violation as it comes to their knowledge. Then the executive committee takes action.*



17. *The legislature was aware that associations can take the shape of cartels and that is why in section 2(c), the association of producers, sellers, etc. has been included in the definition of cartels. Similarly, the legislature in section 3 also envisaged a situation where enterprises may form an association and take such decisions or adopt such practices which were akin to a cartel. The constitution of an association and adopting of its Memorandum of Articles of Association, its rules, bye-laws, guidelines itself is a decision of the enterprise. Every individual member who subscribes to the Memorandum of Association and becomes member of the Association either at the time of inception or later on, is a party to the decision as recorded in the form of by-laws, guidelines, rules & regulations of the association. The decisions of the Executive Committee of the Association elected by the general body of the association are not only the decisions on behalf of Association but amount to the decisions of the members of the Association. It is quite possible that some members may not agree with the decision of Executive Committee. Those members who do not agree with such decisions which affect the trade or service are supposed to convey their disagreement with the decisions to the Association. If no member conveys disagreement to the decision of the Executive body, it is presumed that he agrees with the decision.*

20. *Appointment of stockist, wholesalers is for the purpose of supply of drugs. These drugs are supplied by stockists to wholesalers and by wholesalers to the retailers. This chain of supply of drugs exists so that the supplies go to the ultimate consumers uninterrupted. In this market of supply of drugs CDAG by its guidelines, actions and penal provisions had put limits to the provision of the services. The decision regarding number of stockists to be appointed in a particular territory is taken by pharma companies based on demand for drugs. Any restriction on such matters collectively imposed or mandated by an association of competitors not only infringes on the freedom of trade as guaranteed by Constitution of India but also erects barrier to*



competition. It may again be reiterated here that there exists a government regulatory mechanism which ensures the fulfilment of regulatory requirements for issuing licenses to all sales establishments pertaining to drugs including wholesalers and retailers. The conduct of the OP in terms of imposition of restriction on appointment of stockists is anti competitive. The restrictive guidelines and norms implemented by the association, seen in conjunction with the action taken for non-compliance, establish that the conduct of the CDAG amounts to limiting the number of players and controlling the supply of drugs in the state of Goa and therefore, contravenes Section 3(3)(b) of the Competition Act, 2002.

27. The drugs these days are quite costly. Some of the drugs cost in lakhs. Many of these are essential drugs used in serious ailments. If a drug costs Rs.1,00,000 for a pack of one month, the discount of 20% would amount to Rs.20,000. Even if the wholesaler or the retailer can afford to give additional discount to the consumer, they do not give discount to the consumer because all of them have joined hands and formed a cartel that no discount would be given to the consumer.

28. This cartelization had taken place because all the members have subscribed to the decisions of the Association that they would abide by the guidelines issued by the Association in respect of retail and wholesale discounts. The association had fixed cash discounts and had also given directions of non transferring of benefits to the consumers. The decision of the association is the decision of the members of the Association. It is apparent that all the members of the Association together acted as a cartel by subscribing to the Memorandum of association and guidelines and by following it. A perusal of the minutes of the General Body meeting would show that violations of the guidelines were brought to the notice of the Executive Committee and the Executive Committee decided to take action against the violators.”



8. I, therefore, came to conclusion that the associations, OP1, OP3 in case No. 30/2011 & associations, OP1, OP2 & OP3 in case No. 41/2011 acted as a cartel for fixing margins and are in violation of section 3(3) of the Competition Act.

9. I also have different opinion in respect of liability of the office bearers/members of the Executive Committee when an Association is found in violation of the provisions of the Act. The liability of the office bearers of an association can be fixed only under section 48 of the Act, unless the office bearer, in his individual capacity, was also a party to the matter and his individual conduct was investigated for violation of the Act. Section 48 is in respect of deemed liability of such individuals who were responsible for taking decisions in case of contravention of the Competition Act by the companies and it is provided that whenever a company is found in violation of the provisions of the Act, the person incharge and responsible for the conduct of the business of the company would be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished. A “company” has been defined in the explanation to section 48 as under:-

“ (a) “company” means a body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

A reading of this definition would show that a “company” includes association of individuals but the legislature has not included in it an association of firms/enterprises/companies. In my opinion, therefore, the office bearer of an association of companies/enterprises/firms is not equivalent to a company. I, therefore, consider officer bearer of association of OP-1, OP-3 and OP-4 in case No.30/2011 and OP-1, OP-2 & OP-3 in case No.41/2011 in their individual capacity would not be liable for penalty under the Competition Act.

