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**HIGH COURT OF DELHI : NEW DELHI**

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**FAO (OS) No. 27/2005, FAO (OS) No. 28/2005, FAO (OS) No. 29/2005, FAO (OS) No. 31/2005, and FAO (OS) No.44/2005 in CS (OS) No. 519/2004**

Reserved on: 9<sup>th</sup> February, 2009

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Decided on: 18<sup>th</sup> September, 2009

**FAO (OS) No.27/2005 & CM No.1533/2005**

Drager Medical India P. Ltd.

...Appellant

Through : Mr. Rajiv Nayar, Sr. Adv. with Mr. Manoj Kumar, Mr. Sushant Kumar, Mr. Shekhar, Mr. Tarun Arora & Mr. Sushil, Advs.

Versus

Usha Drager P. Ltd. & Ors.

....Respondents

Through : Mr. Arvind K. Nigam, Sr. Adv. with Mr. Navin Chawla, Adv. and Mr. Sandeep Mittal, Advs.

**AND**

**FAO (OS) No.28/05 & CM Nos.1535/05, 3078/05 & 16231-32/05**

Dragerwerk AG & Ors.

....Appellants

Through : Mr. Rajiv Nayar, Sr. Adv. with Mr. Manoj Kumar, Mr. Sushant Kumar, Mr. Shekhar, Mr. Tarun Arora and Mr. Sushil Advs.

Versus

Usha Drager Pvt. Ltd. & Anr.

....Respondents

Through : Mr. Arvind K. Nigam, Sr. Adv. with Mr. Navin Chawla and Mr. Sandeep Mittal, Advs.

**AND**

**FAO (OS) No.29/2005 & CM No.1540/2005**

H.L. Medical Systems P. Ltd.

.....Appellant

Through : Mr. Rajiv Nayar, Sr. Adv. with Mr. Manoj Kumar, Mr. Sushant Kumar, Mr. Shekhar, Mr. Tarun Arora and Mr. Sushil, Advs.

Versus

Usha Drager P. Ltd. & Anr.

....Respondents

Through : Mr. Arvind K. Nigam, Sr. Adv. with Mr. Navin Chawla and Mr. Sandeep Mittal, Advs.

**AND**

**FAO (OS) No.31/2005 & CM Nos.1565/05 & 3077/2005**

Drager Medical AG & Co. KGaA .....Appellant  
Through : Mr. Rajiv Nayar, Sr. Adv. with Mr. Manoj  
Kumar, Mr. Sushant Kumar, Mr. Shekhar,  
Mr. Tarun Arora and Mr. Sushil, Advs.  
Versus  
Usha Drager P. Ltd. & Anr. ....Respondents  
Through : Mr. Arvind K. Nigam, Sr. Adv. with Mr. Navin  
Chawla and Mr. Sandeep Mittal, Advs.  
**AND**

**FAO (OS) No.44/2005 & CM Nos.2343/05, 17467/05,  
5478/07, 12802/07 & 15546/08**

Usha Drager Pvt. Ltd. & Anr. ....Appellants  
Through : Mr. A.S. Chandhiok, Sr. Adv.  
with Mr. Navin Chawla and Mr. Sandeep  
Mittal, Advs.  
Versus  
Dragerwerk AG ....Appellants  
Through : Mr. Rajiv Nayar, Sr. Adv. with Mr. Manoj  
Kumar, Mr. Sushant Kumar, Mr. Shekhar,  
Mr. Tarun Arora and Mr. Sushil Advs.

Coram:

**HON'BLE MR. JUSTICE A.K. SIKRI**  
**HON'BLE MR. JUSTICE MANMOHAN SINGH**

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|---------------------------------------------------------------------------------|----|
| 1. Whether the Reporters of local papers may<br>be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not?                                           | No |
| 3. Whether the judgment should be reported<br>in the Digest?                    | No |

**MANMOHAN SINGH, J.**

1. By this common order we shall dispose of five appeals filed by the parties against the impugned order dated 20<sup>th</sup> January, 2005 passed in I.A. Nos. 3171, 4241 and 4906 of 2004 in CS (OS) No.519/2004. The details of the parties who have filed the appeals are already mentioned.

2. The brief facts are that Usha Drager Pvt. Ltd., Plaintiff No.1 and M/s. R.K.K.R Infotech Pvt. Ltd., Plaintiff No.2 filed a suit against M/s. Draegerwerk AG, the defendant, praying for permanent injunction restraining it and its group affiliates, shareholders, agents, etc from carrying on competing business with plaintiffs in India, including selling medical appliances through anyone except plaintiff No.1 and for rendition of accounts of all sales by the defendant and its group affiliates in India in addition to a payment of 20% commission on all sales from the date of filing of the present suit with 13% interest per annum.

