

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Arbitration Application No. 63/2017

M/s. Biogenetic Drugs Pvt. Ltd., Having Its Registered Office At
10, Mathur Vaish Nagar, Tonk Road, Jaipur, through proprietor
Mukut Bihari Goyal son of late Shri Gopal Das Goyal, aged about
61 years, resident of 10, Mathur Vaish Nagar, Tonk Road, Jaipur

-----Petitioner

Versus

The Managing Director, Rajasthan Medical Services Corporation
Limited, Swasthya Bhawan, C-Scheme, Jaipur

-----Respondent



For Petitioner(s)

: Mr. Vibhuti Bhushan Sharma with
Ms. Shruti Dixit

For Respondent(s)

: Mr. Vikram Pratap Singh on behalf of
Mr. Alok Garg

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ
Judgment

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23/02/2018

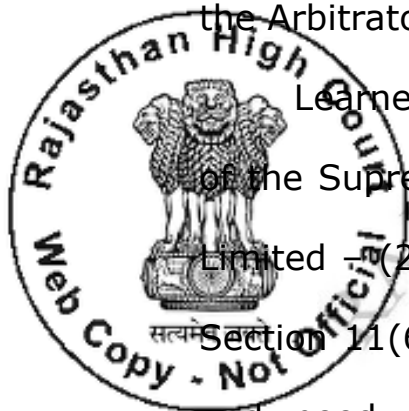
This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by M/s Biogenetic Drugs Pvt. Ltd., a proprietorship firm, through its proprietor Mukut Bihari Goyal, praying for appointment of Sole Arbitrator for resolving its disputes with the respondent.

Mr. Vibhuti Bhushan Sharma, learned counsel for the petitioner, contended that the petitioner firm is engaged in the business of manufacturing/supplying drugs and medicines. On 05.06.2012 the petitioner firm entered into a contract with the respondent for a period of one year for supplying specific drugs/medicines. Clause 8 of the agreement contemplated appointment of an Arbitrator in case of any dispute. After completion of the contract, the respondent illegally deducted a

sum of Rs.1,49,51,969/- out of the payment sanction No.142/2013-14, against the penalty order dated 30.05.2013. The petitioner firm served a notice dated 17.02.2017 on the respondent invoking the arbitration clause and prayed for referring the dispute to Sole Arbitrator for settlement. The respondent failed to act in accordance with the clear procedure and did not appoint the Arbitrator.

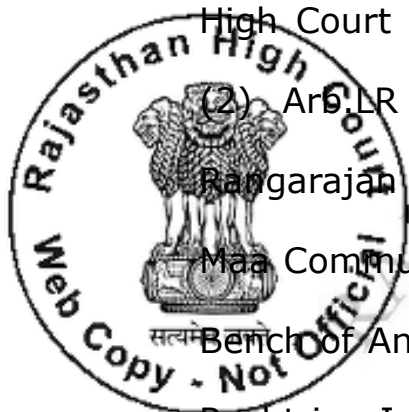
Learned counsel for the petitioner, relying on the judgment of the Supreme Court in Duro Felguera S.A. Vs. Gangavaram Port Limited – (2017) 9 SCC 729, argued that in view of the amended Section 11(6A) added by the 2015 Amendment, the Court should and need only look into one aspect – the existence of an arbitration agreement and no other point is required to be considered for referring the dispute.

Mr. Vikram Pratap Singh, learned counsel for the respondent, opposed the application contending that the petitioner has not highlighted the fact that 14 batches of code 112 of its medicine Erihormycin Estolate Susp 125 ml was held to be not of standard quality and information to this effect was given to him by letter dated 30.05.2017. The respondent had already made payment of Rs.1,49,51,969/- to the petitioner with regard to the supply made by the petitioner against the code 112, i.e. on 29.09.2011 amount of Rs.69,34,987/- and on 30.12.2011 an amount of Rs.94,97,245/-. The payment sanction dated 19.07.2013 highlighted that the recovery of Rs.1,49,51,969/- due towards not of standard quality product. As per Clause 19(3) of the tender document, the respondent was not liable to make any payment whatsoever for the products which were not of standard quality. The application is time barred having been filed with delay of three



