

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

+ **O.M.P. No.459/2007**

% **15th September, 2015**

CHETAN KUMAR AGARWAL & SONS PVT. LTD. & ORS.

..... Petitioners

Through: Mr. Rajesh Gupta, Advocate with Mr.
Harpreet Singh, Advocate and Mr.
Pranpal Saran, Advocate.

Versus

NEW HOLLAND FIAT (INDIA) PVT. LTD. Respondent

Through: Mr. Shambhu Saran, Advocate with
Ms. Gunjan Chhabra, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This is a petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') by which the petitioners, and who are the respondents in the arbitration proceedings, have impugned the Award of the Arbitrator Justice G.T. Nanavati (Retired Judge of the Supreme Court of India) and by which Award the Arbitrator has passed an Award against the petitioners for a sum of Rs.36,86,808/- alongwith interest @ 18% per annum from 1.8.2003 to 10.1.2004 and

thereafter at 12% per annum simple. The awarded amount basically pertains to the amounts which were to be recovered by the respondent herein (claimant in the arbitration proceedings)/M/s. New Holland Fiat (India) Pvt. Ltd./New Holland Tractors (India) Pvt. Ltd as the balance due to the respondent from the petitioners for the tractors and tractor parts supplied by the respondent to the petitioners.

2. The disputes between the parties emanate from a Dealership Agreement dated 1.1.2002 by which the respondent appointed the petitioner no.1 as a dealer for the sale of the tractors and tractor parts. This dealership agreement continued till 18.11.2003 when it was terminated by the respondent. Petitioner no.1 was appointed in terms of the Dealership Agreement dated 1.1.2002 as a non-exclusive dealer for sale and after sale services of the respondent's products. The areas allocated to the petitioners were Fatehpur Sahib and Ropar in Punjab. Alongwith the dealership agreement, the petitioner nos.2 and 3 (husband and wife), and who are the Directors of the petitioner no.1/Company, gave an agreement of personal guarantee securing all payments which were payable by the petitioner no.1 to the respondent. As per the respondent, the petitioner no.1's/Company's performance was poor in achieving targets and hence for the Sirhind

District, the petitioner no.1's dealership was removed. As per the respondent, petitioner no.1 was not only poor in performance by failing to achieve targets, but also the petitioner no.1 failed to maintain financial discipline as a result of which as on 31.3.2003, a sum of Rs.42.92 lacs became due and payable to the respondent. The petitioner no.1/Company thereafter only paid Rs.4,23,500/- by 25.4.2003 instead of Rs.33 lacs as promised by the end of April, 2003, and the respondent after adjusting the security deposit of Rs.5 lacs lying with it demanded the balance payment of Rs.31,86,808/- from the petitioners vide the respondent's letter dated 8.8.2003. It is this aforesaid amount alongwith interest which was claimed by the respondent in the arbitration proceedings alongwith costs of arbitration etc.

3. The Award passed by the Arbitrator shows that the petitioners did their utmost to keep on delaying the proceedings. A number of orders passed by the Arbitrator shows the deliberate and *malafide* actions of the petitioners to unnecessarily cause delay in the arbitration proceedings. Petitioners also made reckless allegations against the Arbitrator, and as noted in the Award. In fact, petitioners did not make any payment of the arbitration proceedings to the Arbitrator, and which was fixed only at a

reasonable rate of Rs.20,000/- per hearing by the Arbitrator, and hence the respondent had to pay the entire costs of the arbitration proceedings.

4. Essentially the petitioners before the Arbitrator took up three stands. The first stand was that the amount claimed by the respondent has not been proved by the respondent by filing the necessary vouchers and documents in support of the statements of accounts filed by the respondent in the arbitration proceedings. The second stand of the petitioners was that the respondent has wrongly disallowed claims which were payable to the petitioners by the respondent under an exchange scheme floated by the respondent as per which, loss suffered by the petitioners on the exchange scheme of old tractors was to be reimbursed by the respondent to the petitioners. The third stand of the petitioners was that the respondent was liable to pay the petitioners amounts under various heads of cash incentive, interest incentive and other business incentives. In sum and substance, the petitioners prayed for dismissal of the claim petition filed by the respondent in the arbitration proceedings and prayed that their counter claim amounting to Rs.49,54,208/- be awarded in favour of the petitioners and against the respondent. It is these three aforesaid heads/stands which have been argued before this Court by the learned counsel for the petitioners.

