

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 7, 2012
Decision on: March 20, 2012

O.M.P. 947/2011, I.A. No.869/2012 (for vacation of stay) & Contempt Petition (C) No.11/2012

PAHUJA SEEDS PVT LTD Petitioner
Through: Mr. H.S. Phoolka, Senior Advocate
with Ms. Prabhasahay Kaur and
Mr. Kanwar Faisal, Advocates.

Versus

TAKII & CO LTD Respondent
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Akhil Sibal,
Mr. Prashant Mehta and Mr. Omar
Ahmad, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
20.03.2012

1. The Petitioner, Pahuja Seeds Private Limited ('PSPL'), a company with its registered office at New Delhi, by this application under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'), seeks interim reliefs against the Respondent Takii and Co. Ltd. ('Takii') having its registered office in Japan. The interim reliefs are sought in the context of disputes that have arisen between them while running a joint venture company for the production and marketing of agricultural and horticultural seeds.

Factual Background

2. PSPL states that it operates commercially in various fields of the seed industry, *inter alia*, in the production, processing, marketing and selling

of high varieties of seeds for various plantation crops, flower, horticulture, etc. PSPL states that it had been importing seeds since 1989 and that Takii was one of the PSPL's main suppliers. PSPL claims that it is one of the first companies in the country to have shifted from open pollinated varieties of seeds to hybrid varieties. It is claimed that due to extensive research work undertaken by it as well as extensive sales, PSPL enjoys a huge market share in the seeds market and is among the top five companies in India in the field. Takii is a company incorporated under the laws of Japan and operates in the same field as PSPL. According to PSPL, with a view to gaining an opening in the Indian market, Takii approached PSPL. Takii was selling seeds in bulk to PSPL and about 90% of the said purchase was sold by PSPL under its own brand name. Upon Takii approaching PSPL both parties entered into a Joint Venture ('JV') Agreement dated 23rd September 1996 ('Agreement') whereby both agreed to develop and sell seeds in the Indian market. The JV came to be known as Pahuja Takii Seeds Limited ('PTSL'). Certain relevant clauses of the JV Agreement between PSPL and Takii dated 23rd September 1996 reads as under:

“Chapter 3 Capital And Ratio

Article 4

The authorized capital of PTS shall be fifty million (50,000,000) Indian Rupees (500,000 shares) and the issued capital shall be twenty million (20,000,000) Indian Rupees (2,00,000 shares) and all of such shares have a par value of one hundred (100) Indian Rupees.

Article 5

The ratio of shares shall be PAHUJA 70% (14,000,000 Indian Rupees) and TAKII 30% (6,000,000 Indian Rupees). This ratio shall be changed up to PAHUJA 49% and TAKII 51% in five (5) years by mutual consent.”

Chapter 6 Takii's Existing Business With Other

Indian Companies

Article 8

PAHUJA agrees that TAKII continues to have its own existing business with other Indian companies for the time being. TAKII shall terminate it in five (5) years after the establishment of PTS.

Chapter 7 Pahuja's Business Other Than Takii's Varieties

Article 9

"TAKII agrees that PAHUJA continues its own business of the seed production and the sales of F1 hybrid and OP varieties such as cauliflower, okra, onion, radish, etc., for Indian domestic market and the export market. TAKII and PAHUJA shall discuss whether this business shall be handled by PTS in five (5) years."

Chapter 9 Shareholders General Meetings

Article 11

Every year a General Meeting of Shareholders called Annual General Meeting shall be held in Delhi, India.

Chapter 10 Directors And Board Of Directors Meeting

Article 12

PTS shall be administered by the Board of Directors composed of five (5) directors. Three (3) directors shall be elected from among those nominated by PAHUJA. Two (2) directors shall be elected from among those nominated by TAKII. The number and its composition ratio of the directors may be changed, if necessary, upon mutual agreement between TAKII and PAHUJA.

Article 13

Directors service term shall be two (2) years. At least two third (2/3) of the total strength of directors shall be directors liable to retire by rotation and at least one third (1/3) of the rotational directors shall retire at

every Annual General Meeting. The directors so retiring shall, however, be eligible to be reappointed at the same Annual General Meeting.

Article 14

Board of Directors Meeting shall be held in Japan, India, any country or place Board of Directors Meeting agreed every year.

Chapter 11 Auditors

Article 15

TAKII and PAHUJA shall, upon mutual agreement, appoint one (1) Auditor. The Auditor shall examine the annual balance sheet and all pertinent documents and records of PTS, and shall submit to the Shareholders General Meeting the report on such examination.

Chapter 17 Cancellation

Article 23

This agreement shall be terminated with both parties consent.

Article 24

In case of breach of this agreement by any of the parties hereto, the other party may cancel this agreement by written notice to the party in breach, if such breach has not been corrected by the party in breach within sixty (60) days after written notice is given by the other party or complaining of such breach.

Article 25

TAKII and PAHUJA may terminate this agreement giving a notice in the event of one or more of the followings of the other party take place:

- a) Insolvency or bankruptcy.
- b) Any other substantial affair by which obligation stipulated in this agreement could not be performed.

Article 26

In the event TAKII or PAHUJA elects to exercise its right of cancellation or termination of this agreement pursuant to the provisions above-mentioned, such party shall have the right to purchase the shares of PTS then held by the other party at the price of shares determined by recognized appraisal appointed by mutual agreement between TAKII and PAHUJA, or the other party shall purchase the shares of PTS then held by such party at the price of shares determined by such recognized appraisal.”

