IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ARB-ICA-4 of 2021 (O&M)
Date of Decision:15.12.2021

M/s Beri Udyog Private Limited **.....Petitioner**

Versus

Jingansu World Agriculture Machinery Co. Limited and others

..... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Sangram Singh Saron, Advocate
and Ms. Surabhi Kaushik, Advocate
for the petitioner.

Mr.Gaurav Chopra,Sr. Advocate
with Mr. Vipul Joshi, Advocate
with Ms. Meghna Nagpal, Advocate
Ms. Seerat Saldi, Advocate
for respondent no.1.

Mr. T.S.Sullar, Advocate
For respondent no.2.

Mr. Gautam Acharya, Sr. Advocate
with Mr. J.S.Dhaliwal, Advocate
and Ms. Prerna Dhall, Advocate
for respondent no.3.

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LISA GILL, J(Oral).

This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act') has been filed by the petitioner-company seeking interim reliefs which read as hereunder:-

> "A. Passing ad-interim ex-parte order restraining/injuncting the respondent no.1 and its officers, agents, servants, sister concerns, subsidiaries etc., from supplying Combine Harvesters and other agricultural machineries to the respondents no.2 to 7 or any entity/ person/distributor/stockiest for export to India or import into India in terms of Clause 2.4 of the Agreement dated 15.12.2016.
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> B. Passing ad-interim ex-parte order restraining/injuncting the respondents no.1 to 7 their officers, agents, servants etc., or

any other person/ distributor/ stockiest in India, from importing/distributing/ selling the Combine Harvesters and other agricultural machineries manufactured by respondent no.1 in India;

C. Passing an ad-interim ex-parte order directing the respondents no.1 to 7, their officers, agents, servants etc., to furnish import, export, purchase, sales and stock/inventory/accounting reports relating to the Combine Harvesters manufactured by the respondent no.1 and exported to India;

D. Passing an ad-interim ex parte order directing the respondent no.1 to deposit an amount of Rs.36,15,00,000/- with this Hon'ble Court."

Brief facts as stated in the petition are that the petitioner-company, M/s Beri Udyog Private Limited (for short 'BUPL') incorporated under the Indian Companies Act, 1956 (for short 'Companies Act'), having its registered office at Karnal, Haryana, is a manufacturer and distributor of agricultural machinery and equipment within and outside India and is also engaged in manufacturing of farm equipment. It is stated that the company supplies and sells its products under the brand name of 'Fieldking' and 'Beroni'. Respondent no.1-Jiangsu World Agriculture Machinery Company Limited, is stated to be a company registered under laws of Republic of China and one of the 21 subsidiaries belonging to Jiangsu World Group. Respondent no.1, is stated to be an agricultural machinery manufacturer also providing marketing and after-sale service. Respondent no.2-Ward Agricultural Machinery India Private Limited (for short 'WAM'), is stated to be a company incorporated under the (Indian) Companies Act 2013 registered with the Registrar of Companies, Cuttack and involved in supplying and distribution of agricultural machinery. Respondent no.2, is stated to be listed as an overseas agent of respondent no.1. Respondent no.3-

Godabari Agro Machinery and Services India Private Limited (for short' GAM'), a private limited company incorporated on 22.11.2019 under the Companies Act 2013, is stated to be registered with the Registrar of Companies, Cuttack. Respondent no.4-Shanghai Yingxin World Machinery Co. Ltd. (for short 'SYWM') is stated to be a subsidiary company of World Group, which is involved in overseas business of World Group brand products. Respondent no.4 is stated to have been established in 2009 and acting as an export centre for all World Group brand machines. Respondent no.5-Moral Gain International Limited, respondent no.6-Guangzhou Yijia Supply Chain Co. Ltd., and respondent no.7-Zhenjiang Sinde Bio Co. Ltd., are stated to be companies used by respondent no.1 to export machines into India.

It is stated that as respondent no.1 wished to access the Indian market for selling its agricultural machinery and equipment and petitioner was looking for manufacturers of Combine Harvesters and other agricultural machinery, which it could brand and sell under its own brand name of 'Fieldking', agreement dated 15.12.2016, was executed by and between the petitioner-company and respondent no.1, wherein petitioner was appointed as the exclusive distributor of Combine Harvester and other agricultural equipment manufactured by respondent no.1 throughout India for a period of five years.