3. Along with the suit the plaintiffs filed an application for interim injunction being I.A. No.3171/2004 for permanent injunction and rendition of accounts, based upon Clause 6 of the Joint Venture Agreement dated 9<sup>th</sup> May, 1987, the said clause being in the nature of a non compete clause between the parties. The prayer in the application for injunction reads as follows:-

“Pass an order of temporary injunction in favour of the plaintiffs and against the defendants and its group companies or subsidiary companies or any company in which the defendants or its shareholders hold any share from carrying out any business in India in competition with plaintiff No.1 including selling their medical appliances / equipment / apparatus in India except to or through plaintiff No.1.”

4. As per the plaint, a distribution agreement was signed between defendant no. 1 and Usha Services and Consultants (P) Ltd. (hereinafter referred to as UCPL) on 21<sup>st</sup> March, 1986 for distribution of Drager products in India. On 9<sup>th</sup> May, 1987 a Joint Venture Agreement was signed between the above-mentioned parties for the sale, development and manufacture of Drager products in India. As a result of

this, on 5<sup>th</sup> October, 1988, a JV by the name of Usha Drager (P) Ltd. (hereinafter referred to as UDPL) was incorporated. In 1990, a fresh distribution agreement between defendant no. 1 and UDPL was signed resulting in the mutual termination of the previous distribution agreement dated 21<sup>st</sup> March, 1986.

5. UCPL ceased to be a shareholder of UDPL in 1992. The distribution agreement of 1990 was transferred by defendant no. 1 to Dragerwerk Medizintechnik GmbH in 1997 and in 1999 a distribution agreement took place between the latter and UDPL for the sale of its exclusive as well as non-exclusive products in India. Dragerwerk Medizintechnik GmbH is now Dragerwerk Medical AG & Co. KGaA. In 2001, plaintiff no. 2 (RKKR Infotech (P) Ltd.) purchased shares of UDPL from Usha India Ltd.

6. Dragerwerk Medical AG & Co. KGaA terminated the distribution agreement of 1999 with effect from 31<sup>st</sup> December, 2003. Defendant no. 1 then proposed setting up another company for distribution of its goods in India and sought the permission of the FIPB on 27<sup>th</sup> January, 2004 for acquiring 100% shareholding of said company, pursuant to which the plaintiffs filed the present suit.

7. After filing the suit the plaintiffs filed an application being I.A. No.4241/04 seeking the impleadment of M/s. Drager Medical AG & Co. KGaA, M/s. Drager Medical India Pvt. Ltd. and M/s. H.L.Medical Systems Pvt. Ltd. as defendants 2,3 and 4 respectively. Another application being I.A. No.4906/04 was also filed by M/s. Drager

Medical AG & Co. KGaA, seeking its deletion from the array of parties on the plea that proposed defendant No.2 is not carrying on its business activities in India directly or indirectly. After considering the submissions of the parties in I.A. No.4241/04 the learned Single Judge as per merit has recorded the reasons in allowing the application in Para 7 of the impugned order which reads as under:-

“7. The plaintiff's case is thus –

(a) Primarily founded on the plea that the phrase "another company of the Draeger group" contained in clause 6 of the agreement covers the three proposed defendants mentioned in is 4241 of 2004. Since the said proposed defendants derived their existence through the Draeger group and clause 6 covers such entities they are not only required to be joined as parties but are required to be enjoined from violating clause 6.

(b) That the joint venture is the ultimate victim of the acts of the defendants and the proposed defendants.

(c) That it is the defendant who is blackmailing the plaintiff as is evident from the e mail of Mr. Alain Rastouil dated 14th June 2002 wherein it was stated that unless plaintiff No. 1 is converted into a subsidiary of the Draeger Group with 51 per cent of its shares to be with defendant No. 1, no new business plans would be presented or considered by defendant No. 1.

(d) That the original share holders are M/s Usha Services - 20 shares, RKKR - 20 shares, Anil Rai & Co. - 20 shares and Mr. Anil Rai - 40 shares. M/s Usha Services ceased to be a share holder on 23.10.1992 and the present share holders are RKKR, Mr. Anil Rai, Mrs. Malvika Rai and Mr. Anand Rai and since shares were transferred in duly convened Board Meeting attended by Draeger nominees who had consented thereto, the joint venture does not cease and the assignment of the shares objected to by the defendants thus has been approved by virtue of the Board meeting attended to by the Draeger nominees.....”

