

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

% *Judgment Reserved on: 19th February, 2016*
Judgment pronounced on: 1st March, 2016

+ **O.M.P.(I) No.575/2015**

KOHINOOR SPECIALITY FOODS INDIA PRIVATE LIMITED

..... Petitioner

Through Dr.Abhishek Manu Singhvi and
Mr.Rajiv Nayar, Sr.Advs. with Mr.Anuj
Berry, Mr.Mithun V.Thanks,
Mr.Sourabh Rath & Mr.Nikhil
Varshney, Advs.

Versus

KOHINOOR FOODS LIMITED & ORS

..... Respondents

Through Mr.Sandeep Sethi and Mr.Ramji
Srinivasan, Sr.Advs. with Mr.Kamal
Nijhawan, Mr.Shailesh Kapoor,
Mr.Gurmehar S. Sistani & Mr.Sumit
Gaur, Advs. for R-1.
Mr.Ramji Srinivasan, Sr.Adv. with
Mr.Kamal Nijhawan & Mr.Shailesh
Kapoor, Advs. for R-2 to 4.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") seeking interim measures of protection to restrain the respondents from breaching the non-compete obligations contained in the Business Transfer

Agreement dated 1st June, 2011 (hereinafter referred to as "Business Transfer Agreement") between the petitioner, respondent No.1, Mr.Jugal Kishore Arora, Mr.Satnam Arora and Mr.Gurnam Arora (hereinafter collectively referred to as "Promoters") who are respondents No.2, 3 and 4 and Non-Compete and Non-Solicitation Agreement dated 1st June, 2011 between the petitioner and the Promoters (hereinafter referred to as "Non-Compete Agreement").

FACTS AS PER PETITION

2. Kohinoor Speciality Foods India Private Limited, the petitioner is a company incorporated under the Indian Companies Act, 1956, by the respondent No.1 on 25th May, 2011 to carry on the business of *inter alia* the marketing, trading, selling and distributing of rice products including broken rice in India. By virtue of a Shareholders and Investment Agreement dated 1st June, 2011 (hereinafter referred to as "Shareholders Agreement") between respondent No.1, petitioner and McCormick Ingredients Southeast Asia Private Limited (hereinafter referred to as "McCormick"), McCormick subscribed to 85% of total issued and paid up capital of the petitioner.

The respondent No.1 is a public listed company. The Promoters have incorporated the respondent No.1 on 26th July 1989, in the name of Satnam Overseas Private Limited as a private company to carry on the business of *inter alia* manufacturing, sale, distribution and trade of basmati rice, ready to eat products, cook-in sauces and cooking pastes, spices, seasonings and frozen food. Respondent No.1 holds 15% of total issued and paid up capital of the petitioner.

In para 13 of the Business Transfer Agreement and the Non-Compete Agreement, Clause 13 also contained the mode of dispute resolution by way of Arbitration proceedings.

2.1 Brief facts of the case as per the petition are that by virtue of the Shareholders Agreement between respondent No.1, the petitioner and McCormick, McCormick subscribed to 85% of total issued and paid up capital of the petitioner- Company and became its majority shareholder.

2.2 On the same day, the Business Transfer Agreement was executed between the petitioner-Company, respondent No.1 and the Promoters. In terms of the Business Transfer Agreement, respondent No.1 sold its entire Undertaking comprising of assets, employees, employees benefit plans, current liabilities and licenses (hereinafter referred to as "Undertaking") belonging exclusively to the business of manufacturing, processing, finishing, marketing, trading, distributing, importing, exporting and/ or supply of food products, including ready to eat products cook-in sauces, cooking pastes, spices, seasonings, frozen food, and the marketing trading, selling and distributing of rice products (including "broken rice") in the territory of India to the petitioner-Company (hereinafter referred to as the "Transferred Business") for a consideration of Rs.315,00,00,000 (hereinafter referred to as the "Purchase Price"). Clause 2.1.1 of the Business Transfer Agreement records that the Purchase Price includes value being paid to respondent No.1 to undertake the non-compete obligations as set out under the Agreement, and that respondent No.1 acknowledges the adequacy and sufficiency of such consideration.

2.3 In terms of Clause 8 of the Business Transfer Agreement, respondent No.1 agreed that it would *inter alia* not commence, establish, engage in, or carry on, whether directly or indirectly, any business in India, which is in competition with the business of the petitioner, for a period of 7 years from 9th September, 2011.

2.4 The respondents and their various relatives and affiliates, through various Deeds of Assignment dated 1st June, 2011 assigned their rights to the trademark "Kohinoor", as well as various other trademarks required for the business of the petitioner, to McCormick Switzerland GmbH, for substantial consideration. By the Licenced Mark and Corporate Name Licence Agreement dated 1st June, 2011, McCormick Switzerland GmbH licensed the various trademarks to the respondents for the limited purposes mentioned in the said agreement.

2.5 In view of the said Deeds of Assignment, the respondents have no right to use the trademark "Kohinoor", and the other trademarks mentioned in the said Deeds of Assignment, except for the limited purposes mentioned in the Licensed Mark and Corporate Name License Agreement dated 1st June, 2011.

2.6 The petitioner and respondent No.1 also entered into a Rice Supply Agreement dated 9th September, 2011 ("Rice Supply Agreement"), pursuant to which, the respondent No.1 *inter alia* agreed to exclusively manufacture, process and package rice products for the petitioner-Company, on the terms and conditions as specifically set out in the Rice Supply Agreement.

2.7 Subsequently, the petitioner, at the request of the respondent No.1 and its representatives, including respondent No.2 also extended finance to respondent No.1 for procurement of paddy for the purpose of manufacturing

finished goods for the petitioner. For this purpose, the petitioner and respondent No.1 entered into the 1st Financing Agreement dated 21st January, 2013, 2nd Financing Agreement dated 30th October 2013 and 3rd Financing Agreement dated 31st October 2014.

2.8 At the time of entering into the Shareholders Agreement and Business Transfer Agreement, the petitioner paid substantial value for the exclusive right to distribute, market and sell rice products under the "Kohinoor" brand name in India. The respondents were paid for their agreement to refrain from introducing any competing products in the Indian market, under any brand name or through any collaborator or third party. They also paid consideration to the respondents and their various affiliates, in terms of the various Deeds of Assignment, for the assignment of the trademark "Kohinoor" and other related trademarks, with a view to ensure that the petitioner retains the sole right to the use of the said trademarks in India.

2.9 The petitioner were dissatisfied with the respondent No.1's performance of its obligations under the Rice Supply Agreement for the last few years. The petitioner alleged that respondent No.1 breached the said Agreement on several occasions, causing continuous losses to the petitioner and severely impacting the petitioner's business as the petitioner had realized that the respondent No.1 was not able to supply adequate finished goods to the petitioner, at competitive prices, to meet the market demand.

2.10 In an email dated 10th June, 2014 from respondent No.3 to the petitioner, it was suggested that respondent No.1 "would like to restart marketing of Rice in India, under a separate Brand and a separate marketing network." The petitioner stated that the said suggestion was made many times

and after various meetings and discussions, the petitioner was constrained to terminate the Rice Supply Agreement, vide its letter dated 7th August, 2015 ("Termination Notice"), on account of the respondent's various breaches of the Rice Supply Agreement. The causes for the termination and the respondent's various acts of omission and commission were detailed in the Termination Notice. The Advocates for the respondent replied to the said Termination Notice, alleging that the termination was without cause. The petitioner, in its reply dated 28th September, 2015 has denied the allegations made by respondent No.1.

2.11 Further, meeting between the representatives of the petitioner and respondent Nos. 3 and 4, as representatives of respondent No.1 was held in Gurgaon on 15th September, 2015. Subsequent to this meeting, the respondent No.4, on behalf of respondent No.1 addressed a letter to the petitioner alleging that they were "not bound by any agreements". Respondent No.4 addressed a further email dated 19th September, 2015 to the representatives of the petitioner *inter alia* stating that respondent No.1 "is not bound by Non-Compete Obligation,". The petitioner has replied to this correspondence, by its letter and email, both dated 27th September, 2015. Subsequently, on 28th September, 2015, respondent No.1 made a communication to the Bombay Stock Exchange and the National Stock Exchange, in which, apart from levelling various allegations against the petitioner, respondent No.1 stated that "they are free from the provisions of various agreements".