It is further stated, that in terms of Clause 2.3 of the Agreement, it was agreed that respondent no.1 shall not supply the Combine Harvester or any other form of agricultural equipments to any other person without prior consent in writing of BUPL and in terms of Clause 2.4, respondent no.1 agreed not to appoint any new dealer or distributor or stockiest during pendency of the agreement and for further period of two years after the date

of termination of the agreement. Clause 2.3 and 2.4 of the Agreement read as under:-

> **"2. <u>Warrant and Liability of Supplier.</u>**
>
> 2.3. Supplier shall not supply 'Combine Harvester; or any other form of agricultural equipments to any other person, dealer or distributor without prior consent in writing of BUPL.
>
> 2.4 Supplier shall not appoint any new dealer/distributor and stockiest for sale of 'Combine Harvester' or any other form of agricultural equipments during the pendency of the agreement and for a period of two years after the date of termination of this agreement."

It was further agreed that the agreement would continue in force for a period of three years unless terminated by mutual written consent by both the parties under normal circumstances by giving notice of three months in writing. Clause 19.1 and 19.2 dealing with the same read as under:-

> "**19. <u>Termination</u>**
>
> 19.1. This agreement shall continue in force from the date hereof for a period of 3 (three) years unless terminated by mutual written consent by both the parties hereto under normal circumstances by giving notice of three (3) months in writing. The agreement can be terminated after 1st year of association only. All provisions of this agreement relating to confidential information disclosed pursuant to this agreement prior to termination and Clause 2.4 will survive the termination of this agreement.
>
> 19.2 Any material breach of the terms and conditions of this agreement by either party will lead to termination of the agreement at the option of the other party. However, if required by BUPL, SUPPLIER with complete execution of the ordered items under existing purchase orders and the parties shall settled their account."

It is further stated that respondent no.1 in complete violation of the terms and conditions of the agreement dated 15.12.2016, incorporated respondent no.2 through its employees and there was a specific breach of the terms and conditions of the agreement as the Indian market was accessed by respondent no.1 by selling and exporting machines to respondent no.2.

Termination notice dated 25.07.2019, was served upon respondent no.1 by the petitioner. Breach was admitted by respondent no.1 pursuant to which a Memorandum of Understanding (for short 'MOU') was executed between the petitioner and respondent no.1 on 02.11.2019 and the following conditions it is pleaded, were *inter alia* agreed on :-

"a. Compensation claim and settlement: Respondent no.1 agreed to pay compensation of INR 2,50,00,000/- (Rs. 2.5 Crores) Crores as damages to the petitioner. The said damages were agreed to be paid as a discount on the further machines to be purchased by the petitioner.

b. Price with respect to Machines kept at Warehouses of World Group, India (Indian Operator): Respondent no.1 agreed to sell to the petitioner Combine Harvester having model name: 4LZ-4.0E with 500 mm Track, at a new base price agreed i.e., INR 9.96 Lakhs plus GST (i.e. INR 11.45 Lakhs minus INR 1.5 Lakhs).

c. Price with respect to China Supplies: The free on Board (FOB) price was USD 13900/- for China supplies which was agreed to be sold at the FOB price for China supplies at USD 11758/-.

d. Revolving Credit/Payment: Further, it was agreed that respondent no.1 shall offer revolving credit of up to INR 2.5 Crores for machines bought by the petitioner and the petitioner would release the full payment in favour of respondent no.1 when the said revolving credit is exhausted and before placing the next order.

e. Transportation: Respondent no.1 was to arrange for the

transfer of the Combine Harvesters from the warehouses of respondent no.1 Indian operator to its factory or any other desired places as per requirement.

f. Liquidation of other Model Harvester Stock lying at the Warehouse of respondent no.1 Indian entity: Liquidation of the stocks by respondent no.1 of the other models of harvesters that were not required by the petitioner that were lying in the warehouses within a period of 30 days.

g. It was also agreed that with the signing of the MOU, petitioner would continue to retain its exclusivity with respect to the sole distribution of the agriculture machinery and equipment supplied by respondent no.1 in India or to be supplied in India as per Clauses 2.3 and 2.4 of the Agreement dated 15.12.2016.

h. Withdrawal of Legal Notice: That in view of the signing of the instant MOU by the parties, the petitioner withdrew the termination notice dated 25.07.2019 and limited its entitlement to compensation to the extent as agreed under the MOU."

The petitioner, it is stated, was duly adhering to the terms and conditions of the agreement dated 15.12.2016 as well as MOU dated 02.11.2019, but respondent no.1 in blatant disregard committed a further breach by exporting Combine Harvesters manufactured by it through other entities. An e-mail dated 03.03.2020, is stated to have been sent by the petitioner to respondent no.1 regarding shipment of 51 units of Combine Harvesters that had allegedly arrived in India in February 2020 and offloaded at the warehouse of respondent no.2. Clarification in this regard was sought, but the aspect was allegedly not dealt with by respondent no.1. It is further stated that petitioner also came to know that respondent no.3, a company incorporated by one of the employees of respondent no.1, who was also one of the ex-directors of respondent no.2 was selling Combine Harvesters of the same make and built manufactured by respondent no.1,