8. On 20<sup>th</sup> January, 2005 a Single bench of this Court passed an order in three applications being I.A. No. 3171/2004 filed by the plaintiffs as regards Clause 6 of the Joint Venture Agreement, I.A. No. 4241/2004 filed by the plaintiffs for impleadment of Drager Medical AG & Co. KGaA, Drager Medical India (P) Ltd. and H. L Medical Systems

(P) Ltd, and I.A. No. 4906/2004 by defendant no. 2 (of the amended memo of parties) for its deletion from the arrayed parties. The relief granted as per impugned order can be summarized as follows:

(I) I.A. No. 4241/2004 was allowed. Proposed defendant no. 2 & 3 (Drager Medical AG & Co. KGaA and Drager Medical India (P) Ltd.) were found to be part of the same Drager Group. That they were not party to the JVA was held immaterial. Proposed defendant no. 4 (H.L Medical Systems (P) Ltd.) was also impleaded as it was appointed the exclusive distributor in violation of Clause 6 of the JVA.

(II) I.A. No. 4906/2004 filed by the proposed defendant no.2 was rejected.

(III) As regards I.A. No. 3171/2004, though balance of convenience was even, prima facie case was found to be in favour of the plaintiffs. 10% commission of sales were directed to be secured by the Registrar of this court since the date of filing of the suit, as regards the products in Appendix 1 of the JVA as well as future sales covered by Clause 6 of the JVA as per the quarterly statement of accounts.

9. Firstly, we shall deal with the three appeals being FAO (OS) Nos. 27/2005, 29/2005, 31/2005 filed against the impugned order by which I.A.No. 4241/2004 was allowed and defendant nos. 2 to 4 were impleaded. In FAO (OS) No. 27/2005, defendant no. 3 (appellant herein i.e. Drager Medical India Pvt. Ltd.) has prayed that the impugned order dated January 20, 2005 passed in I.A No. 4241/2004 be quashed/set aside/modified and that it be deleted from the array of parties. Defendant no. 3 has submitted that the relevant portion of the impugned order sought to be set aside is as follows:

“...the defendant has already set up a company by the name of Drager Medical India Pvt. Limited., proposed Defendant no. 3, which was actually to be the changed name of plaintiff no. 1 company as per the Board meeting dated 15<sup>th</sup> February, 2002, hence the proposed defendant no. 3 is also required to be joined as

a party. Furthermore, it is also a Drager Group Co. covered under Clause 6 of the Agreement. Accordingly, it would be appropriate and indeed in the interest of justice that since both the proposed defendants 2 and 3 are group companies of Drager Group and would thus fall within the scope and ambit of Clause 6 of the agreement, they are required to be impleaded as defendants 2 and 3. Whether or not the proposed defendants 2 and 3 are necessary parties, they certainly are proper parties.”

10. As grounds for supporting its contention, defendant no. 3 has submitted the following :

- a) The learned single judge has passed the impugned order without allowing defendant no. 3 to present its arguments in violation of the natural principles of justice.
- b) There exists no contract of any nature between defendant no. 3 and the plaintiffs and no allegation has been made against the former by the latter, thus resulting in an absolute lack of any cause of action against defendant no. 3. Further, the plaintiffs’ agreements with the other defendants in the suit do not impact the rights of defendant no. 3 in any way.
- c) The present suit has been filed for specific performance of Clause 6 of the JVA to which neither the plaintiffs nor defendant no. 3 are party and that in a suit for specific performance of an agreement relief cannot be granted against a stranger to the contract.
- d) Defendant no. 3 is not a necessary party to the present suit as the plaintiffs have no right or claim for any relief against it and also because its absence would not render it impossible for the court to decide the disputes involved.
- e) The finding that defendant no. 3 and defendant no. 2 are part of the ‘Drager Group’ is based on the website of defendant no. 1 company.
- f) The impleadment of defendant no. 4 has been allowed by the impugned order despite the absence of any allegations in the plaint as to the same and contrary to the settled law that where a defendant is added, unless the court directs otherwise, the plaint shall be amended in such a manner as may be necessary and the amended copies of the summons shall be served upon the new defendant.
- g) No opportunity has been granted to defendant no. 1 to state that it has not been carrying on any business other than through

plaintiff no. 1 and therefore no cause of action lies against the former. Further, it has been wrongly held that defendant no. 3 is distributing medical equipment of defendant no. 1 as there exists no privity of contract between the two.

