

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

+ **C.M.(M) No.1390/2011 and C.M. No.21626/2011 (stay)**

% **21st August, 2014**

M/S SPACELABS MEDICAL INC. & ANR. Petitioners

Through: Mr. Darpan Wadhwa, Advocate with
Mr. Vipin Tyagi, Advocate and Mr.
Nikhil Singhvi, Advocate.

VERSUS

M/S. ALPHA & OMEGA DIAGNOSTICS (INDIA) LTD. & ANR.

..... Respondents
Through: Mr. T.A. Francis, Advocate with Mr.
Mahesh Katyayen, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Article 227 of the Constitution of India is filed by the defendant nos.1 and 4 in the suit for recovery of moneys and injunction filed by the respondents/plaintiffs. Petitioners/defendants no.1 and 4 impugn the order of the trial court dated 19.5.2011 by which the trial court has held that the preliminary issue framed of territorial jurisdiction cannot be decided without leading of evidence by parties during the trial

holding that the issue of territorial jurisdiction is a mixed question of law and fact.

2. The subject suit which is filed by the respondents/plaintiffs sought reliefs of recovery of money and injunctions etc. The relief clauses of the plaint read as under:-

“1. Pass a Decree for Recovery of Rs.17,64,410.00 along with Pendente lite and future interest @ 18% per annum from the date of filing the suit till realization, in favour of the Plaintiffs and against the Defendant Nos.1 & 4.

2. Pass a decree of permanent injunction restraining the Defendant Nos.1 & 4 from deploying any other Distributor to cater to the Bhilai Steel Plant Hospital for servicing their equipment till the pending disputes raised in the present Suit pertaining to Bhilai Steel Plant Hospital are settled and till such time, allow the Plaintiff No.2 to accept the offer of Bhilai Steel Plant Hospital for continuing to provide the requisite services to Bhilai Steel Plant Hospital on the same terms and conditions as the existing contract, at least till all the pending issues raised in this suit, including the lifting of inventories lying with the Plaintiffs by the new Distributor whom the Defendant No.1 may eventually wish to take over from the Plaintiffs, are settled.

3. Pass an order directing the Defendant Nos.1 & 4 to make immediate supply of spares requisitioned by the Plaintiffs from Defendant No.1 for rectifying the defective Monitors at Bhilai Steel Plant Hospital, as already committed on their behalf by the Vice President of Defendant No.4 in his meeting with the Plaintiffs held at New Delhi on 12/8/2004.

4. Pass an order that after the period of the Comprehensive Maintenance Contract for Bhilai Steel Plant Hospital gets over, any new Distributor whom Defendant No.1 may wish to take over from the Plaintiffs, should lift the left over inventories from the Plaintiffs in

accordance with their policy and precedent set earlier for the inventory of an erstwhile Distributor to be taken over by the new Distributor on payment of inventory cost paid by the Plaintiff No.1 to the Defendant No.1 and Merino Healthcare Pvt Ltd, after independent assessment of their pecuniary value.

5. Pass an order that in the event the Bhilai Steel Plant Hospital still levies some penalty on the Plaintiff No.2 for failure to rectify some of their defective Monitors owing to the lack of supplies of the requisite spares by Defendant No.1 to the Plaintiffs during the currency of the existing Comprehensive Maintenance Contract valid till 30/09/2004, the same penalty will be recovered from Defendant No.1.

The cost of the suit may please also be awarded.”

3. The aforesaid prayer clauses were made on the basis of averments in the plaint which stated that plaintiff no.2/respondent no.2 had entered into a Distributor Sales Agreement dated 1.4.1998 with the defendant no.1/petitioner no.1. As per the Distributor Sales Agreement, medical products were to be supplied by defendant no.1/petitioner no.1 to the plaintiff no.2/respondent no.2. Plaintiff no.1/respondent no.1 claimed that the contract of Distributor Sales Agreement though only entered into between the plaintiff no.2/respondent no.2 and the defendant no.1/petitioner no.1, the same was also of the plaintiff no.1/respondent no.1 with petitioner no.1/defendant no.1 and that the Distributor Sales Agreement in fact enures also for the benefit of the plaintiff no.1/respondent no.1 which is the sister company of plaintiff no.2/respondent no.2. On account of

plaintiffs/respondents getting medical products under the Distributor Sales Agreement they had entered into a comprehensive maintenance contract with Bhilai Steel Plant Hospital with respect to medical equipments of petitioner no.1/defendant no.1 installed in the said hospital. Disputes have arisen between the parties as per the averments in the plaint and the total claim which is made for money is essentially on account of facts as stated in paras 20 and 21 of the plaint which read as under:-

“20. It is the case of the Plaintiffs that they are entitled to recover the following amounts as per details given below

S. No.	Particulars	Amount
i)	One time payment for Warranty Service provided by Plaintiff No.2 for equipment installed at Bhilai Steel Plant Hospital, as the Comprehensive Maintenance Contract is due to explain on 30/9/2004	US\$ 8000
ii)	Payment due to Plaintiff No.1 against Credit Note No.185172 dated 14/2/2003 for Distributor Commission	US \$ 125
	Sub Total	US \$ 9225
iii)	Payments due to the Plaintiff No.2 withheld by Bhilai Steel Plant Hospital owing to failure of Defendant No.1 to supply the spares required by the Plaintiffs to rectify the defective Monitors at that Hospital	(Rs. 7,93,000.00 Rs.3,60,000.00 Rs.11,53,000.00

Total Amount

The Defendants are liable to pay a sum of Rs.11,53,000.00, being the principal amount and Rs.6,11,410.00, being the interest @ 18% per annum for the respective periods till the filing of the suit, thus totaling Rs.17,64,410.00/=. The Defendants are further liable to pay pendent-lite and future interest @ 18% per annum from the filing of the suit till realization.

