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

+ **RFA (OS)(COMM) 9/2017 & CM No.23816/2017**

Date of decision: 12th October, 2017

SINOPHARM WEIQIDA PHARMACEUTICAL CO (WQD)

..... Appellant

Through: Mr.Sandeep Sethi, Sr. Adv. with
Ms.Rajeshwari H. And Mr.Tahir
A.J, Adv.

versus

DSM SINOCHEM PHARMACEUTICALS INDIA PVT LTD

AND ANR

..... Respondents

Through: Mr.Chander M. Lall, Sr. Adv. with
Ms.Nancy Roy, Mr.Rohin Koolwal,
Mr.Rupin Bahl, Mr.Abhimanyu
Chauhan and Ms.Rani Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (Oral)

CM No. 63553/2017

This application is for placing on record an affidavit filed by the respondent.

Allowed subject to all just exceptions.

Contents of the affidavit would be examined when we deal with the appeal filed by the non-applicants on merits.

RFA(OS)(COMM) 9/2017 & CM 23816/2017

This order disposes of Regular First Appeal by Sinopharm Weiqida Pharmaceutical Co (WQD) under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with section 10 of the Delhi High Court Act, 1966 impugning the decree and order dated 17th May 2017 and the earlier order dated 16th May 2017.

2. The order dated 17th May 2017 passed by the Single Judge closes the right of the appellant, defendant no. 1 in CS (OS) 78/2017, to file written statement and passes decree of the permanent injunction in favour of the Plaintiffs, who are respondents before us, namely DSM Sinochem Pharmaceuticals India Pvt. Ltd and DSM Sionochem Pharmaceuticals Netherlands BV, in terms of paragraph 44(a) of the plaint, which reads as under:

“(a) A decree of permanent injunction restraining the Defendants, by themselves or through their directors, group company, associates, officers, agents, servants, assigns, licensees, distributors and dealers or anyone acting for and on their behalf from using, manufacturing, distributing, selling, offering for sale, or dealing with, directly or indirectly, in

Active Pharmaceutical Ingredient, pharmaceutical products, compound or formulation thereof containing Amoxicillin Trihydrate produced by a process. That may amount to infringement of Patent No247301 of the Plaintiff No.1;”

3. In order to appreciate the controversy, we would like to refer to relevant facts in brief.

4. The plaintiffs, had filed the aforesaid Civil Suit, CS (COMM) no. 78/2017 alleging infringement of patent no. 247301 in India titled “Process for Preparing Amoxicilin Trihydrate”. The plaint alleges that the defendant No.1 registered under the laws of Republic of China was the principal company of the 2nd defendant, Sinopharm India Pvt. Ltd., a company incorporated under the Indian Laws. Defendant No.1 was engaged in infringing business of pharmaceutical preparations and drug products. The 2nd defendant was overseeing and administering the business affairs of the 1st defendant and hence they were jointly and severally liable for the infringing activities. The plaint is detailed and has 43 paragraphs excluding the prayer clauses.

5. The plaint had come up for first hearing before the Single Judge on 30th January, 2017. The Single Judge had recorded the contention of the plaintiffs that the 1st defendant was exporting the infringing goods to

India which were marketed by the 2nd defendant and then observed that the plaintiffs had not expressly pleaded export of the goods by the 1st defendant to India to the 2nd defendant. It was also observed defendant no. 1, cannot be restrained from manufacturing the product in China, but could be restrained from exporting the infringing goods to India. The plaintiffs would have to sue the 1st defendant at the place where it was situated. The relevant paragraphs of the order dated 30th January, 2017 read as under:

“7. The defendant no.1 is a Chinese entity which is stated to be infringing the said patent and exporting the infringing goods to India and defendant no.2 Sinopharm India Pvt. Ltd. is pleaded to be marketing the said goods in India. It is however not expressly pleaded that defendant no.1 is exporting the goods to India to defendant no.2.

8. I have enquired from the counsel for the plaintiffs as to how this Court would have territorial jurisdiction against the defendant no.1 situated in China and who is alleged to be manufacturing through the infringing process.

9. xxxx

10. xxxx

11. Though importing the infringing goods may give a cause of action to the plaintiffs against the defendant no.2 situated at Delhi but as aforesaid it is not so expressly stated.

12. The counsel for the plaintiffs refers to the packaging of the allegedly infringing goods at page 196 to show that

the defendant no.2 is marketing the infringing goods but that also does not show any reference to the defendant no.2, as is required under the laws relating to Drugs & under the Legal Metrology Act, 2009.”

