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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 07.10.2013

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O.M.P. 1008/2013

M/s KRISHAV TRADE CONCERN

..... Petitioner

Through: Mr Darpan Wadhwa & Mr Akhil Sachar,
Advts.

versus

M/s TRANSLUMINA THERAPEUTICS LLP

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

IA No. 16199/2013 (Exemption)

Allowed subject to just except exceptions.

OMP No. 1008/2013

1. This is a petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the Act) wherein essentially following three reliefs have been sought:

(i) First, the respondent, its legal representatives, successors and assigns should be restrained from entering into any agreement styled as 'Distributorship Agreement' with any third party for supply of Yukon Choice PC Coronary Stents (in short the stents) in the territory of Nepal;

- (ii) Second, the respondent be enjoined from supplying the stents even directly to any third party in the territory of Nepal; and
- (iii) Third, stay the operation of the letter dated 16.07.2013, whereby the distributorship agreement executed between the petitioner and the respondent dated 13.02.2013, stands terminated.

2. Briefly, the following broad averments are made in the petition:

2.1 A distributorship agreement dated 13.02.2013 (in short the agreement) was executed between the petitioner and the respondent initially, for a period of 60 months. The agreement was operable from 13.02.2013.

2.2 Pursuant to the said agreement the respondent was appointed as a distributor for sale of the stents manufactured and sold by the petitioner in the territory of Nepal.

2.3 The petitioner had exclusive rights of purchase/ distribution and marketing of these stents in the territory of Nepal. The petitioner had a right to appoint sub-distributors for the said territory.

2.4 The respondent was required to inform the petitioner with regard to any inquiries received from potential buyers of stents for sale in Nepal, and that, the respondent could not directly or indirectly entertain any new order or inquiries in the said territory.

2.5 The parties herein had the right to terminate the agreement with immediate effect in case of the other party was in breach of essential obligations pursuant to the said agreement and failing to remedy the breach or violation within thirty (30) days after it was requested to do so by the other party, in writing.

2.6 For a period of twelve (12) months from the date of commencement of the agreement, i.e., 13.02.2013, there was to be no purchase target, which the petitioner was required to achieve.

3. The petitioner, avers that it sold 47 stents worth Nepali Rupees 21,46,723/- (INR 13,41,702/-). It is further stated that, the petitioner had placed orders in February and June 2013 in respect of 31 and 16 stents respectively. The petitioner claims that, it had also appointed a sub-distributor on 16.05.2013, for a period of 48 months, for distribution of stents in the central region of Nepal.

3.1 It is stated that, the petitioner, was making attempts to expand the market for sale of stents manufactured by the respondent. Reliance in this behalf is placed on emails dated 14.05.2013 and 29.05.2013.

3.2 It is averred in the petition that, on 20.06.2013, it received an email from the respondent that it was in the process of entering into a partnership “with other prospects” qua new accounts. The respondent appeared to have communicated to the petitioner by the very same email that, it could continue to cater the existing accounts, it was servicing in Nepal; since according to the respondent, it was not represented in major accounts, in line with market exigencies, it was required to approach them differently.

3.3 Apparently, a reply was sent by the petitioner through its advocate which is dated 04.07.2013, protesting as regards the respondent’s suggestion that for new accounts it would operate in partnership with other prospects. The petitioner, appears to have communicated that, any such action, would be a breach of terms of the agreement. Importantly, the petitioner warned the respondent that if it went ahead with its decision, the petitioner “*shall have no option but to hold you (i.e., the respondent) responsible for the*

losses and damages suffered and/ or to be suffered by them (i.e., the petitioner) on account of your (i.e., the respondent) supplying your (i.e., the respondent) Coronary Stents to any entity other than our (i.e., the petitioner) client for any part or portion of Nepal...”.

3.4 The respondent, evidently, by its communication dated 16.07.2013 terminated the agreement with immediate effect. It is important to note in the said communication the respondent professed that, it did not receive any response to its earlier email dated 20.06.2013. The respondent, however, prefaced the termination broadly with the grievance that the petitioner was not able to open up the market because of which it did not have a presence in major hospitals situate in Nepal. It was also pointed out that the respondent had billed the petitioner for 47 stents, whereas it had sold only 10 stents in the last three months. It was sought to be conveyed that Nepal had a market, for an annual sale of 4000 stents. There was also a reference to telephonic conversation held on 19.06.2013, wherein according to the respondent, the petitioner’s representative had complained that it would not cater to 80% of the Nepal business. The respondent thus stated that since an option had been given to the petitioner to continue with the existing account, to which no response had been received, it was construed therefore that the petitioner was not interested and therefore it had taken the decision to terminate the agreement.

