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

+ O.M.P.(I)(COMM) 93/2020

RARE METABOLICS LIFE SCIENCES

PVT.LTD & ANR

.....Petitioners

Through: Mr. Jayant Mehta & Mr. Anshumaan
Sahni, Advs.

versus

MATRIX LABS

..... Respondents

Through: Mr. Amitabh Chaturvedi, Mr. Jeevesh
Nagrath, Mr. Sangeeth Mohan & Mr. Chandan
Dutta, Advs.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

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24.04.2020

1. The hearing was conducted through video conferencing.
2. This petition seeks release of 7.24 lacs COVID 19 Rapid Test Kit and other COVID 19 related materials which have been imported and/or are being imported by the respondent from People's Republic of China. Petitioner no. 1 viz. Rare Metabolics Life Sciences and the respondent signed an agreement making Rare Metabolics the exclusive distributor of medical products imported into India by the respondent. Later another agreement was signed in which Rare Metabolics appointed petitioner no.2 as its distributor for COVID 19 Rapid Test Kits and other related material to which the respondent also was a signatory. On 25th March 2020, Rare Metabolics had expressed a desire to import one million tests of WONDFO SARS CoV-2 Antibody tests. It requested the respondent to send it a

Proforma Invoice and specify the delivery time at the earliest. The respondent acknowledged the order and replied that it would process and send the PI (Proforma Invoice) soon. On 27th and 28th of March the ICMR/National Institute of Cancer Prevention and Research placed an order on petitioner no. 2 for five lakh COVID 19 Rapid Tests at the rate of Rs. 600/- per test. The total order value was Rs. 30 crores. The respondent, being the importer, obtained a licence to import medical material. No customs duty was payable for supplies made to ICMR. The court is informed tht now all such material is duty exempt. Of the said order for 500,000 tests kits, 2.76 lakh have already been delivered to ICMR and the remaining 2.24 lakh tests are expected to be delivered very shortly. The Court is informed that the said consignment is likely to land in India in the next 24 hours, subject to prioritisation by the Government of India.

3. The petitioners contend that according to the bi-partite agreement the material cannot be distributed in India, except through Rare Metabolics, which has already paid Rs. 12.75 crores to the respondent and this amount covers the cost of import of 5 lakh tests at the rate of USD 3 per test and the freight cost.

4. According to the learned counsel for the respondent-importer, the freight cost is in the range of approximately Rs. 2 crores for one million tests, 50% of the same would be applicable to the orders placed by the ICMR. The cost of import by respondent per test works out to: US\$3 per test x Rs. 75/- (US\$ to INR exchange rate) = Rs.225/- + Rs.20/- freight cost = Rs.245/-. Multiplied into 5 lakh tests, the total cost to the respondent for the ICMR destined kits/tests is Rs.12,25,00,000/- (Rs.225 x 500,000). (Rupees twelve crores and twenty-five lacs only). The US Dollar has

become a trifle more expensive in the past few days, but that is of minimal consequence, at this stage.

5. The respondent is to supply these goods to petitioner no.2 for Rs.20 crores plus 5% GST = Rs.21 crores, at an apparent 45% profit of Rs.7.75 crores. Petitioner no. 2 is to receive an amount of Rs. 30 crores plus GST from the ICMR, for a similar evident profit of Rs.9 crores despite no value addition to the imported medical material. So, from the Rs.30 crores to be paid by ICMR for the 5 lakh kits/tests, Rs.18.75 lacs will be the shared by the intermediaries because, as discussed hereinabove, the actual costs of the monies paid to supplier/exporter was only Rs.11,25,00,000/-. The Court is informed that the goods are being flown in by Air India from China. In the circumstances the freight cost of Rs.2 crores for the one million kits/tests is may be an issue, but it is not being looked into for the moment.