2.12 It was alleged by the petitioner that even during the subsistence of the Rice Supply Agreement, the representatives of respondent No.1 have from

time to time suggested to the petitioner's representatives that respondent No.1 would be interested in participating in the domestic market.

Respondent No.4 had thereafter addressed an email to the Managing Director of the petitioner suggesting that respondent No.1 wishes to sell broken rice in the domestic market. The said email indicates that the respondents intend to commence business in the domestic market which as per the petitioner is in violation of the terms of the Business Transfer Agreement and the Non Compete Agreement who suggested that the petitioner's termination of the Rice Supply Agreement allows the respondents to repudiate the terms of the various other Agreements entered into between the petitioner and the respondents. However, the said suggestion is refuted by the petitioner on the following grounds:

- i. The Non-Compete Agreement is not in any manner linked with or reliant upon the subsistence of the Rice Supply Agreement. The obligations of respondent Nos. 2 to 4, and their affiliates, which includes respondent No.1, as under the Non Compete Agreement, remain valid and binding, irrespective and independent of the subsistence of the Rice Supply Agreement;
- ii. Clause 8.5 of the Business Transfer Agreement has no applicability in the present circumstances as the Rice Supply Agreement has been terminated prior to the expiry of the lock-in period and for substantial and sufficient cause. While the respondents have repeatedly attempted to suggest that the termination is without cause, there has been no judicial finding on this account. It is impermissible

for the respondent No.1 to unilaterally declare that the Rice Supply Agreement has been terminated without cause.

iii. Respondent Nos.2 to 4 have been paid separate and substantial consideration under the Non-Compete Agreement, and have been duly compensated for entering into the said Agreement. Their obligation to refrain from competing with the petitioner in the domestic market is hence independent of the subsistence of the Rice Supply Agreement.

3. As the petitioner had apprehended that the respondents may be contemplating actions in breach of their non-compete obligations, therefore the present petition was filed. The petitioner has sought the interim order to restrain the respondents from breaching the non-compete provisions specified under Clause 8 of the Business Transfer Agreement and Clause 4 of the Non-compete Agreement respectively, whether directly or indirectly, through themselves or any third parties; or launching any product that is similar to or in competition with the products of the petitioner, in violation of the Business Transfer Agreement and the Non-Compete Agreement.

4. It is stated in the petition that if respondents are not restrained from acting in breach of their obligations under the Business Transfer Agreement and the Non-Compete Agreement, the statement is made that it will initiate arbitration proceedings in accordance with the procedure provided under Business Transfer Agreement, as well as the Non-Compete Agreement, *inter alia* seeking a declaration to the effect that the respondents obligations under the aforesaid agreements remain valid and binding for the period set out in the said agreements; as well as damages for the losses caused to the petitioner on

account of the respondents' various acts of omission and commission in breach of the aforesaid agreements

5. Reply has been filed on behalf of the respondents to the petition under Section 9 of the Act. In the reply the execution of various agreements mentioned in the petition and amount of consideration received from the petitioners have not been denied by the respondent rather it is submitted by them that under the Agreements, the domestic market of rice and food products was made over to the petitioner for a period of seven years while the respondents retained all the rights for export of rice and food products. The export market of rice and food products including KOHINOOR is being managed by the respondents.

6. It is the case of the respondents that the petitioner have not given notice in compliance with Clause 21 of the RSA thereby giving the respondents an opportunity to rectify the breach. The termination notion is without any cause. The petitioner in undue haste terminated the RSA on false grounds.

It is stated by the respondents that the petitioner has sought to terminate the RSA only when the respondents by their detailed email dated 26th June, 2015 addressed to Mr.Steve Moore and Mr.Satish Rao of the petitioner, stated that they had suffered a substantial loss during the financial year 2014-15 on account of the petitioner's breaches. In the said email the respondents had expressed their concern in the areas which were affecting the respondents and KOHINOOR brand. It is only after the said mail the petitioner, on false grounds, had issued the termination letter, which is contrary to Clause 21 of SPA.

7. Even earlier, the respondents through its email dated 14th January, 2014 had expressed its concern, besides other, with regard to accumulation of inventory, cash flow, increase in processing cost, new crop dispatches, republic day scheme, FG warehousing capacity and transportation. But the concerns of the respondents were never appropriately addressed by the petitioner. By other emails addressed in the year 2014, the respondents had expressed their resentment over purchasing of Rice from an alternate supplier. The petitioner was cautioned about the breach committed by the petitioner.

8. On 12th October, 2015, the earlier bench at the time of admission had *inter alia* passed the following order:

"After some arguments, Mr.Rajiv Nayar, the learned Senior Advocate for the petitioner would submit without prejudice to the rights and contentions of the petitioner that the notice of 7th August, 2015 may be treated as notice under Clause 21 of the agreement for curing of defects and if the respondents were to abide by the letter and spirit of the Rice Supply Agreement, the petitioner would not insist upon the termination of the agreement.

Mr.Sandeep Sethi, the learned Senior Advocate states, upon instructions, that the respondents shall supply rice in terms of the orders placed and the anomalies as may be stated in the notice dated 7th August, 2015 shall be cured within two weeks from today. In particular, he submits that the quantity remaining to be supplied as per Rice Supply Agreement would be honoured by them.

Mr.Rajiv Nayar, the learned Senior Advocate states that the petitioner shall communicate to the respondents the requirement of rice and details of the schedule of supply shall be amicably worked out between the parties."

9. After passing of the said order, the petitioner had filed an additional affidavit of Mr.Satish Rao, who stated that on the same day, i.e. Friday, 16th October, 2015, the petitioner was served with a copy of an unnumbered

Company Petition filed by respondent No.1 and respondent No.4, against the petitioner, its majority shareholder, and its directors, *inter alia* alleging acts of oppression and mismanagement in the conduct of the affairs of the petitioner. The said Company Petition contains *inter alia* the following prayers:

"(iv) Direct the Respondents to buy back the Petitioners' shareholding at fair market value, as may be approved by the Hon'ble Company Law Board without considering the illegal and fabricated entries in the financial statements after an audit and investigation by an Independent Auditors;"

"(vii) Direct the Respondents not to take any decision with regard to the substratum of Respondent No.1 Company without the concurrence of the Petitioner."

It is alleged in the Company Petition that the termination of the RSA has resulted in the loss of the substratum of the Company.

It is stated in the affidavit that respondent No.1 and its promoters had no intention whatsoever of reaching an amicable resolution of their disputes with the petitioner who had given the wrong suggestion before this Court that respondent No.1 was willing to cure the breaches identified in the Termination Notice.

10. A reply affidavit of Rama Kant on behalf of respondents was filed wherein it was submitted that the respondents have not given any occasion to the petitioner to resile from the settlement. The reasons which have been attributed to the respondents are not correct. The petitioner has misinterpreted the facts. With regard to the filing of the Company Petition before the Company Law Board under Section 397 and 398 of the Companies Act, it is submitted that the said petition was necessitated since the petitioner, despite request of the respondents was not willing to postpone/shelve the passing of

accounts in the AGM which was proposed to be held on 23rd October, 2015. In view of the settlement proposed during the course of hearing on 12th October, 2015 before this Court, the petitioner ought not to have adopted a rigid position for passing of the accounts in AGM to which the respondents have serious objections. In the said circumstances the respondent Nos.1 and 4 had no option but to approach the Company Law Board *inter alia* seeking restraint against the petitioner from convening the AGM of 23rd October, 2015. Since the reliefs sought in the Company Petition were purely within the purview of Company Law Board and since the date for holding the AGM was approaching fast, therefore, the respondent No.1 had no option but to approach the CLB. Therefore, the respondents do not see it as a reason to resile from the settlement. Various other reasons are given for filing the company petition in para 5-14 of the affidavit. It is not necessary to discuss the said issues in the present matter as the same have to be decided as per its own merit by the competent Court.

