

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2016

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

O.A.Nos.760, 761 of 2016
and A.Nos.4392, 4396 and 4397 of 2016

1. Delvin Formulations Privated Ltd.,
No.25, 12th Cross Street,
Shastri Nagar, Adyar,
Chennai-600 020.
2. Delvin Surgicals Private Ltd.,
No.25, 12th Cross Street,
Shastri Nagar, Adyar,
Chennai-600 020. ... Applicants in both petitions

vs.

1. Peekay Mediequip Ltd.,
No.131, Sengipatti Village,
Trichy-Tanjore Main Road,
Thirumalaisamudram,
Tanjavur-613 402.
2. ICICI Bank Ltd.,
No.7 Bazullah Road,
T.Nagar, Chennai 600 017.
3. Samrat Belting Industries,
16/2A, Armenian Street,
2nd floor, Kolkatta 1.
4. RI Drugs and Dressings,
Shop No.1, Jogeshwari Society,
Opp Wonder Point,
CTM Cross Road, Amraiwadi,
Ahmedabad - 380 026.
5. OM Medicals Agencies,
D.No.11-25-390,
KT Road, Vinnakotawari Chowk,
Vijayawada.

6. Uma Medicals Corporation,
Door No.11/407, 408, 409
Backside of Saibaba Temple
Sattenapalli Road,
Narasaraopet,
Guntur 522 601.

...Respondents in all the petitions

Prayer in O.A.No.760 of 2016 : Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(d) of the Arbitration and Conciliation Act, 1996, praying to grant an order of interim injunction restraining the respondent No.1, its men, agents, representatives, or any other person claiming through or under the Ist respondent from selling medical disposable products such as disposable syringes, needles, infusion sets, face masks and caps under the brand name SEPNIL and IV Cannulae under the brand name of SEPNIFLON, in the territories covered under the Agreement for Exclusive Marketing, Distribution and Selling Arrangement dated 20.07.2015, without obtaining No Objection Certificate from the Applicants pending initiation and disposal of arbitration proceedings between the applicants and respondent No.1 under the Agreement for Exclusive Marketing, Distribution and Selling Arrangement dated 20.07.2015 and Deed of Novation dated 15.09.2015.

Prayer in O.A.No.761 of 2016 : Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(d) of the Arbitration and Conciliation Act, 1996, praying to grant an order of interim injunction restraining respondent No.1 from transferring the marketing rights to any third party in respect of products manufactured by the Ist respondent such as disposal syringes, needles, infusion sets, face masks and caps under the brand name SEPNIL and IV Cannulae under the brand name of SEPNIFLON pending disposal of arbitration proceedings between the applicants and respondent No.1 under the agreement for Exclusive, Marketing, Distribution and Selling Arrangement dated 20.07.2015 and Deed of Novation dated 15.9.2015.

Prayer in O.A.No.4392 of 2016 : Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(d) of the Arbitration and Conciliation Act, 1996, praying to appoint an Advocate commissioner to enter upon the premises of respondent No.1, i.e. Peekay Mediquip Ltd. No.131, Sengipatti Village, Trichy Tanjore Main Road, Thirumalaisamudram, Thanjavur 613 402, to inspect and take possession of the registers, books and accounts being mentioned, in manual and electronic form, relating to the purchase of raw materials, consumables, packing materials, production, stock position of raw materials, consumables, packing materials, finished goods, excise and VAT levies, despatch of finished goods and sale of

products of respondent No.1, inflow & outflow, source and application of funds, for the period from 20.07.2015 till the date of such inspection.

Prayer in O.A.No.4396 of 2016 : Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(e) of the Arbitration and Conciliation Act, 1996, praying to issue a Pro Order prohibiting respondents No.3 to 6/Garnishees from making payment upto a limit of Rs.8,14,01,356/- (Eight crores fourteen lakhs one thousand three hundred and fifty six) to respondent No.1 by withholding such balances and outstanding dues payable by them to respondent No.1 and further direct respondents No.3 to 6 to deposit the amounts so withheld to the credit of the above application.

Prayer in O.A.No.4397 of 2016 : Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9(ii)(e) of the Arbitration and Conciliation Act, 1996, praying to issue a Pro Order prohibiting respondents No.2/Garnishee from paying the balance lying to the credit of current account bearing No.602605053762 to respondent No.1 upto a limit of Rs.8,14,01,356/- (Eight crores fourteen lakhs one thousand three hundred and fifty six) and consequently, direct respondent No.2 to deposit the amount so withheld to the credit of the above application.

* * *

For Applicants in : Mr.T.K.Bhaskar
all applications

For Respondents : Mr.B.Shyam
for M/s.Poovayya & Co., for R2

No Appearance for RR 1, 3, 4
and 6

R5 - given up

COMMON ORDER

O.A.Nos.760 and 761 of 2016

1. On 22.09.2016, Mr.T.Madusudhan Reddy, had entered appearance on behalf of respondent No.1. Learned counsel was given a week's time to file a reply.