5. Taking the first issue and head argued on behalf of the petitioners that the respondent has failed to prove in the arbitration proceedings the amounts which the respondent claimed due from the petitioners, it is relevant to note in this regard that in terms of the Order dated 14.5.2005 passed by the Arbitrator, and which was really a consent order, petitioners were to inspect the bulky record in the office of the respondent, but, the petitioners deliberately on one excuse or the other failed to inspect the record. Not only petitioners failed to inspect the record, but the petitioners made reckless and wild allegations against the Arbitrator. All these aspects are noted by the Arbitrator in para 28 of the Award and this para 28 reads as under:-

“28. It is also necessary to refer to an unpleasant part of this proceeding, though the learned Advocates for the respondents have not pressed this point at the time of making oral submissions. It is referred to for the reason that it may not be urged by the respondents that this aspect of the case has not been dealt with. On 8.7.2005 respondent Chetankumar through his Advocates filed an application for recording respondents objections. Earlier on 14.5.2005 I had directed the claimants to give inspection of the documents supporting the Statements of Accounts C-16 & C-17, to which claimants witness Shri S.K. Lalit had referred to, while under cross examination. He had stated that " they are voluminous but I can produce the same. After hearing the parties and on the basis of an agreement between them the following order was passed:

"As the documents in support of various debit and credit entries are many in number it would be better if the respondents take inspection of the same instead of bringing all of them on record. The claimant is directed to produce the same for inspection at a date, time and place agreed by the Ld. Advocates of both the parties"

The Advocates for both the parties had some discussions after that date as mentioned in the letter dated 15.6.2005 of the claimants Advocate. The relevant part of it is quoted below for ready reference:

"This has reference to the last order passed by the Hon'ble Arbitration Tribunal on 14th May, 2005. The Hon'ble Arbitration Tribunal was pleased to direct the claimant i.e. New Holland Tractors (India) Pvt. Ltd. to give inspection to the Respondent of the documents in support of various debit and credit entries made in the Respondent's account as maintained in the books of account of the Respondent. You would recall that it was offered by Claimant after the hearing that such inspection may be done at their Plant at NOIDA at anytime in the coming week commencing from 16th May, 2005 and Shri Chetan Kumar Agarwal of the respondent undertook to fix a mutually convenient date for inspection after contacting his Chartered Accountant. The matter was thereafter also discussed by us with you on two occasions wherein we had again requested you for fixing up an early date for the inspection.

We wish to place on record that till date no response has come from the side of Respondent for conducting the inspection as per direction of the Hon'ble Arbitration Tribunal. In these circumstances, we once again call upon you to inform us at the earliest if your client is still interested in conducting

the inspection and if so, we request for determination of a mutually convenient date for the same".

Yet on 8.7.2005 respondent Chetankumar gave the aforesaid application. In paragraph 3(iv) of that application it was stated that "By the impugned order the entire onus to prove fact of claim is unjustifiably being shifted onto the respondents. The learned arbitrator is sitting with preconceived mind that the claimant's claim is correct and stands substantiated even without documents". He further stated in paragraph 4 -

"In such circumstances, the respondent would most humbly submit that it would not be in a position to inspect the said documents in the premises of the claimant. The claimant ought to follow due process of law to get their claim adjudicated. The basic principle of natural justice cannot be flouted in the garb of principle that arbitral tribunal can devise its own procedure. It is for the claimants to substantiate its claim by documentary evidence, if they fail to do so despite documents being in their possession, they consequences in law will follow. However, the respondent cannot be saddled with the obligation to go to claimant to satisfy and substantiate the claim of claimant".