Chapter 20 Arbitration

Article 29

Any dispute, controversy or claim arising out of or relating to this agreement, or the breach, termination or invalidity thereof, shall be settled exclusively by arbitration in accordance with the “ICC Arbitration Rules as at present in force:

- a) The appointing authority shall be Indian Council of Arbitration.
- b) The number of arbitrators shall be three (3).
- c) The place of arbitration shall be India.
- d) The language to be used in the arbitration proceedings shall be English.

*ICC = International Chamber of Commerce.”

3. According to PSPL, the JV has been functioning well for over last 15 years and as of today has a substantial turnover of Rs.17 crores. PSPL claims that it had acted “as a marketing agent” of Takii and has established its name, goodwill and dependence of Indian farmers on its seeds. It is stated that two other Japanese companies in the market have relatively less market share compared to PTSL.

4. According to PSPL, disputes between the parties arose in 2011 when the PSPL “out of the blue” received an email dated 31st July 2011 from the Respondent expressing its intention to appoint an auditor firm to

perform a detailed and complete audit of the JV PTSL. According to PSPL, the affairs of PTSL had been managed “so well that there hadn’t been any notice by any statutory authority or any lapse on the part of the Directors” nominated by PSPL on the Board of PTSL.

5. In the said e-mail dated 31st July 2011 Takii gave the following reason for asking for an audit of PTSL by an audit firm to be appointed by Takii:

“PTS is a subsidiary company of Takii as the majority interest in PTS is owned by us. As such PTS’s balance sheet has to be consolidated in ours so that our management and shareholders may know how Takii and its major subsidiary companies combined are performing. In addition, as per certain legal procedural compliances, we need to conduct an audit of PTS both corporate and financial.

As the majority owner of PTS, also, we want to appoint an audit firm to perform a detailed and complete audit of the company to confirm business transactions and processes, financial status and any other matters relating its business.

Mr. Pahuja, I hope you will agree to an audit of PTS by our appointed audit firm who will maintain confidentiality.”

6. Mr. Ishwar Pahuja, Director of PSPL, replied to the above e-mail on 14th August 2011 as under:

“Dear Mr. Sugimura,

This refers to your mail dated 31/07/2011. First of all, there has always been an aura of understanding and cooperation. That has been the base of our long association.

You are right as regards consolidation of balance sheet and information to management and share holders. As far as legal procedural compliances are

concerned, they are being taken care of and the present Auditors are conducting audit of PTS both corporate and financial in accordance with law.

If you are asserting your right as a major holder and want to appoint another audit firm, we should not have anything to say.

If you think the present Auditors are not performing a detailed and complete audit, this could be due to lack of communication and your lesser interaction with them.

In principle, how can I disagree even otherwise. As for confidentiality, the existing ones are also maintaining it and we have had no cause of worry during their tenure since inception.

I have spoken my mind. You may consider your proposal if you wish to. Last time, you had hinted at your above thoughts and had also offered that the cost of audit by some other audit firm shall be borne by Takii exclusively.”

7. In response, Mr. Sugimura of Takii informed PSPL that “the audit of PTS will begin sometime in the week of September 19th”. However, on the same date i.e. 14th September 2011, PSPL wrote to Takii stating that since the auditors were conducting tax audit under the Income Tax Act, the Accounts Department would not be in a position to devote time to “outside auditors” and that “it will be desirable to depute your auditors from 15th October onwards.” However, Mr. Sugimura sent an email to PSPL on 16th September 2011 explaining the urgency for the conduct of the audit “in the next three weeks so that we have enough time for consolidation purposes.” This request was rejected by PSPL stating that Takii’s auditors should schedule their work around 15th October 2011. On 3rd October 2011, an email was sent by PSPL to Takii stating that its auditors could begin the audit.”

8. According to Takii, in view of the above letter, it instructed its accounting auditors, M/s. KPMG and its Indian Lawyers, Amarchand & Mangaldas and Suresh A. Shroff & Co. (“AMSS”) to start the audit process. After coordinating with Mr. Ishwar Pahuja, Managing Director (“MD”) of PTSL, the representative of KPMG and AMSS arrived at the office of PTSL on 10th October 2011. According to Takii “to the utter shock of the representatives of the applicant/respondent i.e. KPMG and AMSS, Mr. Ishwar Pahuja on arrival suddenly asked for written confirmation with respect to the scope of the audit and the appointment of KPMG and AMSS to conduct a third party audit by Takii’s representatives.

9. Takii on 11th October 2011 had sent an email setting out detailed scope of audit. Takii also stated in the said email “for a complete audit, as in the international practice, we need audit of statutory (legal) compliances such as Registrar of Companies (ROC) filings as well and hence they are accompanied by representatives from Amarchand & Mangaldas, our Indian lawyers. The period of review will cover last three financial years (FY 2008-09 to FY 2010-11).”

10. On 12th October 2011, Mr. Pahuja replied to Mr. Sugimura under:

“Dear Mr. Sugimura,

Thanks for providing the scope of the auditors work. From the latest mail dated 27/9/2011 you had pointed out that we need to start immediately for the consolidation purpose that clearly meant financial data required for consolidation. Your today’s mail providing scope of audit is entirely different and has no connection whatsoever with consolidation at Takii in Japan.