11. Affidavit in rejoinder on behalf of the petitioner to the reply on behalf of the respondents was filed wherein it was stated that as the petitioner's dissatisfaction with the conduct of respondent No.1, and its various breaches of the Rice Supply Agreement have been consistently communicated to the respondents in various minuted meetings, both at the operational level as well as between the managements of the parties; as well as through various emails over the past three years. Further, the petitioner stated that Clauses 21.5, 21.6 and 21.7 of the Rice Supply Agreement as amended by Amendment No.1, do not require the petitioner to give respondent No.1 any notice prior to termination of the Rice Supply Agreement, or any opportunity to rectify any

breach. The petitioner's termination of the Rice Supply Agreement is hence legal and valid and strictly in terms of the Rice Supply Agreement. It is stated that in any event, the termination of the Rice Supply Agreement is not a subject matter of the present proceedings. The present petition was filed on account of the petitioner's apprehensions of breach of the various non-compete agreements by the respondents as the conduct of the respondents would *ipso facto* show that the petitioner is entitled for such relief. It is stated that the breach of the non compete obligations has been admitted by the respondents when a statement to this effect was made by the counsel for the respondents at the time of hearing of the matter on 6th November, 2015.

12. It is alleged that the Shareholders Agreement, the Business Transfer Agreement, the Rice Supply Agreement and the Non-Compete Agreement are independent agreements, which form entire agreements in their own terms. Except to the extent specifically indicated in the said agreements, the agreements are not dependent upon each other, and cannot be read to be so. The petitioner has validly terminated only the Rice Supply Agreement for cause. The other agreements, including the Business Transfer Agreement and the Non-Compete Agreement remain valid and binding, and have not been terminated. The petitioner reiterated that the obligations cast upon the respondents in terms of the Non Compete Agreement, to refrain from engaging in any business that could compete with the business of the petitioner, are absolute, unqualified and independent of the existence or termination of the Rice Supply Agreement. The respondents are bound to abide by the terms of the Non-Compete Agreement, irrespective of the time

period after which the Rice Supply Agreement was terminated, or the manner of its termination.

13. The petitioner referred to Clause 8.5 of the Business Transfer Agreement, it is alleged that the said clause has no applicability in the present circumstances, in view of the said clause, the terms of Clause 8.1 and 8.2 of the said Agreement would not apply if the Rice Supply Agreement was terminated without cause, after the expiry of a period of five years from the closing date, i.e after 1st June, 2016. It is urged that in the present case, the Rice Supply Agreement has been terminated for sufficient cause, and with effect from 30th September, 2015. Hence, Clause 8.5 of the Business Transfer Agreement has no applicability and the respondents have no right whatsoever to sell rice in India.

14. It is mentioned by the petitioner in the rejoinder affidavit that the respondents have not challenged the termination of the Rice Supply Agreement before any forum as of date, and there is no judicial finding against the said termination. The respondents cannot unilaterally aver that the termination of the Rice Supply Agreement was without cause. The petitioner reiterates that the Rice Supply Agreement was terminated for cause. It is submitted that the petitioner had responded to the respondents' notice dated 17th September, 2015, vide a letter from its Advocates dated 31st October, 2015, specifically responding to all allegations raised by the respondents against the termination of the Rice Supply Agreement. Thus, it would show that the said Agreement was terminated for sufficient cause.

15. In any event, the validity of the termination of the Rice Supply Agreement is not a subject matter of the present proceedings. The Rice

Supply Agreement has been validly terminated and termination has taken effect from 30th September, 2015. The respondents are unnecessarily attempting to draw a link between an email sent on 26th June, 2015 and the Notice of Termination issued on 7th August, 2015, i.e. over 45 days later. In fact the respondents were in various breaches of the Rice Supply Agreement. As respondent No.1 is the petitioner's main supplier and responsible for an overwhelming majority of the petitioner's annual costs/expenses. The said email referred to the certain issues in relation to other agreements, which were specifically settled between the parties.

16. The respondents have also filed a detailed additional affidavit. The said affidavit contained same pleas putting their case in great details.

17. In nut-shell, the petitioner has sought the relief as mentioned in the prayer clause, *inter alia* on the following grounds:

- a. The Non-Compete Agreement and the Business Transfer Agreement form subsisting, legal, valid and binding obligations of the respondents;
- b. The petitioner has paid substantial value as consideration for the respondents' obligation to refrain from competing with the petitioner's business in the Indian market;
- c. The respondents do not have ownership and are not entitled to the use of the trademark "Kohinoor", or any variants thereof, except to the limited extent of the license granted to the respondents, by the owners of the said trademark, i.e. McCormick Switzerland GmbH.

- d. If the respondents are able to introduce any product in the Indian market, in breach of their non-compete obligations contained in the aforesaid Agreements, immediate and severe loss would be caused to the petitioner's business, *inter alia*, on account of the confusion in the minds of the consumers;
- e. If the respondents launch any product in the market, using the brand name "Kohinoor" or any variant thereof, the brand value of the petitioner's brand "Kohinoor" is likely to be severely eroded, and such losses are not compensable in damages;
- f. The petitioner for the last more than 4 years has invested substantial sums of money in establishing its business in India and promoting the brand 'Kohinoor'. In these circumstances, if the respondents engage in any acts in violation of the Business Transfer Agreement and Non-Compete Agreement, grave and irreparable prejudice and injury to the Petitioner's business in India and particular to the brand name 'Kohinoor' would be caused, leading to permanent and full erosion of brand value of petitioner's products, which injury cannot be reduced into quantifiable parameters.

The petitioner's arguments

18. It is argued by Mr. Abhishek Manu Singhvi, learned Senior counsel on behalf of the petitioner that the interim directions sought for are necessary. If interim orders are not passed, the petitioner would suffer irreparable loss and injury as the respondents have now started selling rice under the name Kohinoor Foods Ltd. in domestic market. The said act of the respondents is contrary to the written agreements. Despite of having received the huge

consideration, the respondents in breach of many relevant clauses are carrying out business in open market on commercial scale without any permission. Thus, under these circumstances the interim direction restraining the respondent No.1 and the promoters from breaching the non-compete obligations enshrined under the Business Transfer Agreement and Non-Compete Agreement are imperative otherwise the purpose of paying huge amounts to the respondents would have no meaning.

19. Mr.Singhvi, has also argued that the Rice Supply Agreement has been terminated by letter dated 7th August, 2015 for genuine causes in compliance with the termination provisions. He states that the respondents were obligated to accept all orders which are consistent with clause 4.3 and 4.4 of the RSA, subject to the availability restrictions under clause 4.5. In June-July 2015, petitioner placed orders for supply of 71,741 quintals of rice, which was duly accepted by respondents, for delivery by 30th July, 2015. However, only 47,547 quintals of required goods was delivered as of 7th August, 2015. The respondents without any valid explanation have stated in its response to the Termination notice, dated 19th September, 2015 that an unexpectedly high order was placed and the blends were changed frequently.

20. It is submitted that the Rice Supply Agreement was terminated under Clause 21.5 which provides for an immediate termination without a cure period for the inability of the respondents to supply products in accordance with an order accepted by them. Therefore, the respondents now cannot contend that there were no instances when it failed to meet orders placed by the petitioner. In fact they have failed to make adequate alternative arrangements to fulfill orders under Clause 4.5 of the Rice Supply Agreement,

as they were required to inform the petitioner in writing, in case they are unable to meet the petitioner's requirements and assist them in sourcing the same from an alternate source, then they are the defaulting party. The respondents did not comply with its obligation under Clause 4.5 and failed to inform the petitioner of its inability to supply as per the order placed. Therefore, the petitioner had no option, but to find an alternative supplier on its own account, which was communicated to respondents meeting held on 9th July, 2013, as the respondents have stated in its reply that *inter alia*, it had no capacity and was in a position to supply all of petitioner's requirements, as a gesture the respondents assisted in making co-packer arrangements for petitioner and respondents did not consent to the appointment of an alternate supplier and KSF was therefore in breach of Clause 4.5.