which was being exported to the petitioner. The petitioner, it is stated came to know that respondent no.2-company is still in active contravention of MOU dated 02.11.2019 and agreement dated 15.12.2016 and is still continuing the business of distribution of machines of respondent no.1. It is categorically stated that Mr. Zhang Quiang, a director of respondent no.3, was a former employee of respondent no.1 and an ex-director of respondent no.2, which was incorporated by respondent no.1. He ceased to be a director in respondent no.2 company on 01.11.2019 i.e., a day before MOU dated 02.11.2019 was executed and thereafter he became the Funding Director of respondent no.3. Respondent no.1, in its communication dated 11.05.2020, Annexure P-15, is stated to have confirmed that respondent no.3 was being run by its ex-employees, however, it sought to assure that it had no relation with respondent no.3 and action would be taken for closing down respondent no.3, but no action was taken. Petitioner is stated to have again informed respondent no.1 on 30.04.2020, Annexure P-13, that Combine Harvesters manufactured by respondent no.1 were being sold in the State of Odisha under the brand name of respondent no.1 and for a rate which was much lower than what was being offered by the petitioners. The abovesaid illegal export, it is submitted was admitted by respondent no.1 and stated to be justified on account of inadequate sales at the petitioner's end. Reference is made to the e-mail dated 05.05.2020 and 11.05.2020, Annexures P-14 and P-15, informing respondent no.1 about import of new units of Combine Harvesters into India being more than 50 through other distributors other than the petitioner, which was in violation of the agreed terms.

Petitioner, it is stated, while giving benefit of doubt to respondent no.1 on receipt of e-mail dated 12.05.2020, Annexure P-16, wherein it is stated that due to shortage of sales in India, it was considering

to close its business entirely in the country, called upon respondent no.1 to take remedial steps vide its e-mail dated 25.05.2020, Annexure P-18, which reads as under:-

> "1. Take steps to stop export of your combine harvesters to India to any third party other than BUPL. Take steps to curb illegal importation of the equipment to India, including legal action in China/India, in order to show your commitment and that there is no connivance on your part with other dealers and Godabari.
>
> 2. There should be specific conditions imposed upon the dealers in China that the machines/harvesters sold to them are not for export to India and if the machines are illegally exported to India other than through BUPL, then the warranty clause and the after-sales support on such produces shall not be provided by your company. In-fact, it should be made a part of their dealership agreement in China not to sell the machines outside of their assigned territory. Further, WG should take steps to terminate dealership of such entities in China who violate this condition.
>
> 3. To undertake to us and agree to publicize that no entity has authority to sell Jiangsu World Agriculture Machinery Co. Ltd. Combine Harvesters in India and that you will not provide any after sales support or warranty to such products sold, through such unauthorized channels. Further, your should publicize that the Jiangsu World Agriculture Machinery Co. Ltd. Has not sold any Harvesters to Godabri and the said company has no authority to sell your products in India and that you will not provide any after sales support or warranty to such products sold, through such unauthorized channels.
>
> 4. Since, Godabari is selling the Harvesters in a showroom with the branding of World Group, we call upon you to agree to take legal action against Godabari Agro Machinery and Service India Private Limited or any other

> such entity, to injunct them from selling your products and/or using your intellectual property rights. We call upon you to allow/authorize use to take such legal action and since the importation has taken place at your end, you should bear the legal expenses for such actions."

Reference is made to e-mails dated 27.05.2020, 03.09.2020, 17.09.2020 and 19.09.2020 sent by petitioner to respondent no.1. It is stated that the petitioner was not aware that respondents no.1 and 4 are sisters concerns, both being subsidiaries of the World Group, China and that export of machines i.e., Combine Harvesters by respondent no.1 is even effected through its sister concern/subsidiary-respondent no.4 as well as respondents no.5 to 7 in order to attempt circumvent its obligations under agreement dated 15.12.2016.

After addressing another e-mail dated 14.04.2021, Annexure P-26, legal notice dated 19.05.2021, Annexure P-27 is stated to have been served by the petitioner upon respondent no.1, claiming damages of Rs.36,15,00,000/- for the loss incurred in its business due to illegal importation of machines by respondent no.1 into India. It is further stated that petitioner also issued a without prejudice letter dated 18.06.2021, calling upon respondent no.1 to amicably resolve the disputes by conducting an online video conferencing in terms of Clause 14.1 of the agreement dated 15.12.2016.

Respondent no.1, in response thereto, vide letter dated 22.06.2021, Annexure P-29, denied the allegations in the legal notice while stating that the agreement in question had expired by efflux of time after three years and has no binding effect on both the parties from 15.12.2019 and furthermore, MOU dated 02.11.2019 also came to an end on 19.05.2020, on the fulfillment of compensation payment obligation of Rs. 2.5 Crores

under the MOU, which was duly discharged by Jiangsu World in favour of BUPL.

