

H. M. M. Ltd.

Vs

Director General, Monopolies & Restrictive Trade Practices Commission

Civil Appeal No. 2939 of 1989

(S. P. Bharucha, G. B. Pattanaik JJ)

11.08.1998

JUDGMENT

BHARUCHA, J. –

Under appeal is the judgment and order dated 11-5-1989 passed by the Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as "the Commission"). It held that the appellants were guilty of an unfair trade practice within the meaning of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as "the said Act"). It required the appellants to desist from indulging in trade practices similar to that which had been held to be an unfair trade practice.

2. The appellants manufacture and market consumer products, including Horlicks. In September 1985, the appellants advertised a scheme they called the "Hidden Wealth Prize offer". Coupons were inserted in some bottles of Horlicks in the various pack sizes. Some of these coupons indicated that the purchasers of the bottles in which they were placed would get prizes. The prizes that were offered were 5 Hotline Colour TVs, 10 gift vouchers of Rs. 2000 each for Hotline appliances and 1400 cash prizes of Rs. 100, Rs. 50 and Rs. 20 each. The advertisements of this Scheme made it clear that the prizes were available only to buyers in Delhi city and they were required to claim their prizes by 15-1-1986. The advertisements stated that even if the buyers' coupon did not carry a winning message, he had "several more chances to try. So get the goodness of Horlicks, now. Because with it, you surely can't lose !"

3. The appellants were served with a notice dated 28-1-1986 by the Assistant Director General of Investigation of the said Commission. The notice stated that the said Scheme required investigation with a view to find out whether it attracted the provisions of the said Act. It required the appellants to furnish the following information/documents within 10 days :

"1. Detail note about the organisation, products manufactured and sold, composition of Board of Directors;

2. Date on which the Company took the decision to hold the Hidden Wealth Prize Scheme.

3. Details of level at which the decision was taken in the Company about the contest.

4. Detail note about the 'Horlicks Prize Offer' containing copies of rules and regulations, number of participants, description of winners under the Scheme together with complete printed material about the Scheme;

5. Total expenditure incurred on the Scheme with requisite break-up such as expenditure on prize, advertisement, published material, cost of administration, etc.;

6. A copy of standard dealership agreement;

7. Price lists issued during the last 18 months including date and reasons for revisions in prices of the products including Horlicks; and

8. Copies of various incentives/discount schemes for dealers introduced in the last 2 years with detail note containing reasons therefor."

4. The requisite information was supplied by the appellants on 7-3-1986. They explained the said Scheme and stated that the expenditure thereon was :

##"Expenditure on prizes Rs. 52,250.00 Advertisements Rs. 1,84,101.25 Published Material Rs. 45,312.32 Misc. Expenditure Rs. 626.55"##

The appellants stated that there had been no violation of the provisions of the said Act.

5. On 24-7-1986, the Secretary of the Commission gave to the appellants a notice of enquiry under the said Act. It stated that the appellants had organised the said Scheme from which it

"appeared that as prizes were offered by draw of lots, the respondent had indulged in unfair trade practice of organising a lottery for the purpose of promotion of its sales and thereby resorted to the unfair trade practice as defined in Section 36-A(3)(b) of the Act. Such a Scheme has caused loss and injury to the consumer as stated in the application. (b) Further such a Scheme also falls under Section 36-A(3)(a) of the Act inasmuch as it appears that the cost of the Scheme has been added in the price of Horlicks".

To the notice of enquiry was annexed a copy of the application of the Director General of Investigation which stated that the appellants had

"spent an amount of Rs. 2.92 lakhs (exclusive of cost on administration and which has necessarily to result in an increase in the total cost of operations and which in fact shall consequently have a bearing on the price to be charged for the product or products of the Company. As such, the trade practice inherently causes loss or injury to the consumers. This squarely falls within the purview of clause (a) of Section 36-A(3) as the prize money is partly or wholly recovered by the amount charged in the transaction as a whole".

6. The appellants replied to the notice of enquiry and stated, inter alia, that the giving of prizes to consumers of Horlicks in Delhi city had been to their advantage. No loss or injury had been caused to them. They did not have to pay anything more. The price that was charged to them was the price charged elsewhere in the country. There was no increase in the price either in Delhi or elsewhere in the country by reason of the prize given to purchasers of Horlicks bottles in Delhi city. It was stated that "the cost of giving of prizes was neither fully nor partly recovered from the price charged for the bottles of Horlicks in Delhi city or in country as a whole". The Director General had merely resorted to conjectures and had not even alleged that the prizes were offered with the intention of creating the impression that something was being given or offered free of charge when it was fully or partly covered by the amount charged in the transaction as a whole. No such intention had been alleged nor had it been shown how the prizes were fully or partly covered by the amount charged in

the transaction as a whole. The burden of proving an allegation was on the person who made it but the Director General had not even made an averment in this behalf.

