

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

*Date of decision: 21<sup>st</sup> December, 2017*

+ **O.M.P.(I) (COMM.) 459/2017**

BESTIME TRADING CO. PRIVATE LIMITED..... Petitioner

Through: Mr. Rajiv K. Garg with  
Sandeep Banga and Mr. Ashish  
Garg, Advocates

versus

ALCHEMIST LIMITED ..... Respondent

Through: Mr. Abhishek Singh with Mr.  
Sohail Walia, Advocates

+ **O.M.P.(I) (COMM.) 544/2017 & I.A. 15324/2017**

ALCHEMIST LTD (PHARMA DIVISION) ..... Petitioner

Through: Mr. Abhishek Singh with Mr.  
Sohail Walia, Advocates

versus

BESTIME TRADING CO. PVT. LTD. & ORS..... Respondent

Through: Mr. Rajiv K. Garg with  
Sandeep Banga and Mr. Ashish  
Garg, Advocates

**CORAM:**

**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J. (Oral)**

1. The above petitions arise out of disputes that have arisen between the parties in relation to the 'National C&F Agreement' dated 9<sup>th</sup> July, 2015/ 11<sup>th</sup> June, 2015 (hereinafter referred to as the

‘Agreement’). In terms of the said Agreement, the petitioner (Bestime Trading Co. Private Limited) was appointed as an agent for the purpose of stocking and forwarding the pharmaceutical products of the Respondent (Alchemist Limited). The Agreement was for a period of two years commencing from 11<sup>th</sup> June, 2015 and terminating by efflux of time on 10<sup>th</sup> June, 2017.

2. As per the terms of the said Agreement, the petitioner had deposited with the respondent a sum of Rs. 2.50 crores as and by way of security deposit. The deposit was to earn interest as provided in Clause 6(ii) and 14 (a) and 14 (c) of the Agreement.

3. Clause 14 (c), further required the respondent to refund the said security deposit upon termination of the Agreement within a period of 90 days from the expiration or sooner determination of the same.

4. Clause 19 of the Agreement provided for the renewal of the same upon mutual agreement by the parties.

5. Clause 21 of the Agreement gave a right to either party to terminate the Agreement by giving to the other 60 days notice in writing of its intention to do so without assigning any Reason thereof.

6. Clause 23 of the Agreement requires the petitioner to forthwith deliver to the respondent or otherwise dispose of pharmaceuticals products in accordance with the directions of the respondent, upon the expiration or sooner determination of the Agreement.

7. The Agreement admittedly expired by efflux of time on 10<sup>th</sup> June, 2017. It is the case of the respondent that in spite of such termination, the parties continued to transact, thereby implying an

extension of the Agreement, though no formal Agreement for such extension was executed between the parties. On the other hand, the counsel for the petitioner, relying upon the emails dated 12<sup>th</sup> June, 2017 and 13<sup>th</sup> July, 2017 submits that the petitioner had made it clear to the respondent that they do not intend to continue with their relationship as there were certain payments outstanding from the respondent to the petitioner for the transactions that related to the contractual period.

8. The learned counsel for the respondent further submits that in a meeting held on 21<sup>st</sup> July, 2017, the parties had agreed to renew the agreement upon payment of Rs. 20/- lakhs by the respondent to the petitioner which would have resulted in a reduction of the security deposit from Rs.2.5 Crores to Rs.2 Crores. He further submits that the understanding was that upon receiving such payment the petitioner would sign an addendum and also release the goods that were lying in its stock. He further submits that as the petitioner did not sign the addendum and receive the cheques in this meeting, the respondent vide its e-mail dated 21<sup>st</sup> July, 2017 sent the Addendum to the petitioner for its signature and also informed it of sending the post-dated cheques in accordance with their understanding that had been arrived at between the parties. He further placed reliance on the e-mails dated 25<sup>th</sup> July, 2017 and 27<sup>th</sup> July, 2017 in this regard.

9. On the other hand, the learned counsel for the petitioner, submits that no such agreement had been arrived at in the meeting held on 21<sup>st</sup> July, 2017. He submits that in this meeting also the

petitioner had made it very clear to the respondent that it does not wish to continue with the relationship: it was further requested to the respondent that the respondent should clear all its dues, including release of the security deposit and collect all the Pharmaceutical products lying with the petitioner. He further relies upon the notices dated 25<sup>th</sup> July, 2017 and 26<sup>th</sup> July, 2017 where a similar demand had been raised upon the respondent.