Another letter dated 28.06.2021, Annexure P-30, was sent by the petitioner. It is stated that meetings were held to amicably resolve the dispute, but the talks failed on 04.08.2021.

Petitioner, it is stated is in the process of invoking the arbitration clause i.e., Clause 14 of the Agreement dated 15.12.2016 against respondent no.1. Clause 14 of the Agreement dated 15.12.2016 reads as under:-

> **"14. Settlement of Disputes**
>
> 14.1 In case of any disputes arising out of or in relation to this Agreement the parties shall first try to (resolve the same amicably failing which the same shall be referred to arbitration in accordance with provisions of the Arbitration & Conciliation Act, 1996 or any other statutory medication or re-enactments thereof. The arbitration shall be conducted by sole arbitration who shall be mutually appointed by the parties. The arbitration shall be held in Karnal, Haryana (India) and the proceedings shall be in English. The parties to this Agreement agree that Court(s) in Karnal (India) only shall have exclusive jurisdiction regarding any matter arising out of or related to this Agreement as well as subject to the arbitration clause."

It is submitted that the present petition has been filed under Section 9 of the Arbitration Act for grant of ad-interim measures in view of the fact that continued breach by respondent no.1 will cause irreparable loss and damage to the petitioner with the balance of convenience being in its favour.

Learned counsel for the petitioner vehemently argued that

exclusivity arrangements under Clause 2.3 and 2.4 of the Agreement dated 15.12.2016 read with MOU dated 02.11.2019 subsist till at-least 15.12.2021 and it is imperative that the remaining period of exclusive access to the Indian Market as agreed with the petitioner should be protected. Respondents, it is submitted are flooding the market with their machines thereby adversely affecting the market share of the petitioner in violation of the arrangement under which large number of machines were bought by the petitioner. Respondents, it is contended are selling the machines at much lesser price and at the same time respondent no.1 is not making spares available to the petitioner thereby affecting petitioner's goodwill, which cannot be compensated in any monetary terms. Therefore, the petitioner has a strong prima-facie case in its favour with the balance of convenience in its favour as well. Moreover, irreparable loss shall be caused to the petitioner, in case, interim measures as prayed for are not granted.

Learned counsel for the petitioner vociferously argued that respondent no.1 has engaged in fraud and subterfuge which is apparent from the composition of respondent no.2 and respondent no.3. It is contended that there is ample material on record to show that respondent no.1 has in blatant disregard and violation of agreement dated 15.12.2016 and MOU dated 02.11.2019, accessed the Indian Market in connivance with other respondents thereby causing irreparable loss to the petitioner. It is further submitted that the stand taken by respondent no.1 that it has no link with respondent no.3 and respondents no.4 to 7, is belied by the documents on record.

Learned counsel for the petitioner submits that goodwill of the petitioner-company should be protected at all costs as action of the respondents has led to grave and irreparable loss to the petitioner. Mr. Saron,

with vehemence argued that respondent no.1 being a foreign entity has practiced fraudulent subterfuge to breach the agreement and has caused actual monetary damage and loss to the petitioner due to loss of market share apart from loss of goodwill which is difficult to quantify in monetary terms. Moreover, in case, the minimum amount in dispute in arbitration is not secured by deposit by this Court till adjudication of the dispute, there is no assurance that damages, if any/ as may be, adjudicated upon in the arbitration award, would ever be released to the petitioner. It is thus prayed that this petition be allowed.

Learned senior counsel for respondent no.1 while refuting the arguments raised by learned counsel for the petitioner submitted that the present petition deserves to be dismissed. Learned counsel for respondent no.1 has argued that there is a clear cut separation of the concept of termination of contract and expiry of contract by efflux of time. Clause 2.4 of the agreement dated 15.12.2016, it is submitted would come into operation only in the wake of termination of the agreement and during the continuance of agreement dated 15.12.2016, it is clause 2.3 of the agreement which would hold currency. As per Clause 2.3 of the agreement, respondent no.1 was under an obligation that it would not supply combine harvesters or any other form of agricultural equipments to any other person, dealer, distributors, in India without prior consent in handwriting of the BUPL. Agreement dated 15.12.2016, does not postulate survival of Clause 2.3 of the agreement post its expiry or even in the event of termination of the contract. Respondent no.1, it is contended was under no contractual obligation or negative covenant to not supply the combine harvesters or other agricultural equipments except during pendency of agreement dated 15.12.2016 i.e., till 15.12.2019.