The said application made by the applicant Mr.Chetankumar is in English and is signed by Mr.Chetankumar in English. Thereafter respondent Chetankumar filed an affidavit again in English and in paragraph 5 thereof he has stated why according to him an apprehension "of biasness and that of arbitrator holding proceedings with a preconceived mind" was created in his mind. At the time of hearing of that application on 2.7.2005 it was suggested by the respondents that I should withdraw as an arbitrator in view of the said allegations. The said request was rejected as the allegations made by the respondents were not true and did not appear to be bonafide. The arbitrator had not compelled the respondents to take inspection. It was the claimant which was directed to give

inspection of the documents demanded for inspection by the respondents. If the place initially agreed by the learned Advocates for the parties was not convenient to the respondents then they should have suggested some other place or obtained some other order from me in that behalf. No such attempt was made and straight way respondent Chetankumar made the aforesaid application dated 8.7.2005. I had also passed an order in that behalf on 22.7.2005. At that time I had not recorded the reasons for rejecting the objections and the request made by the respondents and therefore I am now stating the reasons in the award. The facts narrated above clearly indicate that the allegations made by the respondent Chetankumar are without any justification. In fact, the respondents were treated leniently and were given long time to file their reply. Though the amount of arbitrator's fees fixed at Rs.20,000/- per sitting is quite reasonable yet in view of the request made by the respondents that point was kept open and the respondents were permitted to support their inability to pay their share or to obtain an order in that behalf from the Court. The respondents have not placed before the Tribunal any material on the basis of which it can be said that they are unable to pay 50% of the amount of fees payable to the arbitrator. The respondents were accommodated every time they wanted some accommodation and when it was found that they were deliberately trying to delay the final disposal of the proceeding, the following order was passed by me on 22.7.2005:

I have read the application made by the respondents and also the supporting affidavit filed by them. I have also heard the Ld. Counsel. I have also given an opportunity to the claimant to have their say and I have also heard their Counsel on the application. After due consideration I do not think it appropriate to withdraw from this arbitration case. The reasons for taking this view shall be stated in the Award. Parties are directed to proceed further with the arbitration proceedings.

As the respondents Counsel are raising objections that whatever is stated by the witnesses is not correctly recorded, it is directed that henceforth the parties will make arrangement for keeping their tape recorders ready at the time of hearing of the proceedings so that whatever transpires during the proceedings is recorded and thereafter no grievance can be made in this behalf.

The respondents are not contributing their share of the Arbitrator's fees and have pleaded inability to pay the same. Under the circumstances, these proceedings cannot be allowed to go on indefinitely. Hence, it is now necessary to fix the time schedule within which the process of cross-examination of the witnesses of either side is completed. The respondents are allowed 4 days time to cross-examine the Witnesses of the claimant and the claimant is given 5 days time to cross-examine the witnesses of the respondents. In order to see that no time is wasted, the hearings hereafter will take place at 11 A.M. and will continue till 5 P.M. with one hour's break. The hearings shall take place continuously from Monday till Saturday. The Ld. Counsel for the respondents states that they cannot appear during week days in this arbitration proceeding at 11 A.M. and continue the proceedings till 5 P.M.

In my opinion this objection is not proper and they should make it convenient to attend this proceedings as directed so that this can be concluded as early as possible. The Ld. Counsel further states that they would be able to appear between 11 A.M. TO 5. P.M. on Saturdays and Sundays only. In my opinion, to conduct arbitration proceedings on Saturdays and Sundays only would not be proper as that would delay concluding of the arbitration proceedings for a very long time. When the Ld. Counsel was asked as to when the next date of hearing should be fixed he stated that he has nothing to say in view of the objection, which he has already regarding hearing on week days.

The next hearing is now fixed on 8th August,2005. and the proceedings will go on continuously for 5 days. The

proceedings will start at 11 A.M. Parties are directed to remain present on that day at the fixed time. As it was agreed earlier the proceedings will be held in the office of Counsel for claimant - Singhania & Partners. For the purpose of enabling the claimant to cross-examine the witnesses of respondents the dates fixed are 12th, 16th and 17th August, 2005. The dates for hearing arguments will be fixed thereafter".