21. Apart from the recovery of Rs.17,64,410.00 claimed by the Plaintiffs, as elaborated in para-20 above, the Plaintiffs are entitled to offload the following inventories left over in their stock which, in accordance with the announced policy and precedent set earlier by Defendant No.1, have to be taken over by the new Distributor from the Plaintiffs, who will become the erstwhile Distributor thereafter.

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| a) | Inventory left over from Stocks purchased from Merino Healthcare Pvt Ltd, Calcutta | As per Annexure-VII |
| b) | Inventory left over from Stocks purchased directly from Spacelabs (Defendant No.1) | As per Annexure-VIII |

That an independent assessment of these inventories, both in respect of their value and genuineness be made when the same are taken over by the new Distributor of the Defendant No.1 from the Plaintiffs, as their erstwhile Distributor, and the same be paid to the Plaintiffs. The Plaintiffs undertake to pay any additional court fees on the said account, when so directed by the Hon'ble Court.

It is pertinent to point out that the Bhilai Steel Plant Hospital have already sent the Plaintiff No.2 their letter dated 27/5/2004 (Annexure-XIV) expressing their desire for extending the existing Comprehensive Maintenance Contract placed on the Plaintiff No.2 for another three years up to 30/9/2007, on the same terms and conditions as the existing contract.

The Plaintiffs, therefore, seek an injunction against Defendant Nos.1 & 4 restraining them from making any other arrangement of their own accord for servicing the Bhilai Steel Plant Hospital beyond September, 2004, till this issue is settled and the requisite spares are supplied to the Plaintiffs. Until then, the Plaintiff No.2 should be allowed to continue servicing the Bhilai Steel Plant Hospital, to avoid further complications.”

4(i) A reading of the four heads of claim which ultimately totaled to a sum of Rs.17,64,410/- with the further relief of entitlement of the respondents/plaintiffs to offload the stock back to the petitioners/defendant nos.1 and 4 shows that these claims that arise are directly related to the Distributor Sales Agreement inasmuch as the warranty service claim is under the Distributor Sales Agreement, credit note payment is under the Distributor Sales Agreement, breach of contract charges on account of alleged failure to supply the spares also arises under the Distributor Sales Agreement and finally the aspect of offloading of stocks pertain to the stocks which were received by the respondents/plaintiffs are pursuant to the Distributor Sales Agreement.

(ii) At this stage, I may state that the admitted case of the respondents/plaintiffs is that the Distributor Sales Agreement continued in view of the letter dated 21.5.2003 and which letter has been annexed by the respondents/plaintiffs themselves as Annexure-8 to the plaint.

It is therefore clear that money claims arise directly and immediately only because of the Distributor Sales Agreement.

5. The other reliefs which are claimed in the plaint with respect to injunction of preventing any other distributor from being appointed or continued liability of petitioners/defendant nos. 1 and 4 to make supply of spares and further directions of no liability of the respondents/plaintiffs towards Bhilai Steel Plant Hospital also directly and substantially arises only and only from the Distributor Sales Agreement which was originally till 31.3.1999 and thereafter extended till 31.12.2003. Essentially therefore leaving aside any issue of a particular language being used in the plaint and prayer clauses, all the claims whether pertaining to money or injunctions or any other orders or directions arise with respect to the Distributor Sales Agreement dated 1.4.1998 entered into by the plaintiff no.2/respondent no.2 with the petitioner no.1/defendant no.1, and which is also binding upon the plaintiff no.1/respondent no.1 as per the admitted case in the plaint.

6. The admitted Distributor Sales Agreement has the following clause pertaining to application of laws and territorial jurisdiction:-

“7.4 Law This Agreement and all orders under this Agreement shall be governed and interpreted in accordance with the local law of the State of Washington without reference to its law relating to conflicts of law. The rights and obligations of Spacelabs and

Distributor shall not be governed by the provisions of the U.N. Convention for the International Sale of Goods, 1980. Distributor will not commence or prosecute any suit, proceeding or claim to enforce the provisions of this Agreement other than in the courts of the State of Washington in King County or the United States District Courts for the Western District of Washington at Seattle. Distributor and Spacelabs hereby irrevocably consent to the jurisdiction and venue of the courts identified in the preceding sentence.”

7. A reading of the aforesaid clause shows that parties agree that the laws of Washington States will apply and also the Courts in Washington States would have territorial jurisdiction with respect to all the disputes which arise out of the Distributor Sales Agreement.

