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

+ **O.M.P.(I) (COMM.) 397/2016**

**ENTER TECH ENTERTAINMENT
PRIVATE LIMITED**

..... Petitioner

Through : Mr Sandeep Sethi, Sr Adv with
Ms Ila Kapoor & Ms Ananya
Aggarwal, Advs.

versus

BLUEAIR INDIA PVT. LTD.

..... Respondent

Through : Mr Akhil Sibbal, Mr Cyril Abrol,
Mr Amol Dixit & Mr Ankur
Mahindroo, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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05.10.2016

VIBHU BAKHRU, J

CAV No.873/2016

1. Since appearance has been put in by the learned counsel for the Caveator/ respondent, the caveat stands disposed of.

IA No.12447/2016

2. Allowed, subject to all just exceptions.

3. The application is disposed of.

O.M.P.(I) (COMM.) 397/2016

4. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

“a) allow the Petitioner to continue acting as the authorized distributor for the sale of all Blueair products in the Territory until the expiry of the 5 year lock-in period;

b) injunct the Respondent, its agents, servants, nominees, assigns or authorized representatives from entering into any contract with third parties on the subject matter of the Agreement, which is the distribution or sale of all Blueair products in the Territory;

c) restrain the Respondent from directly or indirectly supplying any Blueair products to any party/customer in the Territory, as per Clause 2 of the Agreement;

d) direct Respondents to secure the amount of Rs.100 Crores representing the loss suffered by the Petitioner due to the wrongful and illegal termination of the Agreement by the Respondent;

e) pass an ad-interim measure in respect of prayer (a), (b) and (c) above;

f) grant costs of these proceedings to be paid by the Respondents and.”

5. The parties had entered into a Distributorship Agreement dated 01.09.2015 (hereafter 'the Agreement') whereby the petitioner was appointed as the exclusive distributor for the products of the respondent.

6. On 16.08.2016, the respondent terminated the above said Agreement principally on the ground that a sum of ₹2,03,23,164/- (Rupees Two Crore Three Lac Twenty Three Thousand One Hundred and Sixty Four only) was outstanding and payable to respondent as on 05.08.2016 and the same had not been paid despite various reminders. The respondent further called upon the petitioner to pay the aforesaid sum

together with interest, failing which the disputes would be referred to the Arbitrator.

7. In response to the aforesaid letter, the petitioner caused its lawyers to send a letter dated 16.09.2016, *inter alia*, disputing the contents of the notice dated 16.08.2016; however, the fact that a sum of ₹2,03,23,164/- was payable in respect of the goods supplied by the respondent was not disputed. On the contrary, the petitioner stated that the said amount had remained outstanding as the payments from some of its clients/dealers had not been received. In other words, the petitioner admitted that above said sum was payable but had not been paid since the petitioner had not received the payments from its clients.

8. In addition, the petitioner also alleged that two of its dealers had not paid the amounts due for the reason that the respondent had not issued credit notes for ₹6,50,000/- each to the said dealers. The petitioner further stated that news of an association between the respondent and the Hindustan Unilever Limited had been heard by the dealers and, therefore, they had not paid the amount due to the petitioner. The petitioner also claimed that respondent had forced the petitioner to supply goods to certain dealers, who had not paid the amounts due.

9. All the aforesaid allegations were denied by the respondent in its notice dated 23.09.2016 and the statements made in the letter dated 16.08.2016 were reiterated.

10. Mr Sethi, learned senior counsel appearing on behalf of the petitioner submitted that the Agreement contains a negative covenant and in terms of the said covenant, the respondent had agreed that the

petitioner would have exclusive and sole distributorship rights. The respondent had also undertaken that it would not appoint any other distributor in the said territory for supply of any of its goods to any party directly or indirectly.

11. Mr Sethi, further submitted that although specific performance of the agreements which are determinable, cannot be granted but negative covenants are an exception to the rule; and by virtue of section 42 of The Specific Relief Act, 1963, a court could still grant an injunction restraining the party from breaching the negative covenant. He submitted that since in the present case, the respondent had undertaken not to supply the goods / products to any other party, the injunction to restrain the breach of the said covenant should be granted in favour of the petitioner.

12. Mr Sibal, who appeared on behalf of the respondent on advance notice, countered the submissions made by Mr Sethi. He submitted that there is no dispute that the sum of ₹2,03,23,164/- was outstanding and had not been paid. He also handed over the copies of certain e-mails which indicate that reminders were sent to the petitioner for payment of the aforesaid sum. He submitted that since it was not disputed that the petitioner had failed to pay the amount for the goods supplied, the Agreement was terminated. In the aforesaid circumstances, even though the Agreement contained a negative covenant, the petitioner was not entitled to any discretionary relief. Further, since, the Agreement itself stood terminated, the negative covenant also perished along with the Agreement.