(emphasis added)

6. Section 19 of the Arbitration & Conciliation Act, 1996 provides that the arbitrator is not bound by the provisions of the Code of Civil Procedure, 1908 (CPC) or the Indian Evidence Act, 1872. The arbitrator is free to devise its own procedure as long as the procedure complies with the principles of natural justice. It is obvious that petitioners deliberately avoided to inspect the record in support of the statements of accounts filed by the respondent, and which is for the obvious reason that there was nothing to be challenged by the petitioners in the record maintained by the respondent with respect to tractors and spare parts supplied to the petitioners. I hold that there is no illegality in the procedure adopted by the Arbitrator that petitioners were to inspect the bulky record in the office of the respondent. This is all the more so because the order for inspection by the petitioners in the respondent's office was on the basis of an agreement between the parties and so specifically stated in para 28 of the Award. Besides the fact that petitioners failed to inspect the record and therefore

there was no basis of challenge to the statements of accounts maintained by the respondent, the Arbitrator has noted three important aspects to believe the statements of accounts which were filed by the respondent in the arbitration proceedings. Firstly the Arbitrator notes that the petitioners by virtue of two documents Ex.PW2/1 (as on 31.3.2002) and Annexure C-19 (as on 31.3.2003) had acknowledged the amounts due. Secondly, the Arbitrator notes that respondent had duly produced and proved its statements of accounts as Ex.PW2/3 and Ex.PW2/4, however, the respondents did not produce their account books to prove the copy of the account which was filed by the petitioners in the arbitration proceedings (para 49, first three lines at internal page 48 of the Award). Thirdly, the Arbitrator notes that the respondent/Company as per its procedure had sent the statement of accounts to all its dealers which would thus include the petitioners, and there was no reason to doubt this action of the respondent more so because petitioners did not produce the original books of accounts. The relevant paras of the Award in this regard are paras 47 to 49 of the Award and which read as under:-

“47. The claimant has supported its oral evidence by producing documentary evidence also. The claimant's accounts are audited every year as per the statutory requirement. Considering the accounting system of the claimant and audited balance sheets and the certificates Exhs. PW-2/7 and PW-2/8, I find that the Statements of Account Exhs. PW-1/16, PW-1/17, PW-2/3 and PW-2/4 are more reliable and

deserve to be accepted. The attending circumstances also lead to me to that conclusion. The claimant is a big company interested in developing its manufacturing and selling business in India and therefore it would not be interested in doing such things with its dealers as alleged by the respondents. Its officers would not ordinarily have personal interest in such manipulations and telling lies as they would not gain anything thereby. The evidence led by the claimant as regards the procedure and method of maintaining accounts, auditing of their accounts by an independent auditor and the certificates issued by the Chartered Accountants has remained unshaken. The respondent's oral evidence, apart from the fact that it is not supported by any credible documentary evidence, is not sufficient to create any doubt regarding correctness of the statements of account produced by the claimant. The evidence of Chetankumar is evasive, inconsistent and not trustworthy. He does not appear to have regard for truth and can deny anything if that suits his purpose. For all these reasons I hold that the statements of account referred to above nor only truly reflect the account of the respondent company as maintained by the claimant in its books of account, they are also correct.

48. The claimant has also led evidence to prove that it was following the practice of sending statement of account every year to every dealer with a request to confirm his outstanding on a given date and forward the confirmation to their auditors for verification of the accounts maintained by it. Shri R.K. Gupta's (PW-2) evidence on this point has remained unchallenged. Shri Chetankumar had his affidavit later and therein he has not disputed what Shri Gupta has stated. Even during the cross-examination of Shri Gupta no attempt was made to prove that no such practice was followed in case of the respondent company. On the basis of non production or filing of vouchers and invoices suggestions were made that the entries made in the account books are not correct and therefore the statements of account produced by the claimant are also not correct. In fact, various suggestions imputing that they were giving false evidence and producing false and

fabricated documents have been made by both the sides to the witnesses forgetting that suggestions which are not support by evidence on record have no evidentiary value. As regards non production of supporting vouchers and invoices in this case by the claimant, I hold that having failed to take inspection thereof the respondents have no justification in making a grievance in that behalf and even otherwise also in view of other evidence on record, their non production is not of any consequence.