8(i) It is settled law in view of the judgment of the Supreme Court in the case of *Modi Entertainment Network and Anr. Vs. W.S.G. Cricket PTE. Ltd. (2003) 4 SCC 341* that where persons agree to the applicability of laws of a particular Country and agree to the jurisdiction of the Courts of that Country, it is perfectly valid in International law where two parties are from different nations, for agreeing to such a clause giving exclusive jurisdiction to Courts and laws of a particular Country.

(ii) I have had an occasion to apply the ratio of said judgment of *Modi Entertainment Network's case (supra)* in the case of *Gupta Pigments and Chemicals Pvt. Ltd. Vs. Natpar Lines (S) PTE Ltd. & Anr. 176 (2011) DLT 176*. Since the judgment in the case of *Gupta Pigments and*

Chemicals Pvt. Ltd. (supra) is a short judgment, I reproduce the same in its entirety as under:-

“1. The challenge by means of this present appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 5.9.1998 of the trial Court whereby the suit of the plaintiff has been dismissed on account of the fact of the agreement between the parties which provided that the laws of Singapore will apply and the Courts at Singapore will have jurisdiction and accordingly the Courts of New Delhi would not have jurisdiction to try the subject matter.

2. During the course of arguments, attention of the learned counsel for the appellant was drawn to the recent judgment of the Supreme Court in the case of ***Modi Entertainment Network v. W.S.G. Cricket PTE. Ltd.,(2003) 4 SCC 341*** and in para 11 of which judgment the Supreme Court has categorically laid down the ratio that with respect to private international law, the parties are free to choose to get their disputes decided by laws of a neutral country and the Courts of such neutral country. Para 11 of this judgment reads as under:-

“11. In regard to jurisdiction of courts under the Code of Civil Procedure (CPC) over a subject-matter one or more courts may have jurisdiction to deal with it having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one court has jurisdiction, it is said to have exclusive jurisdiction; where more courts than one have jurisdiction over a subject-matter, they are called courts of available or natural jurisdiction. The growing global commercial activities gave rise to the practice of the parties to a contract agreeing beforehand to approach for resolution of their disputes thereunder, to either any of the available courts of natural jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forums or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court. It is a well-settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court; indeed in such cases the English courts do permit invoking their jurisdiction.

Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a foreign court termed as a “neutral court” or “court of choice” creating exclusive or non-exclusive jurisdiction in it.”

3. In view of the aforesaid legal position, it is quite clear read alongwith the admitted clause of the Bill of Lading in question which requires that laws

applicable will be laws of Singapore and the Courts in which the matter will be tried are the Courts of Singapore, there cannot be found any fault with the impugned judgment. The relevant clause applicable reads as under:

“The contract evidenced by or contained in this Bill of Lading is governed by the law of Singapore and any claim or dispute arising hereunder or in connection herewith shall be determined by the Courts in Singapore and no other Courts. All business is transacted only in accordance with the Singapore Freight Forwarders Association Standard Trading Conditions (1986). Copy will be furnished upon request or may be inspected at our premises.”

4. In view of the aforesaid, learned counsel for the appellant states the appellant will have no other option but to file the suit in appropriate Court and consequently says that the impugned judgment would have to stand.

5. In view of the above, the appeal is dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.”

9. The ratios of the judgments in the cases of ***Modi Entertainment Network and Anr. (supra)*** and ***Gupta Pigments and Chemicals Pvt. Ltd. (supra)*** clearly apply to the facts of the present case in view of the admitted clause 7.4 in the Distributor Sales Agreement between the parties. Therefore, the Courts at Delhi or any Court in India will not have territorial jurisdiction to deal with the disputes in the present case.

10. Learned counsel for the respondents/plaintiffs sought to place reliance upon the judgment of the Supreme Court in the case of ***Laxman Prasad Vs. Prodigy Electronics Ltd. and Anr. AIR 2008 SC 685***, however, the facts of that case are distinguishable because the Supreme Court in that case was concerned with the clause which only provided for application of

the laws of Hongkong and not of the Courts of a particular country to have territorial jurisdiction.

11. In view of the above, I am of the opinion that the parties are bound by the admitted clause 7.4 which provides that not only laws of Washington States will apply but the Courts at Washington will have jurisdiction, and hence the Courts at Delhi or in India will not have territorial jurisdiction to deal with the disputes between the parties. In view of the admitted clause 7.4 the issue is not a mixed question of law and fact but only an interpretation of clause 7.4 and therefore such an issue can be decided at this stage and parties need not go to the trial.

12. In view of the above, appeal is allowed. Impugned order of the trial court dated 19.5.2011 is set aside. It is held that the Courts at Delhi or India do not have territorial jurisdiction to decide the disputes which are the subject matter of the present suit. Respondents/plaintiffs are at liberty to initiate proceedings in the Courts at Washington State in terms of clause 7.4 of the Distributor Sales Agreement between the parties. Petition is allowed and disposed of accordingly, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

AUGUST 21, 2014/Ne