21. It is submitted by the petitioner that it is the respondents obligation to (a) produce so much of the products that it has the capacity to produce, and (b) sub-contract the order or the part thereof that the supplier cannot produce, to any third party, subject to the prior written consent of the petitioner. It is submitted that despite repeatedly failing to meet the requirements of the petitioner, they thereby violated clause 4.5.1 of the RSA, therefore, the said Rice Supply Agreement has rightly been terminated under Clause 21.5 which provides for an immediate termination, without a cure period for the inability of the respondents to supply products in accordance with an order accepted by the supplier.

22. It is submitted by Mr.Singhvi that the respondents have to adequately fund the operations/supplies and as per Clause 4.7 of the RSA provides that the respondents will use its historical experience to maintain sufficient

inventory of products to accommodate difference in timing and rate of shipment, etc. Clause 4.13 of the RSA provides that the respondents agree to purchase, install and maintain at its own expense the necessary capital equipment required to support the packaging formats and otherwise comply with the specifications with respect to the products.

23. It is stated by Mr.Singhvi that the obligations under Clause 8 of the RSA were *inter alia* as under:

- Clause 8.2 of the RSA provides that the respondents shall provide to the petitioner access to quality control and production records of all material used and the products produced during the preceding month, within the first 3 business days of each month.
- Clause 8.3 of the RSA provides that the respondent shall provide the buyer (KSF) with detailed reports on cost (input and finished products) and the quality of inputs and finished products (per agreed formats) on a monthly basis, within the first 3 business days of each month. It further provides that the petitioner shall be permitted to have representatives on site to observe all areas of business activity including procurement, quality, dispatch etc.

24. Mr.Singhvi submits that in spite of their obligations, the respondents had informed to the petitioners in October, 2012 that it had constraints on its working capital and would only be able to invest Rs.50 crores for procurement of paddy, therefore, respondents may not be able to comply with their obligations under Clause 4.7 and 4.13 of the RSA. Even the petitioner extended finance to the respondents amounting to a total of Rs.333 Crores for procurements of paddy under 1st Financing Agreements dated 21st January,

2013, 2nd Financing Agreements dated 30th October, 2014. It is stated that petitioner was under no obligation to provide finance to respondents for supply of paddy. This arrangement was not contemplated in the RSA and was a subsequent arrangement between the parties. It was done solely upon respondents request and to ensure that they should not suffer.

The finance arrangements were made in the bonafide interests of the business. However, the respondents failed to adequately and timely provide the rice required by the petitioner, despite the funding provided and the same being communicated by the petitioner to them on multiple occasions. The respondent has indicated in its reply that it was mutually agreed between the parties that the respondents would invest only upto Rs.50 crores who has also stated in its reply that KSF wanted to invest in paddy procurement to make speculative gains, avail of cash discounts and take advantage of lower interest rates from its global financing arrangement. Thus, the said Rice Supply Agreement was rightly terminated under Clause 21.6 as amended pursuant to 2nd Amendment Agreement dated 30th October, 2013 which provides for an immediate termination without a cure period for breach of the financing agreements by respondents.

25. It is alleged that despite of the said obligations, the respondents had repeatedly on numerous occasions from the very beginning, denied access to the representatives of the petitioner on site and denied representatives of the petitioner access to documents and information required under Clause 8, thereby breaching its representation and warranty under Clause 10.1.15. In fact, petitioner had communicated its dissatisfaction in this regard as early as the meetings held in September, 2012 and emails dated 1st April, 2013 and

23rd July, 2015. Therefore, the respondents were also in breach of its representations and warranties as under:

- Clause 10.1.8 of the RSA- “the supplier shall comply with all its obligations, duties, liabilities and responsibilities under this Agreement.”
- Clause 10.1.9 of the RSA- “the supplier agrees to undertake that the supplier shall, at all times, act in good faith and in the best interest of the Buyer in carrying out of its obligations under this agreement.”

26. Thus, the respondents are in breach of representations and warranties in terms of Clause 10.1.5 of the RSA which provides that the respondents shall provide the Buyer (KSF) or its representatives with the information and/or reports as specified in clause 8.

27. It is submitted that the Rice Supply Agreement was terminated under Clause 21.3 which provides for immediate termination of the RSA, without a cure period, for the breach of any representation, warranty or material covenant. Respondents not only breached the general representation and warranties under Clauses 10.1.8 and 10.1.9 but also the specific representation and warranty under Clause 10.1.5.

28. It is argued by Mr.Singhvi that the defence of clause 8.5 is not available to them in view of clause 8.5 of the BTA which provides that the non compete obligations under the BTA will not continue to apply upon respondents in the event, the Rice Supply Agreement is terminated without cause, after the expiry of the lock in period, i.e. 5 years from the closing date, i.e. 8th September, 2011. In the present case, the termination of the RSA, vide letter

dated 7th August, 2015 is for cause within the period of 5 years, i.e. before the lock-in period gets over. Accordingly, clause 8.5 of the BTA does not even apply in the present situation. In any event, the counsel on behalf of the respondents, submitted during the hearing on 11th February, 2016, while reading out clauses 18.1 and 18.2 of the RSA that the defence of termination without cause is available only if the termination is post the completion of the lock-in period.

It is submitted that it is the admitted position of the respondents that clause 8.5 of the BTA cannot be invoked as a defence in the present case, inasmuch as the termination is within the lock-in period of 5 years. Therefore, the non-compete obligations under the BTA and NCSA are squarely applicable upon the respondents.

29. It is submitted that the termination of the RSA even otherwise should not be examined in the present proceedings as the said issue is for the arbitral tribunal to decide and any finding on the same by this Court would only prejudice the arbitral tribunal and amount to the arbitral proceedings being a mere empty formality. Reliance is placed on ***Gammon– OJSC Mosmetrostroy JV and Ors. v. Chennai Metro Rail Ltd. & Ors.***, 2015 (6) Arb. LR 340 (Madras) (para 47 and 48).

30. It is stated that the contract once terminated cannot be revived by way of proceedings under Section 9 of the Act. Reliance is placed on the following decisions:-

- i. ***Bharat Catering Corporation v. IRCTC & Anr.***, 2009 (164) DLT 530, para 17;
- ii. ***Harpal Singh v. Union of India***, 200 SCC Online Del 757, para 8)

Respondents' arguments

31. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of the respondents has argued that the entire averment made in the petition are misconceived. He has referred pleadings of the parties, documents and affidavits filed by the parties in support of his submission. His main submissions are that it is the petitioner who has intentionally and deliberately failed to fulfill his obligation as per terms of rice supply agreement who had been purchasing the supply of rice from third party in violation of terms of the agreement.

32. Mr.Sethi submits that for the last about five years, the arrangement under the rice agreement was being continued without any interruption or dispute, however, for the reason best known to the petitioner, without any valid reason terminated the rice agreement and started purchasing the rice from third parties i.e. other traders. He states that the respondents are not in a position to export the entire lot of rice which are processed by them. The respondents have hundreds of employees and it is a running factory/company. The export market is dull, how they would be able to dispose of their stock of rice if the petitioner suo-moto choose not to receive the supply of rice. The conduct of the petitioner is highly unreasonable. The respondents have already suffered a huge loss in their business. Even if the grievance of the petitioner is assumed to be genuine, but at the same time, it is also a matter of fact that the petitioner has put the respondents into such a position where the respondents cannot shut their company and remove their employees. It is not correct that the respondents are not in a position to meet the demand of the petitioner. The respondents are ready to supply sixty thousand metric ton rice to the

petitioner. Still if there is more requirement by the petitioner, his client may procure the remaining demand of rice from other traders. However, there is no valid justification on the part of the petitioner to enter into agreements to supply the rice to other five traders. The said act of the petitioner is contrary to the terms of the Rice Supply Agreement. He submits that the entire dispute in hand with regard to Rice Supply Agreement is triggered because of trouble created by the petitioner itself who have without any cause terminated the rice agreement. Otherwise his clients are still ready to resolve the petty dispute. He states that if the petitioner is ready to receive the rice from the respondents as per the offer given by him, the dispute can be resolved and under these circumstances, his clients would abide by all other terms by not selling the rice in the domestic market and not to use the mark Kohinoor in any manner.

33. He also submits that the broken Basmati rice cannot be exported as the petitioner has failed to receive the supply of rice including broken rice which are to be sold in domestic market and the respondents are not able to even export the same.