11. FAO (OS) 29/2005 has been filed by defendant no. 4 i.e. H.L. Medical Systems (P) Ltd. praying that the following portion of the impugned order be set aside/quashed :

“14. In so far as the proposed defendant no. 4 is concerned, after the hearing on 17.05.2004 in the present suit, when the defendant appeared through its counsel, the said Drager Medical AG & Co. KGaA caused a public notice to be published in the Economic Times announcing that M/s. H.L Medical Systems (P) Ltd. would be the exclusive distributor for their products for the territory of India. This act of the defendants, shows beyond doubt that the defendant is distributing through its exclusive distributor HL Medical Systems (P) Ltd. (proposed defendant no. 4) the products of the defendant as is evident from the public notice published in the Economic Times and the violation of Clause 6 has been averred to be achieved through the distribution of the products through defendant no. 4. This defendant is also required to be impleaded as defendant no. 4 as the violation of Clause 6 is being sought to be achieved through the medium of defendant no. 4.”

12. The grounds that have been raised by defendant no. 4 in support of its contentions are identical to the grounds raised by defendant no. 3 in FAO (OS) No. 27/2005.

13. FAO (OS) 31/2005 has been filed by defendant no. 2 i.e. Drager Medical AG & Co. KGaA praying for its deletion from the array of parties, with the following arguments in support of its prayer :

- (a) The impugned order has directed lifting of the corporate veil and impleadment of defendant no. 2 (appellant herein) in a suit wherein the only defendant previously impleaded was Dragerwerk AG. The corporate veil was lifted on the basis of information contained in the website of Dragerwerk AG. The law with respect to lifting of the corporate veil is elucidated in **LIC of India v. Escorts Ltd., AIR1986 SC 1730** and it is defendant no. 2's contention that the plaintiffs have failed to

bring out the existence of any of the instances which permit lifting of the veil.

- b) Further, with regard to the law on lifting of the corporate veil, the decision in **New Horizons Ltd. v. Union of India, 1995 1 SCC 478** states that lifting of the corporate veil occurs when the principle of the corporate personality is too flagrantly opposed to justice or convenience or is against the interest of revenue. The appellant submits that it is by no stretch of imagination a group company of Dragerwerk AG. It is further submitted that it was wrongly assumed that the distributor agreement of 1999 was between plaintiff no. 1 and defendant no. 1.
- c) Defendant no. 2 is not a necessary party for adjudication of the relevant dispute as it is a complete stranger to the JVA between defendant no. 1 and USCL and as such, there is no cause of action in favour of the plaintiffs and against Defendant no. 2. In a case of specific performance of contract filed by way of suit for injunction, a stranger cannot be impleaded as necessary party. Defendant no. 2 is the outcome of a JVA between Dragerwerk AG and Siemens AG with the management veto rights in the hands of the latter. Since under this JVA goods are supplied by the appellant across the globe, it cannot be restricted by the negative covenant contained in a JVA to which it is not even party.

14. The contention of the respondents herein/plaintiffs in the suit is that the defendant No.1 i.e. Dragerwerk AG is a foreign company without any assets in India and in case the appeals of the appellants/group affiliates of the defendant No.1 are allowed, the respondents/plaintiffs shall be left without any remedy. It is further argued by respondents that the appellants' contention that they are not party to the JVA and, therefore, cannot be restricted by clause (6) of the same has no force. It is argued by respondents that Section 43 of the Specific Relief Act, 1963 provides that where a contract comprises an affirmative agreement to do a certain act, coupled with the negative agreement not to do a certain act, the

circumstances that the court is unable to compel specific performance of the affirmative agreement shall not be precluded from grant of an injunction to perform the negative agreement. This has also been held in **Gujarat Bottling Co. Ltd. v. The Coca-Cola Co. & Ors., 1995(5) SCC 545.**

15. As per the respondents, the plea of Dragar Medical A.G. and Co. KGaA, defendant no. 2, that it is not a group affiliate of defendant no. 1 is submitted as wrong as 65 % of its shares are held by defendant no. 1 (presently 75 %) and the former is openly advertised as a group company of the latter. The respondents have submitted that it is a fit case for lifting of the corporate veil. In the New horizons case (supra), it was held that the corporate veil could be lifted not only in cases of fraud against the Government but also in commercial matters. The JVA, Foreign Collaboration Agreement, Distribution Agreement and Articles of Association all show relationship between the various defendants on group basis and not on individual basis as contended. The respondents have submitted Clause 17 of the Distribution Agreement to further prove the implicit relationship between Defendant no. 1 and Defendant no. 2. The said clause states in part as follows :

“commencing with this agreement all previous distribution agreements between the distributor and Dragerwerk AG, legal predecessor of Drager Medical AG & Co. KGaA, stand null and void.”

16. It is the respondents' submission that Defendant no. 2 in its letter dated 19<sup>th</sup> March, 2004 to the FIPB wrongly stated that it was a

separate legal entity having no existing/previous venture in the same/allied field as plaintiff no. 1. It is pertinent that the FIPB also initiated an investigation with regard to the purported fraud of the defendants vide C.M. No. 15546/2008.