1.1. As noted on the previous date, all other respondents, except respondent No.5, have been served.

1.2. In these circumstances, Mr.T.K.Bhaskar, says that he has instructions to drop respondent No.5 from the array of parties.

1.3. The said statement is taken on record. Respondent No.5 is dropped from the array of parties.

1.4. Consequently, the applicant will file an amended memo of parties, within one week of receipt of a copy of the order.

2. In the captioned applications the following substantive reliefs have been claimed :

A.No.760 of 2016 : "... to grant an order of interim injunction restraining the respondent No.1, its men, agents, representatives, or any other person claiming through or under the Ist respondent from selling medical disposable products such as disposable syringes, needles, infusion sets, face masks and caps under the brand name SEPNIL and IV Cannulae under the brand name of SEPNIFLON, in the territories covered under the Agreement for Exclusive Marketing, Distribution and Selling Arrangement dated 20.07.2015, without obtaining No Objection Certificate from the Applicants pending initiation and disposal of arbitration proceedings between the applicants and respondent No.1 under the Agreement for Exclusive Marketing, Distribution and Selling Arrangement dated 20.07.2015 and Deed of Novation dated 15.09.2015."

A.No.761 of 2016 : "..... to grant an order of interim injunction restraining respondent No.1 from transferring the marketing rights to any third party in respect of products

manufactured by the 1st respondent such as disposal syringes, needles, infusion sets, face masks and caps under the brand name SEPNIL and IV Cannulae under the brand name of SEPNIFLON pending disposal of arbitration proceedings between the applicants and respondent No.1 under the agreement for Exclusive, Marketing, Distribution and Selling Arrangement dated 20.07.2015 and Deed of Novation dated 15.9.2015."

3. The affidavits, accompanying the captioned applications, set out averments, which are common in nature.

4. Briefly, the case of the applicant is as follows :

4.1. Applicant No.1, evidently, was appointed as a distributor by respondent No.1 for sale of its pharmaceutical products, such as, Syringes, Insulin Syringes, Needles, IV Cannulae, IV sets, Medical/Surgical Face Masks, Caps, etc.,. It is averred that these products, which are disposable in nature, were manufactured and/or imported by respondent No.1 under the brand name : "SEPNIL" and "SEPNIFLON".

4.2. Applicant No.1, in terms of an Agreement dated 20.07.2015, (in short "principal agreement") executed into, with, respondent No.1, was given the right to exclusively market, distribute and sell the aforementioned products manufactured and sold by respondent No.1.

4.3. Amongst other terms incorporated in the principal agreement, under Clause 1.14, applicant No.1 was to receive initial

marketing support from respondent No.1. The marketing support, as envisaged under the said clause of the principal agreement, required respondent No.1 to ensure that applicant No.1 secured in cumulative sales of value not less than Rs.3 crores per month, consecutively for a period of three months, exclusive of sales to Government agencies.

4.4. Likewise, in terms of clause 1.16 of the principal agreement, respondent No.1 was required to assist applicant No.1 in achieving bare sales worth Rs.5 crores per month for three consecutive months.

5. It is the case of the applicants that respondent No.1 was unable to render any such assistance to applicant No.1. Furthermore, the applicants claim that in terms of Clause 3 of the principal agreement, for the purposes of procuring raw material and other direct material, a sum of Rs.5,36,37,314/-, was paid for and on behalf of respondent No.1.

5.1. This apart, the applicants also aver that they advanced a sum of Rs.3,43,73,723/- to respondent No.1, qua expenses incurred on electricity, salaries paid to staff deployed at respondent No.1's factory, and for purchasing machinery to ensure smooth production of products referred to above.

5.2. It is the case of the applicants that a sum of Rs.12,50,567/- was also paid by them to third parties for supply of

blood bags to respondent No.1.

5.3. The applicants' further aver that as against the funds infused, respondent No.1 has supplied products worth, only, Rs.3,57,90,762/- (exclusive of taxes), whereas, under the principal agreement, it ought to have supplied the products worth Rs.13,73,25,544/-.

5.4. I am also informed that vide agreement dated 15.09.2015, a novation was brought about in respect of the principal agreement, whereby, applicant No.2 stepped into the shoes of applicant No.1; as a result of which, all rights and obligations provided in the principal agreement stood vested in applicant No.2.

6. The applicants are aggrieved by the fact that respondent No.1 continues to sell its products under the brand name "SEPNIL" and "SEPNIFLON" to their detriment in breach of terms and conditions provided in the novated agreement.