6. It is noticeable that the plaint was not registered on the said date and the matter was adjourned to 31st January, 2017. Summons were not issued to the two defendants.

7. On 31st January, 2017, at the request of the learned counsel for the plaintiffs, the plaint was listed on 2nd February, 2017.

8. On 2nd February, 2017, after hearing counsel for the plaintiffs and on pursuing judgment dated 25th May, 2016 in FAO(OS) 69/2014 titled ***Blueberry Books & Ors v. Google India Pvt. Ltd.***, the Single Judge directed issue of summons in the suit and in the application for interim injunction by all modes including electronic, returnable on 28th February, 2017. This order also observes that the learned Single Judge still had doubts about maintainability of the suit but felt appropriate to hear the defendants before passing the final order.

9. On 28th February, 2017 the following order was passed:

“1. The service report of defendant no.1 is awaited and the defendant no.2 is reported to be served.

2. *The counsel for the plaintiffs has however filed an affidavit of service of both the defendants.*
3. *The counsel for the defendant no.1 as well as the counsel for the defendant no.2 appear.*
4. *The counsel for the defendant no.1 states that the defendant no.1 has no base or operations or manufacturing facility in India; that there has been no transaction between the defendant no.1 and the defendant no.2; he is however to get specific instructions whether the defendant no.1 has been exporting the drug Amoxicillin Trihydrate to India; that there are proceedings with respect to the drug Amoxicillin Trihydrate in different jurisdictions and particulars thereof also have to be obtained. He seeks few days time for the said purpose.*
5. *The counsel for the defendant no.2 states that the defendant no.2 has not made any transaction with the defendant no.1; that the defendant no.2 has never imported the drug Amoxicillin Trihydrate from the defendant no.1 or from any other entity; the only relationship of the defendant no.2 with the defendant no.1 is that they are relatable to the same parent company.*
6. *The counsel for the defendant no.2 on enquiry also confirms that the defendant no.2 till now has not dealt with and at present is not dealing in the drug Amoxicillin Trihydrate.*
7. *The counsel for the defendant no.1 to on the next date of hearing inform whether the defendant no.1 is importing the drug Amoxicillin Trihydrate to India and / or intends to do so inasmuch as if it is not so, the suit can be disposed of and if it is so then the written statement will be required to be filed.*
8. *The defendant no.2 to by then also file an affidavit on the line of the statement made today in the Court.*
9. *List on 7th March, 2017."*

10. As per the aforesaid order, the Service Report of the appellant i.e. defendant no.1, was not received but the 2nd defendant had been served. Counsel for the defendant no.1 however had entered appearance and stated that it did not have any base, operations or manufacturing facilities in India. There was no transaction between the 1st defendant and the 2nd defendant. However, the counsel was to get specific instructions whether the 1st defendant was exporting Amoxicillin Trihydrate to India and whether there were proceedings with respect to the drug Amoxicillin Trihydrate in different jurisdictions and particulars of which were to be obtained. Counsel had asked for few days time for the said purpose. Defendant no.2 had submitted that it was not importing the drug in India from the 1st defendant or from any other entity. The two defendants were relatable to the same parent company. The said order records that counsel for the 2nd defendant on enquiry had confirmed that 2nd defendant had not dealt with and then was not dealing with the drug 'Amoxicillin Trihydrate'. The counsel for the Appellant/Defendant No. 1, was asked to obtain instructions whether they intended to import the said drug to India and if not, whether the suit could be disposed of. It was also observed that the defendant no.1, if required, could file written statement. However, as

far as the 2nd defendant was concerned, it was asked to file an affidavit in terms of the statement made. The case was adjourned to 7th March, 2017.

11. On 7th March, 2017, counsel for the defendant no.1 had stated that they were not exporting any product in violation of the process patent of the plaintiffs but were exporting their own intermediary product to some Indian entities. It was also recorded that the defendant No.1 would be filing their written statement. The 2nd defendant had filed affidavit affirming that they did not have business relations with the defendant No. 1 and had never exchanged any communication at any point of time with defendant No. 2. The 2nd defendant had neither imported any medicine, more specifically Amoxicillin Trihydrate, from the defendant no.1 nor sold it to any third party. Counsel for the 2nd defendant had stated that they had no objection to passing of decree of permanent injunction in terms of paragraph 44(a) of the plaint, which has been quoted above. Accordingly, a decree was passed against the 2nd defendant namely Sinopharm India Pvt. Ltd. in terms of paragraph 44(a) of the plaint leaving the parties to bear their own cost. Decree Sheet it was directed was to be prepared against the 2nd defendant. This order also specifically granted the defendant No.1 time to file written statement/ reply within prescribed

time. Rejoinder to the written statement was to be filed by 10th April, 2017. Parties were directed to file affidavits of admission/denial of each other documents within one week thereafter. The case was directed to be listed for framing of the issues, if any, and for considerations of the interim application on 20th April, 2017.