4. The petitioner vide communication dated 17.07.2013, (once again, sent through its advocates) refuted the assertion that its letter of 04.07.2013 was not received by the respondent. This time around the petitioner, apart from reiterating the fact that it had exclusive distribution rights in respect of the stents manufactured by the respondent vis-à-vis Nepal; the

communication was concluded with an assertion that the petitioner would take recourse to legal proceedings to enforce specific performance of the agreement and to stop sale/ supply/ distribution of stents in Nepal except through itself.

5. It is in this background that as late as on 05.10.2013, the present petition was filed. Mr Darpan Wadhwa, learned counsel for the petitioner, pressed for the reliefs sought for in the petition. It was his submission that the petitioner was entitled to the reliefs prayed for, for the following reasons:

- (i) that no targets were applicable in the first year;
- (ii) the petitioner was an exclusive distributor for Nepal;
- (iii) and lastly, the respondent was required to forward all inquiries with respect to potential buyers of stents whether received directly or indirectly to the petitioner.

6. In my view, the prayer sought for in the petition would amount to granting specific performance of the contract. The goods in question are movable property. No relief, which would tantamount to granting specific performance can be granted in favour for the petitioner. As noticed hereinabove, in the communication issued on behalf of the petitioner by its advocates, which is dated 04.07.2013, the petitioner itself had indicated that it would sue the respondent for losses suffered or likely to be suffered on account of the alleged breach. As mentioned above, it was only thereafter, in the communication dated 17.07.2013, which was once again issued by the petitioner's advocates, that an indication had been given that it would sue for specific performance and/ or injunction qua third party. Notably, there is no averment in the petition that the goods in issue, i.e., the stents, are not, articles of ordinary commerce and hence specific performance ought to be

ordered. See explanation (ii)(a) to Section 10 of the Specific Relief Act, 1963 (in short the S.R. Act). It is because specific performance cannot be ordered, injunction will have to be refused to prevent breach of the respondent's obligation under the agreement, (if what is alleged by the petitioner is correct) as it would otherwise be in the teeth of Section 41(e) of the S.R. Act.

6.1 I had asked Mr Wadhwa, whether he could seek such an injunction in these circumstances. Mr Wadhwa faced with this, stated that while he would have no objection to a direct sale being conducted by the respondent in the territory of Nepal, the petitioner would be entitled to an injunction against sale of stents in Nepal carried out by respondent through the aegis of another distributor, i.e., a third party.

6.2 Mr Wadhwa contended that the clauses contained in the agreement, when read together, were in the nature of a negative covenant. According to me, this submission is untenable in the facts of this case for more than one reason. There is no such specific averment in the petition. The relief, in any case, is discretionary; more so at an interim stage. [See ***Gujarat Bottling Co. Ltd. vs Coca Cola Co. (1995) 5 SCC 545*** and ***Fashion Television India Pvt. Ltd. vs FTV BVI 2012 (127) DRJ 535***]. Having regard to the fact that the agreement had just about commenced, the petitioner's investment of Rs. 30 lacs, as averred, is not something which cannot be compensated by award of damages. The interim relief sought is really in the nature of a final relief, which if granted at this stage, would bring the business of the respondent to a complete halt vis-à-vis its sales in Nepal. That apart breach, if at all, took place in July, 2013, the petitioner chose not to file the present petition till October, 2013. Much could have changed qua the respondent between July

and October, 2013. Furthermore, the petitioner's own flip flop in putting to notice the respondent, in the first instance, with an action for damages and then warning it with an action for specific performance and injunction does not clearly help its cause. Moreover, the contract by its very nature is determinable. There is, as a matter of fact, no material filed to establish even prima facie its case with respect to either the money having been invested or, with regard to appointment of a sub-distributor. There is only a reference to a sub-distributor by name.

6.3 Therefore, on balance I would, desist from granting the reliefs prayed for, only on the ground that there is a negative covenant obtaining between the parties. The exclusivity of the petitioner's right to distribute stents manufactured by the respondent obtained till the termination of the agreement. The termination, as alleged, being illegal, will have to be challenged in an appropriate action; the remedy for which, to my mind, is perhaps, by way of action in damages, if at all.

7. The petition is, accordingly, dismissed. It is made clear though, that the observations made hereinabove are only for the purposes of disposal of the present petition and that none of that which is articulated above would come in the way of the petitioner, if and when, a substantive action is instituted for remedying its grievance vis-à-vis the alleged breach committed by the respondent.

RAJIV SHAKDHER, J

OCTOBER 07, 2013

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