17. The appellants’ contention that the respondents cannot invoke the JVA is wrong as plaintiff no. 1 is a product of the said JVA and is entitled to protection of its interest from its own shareholders.

18. Having gone through the contentions of all the parties involved, we find it necessary to refer to Clause 6 of the JVA of 1987.

Clause 6 read as follows :

“The shareholders of the joint venture and their directors including their husbands/wives shall not compete in any respect directly or indirectly, neither as share holders nor as Board Members, employees or consultants with the activities of the joint venture or of Drager or of any company of the Drager Group in the field of the products as specified in Appendix 2.”

‘Drager’ has been defined in Article 2 of the Articles of Association of plaintiff no. 1 as :

“Drager means Draegerwerk Aktiengesellschaft a Corporation having an office at Moislinger Allee, 53-55, D 24 OO Lubeck, Federal Republic of Germany, its successors, assigns and nominees and their respective parent, subsidiary or associate companies, corporations or bodies corporate and any company, corporation or body corporate in which drager is amalgamated or merged and their respective parent subsidiary or associate companies and bodies corporate including any company or corporation or body corporate into which any such parent, subsidiary or associate companies, corporations or bodies corporate have merged.”

19. The structure of the Drager group, as given on the website of defendant no. 1 on September 4, 2004, is produced hereinbelow:

12. Draeger WERK AG  
13. -----  
14. | | |

|     |              |              |              |               |         |
|-----|--------------|--------------|--------------|---------------|---------|
| 15. | SUBGROUPS    |              | SUBSIDIARIES |               |         |
| 16. | SERVICES     |              |              |               |         |
| 17. |              | IN GERMANY & |              |               |         |
| 18. | -----        | ABROAD ----- |              |               |         |
| 19. |              |              |              |               |         |
| 20. | Draeger      | Draeger      | Draeger      | OTHER         |         |
| 21. | MEDICAL      | SAFETY AG    |              | INTERSERVICES | SERVICE |
| 22. | AG & Co      | AG & Co      | GmbH         | COMPANIES     | KGaA    |
| 23. |              |              |              |               |         |
| 24. | 65%          | 100%         |              |               |         |
| 25. |              |              |              |               |         |
| 26. | SUBSIDIARIES |              | SUBSIDIARIES |               |         |
| 27. | IN GERMANY   |              | IN GERMANY   |               |         |
| 28. | & ABROAD     |              | & ABROAD     |               |         |

20. Having stated the essential facts and pertinent clauses, as regards the law on the subject, we are of the view that the principle objective of the rule under Order 1 Rule 10 of the Code of Civil procedure, 1908 is to enable the addition of parties for the sole purpose of completely and effectually adjudicating upon the dispute arising between the original parties in the presence of newly impleaded parties, without which there would necessarily be multiplicity of proceedings.

21. At the stage of hearing of an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 the court is not required to adjudicate upon the claims of the parties finally. While deciding an application for impleadment, the Court has to record only a prima facie finding as to whether the proposed parties are proper and necessary and not venture into deciding the real controversy between the parties. It cannot finally adjudicate the questions of fact which would be decided later in the main suit itself.

22. It need not be pointed out that while considering an application for impleadment, the merit of the defenses is hardly a relevant consideration as it will be open to the impleaded defendants to

raise their objection and contentions as regard the lack of their locus standi in their written statement.

23. While deciding the application under Order 1 Rule 10 being I.A. No.4241/04 seeking the impleadment of defendants No.2 to 4, the learned single Judge has given valid reasons stated in Para 7 of the impugned order while exercising his discretion by arriving at the finding that these are proper and necessary parties for the purpose of deciding the real dispute between the parties. The said discretion has been exercised by the learned single Judge after having gone through the pleadings and documents on record.

24. We feel that the Ld. Single Judge has given valid reasons for impleading defendant nos. 2 to 4 and we agree with the same. Therefore, we are not inclined to interfere with the finding of the Ld. Single Judge. In view of the above said facts and circumstances FAO (OS) Nos. 27, 29 and 31 of 2005 are dismissed as being without any merit. No costs.

