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

Date of Decision: 6th January, 2020

\+ **CM (M) 1815/2019 & CM APPL.'s 54937-38/2019**

ION BIO MED ICARE PVT. LTD. & ANR. ..... Petitioners

Through: Mr. Samrat Nigam, Mr. Vimod Kathwalia and Mr. Sandeep Mittel, Advocates. (M:9911389745)

versus

DRAEGERWERK AKTIENGESELLACHAFT MOISLINGER ALLEE & ORS. ..... Respondents

Through: Mr. Niki Kantawala, Ms. Shweta Bharti, Mr. J. K. Chaudhary and Ms. Katyani Mahendru, Advocates for R-1 to 3. (M:9811020312)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. The present petition arises out of the impugned orders dated 25th July 2019, 23rd August, 2019 and order dated 9th December, 2019, by which the application under Order XI Rule 12 CPC, seeking discovery/production of certain documents, was rejected by the Trial Court and the evidence of the parties was closed. The matter is now listed for final arguments on 5th February, 2020.

2. The Plaintiffs'/Petitioners' *(hereinafter, "Plaintiffs")* suit is for permanent injunction and rendition of accounts for amounts arising out of the Joint Venture Agreement *(hereinafter, "JVA")* dated 9th May, 1987 and the Foreign Collaboration Agreement *(hereinafter, "FCA")* dated 20th February, 1990. The parties have been through various rounds of litigation

at the interlocutory stage. The ld. Single Judge had secured the commission amount which the Respondents earn from sale of the allegedly similar/identical medical appliances/equipment/apparatus. The judgment of the ld. Division Bench dated 18th September, 2009 had dismissed the appeal filed by the Respondents herein, which was thereafter carried to the Supreme Court. Vide order dated 13th August, 2010, the Supreme Court had disposed of the interlocutory application with the following observations:

> "*I. A. No. 3 is allowed.*
>
> *On hearing Mr. Dave, senior counsel appearing for the petitioner and Mr. Venogopal, senior counsel appearing on behalf of the respondents, we dispose of this matter with the following order: -*
>
> *In order to protect the interest of the plaintiff-respondent in the suit pending before the High Court, the petitioner has given a corporate guarantee from Draeger Medical (India) Pvt. Ltd., (defendant No. 3 in the suit before the High Court), as also affidavits sworn by Mr. Thomas Mika and Mr. Reinhard Frick. In the separate affidavits Mr. Mika and Mr. Frick aver that they are jointly authorised to represent the petitioner in this case pending before this Court. In their respective affidavits each of them separately undertakes (vide paragraph 3 of their respective affidavits) to secure the interest of the plaintiff/respondents in Suit No.519/2004. before the Delhi High Court and in the event the plaintiff/respondent succeed in the proceedings, to pay any amounts payable and arising from the Court's judgment.*
>
> *The. aforesaid corporate guarantee given by the Draeger Medical (India) Pvt. Ltd. and the personal affidavits of Mr. Thomas Mika and Mr. Reinhard Frick are to be treated as undertaking given to this Court by the petitioner-company.*
>
> *In addition to this the petitioner shall submit before*

> *<u>the Delhi High Court a bank guarantee for a sum equivalent to one hundred thousand euros</u>.*
>
> *This order shall substitute the order of the Division Bench coming under appeal as well as the order passed by the learned Single Judge hearing the suit, insofar as the petitioner is directed to deposit the amount of commission before the High Court. <u>Other parts of the order, asking the petitioner to periodically submit the accounts remain undisturbed.</u>*
>
> *It is additionally clarified that this order shall not come in the way of the petitioner in the contempt proceedings before the High Court."*

As per the above order, instead of deposits of the commission amount, the Respondents were directed to furnish a corporate guarantee along with the affidavits of their directors.

3. Issues have been framed in the suit on 17th April, 2007, which read as under:

> "*1. Whether Mr. A. S. Rajput has been duly authorised to sign and verify the plaint and institute the present suit on behalf of plaintiff No.1? OPP*
>
> *2. Whether the defendants No.2 to 4 are group companies of defendant No.1? OPP*
>
> *3. <u>Whether the defendant No.1 breached the Joint Venture Agreement dated 9.5.1987 by conducting sales of medical equipments/appliances/instruments through defendants No.2 to 4</u>? OPP*
>
> *4. <u>Whether the defendants by their conducted breached the Joint Venture agreement dated 9.4.1987 or sought to take over the plaintiff No.1 company</u>? OPP*
>
> *5. Whether the action on behalf of the defendants complained of in the plaint are correct? OPP*
>
> *6. Whether the Distributor Agreement dated 22.2.1999 is a valid and binding agreement on the plaintiffs? OPD*
>
> *7<u>. Whether the plaintiffs are entitled to a decree of</u>*

permanent injunction as prayed for in the plaint? OPP
8. Whether the plaintiffs are entitled to a decree for rendition of accounts and for payment of found due and payable to it on such rendition? OPP
9. Whether the plaintiffs are entitled to interest on the amounts claimed? OPP
10. Whether the plaintiffs have no locus standi to file the present suit? OPD
11. Whether the Joint Venture Agreement dated 9.5.1987 has come to an end? OPD
12. What is the effect of the judgments and orders dated 10.11.2006 and 8.12.2006 passed in C.P. No. 261/2005 and order dated 8.1.2007 passed in Company Appeal No.1/2007? Onus on parties
13. Relief."

