

A INDIAN DRUGS & PHARMACEUTICAL LTD.

v.

FAMY CARE & ORS.

(Civil Appeal No. 3977 of 2010)

APRIL 30, 2010

B

[V.S.. SIRPURKAR AND DEEPAK VERMA, JJ.]

Administrative law – Government policy – Purchase preference policy – Entry of medicines in the list –

C *Interpretation of – Invitation of tender for supply of Oral Contraceptive Pills by Government – Companies seeking tender enquiry documents – Meanwhile, Purchase Preference Policy for medicines exclusively from Pharma Central Public Sector Enterprises by Government – OCPs listed at serial no. 51, as OCP (Mala D and Mala N) – Rate of contract of entire quantity of 275 lakh cycles of OCPs placed by Government on Pharma CPSEs – Challenge to – High Court quashing the rate of contract as regards the award of 175 lakhs cycles of other brands of OCPs apart from Mala D to the extent of 25 lakh cycles – On appeal held: Order of High Court was justified – Entry in the bracket was not illustrative – Entry is specific and is to be restrictive to Mala D and Mala N – Oral Contraceptive Pills only of that brand were obviously included in the list – Tender – Family Welfare.*

F *The respondent companies are engaged in the business of manufacture and supply of family planning products including Oral Contraceptive Pills (OCPs). The respondent no. 3-Union of India floated an open tender to procure the OCPs. Respondent nos. 1 and 2 requested respondent No. 3 to issue the tender inquiry documents. Meanwhile, the appellant-IDPL pointed out to the respondent no. 3 that the Government had introduced a Purchase Preference Policy for 102 medicines exclusively from Pharma Central Public Sector Enterprises (CPSEs)*

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and their subsidiaries and the OCPs were listed at serial No. 51 of that list. Thereafter, respondent no. 3 issued corrigendum to the tender notice for OCPs that the tender enquiry documents for OCPs would not be opened as promised. Respondent no. 3 then awarded the rate contract of the entire quantity of 275 lakh cycles of OCPs to the appellant. Aggrieved, respondents filed writ petition that the award of the rate contract was in violation of the tender notice and was contrary to the Purchase Preference Policy. The High Court partly allowed the writ petition and quashed the rate of contract awarded to the extent of 175 lakh cycles of other OCPs brands apart from Mala D to the extent of 25 lakh cycles. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. The customer would not be given Mala D and Mala N legitimately if he goes to a medial shop and demands some other brand of Oral Contraceptive Pills. Even the price of Mala D and Mala N differs from the other Oral Contraceptive Pills. The whole world knows and presumably the Union of India also knew what an Oral Contraceptive Pill is. The Union of India, therefore, in branding the particular entry at serial No. 51 could have simply stated Oral Contraceptive Pills. That would have been the end of the matter and that would have been the complete answer to the original writ petitioner's claim before the High Court. However, if the list specifically mentions Mala D and Mala N, there was no question of jumping back and explaining that it was only an illustrative entry. [Para 14] [654-G-H; 655-A-B]

1.2. The whole list is scanned very carefully and no such illustrations are found which would lead to some other meaning to the entry. Wherever an illustration is required, it has been specifically given. The explanations are also to be found in that list. The present entry is specific and tends to be restrictive to Mala D and Mala N.

- A That is the true and correct meaning of entry at serial No.51. The High Court committed no mistake in giving the correct explanation of the entry. It cannot be said that the entry in the bracket was illustrative as there was no necessity to give any illustrations for the general and commonly well understood words 'Oral Contraceptive Pills'. Once a specific brand name was included, it was obvious that it would be only the Mala D and Mala N which would be covered under the entry. [Paras 15, 16 and 17] [655-C-H; 656-A-B]
- C 1.3. Where two views are possible, the view of the policy maker should be adopted. However, in the instant case, two views cannot be possible. The mention of Mala D and Mala N in the bracket was specific, and, therefore, the Oral Contraceptive Pills only of that brand were obviously included in the list. The entry cannot mean anything else and it has to be restricted only to Mala D and Mala N. Thus, the judgment of the High Court is upheld. [Paras 18, 19 and 20] [656-C-F]
- E *Secretary, Ministry of Chemicals & Fertilizers Government of India v. M/s. Cipla Ltd. and Ors., 2003 (7) SCC 1, referred to.*

Case Law Reference:

F 2003 (7) SCC 1 Referred to. Para 18
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From the Judgment & Order dated 26.3.2009 of the High Court of Delhi at New Delhi in W.P. No. 8746 of 2008.