Though in principle we cannot have and also do not

have any objection to the extensive management audit as suggested by you. However, since it involves appraisal of management decision, procedures and controls it is likely to take more time than expected and we will have to be involved in this process. As you know this is the peak season for all the items after extended rainy season hence it will be difficult for us to devote time for such an exercise which we feel can be undertaken later.

As far as ensuring compliances such as Registrar of Companies, R.O.C. filings; the same can be verified at a click of mouse at the MCA website and no lawyers are needed. Data for consolidation purpose is already available with you.

From the scope of audit now suggested and the questioning by the visiting KPMG and your Indian lawyer official there appears to be some hidden agenda at your end. For the last fifteen years our relation with Takii has been cordial like a family. We hope we are meeting in November at APSA and can discuss all these things in detail.”

11. According to Takii, the above allegations were “frivolous and uncalled for.” Further, according to Takii “the said excuse was not a *bona fide* one and was aimed to avoid audit or to buy time.” PSPL’s contention, on the other hand, was that they were not told that Takii’s lawyers would be accompanying their auditors and that the lawyers further created an atmosphere of mistrust and questioned Mr. Ishwar Pahuja with respect to the business dealings of PSPL other than PTSL. Apart from alleging that Mr. Pahuja was carrying on his own business under the banner of PSPL, thereby violating the JV Agreement, “the lawyers were raising questions that had nothing to do with the audit and stating things contrary to the agreement.” It is stated that this led to the PSPL stating in its email dated 12th October 2011 to Takii that even though it had no objection to the extensive management audit, “there

appeared to be some hidden agenda.”

12. The relationship between the parties further broke down when on 20th October 2011, Takii sent PSPL a notice under Article 24 of the Agreement in which, after detailing events that had transpired till then, Takii stated as under:

“18. The aforesaid conduct of PSPL leaves no room for doubt that PSPL seeks to avoid Takii from conducting a third party audit of PTS’s accounts and its statutory compliance. This gives rise to apprehension and doubts as to the JV partner’s conduct and credibility. Further, the non-cooperation amounts to a breach not only as an implied term of the JVA but also because of the shareholders and Directors’ right under the Indian Companies Act, 1956.

19. The excuse given that the present period was peak season making it difficult for PTS to devote such time for audit and that it could undertaken later is simply unacceptable to Takii. It would not require more than one or two persons’ involvement from the JVC to assist representatives of KPMG and AMSS in their audit process. Such persons would not be marketing persons or sales persons but from the finance and corporate side and there is no possibility of any such conflict. Further, there are several statutory documents not available with the ROC records and compliance of which can only be determined from the JVC’s records.

20. Takii being the Joint Venture Partner, that too a majority shareholder has every right to a legal and financial compliance audit of the Joint Venture Company. Further, the management including PTS must cooperate to make available all necessary data/documents for a third party audit as requested by its Joint Venture Partner. The conduct of PSTL constitutes a material breach of the JVA thereby entitling Takii to terminate the JVA unless the same is remedied within a period of 60 days as provided for in

Article 24 of the JVA. These rights under the JVA flow equally from the statutory right of Takii as a majority shareholder and its Directors being on the Board of the JVC were and are entitled to access to all such documents through their representatives and on behalf of whom also this demand is being made.

21. Takii hereby issues this notice calling upon PSPL to cause PTS to immediately allow Takii through its representatives being those from KPMG and AMSS to carry out an audit of the JVC in terms of what has already been communicated commencing no later than 27 October 2011 (taking into consideration the ensuring Diwali holidays) so that the audit exercise can be completed within 60 days period. Take notice further that if the breach is not remedied within 60 days from today (i.e. receipt of the scanned copy of this email/notice), the JVA would stand automatically on the expiry of the said 60 days i.e. on and from 21st December 2011.”

13. PSPL by its reply dated 25th October 2011 denied that there had been any breach of the Agreement and in turn stated that it was Takii which was in breach as PSPL had information that Takii was doing business with competitors in the market in violation of Article 8 of the Agreement. A reply was sent by Takii on 1st November 2011 reiterating its earlier contentions. Nevertheless, according to Takii, it accepted PSPL’s invitation in its reply dated 25th October 2011 to commence audit from 1st November 2011 and informed PSPL that the representatives from KPMG and AMSS would be visiting PSPL to commence the audit.

14. According to Takii, its representatives from KPMG and AMSS arrived at PTSL’s office at 11 am on 1st November 2011 to commence the audit but were prevented by Mr. Pahuja who stated that he was yet to receive a reply to the email that he had sent to Takii on 1st November 2011. PSPL of course denies this.

15. On 2nd November 2011, Takii sent Mr. Pahuja another email asking for permission to commence the audit. It stated that it would no longer send its representatives to PTSL's office "but it is now upon PSPL to cause PTSL to provide all books of accounts, ledgers and all documents required by KPMG and AMSS to carry out the referred scope of work to the respective offices of AMSS (attention of Ms. Maureen Ralte and Mr. Omar Ahmad) and KPMG (attention of Mr. Gagan Deep and Mr. Rajat Vig) at least 3 weeks before the 60 day period expire to enable them to complete the audit within the 60 day period, failing which the JVA will stand automatically terminated with effect from 26th December 2011 without further notice."