7. The Commission framed the following issues :

"(i) Whether the respondent indulged in the unfair trade practices as alleged in the application of the DG and contained a notice of enquiry issued on the basis of that ?

(ii) If the answer to Issue (i) is in the affirmative, then whether the said unfair trade practice is prejudicial to the public interest or to the interest of the consumer in general or to any consumer in particular ?

(iii) Relief."

8. The Commission, in the order under appeal, found from the price lists that in respect of Horlicks and another product of the appellants called Boost, a price increase had taken place on 1-7-1985, but the prices of the appellants' other products, Marmite, Pure Silvikrin, Silvikrin H.D. and Enos Salts till 31-1-1986 had remained what they were on 1-10-1984, 1-4-1984, 1-4-1984 and 1-5-1985 respectively. It was argued by learned counsel for the Director General that this increase in price covered the cost of prizes under the Scheme. The Commission found that the price increase that took place on 1-7-1985 could "surely be taken to reflect partly the cost of the gifts". It said that the said Scheme "was intended to wean away the consumers from Bournvita by allurements of lucky prizes of high value rather than by fair means which may benefit the general run of the consumers". It was a small fraction of the buyers of Horlicks who got the benefit of the said Scheme whereas the multitude got no benefit. The prizes being "manifold costlier than the price of a bottle of Horlicks, a fact on account of which the winning of the prize will be of overriding consideration than the product in question". The Commission held :

"On these postulates it is not difficult to say that the trade practice is no better than a lottery and that the buyer who does not get any prize, does lose it as against the one who wins it although both take to the same transaction. So the trade practice that is meant to wean away the consumer from Bournvita by this allurement is obviously an instrument of facing competition in the market by unfair means and, therefore, prejudicial to public interest. Both the issues are decided accordingly against the respondent."

9. Section 36-A defines unfair trade practice. So far as is relevant, it reads :

"36-A. In this Part, unless the context otherwise requires, 'unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise, namely :

#(1)-(2) * * *##

(3) permits -

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole,

(b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;"

For holding a trade practice to be an unfair trade practice, therefore, it must be found that it causes loss or injury to the consumer. Insofar as prizes are concerned, there has to be the intention of not providing them as offered or creating the impression that they are being given or are being offered free of charge when in fact they are fully or partly covered by the amount charged in the transaction as a whole. The conduct of a lottery for the purpose of promoting the sale, use or supply of a product is an unfair trade practice. It is difficult to see clear, sustainable findings on these aspects in the judgment under appeal.

10. There is no material that indicates that there was a draw of lots or that a price was charged for participation in the draw. The fact that some bottles of Horlicks contained a slip of paper which entitled the buyer to a prize is not a lottery in the ordinary sense of the word.

11. For the purposes of finding that the offering of prizes under the said Scheme was with the intention of creating the impression that something was being given free of charge when it was fully or partly covered by the amount charged for Horlicks, the Commission resorted to speculation about a price increase in the cost of Horlicks some time prior to the said Scheme. We find from the notice of enquiry given to the appellants and the application of the Director General annexed thereto that it was nowhere indicated to the appellants that it was the case of the Director General that the particular price increase that the Commission relied upon was intended by the appellants to offset the cost of prizes under the said Scheme. Had this been indicated in the notice of enquiry, the appellants would have had an opportunity to deal with it. It was unfair in the circumstances to urge that the particular price increase was attributable to the cost of prizes under the said Scheme and the Commission ought not to have so held. The appellants averred in their reply to the notice of enquiry that the consumer was not required to make any payment towards the prizes and there is no proof on the record to the contrary. It was the Director General who made this allegation and it was for him to establish it. Since he did not, the allegation ought to have been rejected. The Commission should have noted with advantage the expenditure incurred by the appellants in the years 1984-85 and 1985-86 on advertisements and marketing of Horlicks, namely, Rs. 2,33,33,637 and Rs. 2,96,69,208, respectively, and contrasted it with the expenditure on the prizes under the said Scheme, namely, Rs. 52,250. That would have indicated fairly clearly that the appellants were right in stating that no part of the comparatively insignificant expenditure on the prizes had been recouped from the consumers of Horlicks.

12. Lastly, it is difficult to hold that a consumer who bought a bottle of Horlicks that did not entitle him to a prize suffered a loss.

13. In the result, the appeal is allowed and the order under appeal is set aside. There shall be no order as to costs.