L.N. Rao, Meera Mathur for the Appellants.

Prag P. Tripathi, ASG, Indira Sawhney, Asha G. Nair, Manpreet Singh Doabia, D.S. Mahra, Abhimanyu Mahajan and H Shally Bhasin Maheshwari for the Respondent.

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The Judgment of the Court was delivered by A

V.S. SIRPURKAR, J. 1. Leave granted.

2. In this appeal, the appellant Indian Drugs & Pharmaceutical Ltd. (IDPL) challenges the judgment of Delhi High Court whereby the Writ Petition filed by respondent, Famy Care and another was allowed. The High Court passed the following operative order while allowing the writ petition:

"We quash the Rate Contract No. S-140013/4/2008-OP/100 dated 2nd December, 2008 awarded by respondent No.1 in favour of IDPL, respondent No.2 herein, to the extent that it awards 175 lakhs cycles of other OCP brands apart from Mala-D in the abovestated quantity of 25 lakhs cycles. The writ petition is partly allowed in the aforesaid terms."

3. The respondent, Famy Care Company is engaged in the business of manufacture and supply of family planning products including Oral Contraceptive Pills (hereinafter "OCPs"). They have been supplying these OCPs to the Union of India. Respondent Nos. 1 and 2 distribute these OCPs under the family welfare programmes by Union of India (respondent No.3) free of cost and/or at substantially subsidized rates. It was claimed in the petition that for OCPs in India, almost 85-90% of the market is only through family welfare programmes of respondent No.3. Respondent No.3 used to procure the OCPs through open tender where all companies who fulfilled the eligibility criteria were permitted to participate. Tender was invited for the supply of OCPs on 14.03.2005 and a rate contract was awarded to various parties including Famy Care Ltd. on 18.10.2005, initially for the period of two years which was subsequently extended for another year, till 17.10.2008.

4. One open tender was floated on 18.09.2008 by the Union of India (respondent No.3) and for that, notice inviting tender was published in various newspapers. Following were

A the requirements:

	S. No.	Items	Unit	Tentative Quantity required during 2008-2009
B	1.	Condoms	Million Pcs.	663
	2.	Oral Contraceptive Pills	Lakh Cycles	275
C	3.	IUD Cu-T 380 A	Lakh Pcs.	25
	4.	Emergency Contraceptive Pills	Lakh Packs of 2 Pills	5.5

D 5. The date of sale of tender inquiry document was from 24.09.2008 to 05.11.2008. The respondent companies herein were desirous of participating in the tender. On being unable to download the tender inquiry document, respondent Nos.1 and 2 wrote letters to the Union of India (respondent No.3 herein) on 29.09.2008 requesting respondent No. 3 to issue the tender inquiry documents. However, it is claimed in the Writ Petition that the Union of India refused to accept the pay orders and instead stated that the tender documents had not been issued by the Department and the same were likely to be issued shortly.

E F 6. Again, letters were written on 22.10.2008 and 23.10.2008 by respondent Nos.1 and 2, respectively, requesting the Union of India to issue tender documents to enable them to participate in the tender for the OCPs. The

G H original writ petitioners, respondent companies herein also contacted the concerned officers of the Union of India and were informed that the date of sale of tender inquiry documents had been extended and they would be informed of the finalization of the date. In the meantime, M/s. IDPL (appellant herein) pointed out to the Union of India and claimed that the

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Government had introduced a Purchase Preference Policy for 102 medicines exclusively from Pharma Central Public Sector Enterprises (CPSEs) and their subsidiaries. Reliance was made on letter dated 07.08.2006 issued by the Ministry of Chemicals & Fertilizers, Department of Chemicals & Petrochemicals, bearing No. 50013/1/2006-SO(PI-IV). It was pointed out that the OCPs were listed at serial No. 51 of that list under the said Purchase Preference Policy and, therefore, the purchases should be made exclusively from Pharma CPSEs. On this, corrigendum dated 04.11.2008 came to be effected by the Union of India to the tender notice for OCPs to the effect that the tender enquiry documents for OCPs would not be opened on 05.11.2008 as was promised. The respondent companies herein contacted the Union of India again on 03.12.2008, when they were informed that the rate contract of the entire quantity of 275 lakh cycles of OCPs had already been placed by the respondent No. 3 on appellant IDPL. In short, the whole contract went in favour of the appellant. This was challenged before the High Court by way of a Writ Petition filed by Famy Care Ltd. and Phaarmasia Ltd., the respondents herein. It was urged before the High Court that the impugned rate contract dated 02.12.2008 was awarded in flagrant violation of the tender notice dated 18.09.2008 and was also contrary to the Purchase Preference Policy. The High Court, by its impugned judgment, has allowed the Writ Petition and quashed the said rate contract dated 02.12.2008 insofar as it awards 175 lakh cycles of the other brands of OCPs apart from Mala D to the extent of 25 lakh cycles.