49. The claimants witnesses have deposed that the letter dated 21.4.2003 (Exh. PW-1/6A) was sent by the claimant to the respondent company for confirmation of the amount outstanding as on 31.3.2003. Witnesses Shri Lalit and Shri R.K. Gupta have stated that respondent company had acknowledged its liability shown therein and that Exh. PW-1/6A is a correct copy of that acknowledgement. Shri Gupta has also proved similar acknowledgement (Exh. PW-2/1) for the previous year. Shri Lalit was cross examined on this point to prove that it was not signed by any authorized person of the respondent company and that it is forged and fabricated document. Shri Lalit had produced the original of document Exh. PW-1/6A. Similar questions were put to witness Shri Gupta with respect to PW-1/6A and PW-2/1. Both of them have admitted that they have no personal knowledge as to who had signed the same. Exh. PW-2/1 is dated April 23, 2002 and Exh. PW-1/6A is dated 21st April 2004. Both the documents are almost similar except that the names of the auditors and the figures are different for the two years. Why these letters were written is stated therein and the amount outstanding as on March 31 is also mentioned. After the letter part is over in these documents there is a writing or confirmation addressed to the auditors wherein the balance due to the claimants as per respondent company's record was to be filled in. The said blanks have been filled up and they have been signed by the authorized signatory of the respondent company. It bears a stamp "for Chetankumar Aggarwal & Sons Pvt. Ltd.....authorized signatory". Both of them are signed by Pankaj. One was signed on 24.5.2002

and the other on 17.5.2003. Chetankumar in his affidavit/examination-in-chief has not said anything about these documents. In his cross examination he stated that he does not remember whether there was any Mr. Pankaj working with respondent no.1 on 23.4.2002. Then he stated that there was no Mr. Pankaj authorized to sign on behalf of the respondent company. He did not produce employee's register on the ground that he was not able to find it even though he had searched it for 2 or 3 days. Respondents have not produced their account books or any other credible evidence to prove that the amounts mentioned as due in the aforesaid said two documents are not correct. Chetankumar's evidence is not such, in view of the various infirmities therein, that can be relied upon without documentary support. Judging the rival evidence on probabilities, it is hard to believe that the claimant did not get the amount due as on 31st March of each year confirmed and fabricated the documents Exhs. PW-1/6A and PW-2/1. As the sales to respondent company were made partly on credit basis and a running account was maintained and the claimant was under a statutory obligation of getting its accounts audited and to submit balance sheets, it is more probable that the claimant did get the amounts due on March 31 confirmed from its dealers. I therefore, accept the evidence of the claimant in preference to that of the respondents and holds that that Exhs. PW-1/6A and PW-2/1, were sent to the respondent company and it did confirm the amounts due to the claimant as mentioned therein. I also hold that the respondents have failed to prove that the statement of account RW-1 / 2 is correct.”
(emphasis added)

7. At this stage itself it may be noted that while hearing objections under Section 34 to an Award passed under the Arbitration and Conciliation Act, 1996, this Court does not sit as an appellate court to re-appraise the findings on facts and conclusions of the arbitrator. Once arbitrator takes one

possible and plausible view from the evidence which has been led before him, this Court will not interfere with the findings and conclusions of the arbitrator unless the findings and conclusions of the arbitrator are perverse. I have already reproduced above the relevant discussion by the Arbitrator and there is no perversity in the same for this Court to interfere under Section 34 of the Act. Therefore, the challenge by the petitioners to the findings and conclusions of the Arbitrator must fail and it is held that the respondent has proved its claim against the petitioners.

8. The second argument urged by the petitioners was that petitioners were entitled to various amounts under the exchange scheme whereby petitioners exchanged old tractors for new tractors of the respondent and the difference of the price as losses were to be borne by the respondent. In this regard it is seen from the impugned Award that the petitioners have failed to file even a single document which shows that there existed an exchange scheme, and much less what were the details of the exchange scheme and as to what were the specific amounts which were to be granted to the petitioners by the respondent under that scheme. Arbitrator therefore records that once there is only oral evidence led by the petitioners, and there is no support to the same by documentary evidence; much less

clinching documentary evidence; oral statement by one party viz the petitioners would stand rebutted by the oral statement/deposition of the respondent, and hence not only petitioners can be said to have failed to discharge the onus of proof, but that on preponderance of probabilities it had to be held that there was no exchange scheme and any amounts due by the respondent to the petitioners under this head. Also, the Arbitrator notes that with respect to the evidence led by the petitioners of another dealer Mr. Luv Goyal, it is noted that not only the said dealer did not produce any exchange scheme but he also failed to show any documentary evidence of any transactions as to which person with whom the said Mr. Luv Goyal as a dealer of the respondent had exchanged old tractors for the new tractors. All these aspects are contained in paras 50 to 56 of the Award and these paras read as under:-