34. He has also raised many other issues, which according to this Court are not relevant in order to decide the present petition. Those may be relevant if the parties would go before the Arbitral Tribunal in order to adjudicate their respective disputes by filing of claim and counter-claims.

Discussions on rival submissions and legal issues

35. It is undisputed fact that the petitioner has paid substantial consideration to the respondents to refrain from competing with the petitioner's products, and to retain exclusive rights to use of the "Kohinoor" trademark in India and the breach of non-compete obligations under the Business Transfer

Agreement and the Non-Compete Agreement by the respondents will lead to immediate and irreparable harm to petitioner company's business and brand image in India. The presence of the respondents' competing products in the market is likely to cause severe financial loss to the petitioner on erosion of business and diminishing brand value of petitioner's product.

36. The main clauses of the Business Transfer Agreement are reproduced herein below:-

"2. SALE AND ACQUISITION OF UNDERTAKING

2.1. Sale and Acquisition

2.1.1. On and subject to the terms and conditions of this Agreement, including upon the satisfaction of the Conditions Precedent, the Acquirer agrees to purchase from the Seller, and the Seller agrees to sell, convey, transfer and deliver to the Acquirer, at Closing, all its legal and beneficial ownership in the Undertaking as a going concern on a slump sale basis (as defined under Section 2(42C) of the Income Tax Act, 1961), free and clear of all Encumbrances, for a lump sum consideration equal to the Purchase Price, to be discharged in the manner set out hereunder. The Parties hereby confirm that the Purchase Price includes a value being paid to the Seller by the Acquirer, the adequacy and sufficiency of which is hereby acknowledged by the Seller to undertake the non-compete obligation of the Seller as set out in Clause 8.1. Each of the Promoters jointly and severally and irrevocably agrees and undertakes that he shall cause the Seller to effect the sale and transfer as aforesaid and that he shall at all times remain jointly and severally liable with the Seller for all obligations and liabilities of Seller under, or pursuant to, this Agreement. "

"8 NON COMPETE AND NON SOLICITATION

8.1. TERM

The obligations under this Clause 8 shall be effective from the Closing Date and shall continue in full force and for a period of 7

(seven) years ("Non Compete Term") from the Closing Date. Upon expiry of the Term neither the Seller nor the Acquirer shall have any right, claim or obligations under this Clause 8 against each other (except in respect of any rights and liabilities which may have accrued in relation to any breach, prior to such termination).

8.2. SCOPE OF SELLER NON-COMPETE OBLIGATIONS

8.2.1. The Seller agrees and undertakes that on and from the Closing Date and for the Non Compete Term, except with the prior written consent of the Acquirer, it:

8.2.1.1. shall not commence, establish, engage in, or carry on, or attempt to commence, establish, engage in, or carry on, whether directly or indirectly, by itself or in association with or through any Person, in any manner whatsoever, any business in the Territory which is competing or in competition with the Business and/or which involves the sale of Competing Products or which are or could be reasonably considered to be substitution thereof in the Territory, and shall cause its Affiliates not to do so; and

8.2.1.2. shall give up and/or part with and/or cease and desist from carrying on whether directly or indirectly, by themselves or in association with or through any Person, in any manner whatsoever, any business in the Territory which is competing or in competition with the Business and/or which involves the sale of Competing Products or which are or could be reasonably construed to be in substitution thereof in the Territory, and shall cause its Affiliates to do so.

8.2.2. Without prejudice to the generality of the foregoing, the Seller agrees and undertakes that and on the Closing Date and for the Non Compete Term, except with the prior written consent of the Acquirer, it shall not and shall procure that its Affiliates do not, whether directly or indirectly, by themselves or together with or through any Person, in any manner whatsoever (whether in their own capacity or in conjunction with or on behalf of any Person in any capacity), in the Territory, do or undertake or attempt to do or undertake any of the following activities:

8.2.2.1. Commence, establish, promote, finance, engage in, carry on, join in, participate in, manage, operate, control, conduct, own,

invest in or have an interest in any business, venture or Person which is competing or in competition with the Business in any manner whatsoever in the Territory. Nothing contained in this Clause 8.2.2.1 shall apply to an investment made by the Seller, and its Affiliates in any company listed on any recognized stock exchange, which is competing with the whole or any part of the Business in the Territory, provided that (i) such investment is purely a financial investment and in no manner whatsoever can be deemed to be a strategic investment or one seeking or providing control over the said listed company or its business; and (ii) such investment does not result in the Seller and its Affiliates (in the aggregate) holding more than 5% (five percent) beneficial interest in such a listed company,·

8.2.2.2. Enter into any agreement or arrangement relating to any business which is competing or is in competition with the Business, and/or which involves the sale of Competing Products or which are or could be reasonably considered to be in substitution thereof in the Territory, with any Person involved in the same or which would result in the business of such Person becoming a business which is same as or competing with the Business in the Territory and/or which involves the sale of Competing Products or which are or could be reasonably considered to be in substitution thereof in the Territory,·

8.2.2.3. Divulge or disclose to any Person any Trade Secrets (other than information which is in or which may hereinafter come into the public domain, other than on account of breach of the confidentiality obligation hereunder by the Promoters or disclosed or divulged pursuant to an order of a court of competent jurisdiction) relating to the Business.

8.3. SELLER NON-SOLICITATION OBLIGATIONS

8.3.1. The Seller agrees and undertakes that on and from the Closing Date and for the Non Compete Term, except with the prior written consent of the Acquirer, it shall not and shall procure that its Affiliates do not, whether directly or indirectly, by themselves or in association with or through any Person, in any manner whatsoever (whether in their own capacity or in conjunction with or on behalf

of any Person in the Territory knowingly, do or undertake or attempt to do or undertake any of the following activities:

8.3.1.1. Propose to, canvass, solicit, entice away or attempt to canvass, solicit or entice away from the Acquirer, any Restricted Persons, whether or not such Person would commit a breach of contract by reason of such act;

8.3.1.2. Assist, influence, encourage or induce any of the foregoing action in any manner whatsoever; or

8.3.1.3. Otherwise interfere in any manner with the contractual, employment or other relationship of such Restricted Persons on the one hand and the Acquirer on the other.

8.3.2. The Seller agrees and undertakes that on and from the Effective Date and for the Non Compete Term, in the event that any Person associated with the Seller and/or its Affiliates is a Restricted Person (whether with or without the knowledge of the Seller), then the Acquirer shall be entitled to require the Seller to terminate, or cause the termination of, such association within 30 (thirty) Business Days of receipt of notice in this regard from the Acquirer, in which case the Seller shall be obligated to terminate, or cause the termination of, such association within the stipulated period and bear all costs and consequences for the same.

8.3.3. With respect to the obligations under this Clause 8, the Seller represents and warrants, jointly and severally that:

8.3.3.1. Neither the Seller nor its Affiliates are currently commencing, establishing, engaged in or carrying on, either directly or indirectly, by themselves or in association with or through any Person, in any manner whatsoever, any business in the Territory which is the same as or in competition with the Business;

8.3.3.2. Neither the Seller nor its Affiliates are currently interested, in any manner whatsoever, in any business, venture or Person, other than in any company listed on any recognized stock exchange, which is competing with the whole or any part of the Business in the Territory, provided that: (i) such investment is purely a financial investment and in no manner whatsoever can be deemed to be a strategic investment or one seeking or providing control over the said listed company or its business; and (ii) such investment does

not result in the Seller and its Affiliates (in the aggregate) holding more than 5 % (five percent) beneficial interest in such a listed company;

8.3.3.3. Neither the Seller nor its Affiliates currently have any rights over the goodwill or any intellectual property rights in relation to the Business and any Trade Secrets acquired by the Acquirer pursuant to the transfer of the Business save and except (i) the ownership rights in respect of brand names and trademarks pursuant to the Trade Mark Assignment Agreements; and (ii) the license rights granted under the Trademark License Agreement;

8.3.3.4. Neither the Seller nor any of its respective Affiliates are otherwise in breach of or in default in respect of any obligations under this Clause 8 at present.