12. Order dated 20th April, 2017, records that the written statement had not been filed by the defendant No.1. The plaintiffs had filed I.A no. 4746/2017 under Order VIII Rule 1 read with Order VIII Rule 10 and section 151 of CPC. It was recorded that there was change in the counsel for the 1st defendant and the earlier counsel was disengaged. The new counsel for the 1st defendant had stated that he would file power of attorney and written statement/reply within one week. The Court noticed that the 1st defendant had entered appearance on 28th February, 2017 and subsequently time had been granted for filing of the written statement. In these circumstances, cost of Rs. 50,000 was imposed on the 1st defendant and it was required to file written statement on 28th April, 2017, i.e. within 8 days thereafter. If the written statement was not filed within the prescribed period, the 1st defendant's right to file the same would be closed without any further order. I.A no. 4746/2017 was disposed of.

Interim Order was passed restraining the 1st defendant from exporting to India or otherwise selling in India any pharmaceutical product, the active pharmaceutical ingredient whereof contained 'Amoxicillin Trihydrate' produced by a process in infringement of Patent No.247301 of the plaintiff no.1. Time was given for filing replication, rejoinder and filing of affidavit of admission/denial and the suit was adjourned for 6th July, 2017.

13. The respondents filed I.A no. 5385/2017 under Order VIII Rule 1 read with Order VIII Rule 10 of the Section 151 of the CPC as the written statement was not filed by the by 28th April, 2017. The said application came up for hearing before the Single Judge on 2nd May, 2017. Counsel for the 1st defendant had entered appearance on the advance notice and stated that he had received a scanned copy of the written statement but was not satisfied therewith and had sought another week's time. Counsel had also stated that the cost imposed on 20th April, 2017 would be paid on that day itself. Further, cost of Rs. 50,000 was imposed on the 1st defendant and time to file the written statement was extended till 9th May, 2017 failing which the right to file the written statement would be closed. The suit was, however, listed for 6th July, 2017 as already scheduled.

14. The plaintiffs thereafter, filed another I.A no. 5976/2017 praying for early hearing of I.A. 5385/2017 and I.A. no. 1225/2017 (application under Order XXXIX Rule 1 and 2 of the CPC). The application was listed on the first occasion before Court on 16th May, 2017. Counsel for the 1st defendant had again entered appearance and stated that written statement was ready and would be filed during the course of day. Advance copy of the same was handed over to the counsel for the plaintiffs. It was also stated that cost imposed by order dated 2nd May, 2017 would be remitted during the course of the day. Learned Single Judge vide order dated 16th May, 2017 increased the cost from Rs. 50,000 to Rs. 1 Lakh.

15. As noted above, the written statement was not filed by the 1st defendant on 17th May, 2017, when the suit was taken up for hearing. The Single Judge then closed the right of the 1st defendant to file the written statement after recording that the said defendant could not be permitted to proceed further with the suit and sufficient indulgence had already been granted. Thereafter, the Single Judge, vide the impugned order held:

“7. The plaintiff has sued for permanent injunction to restrain the two defendants from using, manufacturing, distributing, selling, offering for sale or dealing directly or indirectly in Active Pharmaceutical Ingredient (API), pharmaceutical products, compound or formulation thereof containing Amoxicillin Trihydrate produced by a process that

may amount to infringement of Patent No.247301 of the plaintiff No.1.

8. *The counsel for the plaintiffs in the absence of any challenge to its patent has become entitled to the said decree.*

9. *The senior counsel for the plaintiffs under instructions does not press for other reliefs.*

10. *The need to relegate the plaintiffs to evidence for the purposes of relief of permanent injunction is not felt.*

11. *Accordingly, a decree is passed in favour of the plaintiffs and against the defendant No.1, of permanent injunction in terms of prayer paragraph 44(a) of the plaint, leaving the parties to bear their own costs.*

12. *The counsel for the defendant No.1 states that though it is also recorded in yesterday's order that advance copy of the written statement and Counter-Claim was handed over to the counsel for the plaintiffs but it be again recorded so.*

13. *This order is already said to be in continuation of yesterday's order.*

14. *The date of 6th July, 2017 is cancelled.*

15. *No costs.*

16. *Decree sheet be drawn up."*

16. We have heard counsel for the 1st defendant and the plaintiffs and with their consent, the appeal is taken up for final hearing and disposal.