“50. As a defence to the claim made by claimant New Holland and the basis for respondent company's counter claim, the respondents have pleaded 'Exchange Scheme' and recoverability of certain amounts which became payable thereunder and also the cost of survey stated to have been made by them at the instance of the claimant. In their reply it is stated that the claimant being a new entrant in the area had introduced 'Exchange Scheme' to boost its sales. After stating how the scheme was to work it is claimed that the loss which they suffered as agent was to be reimbursed by the claimant as it was really the loss of the claimant. It is also their case that the claimant had promised to give "special discount/incentives / credit note/discounts and other benefits from time to time to its agents to enable the agents to cover such

losses". It is then alleged that the claimant "fraudulently, unjustifiably and arbitrarily" did not credit such amounts in the respondents' account. The respondents have then given details of the amounts which became payable to them and were actually paid to them. According to the respondents no amount as claimed by the claimant is due from and payable by them. On the basis of the same averments respondents have claimed various amounts as stated in the counter claim.

51. It is not in dispute that there is nothing in writing to show that the claimant had introduced the exchange scheme and told the respondents to carry out a survey on their behalf. There is not a single document or a letter on record even indicating that. Therefore these two points will have to be decided on the basis of appreciation of evidence. Claimant's witness Shri Lalit has denied that the exchange scheme was introduced by the claimant or that the claimant had told the respondents to carry out the survey. In his cross examination he admitted that he was not aware about the same. Mr. Gupta has also stated that the claimant had not floated any exchange scheme. As regards survey he has stated that the claimant was under no obligation to pay any amount toward conducting a survey. He has denied that any bill for that amount was submitted by the respondents. Rs.45,000/- were paid to the respondent company on the basis of credit notes. He has also denied any liability to pay on the part of the claimant under Exchange Scheme. In his cross examination he has said that the claimant did not require market to be surveyed by a dealer before his appointment as a dealer. It is done by the claimant itself. He also stated that Rs.45,000/- were credited to the account of the respondent company for some survey and as a goodwill gesture. Rs. 16,32,600/- was credited on account of incentives for sales of tractors as per the Incentive Scheme Policy and he has then explained the factors that were to be taken into account for that purpose. Shri Bansal who was the General Manager - Sales and Marketing has stated that the claimant is a part of international group and it works with proper, planning to appoint a dealer is taken after conducting market survey including the sales potential, type of customers, requirement of sales promotions etc. and therefore it is highly inconceivable that for introduction and promotion of its products in a particular area, the claimant would depend on the inputs to be provided by the dealer

and that too after its appointment. He has further stated that the claimant never called upon the respondents to conduct any market survey nor was there an agreement between the claimant and the respondents to the effect that cost of the market survey would be borne by the claimant. He has then stated that the activity of surveying the market was initiated by respondent company as a part of its market development initiative and it was done so by the respondent company in routine course. The claimant had only supported the respondent's initiative by reimbursing some amount spent by the respondent company towards such market development activities. He has denied that the claimant's representatives used to assess the old tractors or that they were in any manner concerned with the respondent company's transaction of old tractors. He has specifically stated that the exchange scheme of old tractors was started by the respondent company for its own business advantages. The claimant had not assured or promised that it would compensate respondent no.1 for any loss incurred by respondent no.1 in pursuing that scheme. However, some incentives were provided towards sale of fresh tractors but not against the sale of old tractors. In his cross-examination he has admitted that that the prospect data base of the area was prepared by the respondent and that some amount was paid by the respondent to the respondent company for doing that work. He admitted that the exchange scheme pursued by the respondent company was within the knowledge of the claimant. All the suggestions put to him to prove that the exchange scheme was floated by the claimant and that its representatives used to take part in the transactions of old tractors and that the claimant had introduced a scheme/policy for reimbursement of losses suffered by the dealer have been denied by the witness.