Mr. Chopra, contended that prayer of the petitioner in this petition is for restraining respondent no.1 from supplying combine harvesters and other agricultural machines to respondents no.2 to 7 and there is no prayer or relief for injunction or restraining respondent no1 from appointing any new dealer, distributors or stockiest in India for sale of combine harvesters or any other form of agricultural equipments. Therefore, the relief sought by the petitioner being founded upon Clause 2.3 of the Agreement, does not survive subsequent to expiry of agreement dated 15.12.2016, therefore no injunction can be issued for restraining respondent no.1, as sought.

Learned counsel for respondent no.1 had further argued that *bona fides* of respondent no.1 are not suspect in any manner, as is evident from the fact that material breach of agreement dated 15.12.2016 was rectified amicably between the parties and quantum of compensation as agreed upon i.e., Rs.2.5 Crores was duly paid as per terms of MOU dated 02.11.2019. It was further agreed that petitioner would attempt to buy 167 machines from respondent no.1 on or before 15.12.2019 during subsistence of agreement dated 15.12.2016 and that MOU dated 02.11.2019 would subsist at the option of the petitioner till compensation was paid in its entirety and would not come to an end merely because agreement dated 15.12.2016 had expired in the meantime. Clear discount of Rs. 1.5 Lakhs on the machines as available in India at that time and further discount of USD 2142 was afforded by respondent no.1 on the Free on Board Price (FOB) for Chinese supplies. Respondent no.1 would also offer revolving credit up to Rs.2.5 Crores for the machines bought by the petitioner, which was in addition to the compensation agreed to be paid by respondent no.1 to the petitioner. Entire compensation of Rs. 2.5 Crores was admittedly released to

the petitioner on or before 19.05.2020. Thus, MOU dated 02.11.2019, also came to an end on 19.05.2020. With withdrawal of termination notice 25.07.2019, agreement dated 15.12.2016, it is submitted clearly stood revived/restored. However, such restoration, it is argued does not envisage any extension of the term of the agreement.

Furthermore, conduct of the petitioner, it was argued, does not entitle it for any injunctive relief for the simple reason that the petitioner itself chose to remain silent for the alleged breach which took place on 03.03.2020 after execution of MOU dated 02.11.2019. It is contended that it is beyond comprehension that once having earlier issued the notice of termination on 25.07.2019, the petitioner would not have taken any action whatsoever at a subsequent stage for the relief as claimed for.

Learned counsel for respondent no.1 submitted that without prejudice to the categoric stand of respondent no.1 that Clause 2.3 of the agreement does not survive post expiry of the contract by efflux of time and Clause 2.4 does not come into operation except on termination of contract by one of the parties, both the said claims are hit by rigours of Section 27 of the Indian Contract Act. Restrictive/ negative covenant of Clause 2.4 extending beyond the term of the contract, it is submitted is void and enforceable and an injunctive relief should not be granted in such a situation. It was reiterated that the petitioner chose to file the present petition in the month of September 2021, which is reflective of lack of *bona fides* on the part of petitioner and especially the fact that no action has been taken by the petitioner till date for appointment of an arbitrator.

It was further submitted that power to grant interim relief under Section 9 of the Arbitration and Conciliation Act should be guided by provisions of Specific Relief Act, 1996 and as per Section 14 of the said Act,

a contract for non-performance for which monetary compensation is an adequate relief or a contract which is determinable in its nature, no injunction can be granted in such contracts in view of the express bar of Section 41 of the Specific Relief Act. Moreover, the petitioner, it is submitted does not have any *prima facie* case or balance of convenience in its favour and neither has the petitioner been able to prove any irreparable loss or damage being caused to it in case injunction is not granted to it, as the petitioner itself has quantified the damages on account of alleged breach of contract. Therefore, if the petitioner can be compensated monetarily, no injunction is called for. It is thus prayed that the present petition be dismissed.

Learned counsel for respondent no.3, submitted that no injunction can be passed qua respondent no.3 as there is no privity of contract between the petitioner and respondent no.3. Moreover, the present petition, it was contended has been filed under Section 9 of the Arbitration Act, without even initiating arbitration, which disentitles the petitioner from any relief. It is further submitted that merely because an ex-director or an employee of the company has formed a new company after submitting his resignation, is not per se or prima facie indicative of fraud or subterfuge.

Learned counsel for respondent no. 2 has supported the arguments raised by learned counsel for respondents no.1 and 3 and prayed for dismissal of this petition. It is submitted that this petition should be dismissed on the sole ground that it has not been filed in accordance with order VI, Rule 15 A CPC as applicable to Commercial Courts as the petition is not accompanied with a statement of truth, as provided in Appendix I of the First Schedule. Learned counsel for respondents thus seek dismissal of this petition.

Learned counsel for the petitioner while rebutting the abovesaid arguments on behalf of the respondents reiterated the arguments on behalf of the petitioner as addressed.