7. In its judgment, the High Court quoted the order dated 26.08.2005 passed by the Joint Secretary to the Government of India as also the Office Memorandum dated 07.08.2006. In the first referred order, the Government of India had made a proposal to make M/s Hindustan Latex Ltd. (HLL) the captive unit of the Ministry of Health and Family Welfare and expressed that the Department would utilize 75 per cent installed capacity of HLL or 75 per cent of the annual procurement of the Ministry

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- A from HLL, whichever is lower for condoms. In so far as the OCPs are concerned, the reservation for HLL was fixed at 55 per cent. It had also been decided that the order for the private sector could be realized only after the finalization of the rate contract through tendering process.
- B 8. In the second referred office Memorandum dated 07.08.2006, a policy was formulated that the Government had decided to grant purchase preference exclusively to Pharma CPSEs and their subsidiaries in respect of 102 medicines manufactured by them as per the list. Thus, in all, 102 products
- C were covered in the Purchase Preference Policy. This list was eventually to be reviewed or revised by the Department of Chemicals and Petro-Chemicals as and when required, taking care not to include any item reserved for SSI units. The entry at serial No.51 in this list is as under:
- D "51) Oral Contraceptive Pills (Mala 'D' and Mala 'N')"
(Emphasis supplied by us)
- E 9. The High Court noted that in case of contraceptives other than reservation in favour of HLL was required to be 55 per cent and the balance of 45 per cent was to be opened for private sector and could be released only after finalization of the rate contract through tendering process. The High Court further noted that the Purchase Preference Policy was to be
- F applicable to the purchases of maximum 102 medicines, which was to be valid for a period of five years up to 06.08.2011. The High Court also noted that, before it, the original petitioners/ present respondents did not challenge the validity of the Purchase Preference Policy. The only contention raised was
- G that in so far as the OCPs were concerned, the Purchase Preference Policy set out only specifically Mala D and Mala N in the category of OCPs as the medicines covered under the said Policy. In other words, the other branded contraceptive pills apart from Mala D and Mala N were not covered under the
- H purchase preference policy in favour of Pharma CPSEs and

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their subsidiaries and as such the Union of India could not have placed an order for all other branded OCPs on the appellant herein, IDPL under the said Purchase Preference Policy. The High Court also noted the defence raised by the Union of India that the entry at serial No.51 was only illustrative and not exhaustive and in fact the said Purchase Preference Policy in favour of CPSEs extended to all the OCPs. The High Court further noted the stand taken by the Union of India that the Purchase Preference Policy ousted all private players from selling medicines therein to the Union of India. The High Court rejected the stand taken by the Union of India. It went on the plain language of entry at serial No.51 in the list and held that it was clear from the language of entry that it was only in respect of Mala D and Mala N that the Purchase Preference Policy was applicable and in fact the Policy was formulated by the Government only in respect of these two brands in mind in respect of OCPs and it was not possible to countenance the submission that the specific mention of Mala D and Mala N was only illustrative. It was on this basis that the High Court came to the conclusion that the entry related only to Mala D and Mala N and it did not cover the other brands of OCPs, the purchase of which was bound to be effected by the Union of India through tendering process which was the earlier policy.

10. In that view, the High Court further approved of the Purchase Preference Policy and held that the orders could be placed on private sector, once the preference in favour of Pharma CPSEs had been exhausted.

11. This judgment was severely commented upon by Shri L.N. Rao, Learned Senior Counsel appearing on behalf of the appellant herein. We were taken through the whole facts including the initial orders and the Purchase Preference Policy. The basic contention raised was that it was for the Union of India to decide as to from whom it would purchase the OCPs and it made quite clear in the list of 102 items that those 102 items would be purchased directly without any tendering

A process. Therefore, the High Court should not have interfered with the policy making exercise of the Union of India.