years, which is normally the limitation for money suits. As per Section 43 of the Arbitration and Conciliation Act, 1996, the Limitation Act, 1963 is applicable to the arbitration proceedings. Learned counsel, in support of the arguments, has relied on the judgment of Patna High Court in Jamadar Singh Vs. The Engineer-in-Chief and Others – 2000 (3) Arb.LR 202 (Patna), that of Delhi High Court in Rakesh Kumar Garg Vs. MCD and Another – 2008 (2) Arb.LR 107 (Delhi), Yogesh Kumar Gupta Vs. Anuradha Rangarajan – 2007 (2) Arb.LR 446 (Delhi) and Prasar Bharti Vs. Maa Communication and etc. - AIR 2011 Delhi 26, that of Division Bench of Andhra Pradesh High Court in Prathyusha Associates Vs. Rashtriya Ispat Nigam Limited – 2006 (2) Arb.LR 130 (AP (DB)), that of Bombay High Court in Adinath Sahakari Sakhar Karkhana Vs. The Triveni Engineering – 2008 (1) BomCR 115.

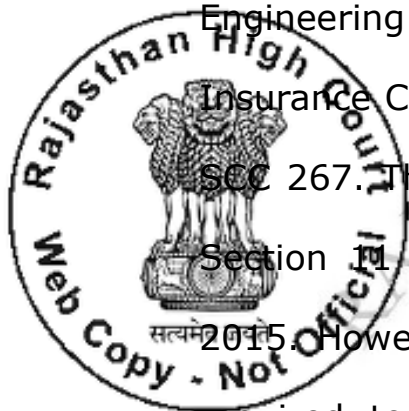
Having heard learned counsel for the parties and perused the material on record, this court finds that after introduction of sub-section (6A) in Section 11 of the Act of 1996 added by the 2015 Amendment, the High Court, while considering the application under sub-section (4), (5) or (6) of Section 11 of the Act of 1996, notwithstanding any judgment, decree or order of any Court, is required to merely examine the existence of an arbitration agreement. The Supreme Court in Duro Felguera S.A., supra, while considering the effect of Section 11(6A), held that the intention of the legislature is clear that the court should and need only look into one aspect – the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple – it needs to be seen if the agreement contains a Clause which provides for arbitration pertaining to the disputes,



which have arisen between the parties to the agreement. In view of what has been discussed by their Lordships, the scope of the power with the Chief Justice or his nominee under Section 11(6) of the Act of 1996 earlier than introduction of the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23.10.2015, was much wider in view of the decisions in S.B.P. & Co. Vs. Patel Engineering Ltd. and Another – (2005) 8 SCC 618 and National Insurance Co. Ltd. Vs. Boghara Polyfab Private Limited – (2009) 1 SCC 267. This position continued till Section (6A) was inserted in Section 11 of the Act by way of amendment brought about in 2015. However, after aforesaid amendment, all that this Court is required to see is whether an arbitration agreement exists – nothing more, nothing less. The intention of the legislature in doing so is essentially to minimize the Court's intervention at the stage of appointment of the arbitrator. Indisputably, in the present case, Clause 8 of the agreement provides for reference of a dispute to the arbitration for adjudication. Clause 8 of the agreement reads as under:-

“8. In case of Dispute or difference arising between the Purchaser and a Supplier relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrator one each to be appointed by the purchaser and the Supplier. The third Arbitrator shall be chosen by the two Arbitrator so appointed by the Parties and shall act as presiding arbitrator.”

In view of existence of the arbitration clause, this court cannot go into any other aspect including about the limitation, raised by the respondent as all these questions are writ large to be considered by the Sole Arbitrator.



In view of above, present application deserves to succeed and the same is allowed. Hon'ble Mr. Justice V.S. Dave (Retd.), R/o Flat No. 102, C-22, Block-A, Trimurti Dave Apartment, Sawai Jai Singh Highway, Bani Park, Jaipur, (Phone No.0141-2202643), is hereby appointed as an independent sole arbitrator to resolve the disputes between the parties. Payment of the costs of arbitration proceedings and the arbitration fees shall be made as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 read with Manual of Procedure for Alternative Dispute Resolution, 2009 of this Court, as amended from time to time.

A copy of this order be sent to Hon'ble Mr. Justice V.S. Dave (Retd.), for needful.

(MOHAMMAD RAFIQ),J

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