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

+ **ARB.P. 404/2016**

ORCHID PHARMA LIMITED

..... Petitioner

Through: Mr. Neeraj Malhotra with Mr. Rupal
Luthra, Advocate

versus

VHB LIFE SCIENCES LIMITED & ANR. Respondents

Through: Mr. Ravikesh K Sinha, Advocate for
Respondent no.1.
Mr. Shyam Nandan with Mr.
Siddharth Bamba, Advocate for
Respondent No.2.

CORAM: JUSTICE S.MURALIDHAR

ORDER

25.01.2017

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1. This is a petition under Section 11 (6) of the Arbitration & Conciliation Act, 1996 ("Act") filed by the Petitioner, Orchid Pharma Limited ('OPL') against Respondent No. 1, VHB Life Sciences Limited ('VHB'), and Respondent No. 2, Nitin Life Sciences Limited ('NLS') seeking reference of the disputes between them to arbitration.

2. The background of this case is that there was an Agreement between OPL and VHB dated 26th August, 2002 for manufacturing, selling and delivering the goods as mentioned in Schedule 'A' to the said Agreement to BHP directly and/or to any of its agent/distributor. On 29th March, 2005, a Supplemental Agreement (SA) was entered into between OPL and VHB for certain additional projects mentioned

in Annexure 1 to the said SA on the same terms and conditions as the main Agreement.

3. A Purchase Order dated 13th December, 2006 was raised on OPL by NLS for supply of 45 kg of Meropenem Buffered Sterile. The said Purchase Order clearly indicated that while the invoice was to be raised by OPL on NLS, the payment thereof was to be made by VHB. Pursuant to the above Purchase Order, an invoice was raised by OPL on 21st December, 2006 in which NLS was shown as the consignee. The total value of this consignment was Rs. 1,80,00,009/-.

4. VHB does not dispute that in terms of the said invoice, the liability to make payment is of VHB. However, on 31st March, 2007, it raised a debit note on OPL for a sum of Rs. 81,50,621/-. This was allegedly due to the supply not matching the requisite quality. After adjusting the above amount indicated in the debit note, VHB paid OPL a sum of Rs. 98,49,388/- by a cheque dated 29th May, 2007. This, according to VHB, was in full settlement of the above invoice.

5. OPL, however, kept pursuing its claim for the balance amount. It filed a suit being CS(OS) No. 143/2008 in the High Court of Madras against VHB and NLS. In the said suit, an application was filed by VHB under Section 8 of the Act, which came to be allowed by the High Court of Madras by an order dated 10th April, 2015.

6. Interestingly, in defending the said application, OPL contended that there could not be an arbitration of the claims of OPL against VHB

and NLS since NLS was not the party to the agreement and there was no arbitration clause governing the disputes between OPL and NLS. The stand of NLS in the said proceedings, however, is not clear. In its order dated 12th April, 2015 the Madras High Court referred to the decision of the Supreme Court in ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641*** and came to the conclusion that although NLS was not a party to the arbitration agreement, the dispute could be referred to arbitration.

7. OPL thereafter filed the present petition. Although, OPL is located in Chennai, VHB in Mumbai and NLS in Himachal Pradesh., the justification offered by OPL for approaching this Court is that the arbitration clause mentions Delhi as the venue of arbitration. Mr. Neeraj Malhotra, learned counsel appearing for OPL, refers to the decision of the Constitution Bench of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552*** which held *inter alia* that the Court within whose jurisdiction the arbitration takes place would also have jurisdiction.

8. It is submitted by Mr. Ravikesh Sinha, learned counsel appearing for VHB, that in pursuing its claim against OPL for damages for loss of reputation VHB invoked the arbitration clause and approached the High Court of Bombay with an application under Section 11 of the Act for the appointment of an Arbitrator. The said application was allowed by an order dated 20th October 2010, and the disputes between OPL and VHB were referred to arbitration by Justice A. P.