10. As the disputes between the parties could not be resolved and the pharmaceutical products remained lying with the petitioner, the respondent filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), being OMP (I) (COMM.) 344/2017. The same was listed before this Court on 11.09.2017 when the following order was passed:-

*O.M.P. (I) (COMM.) 344/2017*

*The petitioner, by this petition under Section 9 of the Arbitration & Conciliation Act, 1996, seeks directions to the Respondents to dispatch the stock lying with the Respondents to the customers/ hospitals/ dispensaries/distributors as directed by the petitioner. Learned counsel for the petitioner contends that petitioner has supplied medicines worth Rs. 1,45,95,916/- to the respondent and the respondent is not dispatching the same as per the directions of the petitioner.*

*Learned counsel for the respondent submits that the agreement was only upto 10.06.2017 and thereafter it was extendable by mutual consent. He submits that the respondents have not received the amount due and payable by the petitioner since September 2016.*

*He submits that even the cheques issued by the petitioner have been returned uncashed from the bank. He submits that as per the statement of account forwarded by the petitioner with their e-mail dated 11.07.2017, a sum of Rs.47,94,195/- is shown*

*due and payable to the respondents. Further, he submits that the petitioner has forwarded TDS Form-26 AS which shows that amount of Rs.52,69,679/- has been paid. He submits that though the said payment is shown to have been paid to the respondent, the respondent has not received by the petitioner till date. He further submits that the security amount of Rs. 2.2 crores is already lying with the petitioner which the petitioner is liable to refund within 90 days of the termination of the contract, which was terminated on 10.06.2017. Learned counsel for the respondent submits that the respondent is willing to dispatch the medicines lying with the respondent subject to petitioner clearing the account of the respondent. Learned counsels for the parties submit that the parties may be referred to mediation. Accordingly, the parties are referred to mediation. The parties shall appear before Delhi High Court Mediation & Conciliation Centre on 14.09.2017.*

*List before Court for reporting settlement, if any, on 13.10.2017.”*

11. The parties could not arrive at an amicable settlement and the above petition was listed before this Court on 13.10.2017, when the respondent herein withdrew the above petition reserving liberty to raise all claims before the Arbitral Tribunal.

12. It was now the turn of the petitioner to file the present petition under Section 9 of the Act inter alia seeking the following reliefs:-

“a) Pass appropriate Directions thereby Directing the Respondent to deposit a sum of Rs. 2,71,95,841.00 being the admitted amount payable by the respondent to the petitioner on account of security deposit and commission /service charge payable to the petitioner and that the same be release to the petitioner;”

13. Notice on this petition was issued to the respondent on 10.11.2017. Though no reply was filed to the petition, the respondent filed its own petition under Section 9 of the Act, being OMP (I) (COMM) 544/2017 inter alia praying for the following relief:-

*A. Restrain in the Respondent and his employees, agents, servants, representatives, associates, assignee and/or any other person acting on his behalf from visiting/entering the site at F-58, Sector - 40, Noida, Uttara Pradesh;*

*B. Restrain the Respondent and his employees, agents, servants, representatives, associates, assignee and/or any other person acting on his behalf from creating any hindrance in the ongoing work at the site at F-S8, Sector - 40, Noida, Uttar Pradesh; and; ,*

*C. Grant the aforesaid orders ex-parte in terms of the above prayers, and;*

*D. Confirm the same after notice and;*

*E. Direct the Superintendent of Police, Gautum Buddh Nagar and Station House Officer, Sector-39, Noida Police Station and other local police authorities to ensure compliance of the orders of this Hon'ble Court and;*

*F. Award the cost of the Petition in favour of the Petitioner and against the Respondent; and*

*G. Pass any other or such further orders as this Hon'ble Court may deem fit and proper in the circumstances of the case.*

14. It is contended by the counsel for the petitioner that the respondent has duly acknowledged the amount of Rs. 2,71,95,841/- as being due to the petitioner, albeit its raising a counter claim of Rs.5 Crores as damages and a further sum of Rs. 1,45,95,937/- towards the stock of pharmaceutical products lying with the petitioner. It is

contended by the counsel for the petitioner that as far the products lying with the petitioner are concerned, the petitioner not only earlier, but specifically in the order dated 11.09.2017, had offered the same back to the respondent, however, it is the respondent who later withdrew the said petition and therefore, neither took delivery of these goods nor raised any claim thereof from 11.09.2017 onwards. As far as the claim of damages is concerned, relying upon the judgment *Union of India v. Raman Iron Foundry* (1974) 2 SCC 231 and *Gangotri Entreprises Limited v. Union of India and Others* (2016) 11 SCC 720, he submits that the claim of damages is yet to be adjudicated and, therefore, the respondent cannot retain any amount towards such damages pending such adjudication.

