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

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**Date of decision: 17.05.2022**

+ W.P.(C) 8938/2021, CM Nos. 27803/2021, 3862/2022, 3878/2022  
ARVIND MEDICARE PVT. LTD. THROUGH ITS AUTHORISED  
SIGNATORY ..... Petitioner

Through: Mr. Biswajit Das and Ms. Anamika  
Sharma, Advs

versus

DR. NEERU MEHRA ..... Respondent

Through: Mr. Ashim Vaccher, Mr. Vaibhav  
Dabas, Mr. Kunal Lakra, Advs.  
Ms. Hetu Arora Sethi, ASC with Ms.  
Kavita Nailwal, Adv.

**CORAM:****HON'BLE MR. JUSTICE YASHWANT VARMA****YASHWANT VARMA, J. (ORAL)**

1. By means of this writ petition, the plaintiff petitioner challenges the orders of 08 April 2021 passed by the Commercial Court rejecting (a) an application purporting to be under Order VI Rule 17 of the **Code of Civil Procedure, 1908** [Code], (b) an application under Order XIV Rule 5 and a similar application made by the petitioner for framing an additional issue in proceedings emanating from the counter claim filed by the defendant respondent.

2. It becomes pertinent to note that the petitioner had instituted a suit for permanent injunction as well as for recovery of business losses/damages, operational and financial cost, opportunity cost,



repudiation and goodwill cost together with litigation fee. By an order of 04 February 2021, the Trial Judge framed the following issues: -

**“FRAMING OF ISSUES**

1. Whether contract dated 09.03.2019 comprises of two distinct set of contracts, one set of contract/promises performable within the hospital premises of the plaintiff with tenure from 15.03.2019 till 31.03.2022 and the other set of contract/promises performable outside the hospital premises of plaintiff within 5 kms radius for one year period from the date of termination of first set of promises under clause 10(a) of the contract?
2. Whether the second set of contract/promises inter alia comprised under Clause 10(b) of the contract is enforceable in law?
3. Whether plaintiff is entitled for specific performance of defendant's promise under Clause 10(b)?
4. Whether defendant is breaching her own promise?
5. Whether Defendant has committed offence against humanity, morality, illegality when she abruptly stopped coming to the Plaintiff's hospital to perform her obligation?
6. Whether Plaintiff is entitled to compensation from the defendant for her breach of obligation and if so, how much?"

3. The petitioner thereafter moved an application seeking amendment of the reliefs claimed in the suit and in terms of that application sought the insertion of further reliefs claiming specific performance of an agreement dated 09 March 2019. The Commercial Court by the impugned order has held that no justification existed for granting the amendments as prayed for bearing in mind the fact that the relief of specific performance would amount to changing the nature and character of the suit itself. Additionally the Commercial Court rightly took into consideration the fact that the



amendments were sought after the trial of the suit had commenced. Before the Court, it is further conceded that the aforesaid agreement was to remain effective till 31 March 2022 only. In view of the aforesaid, it is manifest and evident that the claim for specific performance of the agreement has, for all practical purposes, rendered infructuous.

4. It would also be pertinent to note that the respondents filed a counter claim in that suit on 01 December 2020. While responding to the counter claim which was filed, the petitioner in its written statement claimed a right of set-off. On the counter claim, the Trial Judge framed the following issues on 17 February 2021: -

**“ISSUES**

1. Whether plaintiff is entitled for recovery of sum of Rs. 6,54,893/- from Non Claimant/Respondent? Onus of proof on Counter Claimant.

2. Whether Counter Claimant is entitled for any interest from Non Claimant/Respondent?

If so, at what rate and for which period? Onus of proof on Counter Claimant.

3. Whether the Non Claimant/Respondent has paid any amount in excess of amount payable by it to Counter Claimant, as alleged? If so, whether the Non Claimant/Respondent is entitled to any adjustment/set off/refund, as

claimed? Onus of proof on Non Claimant/ Respondent.

4. Relief.”

5. After the aforesaid issues were framed, the petitioner moved an application purporting to be under Order XIV Rule 5 of the Code and sought the following additional issues being framed in the main suit. Those proposed issues read thus: -



“a. Whether plaintiff is entitled to specific performance of the service contract dated 09.03.2019?

b. Whether the service contract containing clause 10(b) is part of the parties constitutional and contractual freedom and do not fall foul with Article 19(1)(g) and 21 of Constitution of India?

c. Whether service contract containing Clause 10(b) is not a restraint of trade, business and profession and thus is not hit by Section 27 of Indian Contract Act, 1872, Article 19(1)(g) and 21 of the Constitution of India?

d. Whether Defendant’s aforesaid defence of restraint of profession is not replete with immorality, unethicity and illegality, which Court and state cannot be a party thereto?

e. Can Defendant raise the territorial jurisdiction when she concedes the same in her Counter Claim?”

6. Dealing with the application for framing of additional issues in the main suit, the Court firstly noted that insofar as the issue of the petitioner being entitled to specific performance of the contract is concerned, the same would clearly not survive considering that the application for amendment itself had been refused. It accordingly held that no occasion arises to frame additional issue (a) with respect to specific performance of the service contract of 09 March 2019. Additional issue (b) which was proposed by the petitioner, however, found favor with the Commercial Court and accordingly the same came to be accepted and framed as issue no.7. The Trial Judge further held that proposed additional issues (c) and (d) are repetitive and therefore would not merit acceptance.