Shah, a former Chief Justice of this Court. It is stated that at present Mr. Justice C.K. Mahajan, a former Judge of this Court is the sole Arbitrator in the said arbitration.

9. Initially OPL did not participate in the said arbitration proceedings and filed a Special Leave Petition (SLP) in the Supreme Court challenging the order dated 20th October 2010 of the High Court of Bombay. The said SLP came to be dismissed by the Supreme Court on 7th September, 2012 by following order:

“There is a delay of 434 days in filing the special leave petition and 98 days in re filing the same for which no reasonable explanation has been given. The application for condonation of delay is dismissed.

Although we are not inclined to interfere with the order passed by the High Court, all the points raised by the Petitioner in the present petition are specifically kept open to be raised before the arbitrator. The special leave petition is, therefore, dismissed.

It is however, submitted by the learned counsel that the defence of the Petitioner has been struck off by the Arbitrator. If that be so, the Petitioner is at liberty to seek remedy in accordance with law.”

10. Thereafter OPL filed its statement of defence before the learned Arbitrator with no objection by VHB. The said arbitration is stated to be pending before Mr. Justice C.K. Mahajan.

11. Mr Sinha learned counsel for VHB points out that OPL ought to have filed its counter-claim in the above arbitration and has in fact missed the bus, as far as its present claim is concerned. On the

question of making NLS a party to the arbitration, the stand of VHB is that since VHB has accepted its liability for making payment *qua* the supplies made by OPL to NLS on VHB's instructions, there is no need for NLS to be made a party to the present dispute between OPL and VHB.

12. The stand of NLS as articulated by its counsel Mr. Shyam Nandan is that in the absence an arbitration agreement with OPL, NLS cannot be made a party to the arbitration proceedings. Reliance is placed on a judgment *Deutsche Post Bank Home Finance Limited v. Taduri Sridhar (2011) 11 SCC 375*.

13. In rejoinder, Mr. Neeraj Malhotra points out that OPL cannot be left without a remedy. He submits that OPL bona fide believed that its claim against VHB for the balance payment against the invoice in question was different from VHB's claim against OPL for damages and loss of reputation which was therefore a dispute different from the one that OPL has against it regarding the non payment of the balance amount for the supply made to NLS on its behalf. He further submits that the suit filed by OPL in the High Court of Madras was much prior to VHB invoking the arbitration clause. He, therefore, submits that OPL cannot be denied the right to pursue its claim against VHB and NLS in the arbitration proceedings.

14. The Court would like to first deal with the issue whether NLS can be made a party to the arbitration proceedings. The fact of the matter is that there is no agreement between OPL and NLS, much less and

arbitration agreement. Merely because NLS was party to the suit before the High Court of Madras, it is not possible to infer that it acquiesced in the order allowing VHB's application under Section 8 of the Act. In any event VHB has already accepted its liability for the supply made by OPL by making payment of the aforementioned sum of Rs. 98,49,388 by cheque to OPL. The dispute now is with regard to the balance amount. Therefore, for the purpose of OPL's claim against VHB for the balance sum, NLS is neither a proper nor a necessary party to the dispute. Accordingly, the Court accepts the plea of NLS and directs that it be deleted from the array of parties.

15. As far as OPL's claim against VHB is concerned, while the Court does not wish to comment on its merits, the Court is of the view that OPL cannot be denied its remedy. Since there is already a pending arbitration between the same parties, the Court considers it appropriate to refer the claim OPL has as against VHB to the same learned Arbitrator Mr. Justice C.K. Mahajan who will fix his own terms and communicate them to the parties at the earliest. OPL's claim against VHB will be treated as a counter-claim.

16. Both parties i.e., OPL and VHB will appear before Justice C K Mahajan on a date and time fixed by mutual consent.

17. The petition is disposed of in the above terms.

S.MURALIDHAR, J

JANUARY 25, 2017/P