12. When we see the impugned judgment, it is clear that the policy of the Union of India was not in question in any manner before the High Court. In fact, even the writ petitioners before the High Court i.e. the respondents herein had relied upon that policy and their only contention was that the policy should be implemented in its true spirit. In that, the contention was that the bare reading of entry at serial No.51 was clear that the Government had decided to purchase these products directly without any tendering process and had decided so only in case of Mala D and Mala N. There will be no question of finding fault with the policy nor can it be argued that the policy was being tinkered with. The argument raised by Shri Rao, Learned Senior Counsel and Shri Prag Tripathi, Learned ASG has to be rejected. The basic question that fell for consideration was the interpretation of the entry at serial No.51 and that is correctly decided.

13. The contention raised on behalf of Shri Rao as well as Shri Tripathi was that the entry was only illustrative. To buttress this argument, it was tried to be contended that the chemical formulation of Mala D and Mala N was identical with the other brands and, therefore, mere mention of Mala D and Mala N did not make any difference and the entry related to all the Oral Contraceptive Pills. The argument is quite attractive, however, it lacks substance.

14. A simple question was asked during the debate as to whether if a customer went to a medical shop and demanded some other brand of Oral Contraceptive Pills, could Mala D and Mala N, as the case may be, given to that customer legitimately. This is obviously answered in the negative. It was also found that even the price of Mala D and Mala N differed from the other Oral Contraceptive Pills. But even more than that, the basic argument on behalf of the appellant is that the entry was only

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illustrative. We do not see any merit in this argument. The whole world knows and presumably the Union of India also knew what an Oral Contraceptive Pill is. The Union of India, therefore, in branding the particular entry at serial No. 51 could have simply stated Oral Contraceptive Pills. That would have been the end of the matter and that would have been the complete answer to the original writ petitioner's claim before the High Court. However, if the list specifically mentions Mala D and Mala N, there was no question of jumping back and explaining that it was only an illustrative entry.

15. We have scanned the whole list very carefully and we do not find any such illustrations which would lead to some other meaning to the entry. Wherever an illustration is required, it has been specifically given. The explanations are also to be found in that list. The entries at serial No.12, fluconazole and at serial No.2, Ampicillin IP so also the entries at serial Nos. 13, 72 and 78 are clear enough to suggest that wherever the authorities wanted to be specific, they have been very specific. However, in so far as the present entry is concerned, it is specific and tends to be restrictive to Mala D and Mala N. In short, the controversy here is quite simple and that is the true and correct meaning of entry at serial No.51. In our opinion, the High Court has committed no mistake in giving the correct explanation of the entry. We are not prepared to accept the argument that the entry in the bracket was illustrative, as, in our opinion, there was no necessity to give any illustrations for the general and commonly well understood words 'Oral Contraceptive Pills'.

16. Learned Counsel, in support of their argument, further argued that entry at serial No. 51 was relating to a generic medicine and did not refer to any branded product. We were also taken to the position prior to the introduction of this entry. The entry then read was Nishchint Emergency Contraceptive Pills Livonorgestrel. It was argued that Nishchint was an Oral Contraceptive Pill. However, it was a pill to be taken after the sexual intercourse, as opposed to the type of Oral

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A Contraceptive Pills in categories similar to Mala D and Mala N, which are to be used in one complete cycle for efficacy.

17. This argument does not impress us. There was no necessity on the part of the Union of India to explain or make

B illustration of OCPs because the whole world knows what an OCP is. Once a specific brand name was included, it was obvious that it would be only the Mala D and Mala N which would be covered under the entry.

C 18. It was further tried to be suggested that where two views are possible, the view of the policy maker should be adopted. For this purpose, reliance was made on *Secretary, Ministry of Chemicals & Fertilizers*

Government of India v. M/s. Cipla Ltd. & Ors. [2003 (7) SCC 1]. We have absolutely no quarrel with the proposition laid down

D by this Court in the aforementioned judgment. However, in this case, we do not think that two views could be possible. The mention of Mala D and Mala N in the bracket was specific, and, therefore, the Oral Contraceptive Pills only of that brand were obviously included in the list.

E 19. It was further suggested that the argument based on the notings on the file on behalf of the present respondent cannot be accepted. We do not want to go into that question, since we have already held that on merits the entry cannot mean anything else and it has to be restricted only to Mala D and Mala N.

20. In view of what we have held above, we do not find any merits in the appeal. We, therefore, confirm the judgment of the High Court. The appeal is, thus, dismissed but with no order

G as to costs.

N.J.

Appeal dismissed.