17. The first controversy that arises for consideration is the date on which the defendant No. 1, i.e., the appellant, was served with summons in the suit. As noted above, summons in the suit were directed to be issued to the 1st defendant for the first time by Single Judge vide order

dated 2nd February, 2017. Counsel for the plaintiffs has stated that summons in the suit were dispatched by courier on 10th February, 2017. The date of service of the said summons, however, is not available and has not been confirmed by the 1st defendant and the plaintiffs. The 1st defendant had, however, entered appearance before the Single Judge on 28th February, 2017. We have already referred to the order dated 28th February, 2017 above. The said order noticed the contentions raised by the 1st defendant as well as the defendant no.2. This order records that the 1st defendant would file written statement, in case they wanted to contest the suit. Thirty days time for filing the written statement according to the 1st defendant as per proviso to Rule 1 Order VIII would commence from 28th February, 2017. As per the plaintiffs, it had commenced a few days earlier, on or about 15th February, 2017.

18. We have also referred to the different orders passed on 7th March, 2017, 20th April, 2017, 2nd May, 2017 and 16 May, 2017 which are noted above. It is noticeable that the counsel for the 1st defendant on 16th May, 2017 had informed the court that they had already received an advanced copy of the written statement. It is also accepted and admitted that

advance copy of the written statement was handed over and served on the counsel for the plaintiffs on 16th May, 2017.

19. Proviso to Rule 1 Order VIII of the Code incorporated vide the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 applicable to commercial disputes, stipulates as under:

“Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.”;

20. Second proviso to Rule 10 to Order VIII as inserted by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 which is applicable to commercial disputes stipulates as under:

“Provided further that no Court shall make an order to extend the time provided under rule 1 of this Order for filing of the written statement.”

21. We are in agreement with the contention raised by the counsel of the plaintiffs that ex-facie, the proviso to Rule 1, Order VIII and second proviso to Rule 10, Order VIII have the effect of barring or prohibiting the filing of written statement beyond 120 days from the date of service of summons. The reason being that the proviso to Rule 1, Order VIII specifically stipulates that the defendant would forfeit right to file the written statement as Court are not allow the written statement to be taken on record after 120 days. The second proviso to Rule 10, Order VIII states that no Court shall make an order extending the time provided under proviso to Rule 1 of this order for filing of written statement.

22. However, the aforesaid provisos were not invoked and applied nor is the period breached in the present case, as the right of the 1st defendant to file written statement was closed before expiry of 120 days from the date of service of summons. Even if we accept that the 1st defendant was served with the summons on or about 15th February, 2017, as submitted by the plaintiffs, the period of 120 days starting from 15th February, 2017 would have expired during summer holidays in the month of June, 2017. As noticed above, advance copy of the written statement was served upon the counsel for the respondents on 16th May, 2017. Thus the time limit

legislatively fixed and stipulated as the upper limit and un-extendable was not breached, before the right to file written statement was closed vide order dated 17th May, 2017.

23. Faced with the aforesaid situation, learned counsel for the plaintiffs raised the argument that by allowing the appeal, the appellate court would be granting time to the 1st defendant to file written statement beyond or exceeding 120 days and thus, there would be violation of the outer time stipulated in the first proviso to Rule 1, Order VIII and second proviso to Rule 10, Order VIII of the Code. We would not accept the said argument for obvious reasons. The right to file written statement was closed on 17th May, 2017 and decree was passed by the Single Judge against the 1st defendant on the same day under Rule 10, Order VIII of the CPC. Thus, the 1st defendant could not have filed written statement thereafter. Once and if the order dated 17th May, 2017 is set aside, we would have to grant the time to file the written statement. Any other interpretation would make the appeal provision unworkable and otiose, unless we hold that the written statement should have been filed even if and after the decree was passed. The Code does not provide and stipulate so. Of course the appellate court should be satisfied with the bona fides and genuineness of

the reasons and grounds given for the delay in filing written statement. Invariably the appellate court would insist that a copy of the written statement, if not the original written statement should be enclosed. It may be noted that the notarized and signed written statement was filed by the 1st defendant, in spite of the order and decree dated 17th May, 2017, on 3rd July, 2017. As noticed above 120 days time for filing the written statement came to an end during the summer vacation in the month of June, 2017.

