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

\+ ARB. A. (COMM.) 9/2016 & IA 4070/2016

AFFY GROUP OF COMPANIES ..... Petitioner

Through: Mr.Jayant Tripathi, Mr.Sumit Rajput and Mr.Arjun Mitra, Advs.

versus

MARKSONS PHARMA LIMITED & ANR. ..... Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% 29.03.2016

IA 4071-72/2016

Exemption allowed, subject to all such exceptions.

Applications are disposed of.

ARB. A. (COMM.) 9/2016

1. This is an appeal filed by the petitioner under section 37 of the Arbitration and Conciliation Act against the order dated March 21, 2016 passed by the Arbitral Tribunal consisting of three learned Members. Vide the impugned order, the tribunal as per majority view has rejected the application filed by the petitioner under section 17 of the Arbitration and Conciliation Act for stay of invocation of three bank guarantees bearing Nos.5547602234, 5544602235 and 5548602234 totalling to Rs.36,19,560/-.

The third learned Member has held that the 'special equities' and 'irretrievable injury' and 'fraud' require hearing on merits as both the parties appear to agree, then this Arbitral ought to reserve its decision till the time the final arguments, while directing the claimant i.e. petitioner, keeping the bank guarantee alive till then.

2. Learned counsel for the petitioner makes only submission that the invocation of the bank guarantee has not been in terms of clause 4 thereof which reads as under:-

> *"4) It is not obligatory on the part of Marksans to establish or prove the defects in the products and we the Bank will on simple demand from Marksans accompanied with failed COA/Report/circular/withdrawal notice/written instructions issued by CMSD tender board/Pacific Pharmaceuticals Pvt. Ltd., 101, Cecil Street * 17-07; tong eng. Building Singapore-069533 ph. (65) 62271230 for poor quality and rejection of batches as per applicable regulation, standards and specifications or quality mentioned in the COA at the time of supply, pay to Marksans, the said amount Rs.1039740/- (Rupees Ten Lac Thirty Nine Thousand Seven Hundred Forty only) a indicated in clause (1) above without demur and without requiring Marksans to invoke any legal remedy that may be available to them to compel us the Bank to pay the same even if Affy Parenterals considers such demand of Marksans as unjustified."*

3. He has drawn my attention to the letter of invocation dated May 15, 2015, which reads as under:-

> *CITIBANK NA*
> *4^{th} Floor, Jeevan Bharti Building,*
> *124, Connaught Circus,*

New Delhi-110001 *15th May, 2015*

Re: Bank Guarantee No.5544602235 dated October 25, 2013 for Rs.10,39,740.00

Sub.: Lodging of claim under the above Bank guarantee.

Dear Sir,

Citi Bank NA, New Delhi branch located at 4th Floor, Jeevan Bharti Building, 124, Connaught Circus, New Delhi-110001 (hereinafter referred to as Çitibank') has given the abovesaid Bank Guarantee in favour of Marksans Pharma Limited presently having its registered office at 11th Floor, Grandeur, Veera Desai Extension Road, Qshiwara, Andheri (W), Mumbai- 400053 on behalf of Affy Parenterals.

Under the said Bank Guarantee, Citibank has guaranteed that the below mentioned pharmaceutical products manufactured and sold by Affy Parenterals to Marksans Pharma Limited are of the agreed quality standard and are free from any defects:

Sr. No.	Name of product	Invoice	Batch No.	Quantity	Amount(Rs.)	Expiry date
1.	VITAHOME CAP	2624	PSG-1393	10944	678528.00	3/16
2.	VITAHOME CAP	80	PSG-1393	5070	314340.00	3/16
3.	VITAHOME CAP	104	PSG-1393	756	46872.00	3/16
	Total Amount				10,39,740.00	

This is to inform you that the aforesaid products have failed in quality and have been rejected by the company's customer Pacific Pharmaceuticals Pte. Ltd. Copy of the rejection letter dated November 29, 2014 received from Pacific Pharmaceuticals Pte. Ltd. is enclosed herewith.