25. The next appeal we shall deal with is FAO (OS) No. 28/2005. This appeal filed by Dragerwerk A.G., defendant no. 1 in the suit, questions the impugned order to the extent of its direction to deposit 10% commission of sales as well as filing of quarterly statement of account in the court by the appellant. The grounds of appeal submitted in support of its contentions are as follows :

- (a) Clause 6 of the JVA cannot be enforced as the JVA itself is not in existence anymore as there was no provision of assignment of rights under the JVA and defendant no. 1 (appellant herein) is to deal with the JV Partner only and not with any third party. Even if there was any such provision, the purported assignment claimed by plaintiff no. 2 is without the

consent of the appellant. The JVA therefore, ceased to have any effect due to absence of any successor/assignee. Even if it had not so ceased, neither of the two respondents was party to the JVA and consequently the appellant has no obligation qua them. With regard to the law on JVAs, the appellant has cited **1996 ITR vol 217 (pg 171)** wherein it was held that transfer/assignment of a joint venture partner's interest creates no rights except right to profit of assignee. Further submitting that there is no privity of contract between itself and the non-party to the JVA, defendant no. 1 states that as per **Prem Singh Devi Ditta Mal and Anr. v. Sat Ram Das and Ors.,AIR 1958 Punj 52** assignment must be shown show to cause of action. Also, an injunction can only be sought with regard to a contract if it subsists between the seeker of the injunction and the party against which it is sought.

(b) Clause 6 can only be enforced by parties to the JVA, i.e. either by UCPL or defendant no. 1. In addition, Section 42 of the Specific Relief Act provides the parties against whom specific performance of contract may be enforced and plaintiff no. 2 does not fall within any of these categories. The plaintiffs have no locus in enforcement of the negative covenant of the JVA, therefore the issue of their locus needs to be addressed before deciding upon the scope of the negative covenant.

(c) In addition it is submitted that the lifting of the corporate veil by the Ld. Judge has been done without any heed to the limited circumstances under which the same can be done and on the basis of information on the internet.

(d) Plaintiff no. 1 was appointed by defendant no. 2 as an exclusive distributor via an agreement dated February 22<sup>nd</sup>, 1999, the said agreement being terminated in 2003. It is submitted that the list of goods to be distributed through this agreement was independent of the list in Clause 6 of the JVA and hence cannot be termed 'competing business'.

26. It appears to us that the entire appeal is based on two points – first, Clause 6 of the JVA and whether the plaintiffs can enforce it for their protection and second, whether the corporate veil ought to have been lifted or not?

27. After due consideration of the facts mentioned in Paras 13 to 17 of our judgment as well as Para 7 of the impugned order and the documents placed on record by the respondents, we are not convinced with the submission of the appellants. Further, since the information based on which the veil was lifted was taken from the *official website* of the appellant, prima facie there can be no doubt then that the appellant's contention that the lifting of the veil was based on 'information on the internet' is calculated, merit-less and attempting to mislead, to say the least. The finding of the Id. Single Judge appears to be correct in view of clause 17 of the distribution agreement wherein the implicit relationship between defendants 1 and 2 as well as clause 6 of the Joint Venture Agreement of 1987 is mentioned. However, we feel that the direction issued by the learned Single Judge to deposit 10% commission of sale in order to secure the interest of the plaintiff is on higher side, therefore, we consider that it should be modified to 5%, the rest of the condition shall be the same as mentioned in the impugned order. As far as the finding of the Ld. Single Judge in this regard, we do not want to interfere except to the extent mentioned above. The appeal is disposed of with this direction.

28. The next appeal to be considered is FAO (OS) No.44/2005 filed by the plaintiffs/appellants herein against the impugned order passed in IA No.3171/2004.

29. The main contention of learned counsel for the appellants is that the learned Single Judge, inter alia, after holding that the respondents are bound by the terms contained in Clause 6 of the Joint

Venture Agreement and that the appellants have a prima facie case, under those circumstances, ought to have issued the interim injunction instead of only granting direction to the respondent No.1 to secure 10% of the commission on sales as well as quarterly statement of account in the Court.

30. It is argued by the learned counsel for the appellant that the impugned order is, therefore, not sustainable as the learned Single Judge has not appreciated the ratio of the judgment of the Supreme Court in the Gujarat Bottling Co. case (supra). He has argued that in case of a negative covenant the question of balance of convenience or irreparable harm loses its significance and injunction must follow and in fact injunction ought to have been issued in view of Section 42 of the Specific Relief Act, 1963.

31. He has further argued that damages in the form of security of commission cannot adequately compensate the appellants for the loss and injury suffered by it due to non grant of injunction. He has stated that if the respondents No.1 and 2 are allowed to market medical equipment in India by illegal means then the appellants' business will be prejudiced. Therefore, it is submitted that the impugned order should be set aside.

32. We have considered the rival submissions of the parties. No doubt in connected matters the disputes between the parties have been referred to arbitration. At the present stage, in order to strike balance between the parties we are of the considered opinion that the impugned

order passed by the learned Single Judge is a balanced order and in case the appellants succeed in the main suit, they would be entitled to receive the profits made by the respondent.