24. The next issue which arises for consideration is whether the 1st defendant has been able to show and establish good ground and reason for the delay and why they could not file written statement till 17th May, 2017. On the aforesaid aspect, we would refer to the grounds and explanation given in the appeal. The 1st defendant as noted above is a company is incorporated under the laws of Republic of China and the address given in the plaint is North-4th RNG RD, Yingu Mansion, 19th Floor, Beijing China. The 1st defendant has highlighted the logistic hurdles and requirements as the plaint, written statement etc. had to be translated into Chinese and as per the laws of China, the written statement was to be notarized and thereafter, sent to India by courier. These

formalities and mandates were time consuming. The 1st defendant along with the present appeal has enclosed a copy of the written statement with the notary certificate. The Notary Public had attested the written statement on 8th May, 2017. Thus, the written statement was drafted earlier and was attested on the said date. This would clearly show that the 1st defendant was conscious of the requirement and need to file written statement and had taken adequate steps in this regard. They were not sleeping and were not lackadaisical over the matter. An interim injunction order had been passed against them. As noticed above, the plaintiffs were served with the advance copy of the written statement on 16th May, 2017. It is also apparent and counsel for the 1st defendant submits that the signed and notarized written statement was not received and could not be filed in the Court/Registry by 17th May, 2017. We also find that extremely short dates were given in the suit from 2nd May, 2017 onwards. Cost of Rs. 50,000 was imposed by the order dated 2nd May, 2017. By order dated 16th May, 2017 the cost imposed was increased to Rs. 1 lakh. In the appeal, it is stated that the counsel for the 1st defendant had received the original and attested written statement and counter claim on or around 20th May, 2017. In light of the aforesaid facts, we would

observe that the 1st defendant has explained and shown good cause and ground for the delay. This exercise of discretion would be subject to costs.

25. Another question which arises is whether a decree under Rule 10 Order VIII of the Code should have been passed as per and in the facts and circumstances of the case. Counsel for the 1st defendant has drawn our attention to the orders passed by the Single Judge wherein he had expressed doubts about territorial jurisdiction, etc. and whether the court could have passed the decree of permanent injunction against the manufacturing activities in China. In particular, our attention was drawn to prayer clause (a) which is not restricted to imports to India but seeks injunction against the 1st defendant from using, manufacturing, distributing, selling, offering for sale, or dealing with, directly or indirectly, in Active Pharmaceutical Ingredient (API), pharmaceutical products, compound or formulation thereof containing Amoxicillin Trihydrate produced by a process of which infringement was alleged. The consequences of the said order would have very wide repercussions and effect.

26. Counsel for the plaintiffs has submitted that there are specific legal presumptions and onus would be on defendant No. 1 under the Parent Act

and accordingly in the absence of the written statement decree in terms of prayer (a) could have been passed. We need not go into this aspect in detail but we do feel that the matter requires in depth consideration, in light of the defence set up by 2nd defendant in the order dated 7th March, 2017 that they did not have any business transactions with the 1st defendant and they had neither imported nor dealt with 'Amoxicillin Trihydrate' manufactured by the defendant No.1. Question of territorial jurisdiction and right and power of the Indian Court as to the injunction for manufacture etc. against the 1st defendant as prayed and granted in terms of paragraph 44(a) of the plaint would arise and should have to be examined and considered.

27. Accordingly, we set aside the order and decree passed vide order 17th May, 2017 under Order VIII Rule 10 of the CPC. The written statement and counter claim filed by the 1st defendant/appellant would be taken on record, subject to the payment of additional costs Rs.1,00,000/- to the plaintiffs. We notice that the 1st defendant has already paid cost of Rs.1,50,000/- to the plaintiffs. The plaintiffs would file the replication and written statement to the counter claim within stipulated period of 30 days

from today. The interim order passed by the Single Judge would revive and would operate till next date of hearing before the Single Judge.

28. In the aforesaid terms, the present appeal, along-with pending applications, is disposed of.

29. In order to cut short any delay, parties are directed to appear before the Single Judge on 20th November, 2017, when appropriate order and directions would be passed.

SANJIV KHANNA, J

NAVIN CHAWLA, J

OCTOBER 12, 2017/umang