16. On 28th November 2011, PSPL wrote to Takii denying the allegations of having committed breach of the Agreement. It pointed out that M/s. Sumer Garg & Co. had been appointed in accordance with Article 15 of the agreement and that in case Takii was not satisfied with them, it should move a resolution in accordance with the provisions of the Companies Act, 1956. Takii was requested to communicate a convenient date for convening a board meeting. It was also asked to provide details of its business dealings with other Indian companies since January 2002 to enable PSPL to take proper legal proceedings.

17. According to Takii, PSPL was at all times aware that Takii was doing business with other seed purchasers in India and on many occasions discussions took place between Mr. Ishwar Pahuja and Mr. Akshay Pahuja with Takii's representatives including Mr. Sugimura in relation to seed production contracts given to other Indian companies. It is stated that employees of PTSL often travelled with the representatives of Takii to visit various other Indian companies with the knowledge of

Mr. Ishwar Pahuja between 2002 and 2004, long after signing of the Agreement.

18. On 3rd December 2011, PTSL sent a notice to Takii about a Board meeting to be held on 12th December 2011 at Delhi and that the provisional agenda of the meeting was to discuss and finalize the appointment of an independent firm of Chartered Accounts to conduct a special audit of the accounts of PTSL. On 10th December 2011, Takii replied to the said notice stating that there was no reason for PTSL to carry out any special audit. Takii asserted its independent right to nominate its own representative to carry out an audit of PTSL on its behalf since it was the majority shareholder of PTSL. Further, since the time was too short for Directors of PTSL who were residents of Japan to attend the meeting on 12th December 2011, Takii requested that the proposed meeting may be held in Japan on 17th January 2012 or that Board meeting may be held by way of video conferencing.

19. It appears that a Board meeting of PTSL was nevertheless held on 12th December 2011 with the quorum of Mr. Ishwar Chand Pahuja, Chairman, Ms. Chanchal Pahuja, Director and Ms. Charu Pahuja, Director. *Inter alia*, the minutes of the said meeting, a copy of which have been placed on record by PSPL, show that it was decided to invite “quotations from three audit firms of international repute (other than KPMG)” and that the decision to appoint one of them was deferred to the next meeting which was decided to be held on 16th December 2011 at Delhi. It was stated that Directors who were not in a position to attend the meeting could do so by video conferencing. On the same date, a letter was written to Mr. Sugimura on behalf of PTSL to the same effect. On 14th December 2011, Takii wrote to PTSL stating that the Board meeting

held on 12th December 2011 was invalid as the quorum had to be “one half of the total strength or three Directors whichever is higher.” Since PTSL had seven Directors i.e. four nominees of Takii and three of PSPL, which fact had been admitted by PSPL’s email dated 20th April 2011, the alleged Board meeting was *ex facie* void. Takii further noted that the minutes of the meeting dated 12th December 2011 purported to state that Takayuki Yui was not a Director of PTSL and that PTSL had only six Directors. It was stated by Takii that if this was to be the position, then PSPL was in breach of the agreement which required Takii to have majority Directors.

20. PTSL replied on 15th December 2011 stating that it had only six Directors and that “the name of Mr. Takayuki Yui as a director of PTS as reflected in company’s email of 20th April, 2011 was a result of an inadvertent mistake made by an employee of the company due to misconception of DIN obtained for Mr. Takayuki Yui. The said mistake was later clarified vide company’s email dated 11/7/2011.” It was informed that the Board meeting would be held as scheduled on 16th December 2011. The minutes of the Board meeting of PTSL held on 16th December 2011 again showed that only three Directors attended and that Price Waterhouse & Coopers (PWC) were appointed as special auditors.

21. On 17th December 2011, PSPL wrote to the Indian Council for Arbitration (ICA) referring to Article 29 of the Agreement and requesting that an arbitral tribunal be constituted by the ICA in terms thereof. PSPL also informed ICA in the said letter of the name of its arbitrator.

Present Proceedings

22. The present petition was filed on 19th December 2011 under Section

9 of the Act seeking the following reliefs:

“It is most respectfully prayed that this Hon’ble Court may be pleased to pass the following orders:

- (i) Restrain, by an ex-parte ad-interim order, the Respondent, its directors, agents, assigns or anyone acting on its behalf from selling seeds in India, except from the JV company, i.e. Pahuja Takii Seeds Ltd.
- (ii) Restrain, by an ex-parte ad-interim order, the Respondent, its directors, agents, assigns or anyone acting on its behalf from terminating the Agreement entered into between the parties, contrary to the terms of the Agreement;
- (iii) Pass any such further orders as this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.”

23. The petition was heard on 21st December 2011 when the following orders were passed:

“I. A. No. 20760 of 2011 (for exemption)

Exemption allowed subject to all just exceptions.

The application is disposed of.

O.M.P. 947/2011

1. Notice through all modes including e-mail, returnable on 15th February 2012.

2. It is pointed out by Mr. H.S. Phoolka, learned Senior counsel appearing for the Petitioner that the dispute between the parties is essentially about the appointment of an independent Auditor to carry out the special audit as suggested by the Respondent covering the period of three years. He refers to the minutes of the meeting of the Board of Directors of the Petitioner company held on 16th December 2011, which was not attended by the Respondent, in which a firm of Auditors which had quoted the lowest figure was

appointed. However, the decision has been unable to be implemented due to the non-participation of the Respondent.