Heard learned counsel for the parties at length and have gone through the file with their assistance.

It is a matter of record that petitioner and respondent no.1 entered into agreement dated 15.12.2016, wherein the petitioner was appointed as the exclusive distributor to import and sell Combine Harvester machines manufactured by respondent no.1 in India. As breach of agreement was discovered by the petitioner, notice of termination was issued by it to respondent no.1 on 25.07.2019. After parleys between the petitioner and respondent no.1, the matter was amicably resolved and MOU dated 02.11.2019 executed, with the termination notice being withdrawn. The terms and conditions of the MOU have been referred to in detail in the foregoing paras and are not being reproduced for the sake of brevity.

Primary argument raised by learned counsel for the petitioner is that there is an exclusivity arrangement arrived at between the petitioner and respondent no.1 at the time of execution of agreement dated 15.12.2016. Breach of the agreement within the first year of execution of the said agreement is admitted by respondent no.1 and on such admission MOU dated 02.11.2019 was entered into between the parties, wherein respondent no.1 agreed to release an amount of Rs.2.5 Crores as damages to the petitioner as per terms and conditions stated in the MOU. Certain other concessions were also offered to the petitioner pursuant to the breach committed by respondent no.1. It is submitted that admission of the first breach itself, is sufficient to indicate the mala fide intention of respondent no.1 and same is stated to be substantiated by the fact that respondent no.2

was incorporated with the sole purpose of accessing the Indian Market in breach of the contract and that respondent no.3 was incorporated right after the MOU dated 02.11.2019 was executed by a person who was an ex-employee of respondents no.1 and 2. Machines were being exported through respondent no.4, which is stated to be a sister concern of respondent no.1 as well as by respondents no.5 to 7 which are other Chinese entities related to respondent no.1.

Controversy at hand admittedly revolves around the interpretation of Clause 2.3 and 2.4 of agreement dated 15.12.2016 and period of their operation.

Clause 2.3 and 2.4 are again reproduced as hereunder:-

> **"2. <u>Warrant and Liability of Supplier.</u>**
>
> 2.3. Supplier shall not supply 'Combine Harvester; or any other form of agricultural equipments to any other person, dealer or distributor without prior consent in writing of BUPL.
>
> 2.4 Supplier shall not appoint any new dealer/distributor and stockiest for sale of 'Combine Harvester' or any other form of agricultural equipments during the pendency of the agreement and for a period of two years after the date of termination of this agreement."

Perusal of agreement dated 15.12.2016 and Clause 2.3 above reveals that the said Clause continues to be in force for the period of operation of the agreement. Though, learned counsel for the petitioner has sought to argue that with the execution of the MOU dated 02.11.2019, term of agreement dated 15.12.2016 also stands extended, in my considered opinion it cannot be concluded so at this stage in these proceedings. Clause 7 of MOU dated 02.11.2019 reads as under:-

> "7. **Agreement/ Future Agreement:-**

That it is agreed that the instant MOU has been drafted in accordance with the terms agreed by the parties. Once the instant MOU is signed, it will come into force from the date of signature and thereafter it shall become an Annexure to the Agreement dated 15.12.2016 executed between the parties and will continue till the entire compensation of Rs.2.5 Crores is paid by the Second Party to the First Party.

The Parties shall start discussion with respect to the future business corporation and the new Agreement from the month of December 2019. It is also agreed that with the signing of the instant MOU, the party of the First Part shall continue to retain its exclusivity with respect to the sole distribution of the agriculture machinery and equipment supplied by the Part of the Second Part in India or to be supplied in India as per Clauses 2.3 and 2.4 of the Agreement dated 15.12.2016."

It is specifically stated in Clause 7 of the abovesaid MOU that it shall become an Annexure to agreement dated 15.12.2016 and that it would continue till the entire compensation of Rs.2.5 Crores is paid by respondent no.1 to the petitioner. It was further agreed between the parties that the petitioner would continue to retain its exclusivity with respect to sole distribution of the agricultural machinery and equipment supplied by respondent no.1 in India or to be supplied in India as per Clauses 2.3 and 2.4 of the agreement dated 15.12.2016.

At this stage, it is relevant to refer to Clause 8 of the MOU which reads as under:-

"8. Withdrawal of Legal Notice:-

That in view of the signing of the instant MOU by the parties, the party of the First Party hereby withdraws the termination notice dated 25.07.2019 sent by its lawyer and its entitlement to compensation shall be limited to the

extent as agreed under this MOU. The compensation for damages and other claims for the breach as mentioned in the termination notice dated 25.07.2019 accordingly stands settled between the parties.

The agreement dated 15.12.2016 and all its provisions shall continue to subsist subject to the terms and modifications agreed under this MOU."

