

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 + O.M.P. 225/2008 and I.A. 5068/2008

April 29, 2008

HERO CYCLES LIMITED Petitioner
 Through Mr. A.S. Chandhiok, Sr. Advocate with
 Mr. Sumant Batra, Mr. Sanjay Bhat, Mr. Nitin Sharma,
 Advocates
 versus
 ULTRA MOTORS INDIA PRIVATE LTD Respondent
 Through Mr. Rajiv Nayar, Sr. Advocate,
 Mr. Sandeep Sethi, Sr. Advocate with
 Mr. Vineet Malhotra, Mr. Pragyan Sharma, Advocates

CORAM:
MR. JUSTICE S. RAVINDRA BHAT

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| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

Mr. Justice S. Ravindra Bhat (Open Court)

I.A. 5068/2008 (Exemption)

Allowed subject to all just exceptions.

O.M.P. 225/2008

1. Issue notice. Mr. Vineet Malhotra, learned counsel accepts notice. With the consent of counsel for the parties, the petition was heard finally.
2. This petition under Section 9 of the Arbitration and Conciliation Act seeks interim

measures against the respondent. The reliefs sought are to restrain the defendants from:

- "a) Selling UMIL EV Kits to any party of manufacturing electric vehicles in India;*
- b) Selling electric vehicles in the categories of high speed and low speed products forming subject-matter of the Agreement;*
- c) Holding the National Dealers Convention at Goa on 3rd and 4th May, 2008 or any such meeting of dealers and not to convene any such or other meeting of joint-dealers in future till conclusion of arbitration proceedings;*
- d) Using the trademark and or brand name of the Petitioner for the sale of any of its products including Velociti or on any of its stores;*
- e) Maligning the image, reputation and good will of the Petitioner in the market or spreading rumors against the Petitioner in any manner including dossier or correspondence to joint-dealers, press releases, statements etc.*
- f) Any other claim as this Court may deem fit in the facts and circumstances of the present case."*

3. The facts necessary for the present proceeding are that the petitioner (hereafter called "Hero") entered into an Agreement for Technical Collaboration and Joint Marketing with the respondent (hereafter referred to as "UMIL") on 29.9.2006. In terms of the agreement, Hero, a well known manufacturer and distributor of bicycles and other such like products in India, contracted with UMIL for developments of specified products i.e. E-bike, E-Moto and E-Scooty. These were described in Clauses 10,11 and 12 of the definition clause. The parties provided for various terms such as supply prices, terms of payments, warranties intellectual properties etc.

Articles 7.1, 7.2 and 7.4 reads as follows:

"7.1 This is an exclusive agreement. Subject to clause 2.6, HCL shall not seek to procure or actually procure similar products of the same category EV Kit, from any third party, other than UMIL, during the term of this agreement.

7.2 UMIL shall not offer the E-bike, E-moto, or E-scooty to any person or

already delivered to HCL shall be deemed as sold and HCL shall be bound to pay UMIL for such kits at the price agreed in the duly signed purchase order. In the event of expiry, non renewal or termination of the agreement, UMIL will ensure the supply of spares pertaining to UMIL EV Kits for a minimum period of 3 years from the date of last supply of the UMIL EV Kit."

6. The agreement also contained an arbitration clause. The last condition relevant for decision in this is Article 29. It provides as follows:

"29.1 Both the Parties undertake that they will not undertake any act that shall amount to soliciting the employees, officers, workers, etc. of each other"

7. The petitioner Hero Cycles Ltd. has adverted to souring of the relationship with UMIL and has referred to e-mail exchanges and letters dated 26th February, 2008, 28th February, 2008, 4th April, 2008 and 27th March, 2008. It is contended on its behalf by Sh. A.S. Chandhiok, learned senior counsel that cumulative reading of these as well as the notice dated 23.04.2008 show that UMIL has now sought to terminate the agreement. In this background, it is contended that the proposal of the UMIL to hold a meeting on 3rd and 4th May, 2008 of dealers, has to be enjoined. Learned counsel also relied upon Clause 7.1 and 7.2 in support of the submission that the respondent cannot, during the subsistence of the agreement, market a competing product or anything similar to the products which are subject matter of the agreement.

