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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION (L) NO. 1463 OF 2019**

Deepak Nitrite Limited	...Petitioner
<i>Versus</i>	
Sara Chemicals & Consultants	...Respondent

Dr Birendra Saraf, *with Sachin Mandlik & Apurva Gupta & Puru Jain, i/b Abhishek Adke, for the Petitioner.*
Mr Chirag Mody, *with Nishtha Agarwal, i/b Bharucha & Partners, for the Respondent.*

CORAM: G.S. PATEL, J.
DATED: 4th February 2020

PC:-

1. This order, by consent, will dispose of the Section 9 Petition. Dr Saraf states that arbitration has not yet been formally invoked. However, Mr Mody on instructions states that his client is willing to proceed to arbitration and waives any objection, especially for the purpose of Section 4 of the Arbitration & Conciliation Act, 1996. ***The Petitioner states*** that the agreement between them is deemed to be terminated. The Petitioner will issue a formal notice within 21 days setting out the claim and demand. ***The dispute in this regard is also, by consent, referred to arbitration.***

2. In the meantime and pending arbitration, parties have agreed to the following order:

(a) Regarding Equipment. —

- (i) The Respondent had purchased equipment from funds provided by the Petitioner. The invoices are in the name of the Petitioner.
- (ii) In 21 days, the Respondent will deliver these items of equipment to the Petitioner.
- (iii) The Petitioner will pay for the costs of transportation from the Respondent's factory or unit.
- (iv) A list of the equipment along with the supporting documents such as invoices will be put on Affidavit and this will be furnished to the other side as also filed in Court.
- (v) The Petitioner has a list of equipment that includes more items that the Respondent accepts or acknowledges. Mr Mody limits his statement to the equipment items accepted by the Respondent. He agrees that the Respondent will file an affidavit in these proceedings explaining his stand in regard to the balance items of equipment claimed by the Petitioner. That affidavit is also to be filed within 21 days from today.
- (vi) Mr Mody agrees that, as a precautionary measure, the dismantling of the equipment

will be in the presence of representatives of the original vendor or the original equipment manufacturer. The Respondent will maintain a log of this dismantling showing the item dismantled, the date and time, and the persons present. These details are to be filed in the arbitration proceedings.

- (b) **Regarding Data Samples.**—The pilot or testing done by the Respondent and which the Respondent says is complete, but which the Petitioner says is partial, certainly generated some data and some samples. I am not accepting the Petitioner's request for a hand over or delivery of that data or those samples but instead will accept as reasonable Mr Mody's statement that the data and samples relating to the subject project for and on behalf of Deepak Nitrite Limited will be separately identified, appropriately packed, stored or preserved.

3. The reason for this order regarding the data and the samples is Mr Mody's submission that the Respondent has not been fully paid although it has performed all its obligations under the contract. Without payment it is not required to release the data and the samples to the Petitioner. This position is disputed. All contentions are expressly kept open. I note Dr Saraf's submission that according to the Petitioner, the Respondent has been overpaid and therefore the Petitioner is entitled to a return of the data and samples. That cannot be the matter of an interim order under Section 17 taking a prima facie view.

4. Hence, this order regarding the data and samples will continue pending the completion of the arbitration and until an Award is made and communicated to the parties.

5. By consent, the parties are referred to the sole arbitration of Mr Sanjay Kher, learned Advocate of this Court, and a specialist and expert in patent matters.

(a) **Appointment of Arbitrator:** By consent, Mr Sanjay Kher, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Technology Development & Services Agreement dated 8th December 2017.

(b) **Communication to Arbitrator of this order:**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s Mr Sanjay Kher, Advocate.

Address Clover Consulting, Clover House, 176A, Vaishali (Rear Bungalow), Bhalchandra Road,

Mumbai 400 014.

Mobile 9920038006

Email sanjaykher@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Section 16 application:** The respondent is at liberty to raise all questions of jurisdiction within the meaning of

section 16 of the Arbitration Act. All contentions are left open.

(g) Interim Application/s:

(i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator.

(ii) Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(h) Fees: The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(i) Sharing of costs and fees: Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) Consent to an extension if thought necessary. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) Venue and seat of arbitration: Parties agree that the venue and seat of the arbitration will be in Mumbai.

6. The petition is disposed of in these terms. No costs.

(G. S. PATEL, J)

Note: This order is modified by an order dated 11th February 2020. Corrections are shown in bold and italics.