4. The parties have since led evidence in the matter. The submission of ld. counsel appearing for the Plaintiffs, is that the reliefs prayed for in the suit are for permanent injunction and rendition of accounts. The case of the Plaintiffs is that the Respondents have been selling various medical appliances/equipment/apparatus in violation of the covenants contained in the JVA and therefore, the Plaintiffs are entitled to the accounts of profit made on the sale of the said equipment. It is submitted that though the Plaintiffs made repeated attempts to obtain the accounts in respect of the sale of such equipment to various hospitals, from the Respondents, since the officials who appeared on behalf of the Respondents did not make true and fair disclosure, the application under Order XI Rule 12 CPC was moved. The submission is that if the Court finds that the Respondents have sold any of the medical appliances/equipment/apparatus, in violation of the rights of the Plaintiffs under the JVA, as also the FCA, the Respondents would be entitled to render accounts of profits to the Plaintiffs.

5. On the other hand, ld. counsel for Respondent Nos. 1 to 3 submits that the case of the Respondents is that none of the medical appliances/equipment/apparatus has been sold in violation of the JVA and the equipment which are now being sold are not covered under the covenants of the JVA.

6. The Court has heard the ld. counsels for the parties and perused the reliefs claimed in the plaint. The prayer in the plaint reads as under:

> "*i. Pass a decree of a permanent injunction in favour of the Plaintiffs and against the Defendant restraining the Defendant and its Group companies or subsidiary Companies or any company in which the Defendant or its shareholder hold any shares from carrying out any business in India competition with Plaintiff No.1, including selling the medical Appliances/equipment/apparatus in India except to or through Plaintiff No.1.*
>
> *ii. Pass a decree of rendition of accounts, directing the Defendant to render accounts of all sales made by it or by its Group/Subsidiary Companies directly or indirectly in hull and a decree for payment of 20% commission on a sue sales along with interest @ 13% per annum.*
>
> *iii. Costs of the suit, and*
> *iv. Any other order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.*"

7. A perusal of the reliefs in the plaint, as also the issues which have been framed in the suit, shows that one of the main issues is whether the Respondents have breached the JVA and whether the Plaintiffs are entitled to permanent injunction as prayed for. The said issue would now be decided by the Trial Court on the basis of the evidence led by the parties. Mr. Nigam, ld. counsel appearing for the Plaintiffs, submits that the Plaintiffs

have led evidence to show, by way of illustration, the various hospitals that have been supplied with the medical equipment/apparatus/appliances, which are in violation of the covenants in the JVA. He further submits that the purpose was to ascertain the nature of the equipment supplied and the amount of sales and revenue generated by the Respondents. It is submitted that if the application is not allowed at this stage, the Court would not be able to pass an effective order at the time of final adjudication. The Plaintiffs' stand is that the Trial Court rejected the application on the ground that the record would be voluminous, as it includes more than 150 hospitals, and that by itself cannot be a ground for rejection of the application.

8. Mr. Kantawala, ld. counsel for Respondent Nos. 1 to 3, submits that the application has not been rejected by the Trial Court only due to the voluminous nature of the record but also in view of the fact that the application was completely ambiguous and vague and did not give any details.

9. The Court has considered the rival submissions. There is no doubt that the case of the Plaintiffs is that the Respondents are selling the medical equipment/apparatus/appliances in violation of the obligations stipulated in the JVA. However, this has to be established by the Plaintiffs by means of evidence to be led before the Trial Court by its witnesses. After evaluating the evidence led by the parties, the Trial Court would first have to come to a conclusion as to which of the medical equipment/apparatus/appliances would be covered under the negative covenants, if any, and then decide in respect of which of the medical equipment/apparatus/appliances, the rendition of accounts ought to be granted. For the decision on these aspects the illustrative examples of sales of equipment which are stated to have been

shown on record by the Plaintiffs are to be considered and not each and every equipment/apparatus and each and every sale.

10. Upon the Trial Court adjudicating this issue on the basis of the illustrative examples given by the Plaintiffs' witnesses, the Trial Court would have to pass appropriate orders, both, in respect of reliefs (i) and (ii). The relief of rendition of accounts, if passed, would obviously relate to all the medical equipment/apparatus/appliances and not merely the illustrative examples which have been adduced by the Plaintiffs. The said relief has to be in terms of Order 20 Rule 17 of the Code of Civil Procedure, 1908.

11. Thus, the application under Order XI Rule 12 CPC seeking discovery would not be required to be permitted at this stage. This would, however, not bar filing of such an application, if permissible, at a later stage.

12. The petition and all pending applications are disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

JANUARY 06, 2020/*dk*