3. Referring to the notice dated 20th October 2011 issued by the Respondent, Mr. Phoolka states that the Petitioner apprehends that having frustrated the attempt of the Petitioner to have the Auditor appointed the Respondent will unitarily terminate the agreement.

4. It appears to this Court that the Petitioner has made out a *prima facie* case for grant of interim relief. It is directed that till the next date of hearing the Respondent will not take any precipitate action adverse to the Petitioner pursuant to the notice dated 20th October 2011 issued by the Respondent to the Petitioner. Further, any action or decision taken by the Respondent in relation to its agreement with the Petitioner will be subject to the further orders of this Court.

5. Order dasti.”

24. On receipt of notice, Takii filed IA No.869 of 2012 on 12th January 2012 seeking vacation of stay. In it, Takii stated that it was yet to receive a copy of the letter dated 17th December 2011 purportedly written to the ICA by PSPL. From the records of the ICA inspected by Takii, it appeared that the letter was received by ICA only on 23rd December 2011. On 3rd January 2012, Takii sent a detailed letter to the ICA objecting to its jurisdiction. It was maintained that it was only when the ICC Court of Arbitration (COA) failed to appoint the Presiding Arbitrator that the role of the ICA would come to play. Takii contended that the JV Agreement stood automatically terminated on 26th December 2011 in view of the failure of PSPL to approach the Court within the 60 day period, as required by the notice of termination dated 20th December 2011. It was pointed out that this Court's order dated 21st December 2011 did not operate as a stay of the notice of termination. The order only

directed Takii not to take any precipitate action. Since the JV Agreement stood automatically terminated on 26th December 2011 there was no question of Takii taking any precipitate action after the order passed by this Court. Takii maintained that since the agreement was terminable, no injunction could be granted in terms of the Specific Relief Act, 1963 ('SRA'), particularly Section 14, read with Section 41 thereof.

25. Notice was directed to issue in the above application on 17th January 2012 when this Court passed the following order:

"IA No. 869/2012 (for vacation of stay)"

1. Notice. Ms. Prabhsahay, Advocate accepts notice for the Petitioner/non-applicant.
2. This is an application by the Respondent for vacation of the interim order passed by this Court on 21st December 2011.
3. It is submitted by Mr. Shambhu Prasad Singh, learned Senior counsel appearing for the Applicant that the Respondent is only interested in consolidating the accounts of the Joint Venture Company, Pahuja Takii Seed Ltd. ('PTSL') with the accounts of other subsidiaries/units of the Respondent Company. The Respondent is willing to have a joint meeting of its auditors with the Statutory Auditors of PTSL.
4. Mr. Phoolka, learned Senior counsel appearing for the Petitioner states that the Petitioner has no objection to the Statutory Auditors of PTSL sitting with the Auditors of the Respondent. All the doubts and queries regarding the accounts of the PTSL and any clarification regarding the consolidation of the accounts could be raised with the Statutory Auditors and answered by them. It is stated that for this purpose, a joint meeting can take place in the registered office of the PTSL on any date convenient to the parties.

5. In view of the above statement, it is directed that one Director of the Respondent Company will remain present along with the Respondent's Auditors for a joint meeting to be held with the Statutory Auditors of PTSL. All questions and clarifications relating to the accounts of PTSL for the last three financial years, i.e., 2008-09, 2009-10 and 2010-11 and relevant to the issue of the consolidation of the accounts will be answered by the Statutory Auditors of PTSL at the meeting which will take place in the registered office of PTSL on any date between 23rd January 2012 and 13th February 2012 which may be convenient to the Director of the Respondent Company who has to visit India for this purpose. The date convenient to the Director of the Respondent Company will be communicated to the Petitioner at least three days in advance.

6. This order is without prejudice to the rights and contentions of either of the parties.

7. List on 15th February 2012.

8. Order dasti to the counsel for the parties.”

26. Meanwhile, on 31st January 2012, PSPL filed contempt petition CCP No.11 of 2012 in which it was stated that Takii had disobeyed the order dated 21st December 2011 since it had proceeded to initiate arbitration before the ICC by filing a statement of claim a copy of which was sent to ICC on 15th January 2012. It was alleged that ICA had also replied to Takii on 12th January 2012 rejecting its contention regarding the interpretation of Article 29 of the Agreement and had invited Takii to nominate its arbitrator by 14th January 2012. PSPL further stated in its contempt petition that Takii had filed a civil suit in the District Court, Delhi against the ICA seeking to restrain it from proceeding with the constitution of the arbitral tribunal.

27. When the said contempt petition was listed before this Court on 3rd February 2012 it was directed to be listed along with the main petition on 15th February 2012.

28. An affidavit was filed by Takii on 14th February 2012 detailing what according to it had transpired on 12th February 2012. This Court was informed on 15th February 2012 that its order dated 17th January 2012 could not be worked out. Counsel for Takii informed the Court that PSPL had insisted on having the inspection of the accounts of PTSL recorded on video to which Takii had objected. He stated that there was a complete breakdown of trust between the parties and, therefore, Takii was pressing for vacation of stay. On its part, PSPL had filed an affidavit on 22nd February 2012 placing on record the transcript of the meeting held on 12th February 2012. PSPL also placed on record a copy of the proceedings dated 16th January 2012 passed by the learned Additional District Judge in Takii's Suit No.41 of 2012 declining the prayer of Takii for an *ex-parte ad interim* injunction against the ICA.