52. Chetankumar in his affidavit/examination in chief has stated in detail about the Exchange Scheme and the survey conducted by him. He has not stated when the Exchange Scheme was introduced. As regards the survey it was after the respondent company was appointed as a dealer. He has stated that the respondent company being an agent of the claimant the loss suffered by it was the loss of the claimant. The claimant had therefore devised a scheme in the year 2002 for reimbursement of those losses. In his cross examination he has stated that the survey by the respondent company had commenced in January or

February of 2000. He admitted that there is nothing in-writing to show that claimant had undertaken to reimburse the survey expenses of Rs.3 lacs. He also admitted that he had only orally demanded Rs.2,50,000/- being the balance amount from the sales representatives of the claimant. He also admitted that there was no writing to show the claimant had promised to reimburse losses suffered by the respondent company in the exchange scheme. He has also admitted that except the oral demands made to the sales representatives of the claimant, no steps were taken by the respondents to recover the amounts stated to have 'become due under the exchange scheme.

53. The Dealership Agreement in clear terms provided that the dealer is not the agent of the company (claimant). It also provided that the dealer shall promote and advertise the sale at its own expense. Claimant's witness Shri Bansal appears to be right in what he has said regarding the survey as it would be illogical for the owner to appoint a dealer for an area and then to make a survey of that area for deciding to introduce and promote its products in that area. Ordinarily the owner would make such a survey and decide who should be appointed as a dealer prior to the appointment of the dealer. Therefore it is not believable that the survey as alleged by the respondents was at the instance of the claimant and was to be carried out at the expense of the claimant. The survey was made after the relationship of owner and dealer had started. Therefore it is more likely that it was done by the respondent company on its own, as was expected by the dealership agreement and it was supported to some extent by the claimant. So far as the exchange scheme is concerned, as stated above, there is nothing in writing to show that it was floated or introduced by the claimant. The claimant's witnesses have categorically denied that the claimant had done so. Nothing has been brought out in their cross examination on the basis of which it can be said that such a scheme was introduced by the claimant. If it was really so, there would have been some writing prepared by the claimant in that behalf, as it was likely to have great financial implications. There is no reference to such a scheme in the dealership agreement and therefore it would be reasonable to believe that it was not there before 1.1.2002, it being an important term regarding sale of tractors and involving heavy financial liability.

54. It was submitted by the learned counsel for the respondents that in fairness the claimant should have produced all the relevant schemes and policies as exchange scheme was specifically pleaded by the respondents. It was the respondent company which was asserting that the claimant had introduced such a scheme and therefore it was for it to produce some credible evidence to that effect to transfer the burden on the claimant. The respondent company was not appointed as an agent of the claimant. That was a wrong belief entertained by the respondents and therefore the premise on which the claim is made by it that the loss of the agent was really the loss of the claimant and therefore it was required to be reimbursed has to be regarded as wrong.
55. It was submitted by the learned counsel for the respondent that their witness Shri Luv Goyal was a dealer of the claimant for the period 1998 to 2003 for the districts Jalandhar, Hoshiarpur, Kapurthala and Nawan Shehar and he has also stated that as a result of the survey it was found that in the area allotted to him the sale of New Holland tractors was difficult without indulging in some trading such as purchasing old tractors and selling new tractors of New Holland in exchange. He had therefore discussions with executives of the claimant and strategy of selling tractors was decided upon. It was decided that the dealer would purchase the old tractors and the new tractors would be sold to that person. It was sometimes agreed with the local executive of the claimant company and sometimes with higher officer of the claimant company that whatever loss the dealer was likely to suffer on account of such trading would be compensated by the claimants' company by way of incentives. This witness has also stated that incentives were paid to him. In his cross examination he stated that for the period 1998 to 2000, there was a sole proprietary firm and his father was the sole proprietor. He further stated that the dealership agreement was executed between the claimant and a public limited company in the year 2002. The public limited company closed down its business either by the end of the financial year 2003 or in April 2003. This witness has also admitted in cross examination that he had nothing in writing to show that the claimant company had promised to reimburse any amount either on account of survey or towards the loss suffered on account of transactions of old tractors. On appreciation of evidence, it appears that he is not a witness who can inspire