Clause 4) of the said Bank guarantee states "It is not obligatory on the part of Marksans to establish or prove the defects in the products and we *the Bank will, on simple demand from Marksans accompanied with failed COA/Report/Circular/Withdrawal notice/written instructions issued by MCSD Tender Board /Pacific Pharmaceuticals pte. Ltd. 101, Cecil Street # 17-07, tong eng. Building Singapore-069533 ph. (65) 62271230 for poor quality and rejection of batches as per applicable regulations, standards and specification or quality mentioned in the COA at the time of supply, pay to Marksans, the said amount of Rs.10,39,740/- (Rupees Ten Lac Thirty Nine Thousand Seven Hundred Forty only) as indicated in clause (1) above without demur and without requiring Marksans to invoke any legal remedy that may be available to them to compel us the Bank to pay the same even if Affy Parenterals considers such demand of Marksans as unjustified. "The Bank Guarantee is valid till 31.3.2016.*

Accordingly, the sum of Rs.10,39,740.00 (Rupees ten lacs, thirty nine thousand seven hundred forty only) has become payable by Citibank to Marksans Pharma Limited under the said Bank guarantee No.5544602235 dated October 25, 2013.

We hereby lodge our claim of Rs.10,39,740.00 (Rupees ten lacs thirty nine thousand seven hundred forty only) under the said Bank guarantee No. 5544602235 dated October 25, 2013 and call upon you to pay to Marksans Phama Limited a sum of Rs.10,39,740.00 (Rupees ten lacs thirty nine thousand seven hundred forty only) under the said bank guarantee on the basis of the rejection letter of the company's customer Pacific Pharmaceuticals pte. Ltd. dated 29th November, 2014. Copy of the said ban guarantee is enclosed herewith for your ready reference.

Kindly issue a pay order favouring MARKSANS PHARMA LIMITED payable at Mumbai and send the same to our new address at 11th Floor, Grandeur, Veera Desai Extension Road, Oshiwara, Andheri (W), Mumbai-400053 at the earliest.

Thanking you

Yours faithfully,
For Marksans Pharma Limited

Harshavardhan Panigrahi

Company Secretary & Manager-Legal

Enclosed as above

4. A perusal of the said letter would reveal that the respondent no.1 while invoking the bank guarantee had referred to a letter written by Pacific Pharmaceutical Pvt. Ltd. dated November 29, 2014. In the said letter, Pacific Pharmaceutical Pvt. Ltd. has stated as under:-

"Marksans Pharma Limited
11, Grandeur
Veera Desai Extension Road
Oshiwara, Andheri (W)
Mumbai-400053 *29th November, 2014*

Sub: Rejection for sub-standard quality of Vitahome Capsules

Dear Sir,

We would like to bring to your attention that we have lost our image and brand due to the quality issue that prevailed in the consignment you sent us. We received 170928 bottles during April and May, 2013 from Batch nos.'PSG'- 1393 (Qty – 16770), PSG – 1394 (Qty.) – 19728), PSG-1395 (Qty.-21882), PSG-1396 (Qty.-19404), PSG-1397 (Qty.-19386), PSG-1398 (Qty.-20304), PSG-1399 (Qty.-19758), PSG-1400 (Qty.-20112), PSG-1401 (Qty.-13764). As mentioned even earlier, on receipt of the goods we witnessed huge issue in terms of quality where capsules leaking badly and were extremely soft and sticking to the bottle and each other. After best effort from our team to sort out and see if any product can be salvaged, we were unable to salvage these goods and as we inspected the finished pack, we only saw issues beyond limit. Such poor quality was astounding and after all our efforts of trying to salvage any good product it was concluded that the entire consignment unusable due to the vast spread of the similar defects. Hence we decided to reject the entire consignment.

Thanking you

Your faithfully,
For Pacific Pharmaceuticals Pte. Ltd.

Mathew Toh
Managing Director

5. Suffice to state the terms of the bank guarantee contemplates that demand made by the beneficiary shall be accompanied with failed COA/report/circular/withdrawal notice/written instructions issued by CMSD Tender Board/Pacific Pharmaceutical Pte. Ltd. for poor quality and rejection of batches as per applicable, regulations, standards and specifications of quality mentioned in the COA at the time of supply. It is clear from the letter written by the Pacific Pharmaceutical Pvt. Ltd. that 170928 bottles received by them during April and May, 2013 from the different batches they had witnessed capsules were leaking badly and were extremely soft and sticking on the bottle and to each other. Meaningfully read, the capsules were of not as per quality.

6. The submission made by the learned counsel for the petitioner that the said letter was not accompanied by any report of the authority concerned is not appealing. The letter of Pacific Pharmaceutical Pvt. Ltd. is itself self

speaking which surely reflects the quality of the capsules supplied by the petitioner. The position of law on bank guarantees is well settled, there is no merit in the petition and the same is dismissed.

V. KAMESWAR RAO, J

MARCH 29, 2016
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