6.1. I am only note that it is the admitted case of the applicants before me, that respondent No.1, has terminated the principal agreement vide communication dated 28.05.2016.

6.2. The applicant further aver that this information was communicated to Superstockists by respondent No.1, vide communication dated 31.5.2016.

6.3. The applicants submitted that respondent No.1 has started accepting orders via third parties/Superstockists in gross violation of the obligation cast on respondent No.1.

7. Mr.Bhaskar, who appears for the applicant, says that despite the termination of the principal agreement, certain rights vested in the applicants. For this purpose, my attention has been drawn to clause 4.4. For the sake of convenience, the said clause is extracted hereafter :

"4.4. The termination of this Agreement shall not affect the rights and obligations of the parties accrued prior to the termination of this Agreement. Notwithstanding anything to the contrary contained herein, in the event of termination of this agreement by PEEKAY for any reason, whatsoever, PEEKAY shall not sell either directly or indirectly SEPNIL & SEPNIFLON products or transfer the marketing rights of the said brands to any third party without obtaining a 'No Objection Certificate' from DELVIN."

8. It is, in these circumstances, the applicants pray for ad-interim relief.

9. As would be noticed from my narration above, respondent No.1 has chosen not to file a reply to the applications, despite opportunity having been given by this Court.

9.1. The assertions made in the captioned applications have, thus, gone untraversed.

10. In any event, according to me, the applicants have set up a prima faice. The balance of convenience also appears to be in favour of the applicants. Accordingly, till the next date of hearing, respondent No.1 is injuncted from selling either directly or indirectly SEPNIL and SEPNIFLON products (in short "brands").

10.1. Furthermore, respondent No.1 is injuncted from transferring and/or marketing the aforementioned brands to any third party, without obtaining a No Objection Certificate (NOC) from applicant No.2.

10.2. Applicants shall ensure that the entire set of papers along with the order passed today is served on respondent No.1, within three days of the receipt of a copy of this order.

11. Re-notify on 08.12.2016.

A.No.4396 of 2016

12. Mr.B.Shyam, enters appearance on behalf of respondent No.2.

12.1. To be noted, there is no appearance on behalf of respondents No.1, 3, 4 and 6.

12.2. Insofar as respondent No.5 is concerned, Mr.T.K.Bhaskar, says that he has instructions to drop respondent No.5 from the array of parties.

12.3. The said statement is taken on record. Respondent No.5 is dropped from the array of parties.

12.4. Consequently, the applicants will file an amended memo of parties within one week of receipt of a copy of the order.

13. Re-notify on 08.12.2016.

14. In the meanwhile, respondents No.3, 4 and 6/Garnishees are restrained from releasing sums, if any, available with them which are otherwise payable to respondent No.1, to the maximum extent of Rs.8,14,01,356/- (Rupees Eight Crores Fourteen Lakhs One Thousand Three Hundred and Fifty Six Only).

14.1. Applicants shall ensure that the entire set of papers along with the order passed today is served on respondents No.1, 3, 4 and 6, within three days of the receipt of a copy of this order.

A.No.4397 of 2016

15. Mr.B.Shyam, enters appearance on behalf of respondent No.2.

15.1. To be noted, there is no appearance on behalf of respondents No.1, 3, 4 and 6.

15.2. Insofar as respondent No.5 is concerned, Mr.T.K.Bhaskar, says that he has instructions to drop respondent No.5 from the array of parties.

15.3. The said statement is taken on record. Respondent No.5 is dropped from the array of parties.

15.4. Consequently, the applicants will file an amended memo of parties within one week of receipt of a copy of the order.

16. Learned counsel for respondent No.2 seeks and is granted further time to file a reply.

17. Re-notify on 08.12.2016.

18. In the meanwhile, respondent No.2 is restrained from releasing funds, if any, held by it to the credit of respondent No.1, in current account bearing No.602605053762, to the maximum extent of Rs.8,14,01,356/- (Rupees Eight Crores Fourteen Lakhs One Thousand Three Hundred and Fifty Six Only).

18.1. Applicants shall ensure that the entire set of papers along with the order passed today is served on respondents No.1 and 2, within three days of the receipt of a copy of this order.

A.No.4392 of 2016

19. Mr.Bhaskar, seeks to withdraw this application, with liberty to approach the Arbitral Tribunal with an appropriate application under Section 17 of the Arbitration and Conciliation Act, 1996.

19.1. Learned counsel has made an endorsement to that effect on the application.

20. The captioned application is dismissed as withdrawn with liberty, as prayed for.

10.11.2016

Note : issue order copy on 14.11.2016

gg

RAJIV SHAKDHER, J.

gg

O.A.Nos.760, 761 of 2016
& A.Nos.4392, 4396
and 4397 of 2016

10.11.2016

<http://www.judis.nic.in>