8.3.4. The Seller agrees and undertakes that upon the occurrence of any event or development which has resulted in or will potentially result in, any inaccuracy or incorrectness in the representations and warranties provided by such Party during the period between the signing of this Agreement and the Closing Date (both dates included), such Party shall, forthwith and in any case not later than 3 (three) Business Days upon the occurrence of such event or development or having knowledge thereof, notify the other Party(s) in writing thereof.

8.4. PERFORMANCE OF THE PARTIES

8.4.1. The Seller and the Acquirer agree, acknowledge and confirm that the Business and Undertaking have been purchased by the Acquirer on the express condition that the Seller shall faithfully and diligently observe its obligations under this Clause 8 on behalf of itself as well as its respective Affiliates and that any breach or non-observance of the obligations under this Clause 8 by any of the Seller and/or its Affiliates will cause the Acquirer considerable damage and irreparable loss.

8.4.2. The Seller therefore agrees that the Acquirer shall be entitled to:

8.4.2.1. An injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a court

of competent jurisdiction may deem necessary or appropriate to restrain the Seller and/or its Affiliates from committing any violation or enforce the performance of the obligations under this Clause 8, upon actual or threatened breach thereof; and/ or

8.4.2.2. A consolidated amount of Rs.35, 00, 00,000 (Rupees thirty five crores only), to be paid by the Seller, by way of liquidated damages, upon the breach of any Obligation by the Seller ("Liquidated Damage"). The Seller and the Acquirer acknowledge and agree that the Liquidated Damage to be paid by the Seller to the Acquirer under this Clause 8.4.2 are and shall be deemed to be liquidated damages based on a reasonable and genuine pre-estimate of damages suffered by the Acquirer and shall in no event be considered as a penalty.

8.4.3. It is expressly agreed between the Seller and the Acquirer that the Acquirer may choose to exercise any of the alternatives set out in clause 8.4.2 above, as are available at the relevant time, at its sole discretion.

8.4.4. The above remedies shall be independent of, and in addition to, such other rights and remedies that the Acquirer may have under this Agreement, at law or in equity, none of which rights or remedies shall be affected or diminished thereby.

8.5. EXCEPTION TO SELLER NON- COMPETE

Nothing contained in Clauses 8.1 and 8.2 above shall apply to the Seller's right to sell rice within the Territory, in the event the Acquirer terminates, without cause, the Rice Supply Agreement at any time after the expiry of 5 (five) years from the Closing Date."

37. On the same day, i.e. 1st June, 2011, respondents Nos. 2 to 4, also entered into the Non-Compete Agreement with the petitioner-Company on 1st June, 2011 in terms of which, for a consideration of Rs.35 crores, the said respondents undertook to refrain from *inter alia* commencing, establishing, engaging in, or carrying on, whether directly or indirectly, any business in

India, which is in competition with the business of the petitioner, for a period of 7 years from 9th September, 2011.

The salient terms of the Non-Compete Agreement which are relevant to the present petition are set out below:

"3. EFFECTIVE DATE AND TERM

This Agreement shall be deemed to have come into force on the Closing Date ("Effective Date") and shall continue in full force and for a period of 7 (seven) years ("Term") from the Effective Date. Upon expiry of the Term, this Agreement shall terminate automatically (other than the Surviving Provisions) and no Party shall have any right, claim or obligations against any other Party(s) under it (except in respect of any rights and liabilities which have accrued in relation to any breach, prior to such termination).

4. SCOPE OF NON-COMPETE OBLIGATIONS

4.1. The Promoters agree and undertake that on and from the Effective Date and for the Term, except with the prior written consent of the Acquirer, they:

4.1.1. shall not commence, establish, engage in, or carry on, or attempt to commence, establish, engage in, or carry on, whether directly or indirectly, by themselves or in association with or through any Person, in any manner whatsoever, any business in the Territory which is competing or in competition with the Business and/or which involves the sale of Competing Products or which are or could be reasonably considered to be in substitution thereof in the Territory, and shall cause their Affiliates not to do so; and

4.1.2. shall give up and/or part with and/or cease and desist from carrying on whether directly or indirectly, by themselves or in association with or through any Person, in any manner whatsoever, any business in the Territory which is competing or in competition with the Business and/or which involves the sale of Competing Products or which are or could be reasonably construed to be in substitution thereof in the Territory, and shall cause their Affiliates to do so.

4.2. Without prejudice to the generality of the foregoing, the Promoters agree and undertake that and on the Effective Date and for the Term, except with the prior written consent of the Acquirer, they shall not and shall procure that their Affiliates do not, whether directly or indirectly, by themselves or together with or through any Person, in any manner whatsoever (whether in their own capacity or in conjunction with or on behalf of any Person in any capacity), in the Territory, do or undertake or attempt to do or undertake any of the following activities:

4.2.1. commence, establish, promote, finance, engage in, carry on, join in, participate in, manage, operate, control, conduct, own, invest in or have an interest in any business, venture or Person which is competing or in competition with the Business in any manner whatsoever in the Territory. Nothing contained in this Clause 4.2. 1 shall apply to any investment made by the Promoters, the Company and their respective Affiliates in any listed business or venture or company provided that (i) such investment is purely a financial investment and in no manner whatsoever can be deemed to be a strategic investment or one seeking or providing control over the business, venture or company; and (ii) such investment does not result in the Promoters, the Company and their respective Affiliates holding in aggregate, more than 5 % (five percent) beneficial interest in such business competing with the whole or any part of the Business in the Territory;

4.2.2. Enter into any agreement or arrangement relating to any business which is competing or is in competition with the Business, and/or which involves the sale or which are or could be reasonably considered to be in substitution of the Competing Products in the Territory, with any Person involved in the same or which would result in the business of such Person becoming a business which is same as or competing with the Business in the Territory and/or which involves the sale of Competing Products or which are or could be reasonably considered to be in substitution thereof in the Territory;

4.2.3. Divulge or disclose to any Person any Trade Secrets (other than information which is in or which may hereinafter come into the public domain, other than on account of breach of the

confidentiality obligation hereunder by the Promoters or disclosed or divulged pursuant to an order of a court of competent jurisdiction) relating to the Business.

4.3. Notwithstanding anything set out in this Clause 4, none of the promoters shall be bound by the non-compete obligations set out in this Clause 4, with respect to the Permitted Persons. With respect to Satnam Overseas (Exports), a partnership firm of the Promoters, listed at serial number 4 of the list of Permitted Persons, the Promoters covenant and undertake that they shall, on or before the 90th day from the Effective Date, cause the discontinuation of any business of Satnam Overseas (Export) in the Territory which is competing or in competition with the Business or deals with the Competing Products. In the event the Promoters do not comply with this obligation set out in Clause 4. 3 on or before the 90th day from the Effective Date, the Parties agree and covenant that with effect from the 91st day from the Effective Date, Satnam Overseas (Exports) shall be deemed to be struck off from the list of Permitted Persons without any further action being required from the Parties and Satnam Overseas (Export) shall not be considered a Permitted Person."

38. The Recital A of the RSA states that "By a Business Transfer Agreement executed on 1st June, 2011 (BTA), the supplier has *inter alia* transferred a part of its business (as more particularly set out in the BTA) to the buyer. In terms of the said BTA, the buyer has *inter alia*, acquired the business of marketing, sales and distributions of rice within the territory of India."

39. The non-compete obligations under BTA and NCSA consist of two districts limbs (Clause 8 of the BTA, Clause 4 of the NCSA). Non-compete obligations extend to not competing with the "Business" and/or selling "Competing Products" thereby, making the set of obligations absolutely distinct.

40. It is undisputed fact that the business that has been transferred includes the business of marketing, sale and distribution of basmati and non-basmati rice. Therefore, merely because basmati and non-basmati rice are not additionally specified in the list of “Competing Products” it does not mean that the non-compete obligations do not extend to the same as it was clearly a part of the business transferred to the petitioner. The respondents have denied the fact of having received the consideration as per the agreement.