It is specifically mentioned that agreement dated 15.12.2016 and all its provisions would continue to subsist subject to the terms and modifications agreed under the MOU.

Learned counsel for the petitioner had argued that in view of Clause 7 and 8 of the MOU, term and tenure of agreement dated 15.12.2016 itself stands extended and the timeline on 15.12.2019 would no longer remains sacrosanct**.**

It is relevant to refer to Clause 1 of the MOU, at this stage, which deals with compensation claim and settlement thereof. Relevant portion of which reads as under:-

"1. Compensation Claim and Settlement:-

That the party of the Second Part admits that 145 units of Combine Harvesters were sold by it in India through its Indian entity/India operations/dealers. That in order to resolve the disputes, the party of the First Part has considered the proposal of the Party of the Second Part and has agreed to reduce its claim of compensation. That the Party of the Second Part agrees and undertakes to pay compensation of INR 2.5 Crores as damages to the Party of the First Part.

That the said compensation amount of INR 2.5 Crores shall be paid to the Party of the First Part by the Party of the Second Part by giving discount INR 1.5 Lakhs for machines available in India and USD 2142 (USD to INR exchange be rate being INR 70/-) for machines to be

> imported from China per unit machine. That the total amount shall be compensated by the Party of the Second Part by giving discounts as aforesaid on 167 units of Combine Harvester to the Party of the First Part. The party of the first part will attempt to buy the said 167 machines on or before 15.12.2019 during the subsistence of the Agreement dated 15.12.2016. However, in case, the said 167 machines cannot be bought or lifted by the Party of the First part till 15.12.2019, the party of the Second part will pay the balance compensation payable out of the agreed compensation of Rs.2.5 Crore by transferring machines free of cost to the Party of the First Part by 31.12.2019 and such number of machines being equal to balance compensation payable divided by the price of the machine as per the Agreement dated 15.12.2016 i.e., INR 11.45 Lakhs/USD 13900/- per machine.
>
> Xxxxx
>
> This MOU will subsist at the option of the Party of the First Part till the compensation as aforesaid is paid in its entirely and even beyond the Agreement dated 15.12.2016."

A bare reading of the MOU dated 02.11.2019, reveals that agreement dated 15.12.2016 stood revived. The tenure of the said agreement has clearly not been extended. It is apparent that the terms and conditions of the agreement dated 15.12.2016 would continue to subsist for its tenure subject to terms and modifications agreed as per the MOU. The MOU, it was agreed would subsist at the option of the petitioner till the compensation is paid in its entirety and even beyond the tenure of agreement dated 15.12.2016. The very fact that there is a specific reference in Clause 7 of the MOU that parties would start discussion with respect to future business corporation and the new agreement from the month of December, 2019, is

prima facie indicative and conclusive of the fact that the tenure of agreement dated 15.12.2016, was not extended.

In this background, it is to be seen that the petitioner started complaining of breach of the terms and conditions of the MOU from 03.03.2020 itself. However, present petition was indeed filed in September 2021 in which notice of motion was issued on 17.09.2021 by a Coordinate Bench but *ex parte* interim relief was not afforded at that stage though notice regarding stay was issued.

Learned counsel for the petitioner has sought to explain the delay in filing the present petition which was admittedly filed in September 2021, *inter alia* with the prayer that respondents be injuncted from supplying machines till 15.12.2021, by submitting that first and foremost, it took considerable time in collecting the relevant material and documents to show the breach on the part of the respondents and moreover, the petitioner was made to understand by respondent no.1 that it was in-fact seeking to redress the whole situation especially when an e-mail like the one dated 19.09.2020 was received stating that respondent no.1 had nothing to do with the respondent no.3-Godabari Agro Machinery and Services India Private Limited, which was a company incorporated by a colleague who was being asked to close the company. In my considered opinion such explanation does not in any manner spell out the reasons for delay, especially keeping in view the earlier prompt action taken by the petitioner which led to execution of MOU dated 02.11.2019.

At this stage, it is gainful to refer to Section 9 of the Arbitration and Conciliation Act, which reads as under:-

> "9. Interim measures, etc. by Court.— A party may, before or during arbitral proceedings or at any time after the

making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

Doubtlessly, petitioner has a right to approach under Section 9 of the Arbitration Act, seeking interim measures, but for seeking injunctive relief, it is incumbent upon the petitioner to prove that a prima-facie case is made out in the petitioner's favour and that irreparable loss or damage would be caused, in case, injunction is not granted and moreover balance of convenience is in favour of the petitioner. The Hon'ble Supreme Court in **Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125**, delineated the guiding principles regarding exercise of

jurisdiction of the Arbitration and Conciliation Act and observed as under:-

> "It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

Gainful reference in respect to exercise of jurisdiction under Section 9 of the Arbitration and Conciliation Act being subject to restrictions and limitations contained in the specific relief act can be made to the decision of Hon'ble Supreme Court in **M/s Arvind Constructions Co. Pvt. Ltd., Vs. M/s Kalinga Mining Corporation & Ors., 2007(6) SCC 798.** Reliance by learned counsel for the petitioner on **Adhunik Steels Ltd.,'s**

case (supra) and **Suresh Dhanuka Vs. Sunita Mohapatra (2012) SCC 578**, is of no avail in the given factual matrix.