33. The contention of the appellants is that limited protection was granted to the appellants by the learned Single Judge directing the respondent to secure 10% of the commission on the sales already effected since the date of suit although it was a fit case where the negative covenant in the agreement dated 9<sup>th</sup> May, 1987 should have been enforced by the learned single Judge by way of interim injunction. The contention of the appellant is that genesis of the appeal lies in the Joint Venture Agreement dated 9<sup>th</sup> May, 1987 entered into between Dragerwerk AG as a foreign partner and the predecessor-in-interest of the appellant no. 1 for development, manufacture and sale in India of the medical products of Drager and of companies directly or indirectly controlled by the Drager group including the respondents herein.

34. The appellants apprehend that in order to frustrate any decree passed in favour of the appellants, the respondent would run away from the jurisdiction of this court by disposing of all the properties as the respondent is in India only for the purpose of competing with the appellants and, therefore, the respondent could easily defy all the orders passed by this court in case the suit ultimately is decided in favour of the appellants.

35. Therefore, the learned Single Judge ought to have issued the injunction in favour of the appellants rather than passing a direction for

deposit of 10% of the entire sales made by respondent No.1/defendant No.1 in the suit.

36. The contention of the learned counsel for respondent No.1 is that the appellants herein i.e. Usha Drager Pvt. Ltd. and R.K.K.R Infotech Pvt. Ltd. are neither a party to the JVA nor does there exist any contractual or legal obligation on the part of the respondents qua them. In the JVA all the parties contract as principals in their own right and unless the JVA expressly provides so, no party can enter into an agreement as an agent or representative of any other party or entity and there can be no de-facto party to such an agreement nor can the JVA be treated as de-facto agreement between the appellant No.1 and appellant No.2 and the respondent.

37. It is also argued by the respondent that ex facie there is no privity of contract between the two appellants and respondents. The JVA specifically discloses as to who the parties to JVA are and only such parties can sue for breach of contract, if any. It is also argued that as per well settled law the appellants can seek an injunction only in respect of a contract and when the contract subsists between the seeker of the injunction and the party against which such an injunction is sought. The appellants who wish to obtain a decree on the basis of assignment must allege and prove valid assignment in order to show that he has a cause of action.

38. Since the appellants are not signatory to or privity of JVA at the best the appellants can enjoy a right and privilege available to them

in law i.e. under the Companies Act, 1956. While considering the application of the appellants under Order 39 Rules 1 & 2 of the Civil Procedure Code, 1908 the learned Single Judge after going through the pleadings and documents on record did not grant the interim injunction due to the reasons mentioned in Paras 17 to 20 of the impugned order which read as under:-

“17. While it is not in doubt that negative covenant could be enforced by an injunction, nevertheless the principles informing and guiding the grant of interlocutory injunctions as set out in paragraph 46 of the Gujrat Bottling (supra) judgment, and extracted above, would nevertheless continue to govern these proceedings.

18. Applying the aforesaid position, the following factual situation emerges:

- a) The plaintiffs have a prima facie case as it has demonstrated that the clause 6 of the JVA operates between the plaintiff No. 1 and defendant No. 1 and the newly joined defendants 2 to 4 may be enjoined to enforce the Clause 6 even though they are not signatories but are nevertheless group companies and associates of defendant No. 1 contemplated by Clause 6 of the JVA.
- b) The balance of convenience between the Usha and the Drager group appears to be even. A dispute about the control of the plaintiff No. 1 company between the Usha Group and the Draeger Group is pending in this court for determination and to avoid a deadlock in the governance of the company in addition to be directors of each group, an independent Chairman. Mr. Justice A.B. Saharia, a former Chief Justice of Punjab & Haryana High Court has been appointed to preside over the meetings of the Board of Directors and has been functioning. Both the Drager and the Usha group hold equal number of shares in the plaintiff No. 1 company and thus are equal owners of the plaintiff company. In view of protracted litigation about the control of plaintiff No. 1 company, the balance of convenience cannot be said to exist either in favor of the Usha or Drager Group. However, since Clause 6 operated to safeguard the position of plaintiff No. 1, irrespective of the fact whether Usha or Drager Group control it, the balance of convenience exists in favor of plaintiff No. 1;
- c) The plaintiff in its prayer for interim relief had sought that the defendant and its Group or subsidiary companies be restrained from

carrying out any business in India in competition with plaintiff No. 1. Apart from the fact that the reliefs in the suit sought by the plaintiff's can be compensated in money terms, even in paragraph 34 of the plaint, the cause of action is said to arise on :

- i) 9th May, 1987, when the JVA was entered into between the two groups;
- ii) 22nd February, 1999, when the defendant caused the Distributorship Agreement to be executed between its subsidiary and plaintiff No. 1;
- iii) 15th February, 2002 and 14th June, 2002 when the defendant insisted upon 51 per cent shares as a pre condition for presenting the business plans;
- iv) June 2003 when the defendant caused the termination through its subsidiaries, of the distributorship agreement dated 15th February, 2002 to set up defendant No. 3.