confidence and his evidence cannot be accepted without any independent support. The respondents witness Shri Santhok Singh has stated that he had purchased tractor in or around 2002 from claimant as the claimant had offered to purchase his old tractor at rate higher than the market value. It was purchased through Chetankumar & Co. Similar four or five villagers of his village had also purchased New Holland tractors. He could not produce anything in writing to show that he had purchased such a tractor. On the basis of what is stated in his cross-examination, it is difficult to believe him that he had purchased the same under any exchange scheme floated or introduced by the claimant. The evidence of Jasbir Singh also for similar reasons cannot be accepted as trustworthy and sufficient for the purpose of holding that the claimant had introduced an exchange scheme and that it was under that scheme that he had purchased the New Holland tractor.

56. On overall consideration of the evidence, I hold that on the point of survey and exchange scheme the evidence of the claimants' witnesses is more specific and reliable and therefore it deserves to be accepted. The evidence of the respondents' witnesses does not inspire any confidence as regards its truthfulness and therefore I reject the same. It is held that the respondents have failed to prove that the claimant had floated or introduced any exchange scheme as stated by the respondents. **I have also taken into consideration the conduct of the respondents in reaching this conclusion. Even though lacs of rupees had thus become due and payable to them, the respondents did not take any concrete step to recover those amounts even though they were not paid for quite a long time. Till the initiation of this arbitration proceeding, they had neither written any letter to the claimant nor given any notice to it for payment of those amounts. The respondent no.1 was not a big dealer who would not mind even if its 40 or 50 lacs rupees have remain unpaid. Obviously, the counter claim based upon the survey and exchange scheme is an afterthought and is raised only for the purpose of defeating the claim of the claimant.**

(emphasis added)

9. I may also note that for upholding the conclusion of the Arbitrator in this regard it is noted that the Arbitrator rightly notes that if a huge amount of Rs.40 to 50 lacs would have remained unpaid, and which amounts were claimed by the petitioners as a counter claim, then obviously such claims would have been raised much earlier by the petitioners, but the counter claims were raised only as an afterthought for the first time in the arbitration proceedings. Therefore, even the second stand of the petitioners is totally misconceived and was rightly rejected by the Arbitrator.

10. So far as the third stand and argument of the petitioners with respect to petitioners' entitlement of incentive under various incentive schemes, it is noted that once again petitioners led no evidence except making self-serving oral averments and such oral averments having been denied by the respondent, the Arbitrator was therefore justified in holding that there was no entitlement of the petitioners for any alleged incentive claimed by the petitioners from the respondent.

11. In view of the aforesaid discussion, I do not find any merit whatsoever in the objection petition. In fact, it is quite clear that petitioners in spite of owing of substantial amount of over Rs.37 lacs to the respondent way back from the year 2003, have been on one frivolous ground or the

other refusing to pay the respondent and have deliberately delayed the arbitration proceedings so as to delay the payment which was to be made by the petitioners to the respondent.

12. I have already stated above as to how petitioners have unfairly and recklessly maligned the Arbitrator by making false accusations against the Arbitrator and that petitioners have failed to pay even a single rupee in the arbitration proceedings. Therefore, while dismissing the present petition, I award actual costs to the respondent with respect to these proceedings and respondent will file its certificate of the fees duly supported by the certificate of lawyers with respect to fees paid by the respondent to its lawyers in the present proceedings. The costs stated in the said certificate will be supported by an affidavit of the concerned officer of the respondent and such costs will be the costs which will be payable by the petitioners to the respondent for these proceedings. The affidavit supported by the certificate of fees and the certificate of lawyers will be filed by the respondent within a period of four weeks from today and costs shall be paid within a period of four weeks thereafter by the petitioners to the respondent.

SEPTEMBER 15, 2015

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