In my considered opinion, petitioner is not entitled to the injunctive relief as claimed in this petition. This is so for the reason that after the MOU dated 02.11.2019 was entered into, the alleged breach was admittedly brought to the notice of respondent no.1 by the petitioner in March 2020 at the first instance. There are a number of communications between the parties which have been referred to in this regard. It is not denied that the petitioner did not take any steps whatsoever since March 2020 till the filing of this petition in September 2021 for the relief as sought. Tenure of the agreement came to an end on 15.12.2019. Clause 2.3 of the agreement which envisages that respondent no.1 shall not supply the combine and harvesters or any other form of agricultural equipments to any other persons/dealers or distributors without prior consent of the BUPL, would *prima facie* subsist during the tenure of the agreement. It is to be noted here that even if the argument of learned counsel for the petitioner is accepted that Clause 2.4 of the agreement shall remain in operation for two years after the expiry of the agreement and is not contingent upon the 'termination', the negative covenant is regarding respondent no.1 not appointing any new dealer, distributor or stockiest for sale of combine harvesters or any other form of agricultural equipments for the said period and not regarding supply of combine harvesters etc. Prayer in the present petition is not for injuncting respondent no.1 from appointing any dealer, distributor or stockiest etc., in terms of Clause 2.4 of the agreement but for restraining respondent no.1 from supplying of the combine harvesters or any other form of agricultural equipments to any other person, dealer or distributor. Moreover, it is not denied that compensation of Rs.2.5 Crores

was deposited with the petitioner on 19.05.2020. Moreover, as noticed in the foregoing paras, petitioner chose not to seek relief under Section 9 of the Arbitration Act till filing of this petition in September 2021.

Relief under Section 9 of the Arbitration Act, is admittedly a discretionary relief to be guided by the principles of the Specific Relief Act. Therefore, inordinate delay on the part of the petitioner is indeed fatal to its cause as even the period of two years after the expiry of agreement dated 15.12.2016, would be over on 15.12.2021. Petitioner has also sought a direction to respondent no1 to deposit an amount of Rs.36,15,00,000/- being the damages suffered by it for the loss incurred in its business due to illegal importation of machines into India.

It is pertinent to note at this stage that till date, no action has been taken by the petitioner for initiating arbitration proceedings in terms of Clause 14 of the Agreement dated 15.12.2016 and Clause 9 of the MOU. Apart from the same, no ground has been established for issuance of an injunction in this respect, as well.

An argument had been raised by learned counsel for respondents no.2 and 3 that this petition deserves to be dismissed *qua* the said respondents as there is no privity of contract between the parties. Though, there may not be a privity of contract between the parties, petition under Section 9 of the Arbitration Act, is indeed maintainable. Scope of power of a Court under Section 9 of the Arbitration Act., is not limited to parties to an arbitration agreement and interim directions can be issued against a third party, as well. Reference in this regard can gainfully be made to judgement of Delhi High Court in **GATX India Private Limited Vs. Arshiya Rail infrastructure Limited and another, 2014(75) RCR(Civil) 750**. Bombay High Court in **Girish Mulchand Mehta and others Vs.**

Mahesh S. Mehta, 2009 (13) R.C.R(Civil) 274 held that the Court is free to exercise its power under Section 9 of the Arbitration Act, *qua* persons who are not party to the arbitration agreement or arbitration proceedings as jurisdiction under this provision is extended for passing of interim measures of protection or preservation of the subject matter of the arbitration agreement. Thus, the petition is maintainable against the said respondents.

Argument raised by learned counsel for the respondent regarding the petition not being accompanied with the statement of truth in terms of the Commercial Courts Act is not being delved into in great detail in view of the ultimate decision. However, it is to be noticed that even if a petition under Section 9 of the Arbitration Act, is ultimately held to be governed by the said provisions, it would only be a curable defect and an opportunity can always be afforded to the party to cure the same in a given situation.

No other argument has been addressed and no other point has been raised for consideration.

Petition is accordingly dismissed.

It is clarified that there is no expression of opinion on the claims and counter claims raised by any of the parties lest there be any prejudice to either in proceedings, if at all/which may be initiated or undertaken by them. Observations in this order are confined for decision hereto.

[LISA GILL]
Judge

15.12.2021
s.khan

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.