10. In case No.30/2011, M/s. Janssen Cilag Pharmaceuticals, Mumbai and in case No.41/2011 Alkem Laboratories Limited are the two enterprises who had stopped supplies to informants for want of NOC from Associations. The



argument that they were victims of high handedness of the Chemists & Druggists Associations cannot be entertained. The compliance with law is obligation of every enterprise and no enterprise can be allowed to take the excuse that it was under pressure of some association to break the law. No individual enterprise therefore can take a plea of pressure from any quarter for violation of law. An enterprise violating the law of the land has to suffer the consequences. Violation whether willful or under pressure is violation and has to be held so. The pressure of an association may be a ground for praying leniency but cannot be a ground for exonerating the individual enterprise.

11. Time has come that this Commission should impose deterrent penalties on the individual enterprise, whether members or not of a Pharma Associations/Chemists & Druggists Associations, in case of violation of the provisions of the Competition Act.

12. Penalty under section 28:

The past experience of this Commission shows that the Druggists & Chemists Associations have been taking stand that they have no turnover/business and they do not maintain balance sheet/profit & loss account and they have no revenue. It is submitted by them that since the maximum penalty could be 10% of the turnover, no amount of penalty can be imposed on them as they have no turnover. I consider that in case of associations, who behave like cartel and act for the benefit of their members so that the profit of the members is maximized, the appropriate method of imposing penalty is to treat the association as a cartel of the members and impose penalty on the association on the basis of aggregate turnover of the members. The rules and regulations of the associations in above two matters show that each association has made a regulation that new chemists cannot open a shop unless the turnover of existing chemist shop has reached a certain minimum turnover and a new stockist cannot open a shop unless the turnover of existing stockist has reached a certain level. If we treat average annual turnover of one chemist & druggist shop as Rs.50 lakhs (which is highly on a lower side) and if we consider that on an average the district association has around 100 members, the total turnover of members of district level association would be Rs.50



crores. A State level association has membership of all the Chemists & Druggist within the state and if we consider that on an average 1000 chemists and 100 stockists are there in the State and the stockist turnover is taken as Rs.5 crore, the total turnover of all the members would be Rs. 1000 crores. All India Chemists & Druggists Association have around 5.5 lakhs members and if we consider average annual turnover of each members as Rs.50 lakhs, the total turnover of the members of AIOCD would be 5.5 lac crores.

13. It is not necessary that the penalty has to be a percentage of the total turnover. The penalty should be an appropriate amount keeping in view the gravity of the offence. Looking at the fact that despite Commission passing order in respect of AIOCD earlier, the practice of NOC/LOC has not been given up and trade boycotts and call for boycotts were still being given, I consider that a penalty of Rs.50 crore should be imposed on all the members of AIOCD and this penalty should be paid by this association by collecting from its members. In case of failure of the association to pay the penalty, the assets of the association should be seized and attached and other modes of realization of the penalty /prosecution should be followed. In case of state level organization, I consider that it would be appropriate that a collective penalty of Rs.5 crore be imposed on all the members and it should be recovered by this association by collecting from its members. The district level association members should be imposed a penalty of Rs.1 crore. The penalty has to be separate in each matter. Thus in case No.30/2011 & 41/2011, a penalty of Rs.50 crore each is imposed on members of AIOCD to be collected by AIOCD and deposited with CCI. AKCDA & ADDA, being state level associations, a penalty of Rs.5 crore each is imposed on their members and the association shall pay this penalty by collecting from members. BDDA is a district level organization. A penalty of rupees one crore is imposed on its members to be collected by it from members and deposited with CCI. All the associations involved in above two matters shall file an undertaking within four weeks showing compliance with the order of the Commission. There may be Chemists, though members of the Association but not following the dictates of the Association and may be giving discounts to the customers and may have resisted the decisions of the association being anti competitive, such



individual chemists/stockists would have to approach the Commission and give proof of the fact that they had been giving discount to the customers and have been resisting the dictates of the association being contrary to law. Unless a member gives a proof of his dissent, each member of the association will be liable to share the penalty imposed on the association for formation of a cartel.

New Delhi

Dated: 09/12/2013

Sd/-
Justice (retd.) S. N. Dhingra
Member