Submissions of counsel

29. Mr. H.S. Phoolka, learned Senior counsel appearing on behalf of PSPL submitted that Articles 8 and 9 read collectively with the Agreement constitute a negative covenant which restrained Takii from dealing with any other Indian entity during the subsistence of the Agreement. As on the date this Court heard the present petition on 21st December 2011, the Agreement had not been terminated. On account of the interim order passed by the Court on that date, the termination of the Agreement could not have resulted thereafter even by efflux of time. It was submitted that if Takii was not restrained from dealing with other Indian companies and in any event from directly selling in Indian

markets, it would completely ruin the business of PSPL and therefore the balance of convenience lay in the Takii being restrained as prayed for during the pendency of the arbitral proceedings. It was submitted that Takii's actions were *mala fide* and the irreparable harm that would result to PSPL could not be compensated in damages. In any event if PTSL continued it would not cause any prejudice to Takii which was the majority shareholder and would be entitled to profits and dividends of the JV.

30. Mr. Phoolka submitted that the purported letter of termination was not in accordance with Article 24 at all since there was no written notice of breach of the contract. The so called breach complained of was regarding the audit of the accounts of PTSL which, in fact, PSPL had agreed to and, therefore, even that breach had been remedied. He submitted that lack of trust could not possibly be and in fact was not the stated ground for terminating the Agreement. This was also not mentioned in any of the letters sent by Takii. With the same auditor having continued for PTSL for over 15 years, there was no occasion to ask for a separate audit. It was submitted that if there was a dispute among shareholders of PTSL, that could be examined in terms of the provisions of the Companies Act, 1956 which provided for such a remedy. Even the appointment and removal of the auditor was governed by Sections 224 and 225 of the Companies Act, 1956. On the other hand, Takii had refused to participate in the meeting of the Board of Directors of PTSL and, therefore, was deliberately seeking to kill the business of the PTSL and thereby PSPL in a *mala fide* manner. On its own, Takii had stopped attending board meetings of PTSL in India after 2005. Finally, it was submitted that PSPL was not seeking any specific relief to compel Takii to comply with the obligations under the Agreement but was only

seeking an injunction against Takii from selling seeds in India. Mr. Phoolka relied upon a number of judgments, including ***Suresh Dhanuka v. Sunita Mohapatra***, JT 2011(14) SC 1, ***Gujarat Bottling Co. Ltd. v. Coca Cola Co.*** (1995) 5 SCC 545, ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*** (2007) 7 SCC 125, ***Rajasthan Breweries Ltd. v. The Stroh Brewery Company*** AIR 2000 Delhi 450, ***Dirk India Private Limited v. Mahagenco*** 2007 (Suppl.) Arb.LR 213 (Bombay), ***Modi Rubber Ltd. v. Guardian International Corp.*** 141 (2007) DLT 822, ***Novartis Vaccines & Dignostics Inc. v. Aventis Pharma Limited*** 2010(2) Arb.LR 85 (Bombay) and ***GEA Energy Systems India Ltd. v. Germanischer Lloyd Aktiengesellschaft*** (2009) 149 Comp Cas 689 (Madras). Mr. Phoolka sought to distinguish the judgments relied upon by counsel for Takii.

31. On behalf of Takii, Mr. Sandeep Sethi, learned Senior counsel and Mr. Akhil Sibal, learned counsel submitted that Articles 8 and 9 of the Agreement contained no express or implied negative covenant restraining Takii from dealing with Indian companies indefinitely. It was pointed out that long after the period of expiry of five years from 23rd September 1996, the date of the Agreement, Takii had been dealing with other Indian companies to the knowledge of PSPL which had raised no objection. Therefore, there was no such negative covenant either implied or in practice. It is pointed out that Takii did have four Directors on the Board of PTSL and, therefore, any Board meeting held without the participation of the majority of the directors would be invalid. As a major shareholder of PTSL Takii had a right to have the audit and accounts of PTSL done, particularly when it was answerable to its shareholders internationally and since PTSL was one of its subsidiaries. It is submitted that the audit had to be by a firm of Takii's choice and not

either of PSPL or PTSL. On three occasions i.e. 10th October, 12th November 2011 and 12th February 2012 when attempts were made to have accounts of PTSL inspected by KPMG in the presence of Takii's lawyers, AMSS, PSPL had raised all kinds of objections and refused to permit the audit to go on. Secondly, Board meetings were held by PTSL with only the Directors of PSPL despite knowing fully well that it did not have the necessary quorum and ignoring Takii's request for postponing date of the Board meeting which as a majority shareholder it was entitled to ask for.