41. The scope and ambit of Section 9 is not to restore the contract which has already been terminated. The contract between the respondent and the petitioner created a commercial relationship between the parties. The termination of contract is one of the facets of the contract and as per contract entered into between the parties, the contract could be terminated by the party for various reasons given therein. If the said party is aggrieved by the act of the termination of the contract by respondent and considers that the termination was bad or illegal, the respondent is at liberty to invoke the arbitration clause and claim damages, if any, suffered by the respondent.

42. While dealing with the Section 9 petition, it is to determine as to what should be granted to the petitioner in view of the circumstances explained. Only the *prima facie* view is to be taken at this stage, as if it could not be finally concluded as to which party is responsible for breaches.

43. The respondent has admitted that only the RSA has been terminated and all the other agreements are in force. While this argument has no bearing on the issue of enforcement of non-compete, the same also has no force as the petitioner has only terminated the RSA.

The petitioner has also issued a cease and desist notice dated 5th December, 2015 under the Trademark License Agreement (part of Transaction Documents) for the clear violation by the respondents of the same. Similarly, the NCSA is also an agreement which has a term and has no termination clause and could not be terminated. The similar is the position of the BTA agreement, the same is terminable if the conditions precedent are not completed or if prior to closing either party breached any of its representations and warranties.

44. It is the admitted position that the respondents have made sales of rice to the tune of Rs.29,15,25,987/- from 7th August, 2015 to 30th November, 2015 and Rs.23,69,62,833/- from 1st December, 2015 to 31st December, 2015 to third parties(not being the petitioner) (Total sales- Rs.52,85,08,820 from 7th August, 2015 to 31st December, 2015. They have started selling rice on commercial scale in the market after termination letter dated 7th August, 2015 of the Rice Supply Agreement effective from 30th September, 2015.

45. There is no force in the submissions of the respondents that basmati and non-basmati rice are only listed in the RSA and not in the BTA and/or NCSA and hence the non-compete obligations do not extend to basmati and non-basmati rice as transferred included marketing, sale and distribution of basmati and non-basmati rice and hence the list of products at Schedule 1 of the RSA has no bearing on the scope and application of the non-compete obligation. Schedule 1 for the RSA was to set out the indicative list of products that were to be manufactured/processed/packaged for the petitioners by the respondents. It apparent from the reading of the relevant clauses and agreements that the business transfer included marketing, trading, selling and

distribution of basmati and non-basmati rice. It is clear from; (a) the BTA, (b) the recitals to the RSA, and (c) as also the parties' understanding of the BTA, as evident from the assignment agreements of the various distributor agreements in favour of the petitioner, the non-compete obligations under the BTA and the independent NCSA extend to basmati rice as there are two distinct limbs to the non-compete obligations under the BTA and NCSA. Mr.Sethi, learned Senior counsel submitted that since the petitioner had first breached the Clauses 4.1 and 5.1, therefore the respondents had no option but to sell the rice which was to be received by the petitioner. As they have refused to purchase the same, the respondents, who have huge liabilities, have to dispose of the stocks in the market.

46. The relevant clauses of rice agreement referred by him read as under:-

“4.1. The Supplier agrees and undertakes that the Supplier shall manufacture/process and package the Products exclusively for the Buyer for the Territory, and the Buyer agrees and undertakes that it shall purchase the Products exclusively from the Supplier (subject to the terms of the Agreement) during the Term. Such purchases shall be in such quantities and at such times as set forth in this Clause 4. The Supplier and the Buyer expressly agree that the Supplier shall not and shall have no right to manufacture/process or package the Products for the Territory upon the determination or termination of this Agreement. It is however clarified, that the Supplier shall be entitled, in case of termination or determination of this Agreement by the Buyer without cause, during the Lock-in period, to manufacture/process and/or package and/or distribute, market and/or sell rice 'brokens' for itself and/or any other person, without any hindrance *from* the Buyer.

5.1. The Supplier shall supply and sell the Products to the Buyer without any interruption;

5.2. The Supplier will not sell or supply any Products directly or indirectly to any Person other than the Buyer, other than for the purpose of exports as set out herein.”

47. It is evident from Clause 5.2 of the Rice Supply Agreement that the respondents were not supposed to sell or supply any product directly and indirectly to any person other than the petitioner. There is no denial on the part of the respondents that contrary to Clause 5.2 of the Rice Agreement, the rice under the name Kohinoor Foods Limited has been sold and that too in the market.

48. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause (c) to sub-section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced.

49. It is settled law in India and overseas Countries that where a party has repudiated a contract, the aggrieved party has an election to accept the repudiation or to affirm the contract: *Fercometal S.A.R.L. v. Mediterranean Shipping Co. S.A.* [1989] A.C. 788 . (2) An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance.

In *Braithwaite [1905] 2 K.B. 543* it was held that when A wrongfully repudiates his contractual obligations in anticipation of the time for their

performance, he presents the innocent party B with two choices. He may either affirm the contract by treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice, as a sort of *via media*, to affirm the contract and yet to be absolved from tendering further performance unless and until A gives reasonable notice that he is once again able and willing to perform. Such a choice would negate the contract being kept alive for the benefit of *both* parties and would deny the party who unsuccessfully sought to rescind, the right to take advantage of any supervening circumstance which would justify him in declining to complete.

50. Thus, I am clear in my mind that the operation after termination of agreement cannot be stayed which would be wholly contrary to the provisions of the Specific Relief Act, 1963. Even if the termination of the agreement was found to be illegal and unlawful, in case of terminable contract, the only relief which could have been granted is damages/compensation for the period of notice as provided in the contract. The terms of contract, under these circumstances, as per the respondents in their defence, which are relied upon, cannot be enforceable under Section 14(1)(a) of the Specific Relief Act, 1963. Besides the above, no injunction can be granted in view of Section 41(e) of the said Act as the contract between the parties is determinable and already terminated. Whether such termination is valid or not has to be gone into and decided only in the arbitral proceedings. The question as to whether the contract is specifically determinable and consequently, the same cannot be specifically enforced, is a question that would arise for consideration before the arbitral tribunal. Then at this stage, it is not proper to decide the said issue

as the termination of the contract against the respondents cannot be revived.

In the case of *Marriot International Inc. & Ors vs. Ansal Hotels Ltd. & Anr.*, reported in 82(1999) DLT 137, by this Court in para 106-107 has held as under:

“106. The main issue which arises for consideration is whether the respondents are guilty of breach of contract and if so, in the facts and circumstances of this case should the respondents be restrained by a court injunction or order of interim relief from carrying on their further arrangement with the ITC? Before deciding this issue, two questions which require urgent reply are: (1) Can the respondents be compelled to take the services from the petitioners particularly when they have lost faith, confidence and trust in each other? (2) The other question which also needs to be answered is can the petitioners be adequately compensated in terms of money when it is ultimately proved that the respondents are guilty of breach of contract?

107. I am of the view that it may not be possible to compel the respondents to discharge their obligation of the remaining contract with the petitioners. Distrust and loss of confidence has developed between the parties. In this view of the matter, it would hardly be proper now to compel them to work together.”

51. As far as competing of business is concerned, it is admitted by Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of the respondents that the respondents after termination have started selling rice in the commercial market. This Court in *Ozone Spa Private Limited v. Pure Fitness & Ors.* (2015) 222 DLT 372 in para 32, 37 and 50 has held as under:-

“32. It is well settled principle of law that the negative covenants contained in the agreement which are aimed at to operate during the subsistence/ validity of the agreement in a commercial contract can be validly enforced and injunction for enforcement of the said

covenant cannot be refused on the ground that the same are in restraint of the trade as the underlying purpose of the said negative covenant prohibiting the party to conduct the competing business is to serve the contractual relationship and there exists no such restraint of trade in such a case as the party so restricted is already doing the business as per commercial arrangement under the contract.

37. Let me now discuss the case of the passing off made out by the plaintiff. The passing off is an action in deceit where there are three ingredients which are required to be satisfied in order to make out the case of the tort of passing off which are goodwill, misrepresentation in the course of the trade and resultant damage occurred to the plaintiff. In order to determine whether the plaintiff has established the ingredients for successfully bringing an action for passing off it will be appropriate to advert to the broad principles of the law of passing off. In '**Kerly's Law of Trade Marks and Trade Names**'- pages 42 and 43, paragraph 16-02, the concept of passing off is stated here as under:

"The law of passing-off can be summarised in one short general proposition -no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number.