6. The monies are to be paid after the tests having met the requisite standards of the ICMR. The first consignment of 2.76 lakh tests was delivered to ICMR on 17th April 2020, for which invoice has been raised but the payment is awaited. It is the petitioner's case that the moment payment is received, it will be immediately remitted to the respondent. The latter, however, contends that the import was on the understanding between the parties that there would be 100% upfront payment specifically apropos the consignment for ICMR. It refers to the various communication in this regard, in particular the petitioner's communication dated 18.04.2020, wherein it had agreed to pay the respondent-importer the entire money for the 5 lakh kits/tests upfront. However, the learned counsel for petitioners submits that the said communication was under duress and contrary to the understanding between the parties, both under the bi-partite and tri-partite

agreement.

7. Be that as it may, since the kits/tests are required in the country on urgent basis in view of the worldwide pandemic, it is ordered as under:

- (i) 2.24 lakh tests shall be delivered to ICMR, the moment it lands into India.
- (ii) The total invoice value raised by the respondent-importer upon petitioner no. 1 is Rs. 20 crores plus GST i.e. Rs. 21 crore. The respondent has received Rs. 12.75 crores. The balance amount of Rs. 8.25 crores shall be first paid to the importer before any monies received from ICMR by Petitioner no. 1/ Petitioner no. 2 is adjusted for any other purpose. Such monies shall be paid to the respondent within 24 hours of it coming into the petitioner's bank account.

8. The respondent submits that it has received an order for supply of 50,000 kits/tests, from the Government of Tamil Nadu, through an intermediary dealer viz. M/s Shan Biotech and Diagnostics, at the ICMR approved rate of @Rs.600/- per test. Of this order, 24,000 has been supplied and 26,000 more are to be supplied. Let the same be supplied, the moment the kits/tests reach India, directly to the State Government of Tamil Nadu.

9. The Court is of the view that a profit mark-up of Rs. 155/- i.e 61% on the landed cost price of Rs. 245/- is much on the higher side and in any case more than sufficient for the seller, for the kits/tests to be made available in India for urgent extensive tests through the country, especially in these present extraordinary circumstances of the worldwide pandemic. The country is going through an unprecedented medical crisis affecting public order. People have been cloistered in their homes or constrained to stay

wherever they were on 24th March 2020. The economy is virtually at a standstill for the last one month. There is an element of disquiet apropos one's safety. For people to be assured that the pandemic is under control and for governments to ensure and for agencies engaged in the frontline battle to safeguard people's health, more kits/tests should be made available urgently at the lowest cost, for carrying out extensive tests throughout the country. Public interest must outweigh private gain. The lis between the parties should give way to the larger public good. In view of the above, the kits/test should be sold at a price not beyond Rs. 400/- per kit/test inclusive of GST.

10. Mr. Jayant Mehta, the learned counsel for the petitioners, states upon instructions, that in the interest of the country he would not pursue the matter any further and would give up all further claims, in the case if the importer undertakes to sell the product at not more than Rs.400/- each, inclusive of GST. Indeed, both parties agree to the principle public interest should be paramount and the tests should be made available to the general public at the lowest cost possible. Mr Nagrath, the learned counsel for the respondent submits, that the respondent is ready to and undertakes to supply the kits/tests at Rs.400/- each, plus GST i.e. at 40% lesser than the ICMR approved rate, directly to any Government or its agency or private entity duly approved to carry out these tests.

11. So, from the other 5 lakhs kits/tests, 50,000 shall be excluded for the State of Tamil Nadu and the remaining 450,000 would be available to the respondent to be disposed-off in terms of the above, directly to any Government or governmental agency or any private entity which has received due approval to carry out such tests.

12. In view of the above, the petitioners agree not to pursue any claim

apropos the other 5 lakh kits/tests.

13. The petition is disposed-off in terms of the above.

14. The order be uploaded on the website forthwith. Copy of the order be also intimated to the learned counsel for the parties through email.

APRIL 24, 2020/kk

NAJMI WAZIRI, J