32. Thirdly, PSPL had also resiled from the fact of there being on the Board of PSPL, four nominee Directors of Takii. It is submitted that in the face of this conduct of the Directors of the PSPL it was impossible for the JV to proceed as such. The Agreement was by its nature terminable and, in fact, it came to an end by the efflux of time on 26th December 2011. There was a statutory bar under Section 14 read with Section 41 SRA to PSPL seeking the specific relief of continuation of the Agreement. Relying on the decisions in ***Indian Oil Corporation v. Amritsar Gas Service (1991)1 SCC 533***, ***Rajasthan Breweries Limited v. Stroh Brewery Company, Gujarat Bottling Co. Ltd. v. Coca Cola (1995) 5 SCC 545***, ***PTC India Limited v. Japee Karcham Hydro Corporation Limited*** (decision dated 19th February 2010 in OMP No. 25 of 2010) which was affirmed by the Division Bench by its order dated 13th August 2010 in FAO(OS) No.146 of 2010, ***Goyal MG Gases Ltd. v. Griesheim GmbH 75 (1998) DLT 737*** and ***Indian Railways Catering & Tourism Corp. Ltd. v. Cox & Kings India Ltd.*** (decision dated 6th January 2012 in FAO(OS) No.433-35 of 2011) and ***Fashion Television India Private Limited v. FTV BVI 2011 IX AD (Delhi) 517***, it is submitted that there was no question of enforcing any negative covenant after the period of

agreement had come to an end. It was submitted that the reliefs prayed for could not be granted and the petition had to be dismissed.

Is there prima facie an implied negative covenant in Articles 8 and 9?

33. The first issue that requires to be considered is whether *prima facie* Articles 8 and 9 of the Agreement contain a negative covenant, either express or implied, which restrains Takii from dealing with Indian companies and doing business on its own in India as long as the Agreement subsists. Articles 8 and 9 of the Agreement are in Chapter 6 titled ‘Takii’s existing business with other Indian companies.’ At the time of the Agreement entered into on 23rd September 1996 the parties intended that PSPL could continue its own business with a decision in that behalf to be taken later. Takii could continue its business with other Indian companies for the time being with the rider that it ‘shall terminate it in five years after the establishment of PTS’. It does appear, therefore, that the understanding was that Takii’s existing business at that time with the other Indian companies would stand terminated five years after the establishment of PTS. However, there is no clause in the Agreement that states that Takii cannot thereafter ever do business with other Indian companies. It is difficult to imply such a negative covenant in the plain reading of Articles 8 and 9. In any event there is in fact no clause which states that Takii cannot do business on its own in India after the establishment of PTS or that it should continue to do business only through the JV.

34. That the parties themselves proceeded on this understanding is apparent when understood in the background of the assertion of Takii that to the knowledge of PSPL it had, in fact, been doing business with the other Indian companies from 2002 onwards. This assertion has not

been countered by PSPL. It prima facie bears out Takii's contention that the intention of the parties was not that Takii would never ever do business with any Indian company at any time or that it would never directly sell seeds in India. There is therefore not even a prima facie case in favour of PSPL for grant of the interim relief of restraining Takii from selling seeds directly in India. There also is no *prima facie* case made out to restrain Takii from terminating the Agreement or dealing with other Indian companies since *prima facie* it appears that there is no negative covenant in the Agreement, either express or implied, restraining Takii during the subsistence of the Agreement.

Law concerning enforcement of negative covenants

35.1 The leading decision in regard to the law concerning enforcement of negative covenants is that of the Supreme Court in ***Gujarat Bottling Co. Ltd. v. Coca Cola Co.*** The facts were that the Parle Group held trademarks in beverages including Thumbs up, Limca, Maza, certain beverages, which were being bottled by Gujarat Bottling Company ('GBC'). The Parle Group assigned the trademarks in those beverages in favour of Coca Cola on 12th November 1993. In anticipation of the said assignment, Coca Cola on 20th September 1993 ('the 1993 Agreement') entered into an agreement with whereby Coca Cola authorized GBC to bottle, sell, distribute, beverages under the some of the aforementioned trademarks The said agreement was to operate till November 1998 unless earlier terminated. Paragraph 14 of the agreement contained a negative covenant that GBC would not manufacture, bottle, sell, deal or otherwise be concerned with the products, beverages of any other brands or trademarks/trade names during the subsistence of the agreement including the period of one year's notice as contemplated in paragraph 21. Under paragraph 19 Coca Cola had the right to discontinue supplying to

GBC the essence/syrup and/or other materials on the happening of any of the events mentioned in clauses (a) to (e) of the said paragraph. Clause (b) of paragraph 19 related to transfer of stock, share or interest or other indicia of ownership of GBC resulting in effective transfer of control without the prior express written consent of Coca Cola.

35.2 On 30th April 1994 Coca Cola entered into another agreement whereby it granted GBC a non-exclusive licence to use the trademarks. With the shareholding in GBC being transferred to concerns closely associated with PepsiCo Inc. ('Pepsi') and PepsiCo Food Limited, a subsidiary of PepsiCo, GBC issued a notice to Coca Cola on 25th January 1995 terminating the agreements. Coca Cola then filed a suit in the Bombay High Court in which an interim order was passed restraining GBC from manufacturing, bottling, selling or dealing with the project of any brand or trademark owned by the Respondent other than Coca Cola. A Division Bench modified the injunction by restraining GBC and all those to whom it may have sold its shares from using the plants of GBC for manufacturing, bottling or selling beverages. In effect, the Division Bench gave effect to the negative stipulation in para 14 of the agreement. GBC then appealed to the Supreme Court.