8. Learned senior counsel on behalf of the respondent contested the petition and submitted that the reliefs claimed cannot be granted since the Agreement contains a termination clause. He submitted that by virtue of Section 14(1)(c) read with 41(1) (h) of the Specific Relief Act, 1963

the nature of reliefs sought cannot be granted finally, as injunction is not available, because of Section 14(1)(c). In support of the submission, learned counsel relied on the judgment of the Supreme Court reported as *Indian Oil Corporation Ltd. vs. Amritsar Gas Service*, 1991(1) SCC 533. On the merits, it was contended that at the highest, the respondent can claim enforcement of Clause 7.2 only in regard to the contracted goods and none others for the notice period and no more. It was further contended that the wording and phraseology of Clause 29.1 read with Clause 12.4 are clearly indicative that the respondent's rights to produce such goods as close to was preserved. Counsel contended that if the Court was to grant the reliefs claimed, it would be injuncting the respondent from engaging in trade and entering into valid and lawful contracts, contrary to Section 27 of the Contract Act. Counsel submitted that the non-solicitation clause, i.e. Clause 29.1 did not mention dealers.

9. The Court under Section 9 of the Act has the power to pass appropriate orders, to ensure that pending adjudication of the disputes through arbitration, one or the other party is not prejudiced irrevocably. The amplitude of these power has been remarked upon in several judgments, significantly, *Bhatia International vs. M/s. Bulk Trading SA*, (2002) 4 SCC 105.

10. Coming to the facts of this case, the agreement expressly in force for a period of three years w.e.f. 29.6.2001. The Court is now called upon to decide two questions i.e.

- (i) Whether the respondent can be enjoined from marketing any similar product; and
- (ii) Whether the meeting sought to be called by them on 3rd and 4th May, 2008

should be enjoined or an appropriate restraint order made in that regard.

11. The parties were conscious about contents of the agreement; it concerns products specified in paras 10,11 and 12 of the definition clause. The technical specification of those products were also outlined in Schedule-II to the Agreement. They deal inter alia with E-bike having wheel size ranging from 16-24 inches, E-moto having wheel size in excess of 20-22 inches and E-scooty having wheel size of 16-18 inches diameters. The gross weight, relative speeds and other specifications have also been clearly mentioned.

12. On a plain reading of Clauses 7.1 and 7.2, it is evident that UMIL was obliged not to sell or offer any person or entity other than HCL, the products under the Ultra Model Brand in the territory, (the territory being defined in Clause 6 of the definition clause). Now, there is no dispute that in terms of Clause 27, the parties could terminate the agreement, a contingency which would be effective after expiry of the notice period i.e. 180 days. The petitioner has produced a copy of the letter dated 1.4.2008 proposing to terminate the agreement. Although some contentions were made regarding the date of its effect, according to this Court nothing much turns on it since during the hearing it was admitted that a notice of termination dated 23rd April, 2008 was served on the petitioner. In the circumstances, since the termination would take effect upon the expiry of a period of 180 days, of 23.4.2008 the parties would be bound by the stipulations in Clauses 7.1, 7.2 and 7.4.

13. As far as the second issue regarding the holding of the meeting is concerned, a close

reading of Clauses 12.2, 12.3 and 12.4 suggest that during the subsistence of the agreement, the parties put in place three modes of sale of the goods/products. One was through the joint dealership and other two through exclusive stores of the petitioner and the respondent. Undoubtedly, the petitioner had a greater measure of control over the joint dealership. Nevertheless the contracts with such dealers, for the joint dealership under Clause 12.2(a) were entered into by the petitioner and the respondent together. In the absence of Article 29, the petitioner's claim for restraining the respondent from holding a meeting could have been considerably stronger. However, Article 29.1 specifically deals with solicitation has consciously and perhaps advised excluded the term "dealer". It enjoins the parties not to solicit officers, employees and workers of each other. Dealers are independent contractors. Whether such dealers have relationship jointly under Clause 12.2 with both the parties, or independently, with the respondent, the Court cannot read into the non-solicitation clause, an obligation eschewed, by the parties. Moreover, in the absence of any mention of "dealer" in Clause 29.1 if the Court were to enjoin the holding of some meeting by UMIL, it could unwittingly affect contractual relationships - or the right to enter into contract, at least lawfully participate in a meeting - of parties not before the Court, and also who are not parties to the arbitration agreement. In the circumstances, the blanket order seeking a restraint of the meeting called by the respondent on 3rd and 4th May, 2008 cannot be granted.

14. In view of the above averments, the petition has to succeed partly. The respondent is

hereby restrained from offering for sale or attempting to market any products defined in the agreement with the petitioner, and do anything contrary to Clause 7.2 and 7.4 for 180 days period in question effective from 23rd April, 2008.

15. The petition is partly allowed in the above terms.

Order Dasti.

S. RAVINDRA BHAT,J

APRIL 29, 2008

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