While other causes of action such as luring the employees and purloining the intellectual property and trade secrets have also been pleaded, no specific date has been mentioned in respect of the said pleas.

Thus, the last specified date relating to the cause of action is June 2003. The suit was filed on 12th May 2004. Hence, the balance of convenience would not lie in favor of an state of affairs existing for about 1 year prior to the filing of the suit being altered materially at this stage. The interests of justice after taking into account the above factor would be protected by partly granting the alternate relief for commission prayed for in the suit.

- d) This brings me to the cardinal issue of the irreparable injury to the plaintiff No. 1 if the interlocutory injunction is disallowed. Gujrat Bottling (supra) clearly lays down that -

"..... the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial of the case ....."

- e) The plaintiff itself had quantified its damages at 20 percent commission on sales made by the defendants or by its group/subsidiary companies directly or indirectly in India contrary to the mandate of Clause 6 of the JVA.
- f) Furthermore, even if the companies of the Drager Group such as defendant Nos. 2 and 3 have an independent legal existence, nevertheless these companies cannot be adopted as a medium for

violating Clause 6 of the JVA particularly when prima facie the sale of such products through the Group companies is being effected by defendant No. 1.

19. The plaintiff has also sought to raise other pleas which essentially relate to the protracted dispute between the Usha and Drager Group. In my view, for determining the plea relating to the enforcement of the Clause 6 of JVA, it is not necessary at this stage to consider the other pleas raised by the plaintiff. Similarly, the plea raised by the defendant that there is no appendix 2 is too technical a plea so as to affect the plaintiff's entitlement to invoke Clause 6. It is apparent from the perusal of the entire agreement and the subsequent conduct of the parties that the reference to appendix 2 is an obvious typographical error and both the parties understood the appendix 1 to be the relevant appendix which delineated the products covered by the JVA. Consequently, this plea of the defendant relating to appendix 2 has no merit and deserves to be rejected.

20. In so far as the plea of the defendant that plaintiff No. 2 being a shareholder and a non signatory to the JVA and consequently being disentitled to enforce the terms and conditions of the JVA is concerned, it has no merit. Since the plaintiff No. 1 has locus to enforce clause 6 of the JVA which is in favor of and for the benefit of plaintiff No. 1, notwithstanding the dispute between the Usha and the Drager group for control of the plaintiff No. 1, whether or not plaintiff No. 2 has such locus does not materially affect the rights enforceable by the plaintiff No. 1. In any event the entitlement of plaintiff No. 2, at this stage, to maintain the suit cannot preclude any order which the plaintiff No. 1 may be entitled to.”

39. The discretion of the Learned Single Judge which has been exercised after having gone through the pleadings and arguments of the parties cannot be interfered with in view of the facts and circumstances of the present case. This issue has been dealt with in **Wander Ltd. vs. Antox India Pvt. Ltd., 1990 (Suppl.) SCC 727** wherein the Apex Court has held that in an appeal against the exercise of discretion by a Learned Single Judge, the Appellate Court will not interfere with the same except under certain limited circumstances. The relevant observation of the Apex Court is extracted as under:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below if the one reached by that Court was reasonably possible on the material. The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the facts that the Appellate Court would have taken a different view may not justify interference with the trial court’s exercise of discretion.”

40. In view of the principle laid down in the Wander case (supra) we do not want to interfere with the exercise of discretion by the learned Single Judge as we do not want to reassess the material produced before the learned Single Judge and come to a conclusion different from the one already reached by the learned Single Judge who has considered the matter from all the angles. We feel that the finding given by the learned Single Judge has been arrived at reasonably. Therefore, the impugned order is upheld except the modification of the direction issued by us in appeal being FAO (OS) No.28/2005.

41. We find no merit in the appeal and the same is dismissed. There will be no order as to costs. All the 5 appeals being FAO (OS) Nos. 27, 28, 29, 31 and 44 of 2005 are dismissed except for the modification made in the direction passed in FAO (OS) 28 of 2005. All the pending CMs in the above-mentioned 5 appeals also stand disposed of. The interim orders passed in CMs shall stand

vacated. No costs.

**MANMOHAN SINGH, J.**

**A.K. SIKRI, J.**

**SEPTEMBER 18, 2009**

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