7. Taking up the issue of the prayer made by the petitioner for framing of an additional issue in the counter claim proceedings, the Commercial Court firstly noticed the proposed issue which was suggested by the petitioner and read thus: -



“a. Whether Non Claimant/Respondent is entitled for any interest from Claimant/Plaintiff? If so, at what rate and for which period?”

8. Dealing with the aforesaid prayer, the Trial Judge noted that the counter claim had been filed with the defendant alleging that the petitioner had failed to pay the complete retainership amounting to Rs. 6,54,893/- including outstanding fee of Rs. 5,87,739/-. The counter claim had sought the payment of the aforesaid sums alongwith interest on the basis of the allegations laid in the counter claim. The petitioner while filing a written statement to the counter claim had asserted that the defendant had been paid a sum of Rs. 4,77,694/- in excess and had also been accorded excess credit of Rs. 67,500/-. The additional issue which was sought to be framed essentially claimed interest on the sum which was sought to be set-off.

9. Dealing with the aforesaid issue, the Commercial Court has firstly placed reliance upon the provisions of Order II Rule 2 of the Code to hold that since no relief in respect of alleged excess amounts had been claimed by the petitioner in the main suit, it would be deemed to have relinquished that claim. The Commercial Court has further held that no court fee was paid so as to enable it to view it as a substantive claim.

10. Having heard learned counsel for parties, this Court is of the considered opinion that the challenge to the orders passed by the Commercial Court rejecting the application for amendment as well as for framing of additional issues in the principal suit clearly merits no interference.



11. Undisputedly, the suit as framed was for permanent injunction and a claim for damages. The relief for specific performance which was sought would clearly amount to changing the character of the suit itself. The view as expressed by the Commercial Court in this regard is thus clearly unexceptionable.

12. Turning then to the additional issues which were sought in the principal suit, the Court notes that the proposed additional issue (a) could not have possibly been accepted once the prayer for amendment itself had come to be negated. The Court also does not find any error in the Trial Judge refusing to frame proposed additional issues (c) and (d) in the principal suit since they were clearly repetitive and it had, in any case, accepted the proposed additional issue (b) which now stands framed as issue no.7. As this Court views the issues which were proposed by the petitioner here, it finds no manifest error committed by the Commercial Court which may merit interference under Article 226 of the Constitution.

13. That then leaves the Court to deal with the additional issue which was proposed in the counter claim. Learned counsel for the petitioner contends that once the Commercial Court had accepted consideration of the set-off which was claimed by the petitioner here, the claim of interest was consequential and that the Commercial Court has committed a manifest error in refusing to accept the same as an additional issue.

14. The Court finds itself unable to sustain the aforesaid submission for the following reasons. It becomes pertinent to note that the claim which is described to be as one of set-off was based on the allegation that certain



sums in excess had been paid to the respondent. If that were the case of the petitioner, it was incumbent upon it to have raised that issue in the principal suit itself. In the original suit, no relief had been claimed in respect of the excess payment or credit of which set-off was claimed. The plaint also did not carry any assertion that money had been wrongly retained nor did it carry a prayer for refund. It is in the aforesaid backdrop that the Commercial Court alluded to the provisions of Order II Rule 2 of the Code.

15. While it is true that the Commercial Court has framed issue no.3 in the counter claim proceedings and which relates to the asserted set-off, the petitioner essentially seeks an adjustment of certain sums which are claimed to have been paid in excess to the respondents. A claim for interest would clearly depend upon a positive assertion having been made by the plaintiff clearly affirming that a certain sum is due and payable. No such relief was ever claimed in the principal suit. The adjustment of alleged excess payments could not have possibly also justified a claim for interest.

16. Regard must also be had to the fact that in terms of the provisions contained in Article 1 of Schedule I of the Court Fees Act, 1870, court fees is payable on both a set-off as well as a counter claim. No additional court fee is payable where adjustment alone is sought. As per the petitioner's own case, the sums allegedly paid in excess had been retained and held by the counter claimant in its own hands. No additional court fee was also paid on the alleged set-off which was sought.

17. Accordingly, and for all the aforesaid reasons, the Court finds no ground to interfere with the orders impugned. The Court while parting only



observes that the various observations as they appear in the orders impugned are not liable to and should not be construed as an expression of definitive opinion by the Commercial Court on the reliefs which are claimed by the petitioner.

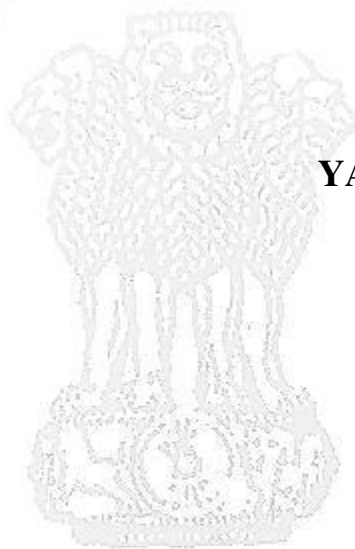
18. The writ petition along with pending applications consequently shall stand disposed of in terms noted above.

19. The earlier date fixed i.e. 25.05.2022 stands cancelled.

**MAY 17, 2022**

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**YASHWANT VARMA, J.**



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