- a) Firstly, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services.
- b) Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to

belief that the goods or services offered by him are the goods or services of the plaintiff.

- c) Thirdly, he must demonstrate that he suffers or, in a quick time action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or service is the same as the source of those offered by the plaintiff..."

50. It is settled law that competition must remain free, it is true. This is the life blood of free enterprise system. Yet it is essential that "trading must not only be honest but must not even unintentionally be unfair". If it is shown that a business of a trader has acquired a distinctive character, the law will restrain a competitor from using the same and prohibition order can be passed by Courts for unlawful activities. A line must be drawn somewhere between honest and dishonest trading fair and unfair competition. One cannot do business of the plaintiff's expensive labour and effort. One cannot deliberately reap and cannot be allowed to filch a rival trades. Passing off is thus a redemp for injury to goodwill."

52. There is no force in the submission of Mr.Sethi who argued that Section 27 of the Indian Contract Act, 1872 is attracted in the matter and referred to the decision in the case of *Superintendence Company of India Ltd. vs. Sh.Krishan Murgai*, reported in (1981) 2 SCC 246, (para 52) in support of his submissions and submitted that the respondents cannot be restrained to sell the rice in the open market once the arrangement has come to an end.

Having gone through the above, it does not help the case of the respondents as the present case is not merely of termination of contract but also of non-competing in the business. The respondents have admitted that after termination, the respondents have sold the rice in the commercial market under the corporate name which forms part of the mark Kohinoor for which

separate agreement of assignment of trademark has been executed and huge amount of consideration has been received by the respondents.

53. Therefore, *prima facie* after having gone through the relevant clauses of the agreements and material placed on record, it appears to the Court that the respondents even after termination of Rice Agreement were not entitled to use the mark Kohinoor in any manner by selling the Rice in the domestic market directly or indirectly. Such use would be in breach of their non-compete obligations under the BTA dated 1st June, 2011 and NCSA dated 1st June 2011, which are separate and independent agreements and continue to be in force and have not been terminated. Mr.Sethi during the arguments had suggested that incase as per Rice Agreement, if the petitioner is ready to perform his part of the agreement to receive rice from the respondents, the respondents would be ready to give an undertaking not to use the mark Kohinoor in any manner and his clients would also not sell rice of any kind in the domestic market.

54. I do not agree with the submissions of Mr.Sethi because of reason as even the terms of the Rice Agreements read with other agreements, in any circumstances the respondents are not entitled to use the mark Kohinoor or to introduce their business in commercial market, otherwise it would amount to breach of Rice Supply Agreement as well as Business Transfer Agreement and they would fail to comply with their obligations as per the non-compete agreement. Overall, during the currency period of the agreement, they cannot enter the market under the brand name/mark Kohinoor openly on commercial scale in order to compete with the business of the petitioner. At present, this Court cannot issue the mandates to purchase/receive the Rice as per Rice

Supply Agreements as it has already been terminated. Since the agreement was terminable in nature, the only remedy lies with the respondents is to claim damages and compensation if a case is made out by them before the Arbitral Tribunal.

55. At the same time, this Court also cannot lose its sight of important factor of the case i.e. it is the petitioner who stopped purchasing the rice from the respondents despite of Clauses 5.1 and 5.2 of the Rice Agreement. The petitioner may have valid grounds and justifications for termination but the same grounds are yet to be determined by the Arbitral Tribunal. The fact of the matter is also that the respondents have been processing the rice and supplying the same to the petitioner for their domestic market for the last 4 years; who has now stopped receiving the same from the respondents. The petitioner is now purchasing the rice from other five traders as informed to the Court by the learned Senior counsel for the petitioner.

56. The circumstances in the present case are quite particular as the petitioner has refused to purchase the rice from the respondents and the petitioner is also insisting that the respondents as per the Rice Agreements are not entitled to sell rice even with the brand name Kohinoor or not in loose condition in the domestic market. In such a situation, some balance approach has to be taken by the Court.

57. With regard to the submission that the broken Basmati Rice cannot be exported, the respondents have filed the letter dated 29th January, 2016. The same is reproduced herein below:

“ALL INDIA RICE EXPORTERS ASSOCIATION

AIREA/CERT/16/13

29th January, 2016

TO WHOM SO EVER IT MAY CONCERN

This is to certify that in processing of Basmati Rice, the rice mills produce about 30-35% broken rice. The broken rice is not exported and is only sold in domestic market. Only full grain Rice is exported. Because of this feature no Rice Miller can survive on exports only. In Domestic Market full grain rice, broken and other by products are sold.

Sd/-
Rajen Sundaresan
Executive Director”

58. There is hardly any valid explanation on behalf of the petitioner that these can be exported. The *prima facie* evidence produced by the petitioner would show that broken rice which are non basmati can be exported.

59. In order to show their hardship and damage, the respondents’ counsel has also filed the list showing total number of employees/workers employed in capacity as casual and permanent category with the respondent company which reads as under:

KOHINOOR FOODS LIMITED	
TOTAL NUMBER OF EMPLOYEES	
AT FACTORY	517
AT CORPORATE OFFICE	90
TOTAL NUMBER OF EMPLOYEES	607
WORKERS EMPLOYED WITH CONTRACTORS	360
NOTE:- WE PAY ON WORK DONE BASIS	
(CONSIDERING AVERAGE EARNING PER WORKER@ Rs 15000/ PER	

MONTH)	
TOTAL EMPLOYEES INCLUDING CONTRACT LABOUR	967

60. The principle of law relating to temporary injunction and to strike balance between the parties during pendency of the controversy is well recognized in the decision of the Supreme Court in the case of ***Dalpat Kumar v. Prahlad Singh***, AIR 1993 SC 276. The relevant portion of the observations of the Supreme Court in the said case states as under:-

“.....It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that;

(1) There is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant.

(2) The court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and

(3) The comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.”

The Supreme Court further held:

“.....Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in ‘irreparable injury’ to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequence of apprehended injury or dispossession of apprehended injury or

dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that 'the balance of convenience' must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibility or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

In *M/s. Gujarat Bottling Co. Ltd. and Others v. Coca Cola Company and Others*, AIR 1995 SC 2372, it was observed as under:-

"46.The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies....."

61. From the entire gamut of the matter, this Court is *prima facie* of the view that the petitioner is entitled for an injunction to restrain the respondents from breaching the term of clause 5.2 of the Rice Agreement as well as from breaching the non-compete obligations contained in the BTA dated 1st June, 2011. The respondents are, therefore, not entitled to sell the rice bearing the

mark KOHINOOR or under the corporate name in the commercial market with the packaging material, otherwise it would amount to violation of the various clauses of the agreement.

However, the respondents would be entitled to sell the rice/processed rice in loose condition/form to the other traders who may sell the rice received from the respondents under their respective brand names and trading styles.

62. It is allowed due to peculiar facts and circumstances of the case in hand, as it is admitted position that there are thousands of traders in India who are selling the rice under their respective brand names and trading styles. If the respondents would sell the rice/processed rice in loose condition *per se*, no prejudice would be caused to the petitioner, as this Court is of the view that the reasonable approach is applicable in the facts of the present case. The same is allowed subject to the condition that the respondents shall maintain the proper accounts and shall submit the same either before this Court or the Arbitral Tribunal, if it is constituted, every quarterly and the said aspect will also be considered by the Arbitral Tribunal at the time of publishing the final Award. It is clarified and as suggested by the learned counsel for the respondents that if during the currency period of agreement the petitioner would be able to change its mind to purchase the rice from the respondents, under those circumstances, the respondents would immediately stop selling the loose rice even to the third parties.

63. The petition is accordingly disposed of. The findings arrived are tentative and shall have no bearing when the matter is decided on merits by the Arbitral Tribunal. The respondents are granted two weeks time to dispose

of the existing stock of Rice, which are already in the market under brand name other than Kohinoor but under the corporate name Kohinoor Food.

64. No costs.

(MANMOHAN SINGH)
JUDGE

MARCH 01, 2016