13. I have heard the learned counsel for parties.

14. At the outset, it is necessary to set out the relevant clauses of the Agreement relied upon by the petitioner which read as under:

“2. Exclusivity and Distribution Territory: The Authorised Distributor will have exclusive and sole distributor rights to sell all Blueair products of the company in Delhi NCR (National Capital Region) and the State of Maharashtra. The Company undertakes to neither appoint any other distributor in the said territory nor supply to any party/customer in that territory directly or indirectly.

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5. Lock-in period of the agreement: The lock-in period of this agreement is 5 years from the date of this contract, i.e. valid till 2019.

6. Extension: The Agreement can be extended by the parties by mutual consent after 8 years. The present agreement gets automatically extended for an additional period of distributorship of 3 years once the authorized Distributor achieves the following sales targets by selling any Blueair Products which includes Main unit/Filter/Any other new products.

During Lock in Period:

1st year (1000 unit)

2nd year (1100 unit)

3rd year (1250 unit)

4th year (1350 unit)

5th year (1500 unit)

Additional Period:

6th year (2000 unit)

7th year (2400 unit)

8th year (3000 unit)

Here the "unit" can be anyone of the following the Main unit/Filter/Any new products.”

15. The term of the Agreement is fixed and it does not provide for a premature termination. However, a fundamental breach of the agreement by a party would, indisputably, entitle the other party to terminate the agreement. It is apparent from the facts of the case that petitioner had failed to pay the amount for the products supplied to it by the respondent. Even if it is accepted that the petitioner’s clients had not paid for the products supplied to them, the same can hardly be a valid ground for the petitioner to withhold the payments due to the respondent.

16. It is not in dispute that the invoices for the goods supplied were raised in the name of the petitioner and the petitioner was obliged to make the payment for the same. There is no condition in the Agreement that the payments due to the respondent would be conditional on the petitioner receiving the same from its clients.

17. A perusal of the Agreement clearly indicates that it was expressly agreed between the parties that the Agreement superseded all previous agreements / arrangements, if any, between the respondent and the petitioner.

18. The petitioner has also not produced any material which would indicate that there was a contemporaneous dispute as to the petitioner’s liability to pay for the goods supplied. There is no correspondence produced which would indicate that the petitioner had disputed its liability to make the payment at the material time.

19. In response to the respondent’s notice dated 16.08.2016, the petitioner claimed that the respondent had defaulted in not issuing credit

notes of ₹6,50,000/- each to two dealers on account of incentives; however, the petition is bereft of any material which would indicate that the respondent had any such obligation. As stated above, there is no correspondence which would indicate that any such credit notes were agreed to be paid by the respondent or were ever demanded by the petitioner.

20. Similarly, the claim made by the petitioner in response to the notice of the respondent that the respondent had forced the petitioner to supply certain goods to certain dealers, is also without any foundation.

21. In the facts of the present case, section 42 of the Specific Relief Act, 1963 is also of no assistance to the petitioner. Section 41(e) of the said Act expressly provides that an injunction cannot be granted *“to prevent the breach of a contract the performance of which would not be specifically enforced”*. Section 42 of the said Act provides for an exception to the aforesaid provisions and reads as under:

“42. Injunction to perform negative agreement

Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

PROVIDED that the plaintiff has not failed to perform the contract so far as it is binding on him.”

22. It is apparent from the plain language of the aforesaid section that it is only an enabling provision, which enables a court at its discretion to

grant an injunction to enforce a negative covenant even in cases where an agreement cannot be specifically enforced; however, an injunction can only be granted where the petitioner has established a good *prima facie* case and the balance of convenience is also in his favour. Further, in terms of the proviso to section 42, the said section is applicable only when the plaintiff is not in breach. In the present case, it is difficult to accept that the petitioner was not in breach of the Agreement since admittedly, the petitioner had failed to pay for the goods supplied by the respondent. Plainly, payment for goods is an implicit obligation of a purchaser in a contract for sale and purchase of goods, which is the substratal subject of the Agreement. As indicated above, the petitioner has not been able to establish a *prima facie* case that the termination of the Agreement was wrongful.

23. I am *prima facie* of the view that the termination of the Agreement is not without any cause and, therefore, I do not consider it a fit case to restrain the respondent from supplying the goods to any other party. In view of the fact that the Agreement between the petitioner and the respondent is terminated, interdicting the respondent from dealing with any other party would effectively restrain the respondent from carrying any business in the specified territory. This, in my view, would not be justified.

24. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

OCTOBER 05, 2016

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