35.3 One of the contentions advanced by GBC was that clause 14 was an agreement in restraint of trade and hit by Section 27 of the Contract Act, 1872. After referring to the decision of the House of Lords in ***Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (1968) AC 269***, it was observed by the Supreme Court: "Except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and it applies in respect of a restriction which

operates after the termination of the contract.” Reference was made to the decision in *Niranjan Shankar Golikari v. The Century Spinning and Mfg. Co. Ltd.*, AIR1967 SC 1098 where it was held that “considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act.” Consequently, it was held that since the negative stipulation in para 14 of the 1993 agreement was “confined in its application to the period of subsistence of the agreement and the restriction imposed therein is operative only during the period the 1993 Agreement is subsisting, the said stipulation cannot be held to be in restraint of trade so as to attract the bar of Section 27 of the contract Act.”

35.4 Thereafter the Court discussed the clauses of the agreement and the facts of the said case in great detail and held that no interference was called for with the interim order passed by the High Court restraining GBC and the entities other than Coca Cola from bottling in beverage or drinks till 25th January 1996 which was the original term of the agreement. As far as the case on hand is concerned the facts do not indicate there being a clear negative covenant in the Agreement between PSPL and Takii as existed in the above decision in the agreement between Coca Cola and GBC.

36. The above law has been followed in several subsequent decisions of the Supreme Court and this Court, which do not, therefore, require

discussion. Suffice it to hold that at this stage this Court is *prima facie* satisfied in light of the above law that there is in fact no negative covenant in the Agreement in question to restrain Takii and therefore the question of enforcing such negative covenant does not arise.

37. Even assuming that there is a negative covenant, its enforcement cannot be sought by PSPL after the expiry of the Agreement. PSPL however asserts that at the time it approached this Court, the Agreement was subsisting while Takii contends that it stood terminated by the efflux of time on 26th December 2011. This is what requires to be examined next.

The Agreement stood terminated by efflux of time

38. The termination clauses of the Agreement envisage 60 days' notice having to be given by one party to the other alleging breach of the contract. The notice dated 20th October 2011 by Takii to PSPL was, in fact, a notice in terms of Article 24 of the Agreement. It does appear *prima facie* that the breach alleged by Takii regarding PSPL, the minority shareholder, not permitting Takii, the majority shareholder, to inspect the accounts of PTSL through Takii's own auditors was not remedied within a period of 60 days from the period of that notice. The requirement for the breach to be considered as being complete on account of the failure by PSPL to remedy it within the period of 60 days appears *prima facie* to be satisfied. There is merit in the contention that even while this Court on 21st December 2011 restrained Takii taking from precipitate action, it did not prevent the Agreement coming to an end by efflux of time on the expiry of 60 days after the notice dated 20th October 2011.

Takii cannot be compelled to continue the JV

39. This Court did attempt by the order dated 17th February 2012 to get the parties to sort out their differences by allowing the audit of PTSL's accounts by Takii's auditors to proceed. However, that could not happen for a variety of reasons which the Court does not consider necessary to examine at this stage. The fact remains that the disputes between the parties have become further irreconcilable and it does appear that there is a breakdown of trust between them. The Court cannot in the circumstances by an interim order possibly compel Takii to continue the JV or restrain it from not selling seeds on its own or through another Indian entity.

40. The facts in ***Suresh Dhanuka v. Sunita Mohapatra*** were that there was an assignment of the trademark whereby 50% of the right, title and interest in the trademark "Naturoma Herbal" with proportional goodwill stood assigned to the appellant forever. In the present case, there is no assignment of the trademark or other intellectual property right by Takii in favour of PSPL or PTSL. Again in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*** there was a negative covenant which was sought to be enforced. It is not possible to read any such implied or express covenant in the present case. For the same reason, the decision in ***Dirk India Private Limited v. Mahagenco*** is distinguishable on facts. Even in ***Modi Rubber Ltd. v. Guardian International Corp.,*** on which extensive reliance was placed by Mr. Phoolka there clearly was a negative covenant.

41. Also prima facie this Court is not at this stage, on the basis of the documents placed on record, persuaded by the submission on behalf of PSPL that the termination of the Agreement by Takii was malafide and

that the resultant breach of the contract cannot be compensated by way of damages. The Agreement in the present case was by nature determinable. The bar under Section 14 (1) SRA against enforcement of the Agreement stood attracted. Even assuming that the Agreement was illegally terminated by Takii, the remedy for PSPL lay only in a claim for damages. The law in this regard stands settled in ***Indian Oil Corporation v. Amritsar Gas Service*** in which the Supreme Court disapproved of an arbitral Award that restored a gas distributorship on the ground that the procedure for its termination was not followed. It was observed (SCC, p. 542):

“The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is ‘a contract which is in its nature determinable’. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to ‘the law governing such cases’. The grant of this relief in the award cannot, therefore, be sustained.”

42. This law explained in the above decision has been applied and followed by the High Court in ***Rajasthan Breweries Limited v. Stroh Brewery Company*** and ***Fashion Television India Private Limited v. FTV BVI***. Consequently this Court is not persuaded to grant the reliefs prayed for in this petition.

Conclusion

43. The petition is, accordingly, dismissed with costs of Rs.30,000 which will be paid by PSPL to Takii within four weeks. The interim order is vacated and the application is dismissed.

44. As regards the contempt petition, there is no case made out for proceeding against the Respondent for disobedience of the order of the Court. Consequently, CCP No.11 of 2012 is also dismissed.

45. It is clarified that the observations on merits made in the present judgment are tentative and prima facie would not bind any other fora, including the Arbitral Tribunal, which might deal with the contentions of the parties on merits.

S. MURALIDHAR, J.

MARCH 20, 2012

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