15. On the other hand learned counsel for the respondent submits that the pharmaceutical products that are with the respondent are of no value to the respondent today, as due to the delay, the respondent has already made alternate arrangement for same. He further submits that the damages that have been claimed are due to the fact that the petitioner lost out on business due to the petitioner not releasing the goods on time and claimed a lien over the said goods. Relying upon the clauses of the agreement, he submits that even if the termination of the agreement was to be accepted, the petitioner was under an obligation to immediately return these goods and could not claim lien over the same. He submits that the security deposit is payable only after 90 days of such termination and, therefore, no lien could have been claimed over the goods by the respondent. He submits that due to

such unlawful action of the petitioner, the respondent has suffered a loss of Rs. 5 Crores, which it is entitled to claim in the arbitration and requires to be secured at this present stage.

16. I have heard the counsels for the parties. It is an admitted case between the parties that the agreement between the parties ended on 10<sup>th</sup> June, 2017. Though it may be correct that certain transactions have taken place thereafter, it cannot be disputed that no formal agreement in that regard was signed thereafter. In fact, the petitioner had categorically stated that it does not wish to carry on its business relationship with the respondent and had even complained that the respondent is supplying goods on its own without any requisition being made by the petitioner. In terms of Clause 14(c) of the Agreement, therefore, the Security Deposit has become refundable to the petitioner. The respondent in its legal notice dated 11.10.2017 not only admitted that this Security Deposit has become refundable to the petitioner, but has also admitted that another amount of Rs.21,95,841/- as commission, is due and payable to the petitioner by the respondent.(5 crore -2,28,04,159 - 2.5 crore)

17. It is also not disputed that certain cheques given by the respondent were returned un-paid upon presentation. It is contended by the counsel for the respondent that payment of these cheques was stopped as the petitioner had not released the goods and signed the Addendum agreement, however, in my opinion, justifiability of such action would be an issue to be determined by the Arbitral Tribunal. At this stage, the fact that these cheques have been returned unpaid would

be vital in deciding the interim arrangement that has to be arrived at, securing the interest of the parties.

18. I also find that the petitioner on 11<sup>th</sup> September, 2017 had offered to return all the products to the respondent. If the respondent was truly suffering a damage on that date, it should have accepted this offer and even if it felt that the amount, as claimed by the petitioner, was not payable, it could have requested the Court to pass some other order of interim arrangement securing its interest for the damages that it may have suffered till that date. However, instead of doing the same, it chose to withdraw its petition seeking leave to agitate all its claim before the Arbitral Tribunal. It filed its present petition under Section 9 only after the petitioner had approached this Court in its own Section 9 petition and as a counterblast.

19. The question whether the respondent could have insisted upon the petitioner continuing with the business relationship after the termination of the agreement by efflux of time and if so, has suffered any damages due to any act of the petitioner and the quantum thereof, are matters to be determined by the Arbitral Tribunal upon evidence being led by both the parties in this regard. The respondent at this stage, of interim protection, cannot claim such damages as a matter of set-off against the otherwise admitted claim of the petitioner. In ***Union of India vs. Raman Iron Foundry (supra)***, the Supreme Court has held as under:-

*“11. Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the*

*claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is not qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties; a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore, makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of a contract has is the right to sue for damages. That is not an actionable claim*

*and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in Jones v. Thompson “Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed”. It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O’Driscoll v. Manchester Insurance Committee Swinfen Eady, L.J., said in reference to cases where the claim was for unliquidated damages: “... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given.” The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, Javed Sheikh v. Taher Malik S. Mikha Singh v. N.K.Gopala Krishna Mudaliar and Iron and Hardware (India) Co. v. Firm Shamlal and Bros. Chagla, C.J. in the last mentioned case, stated the law in these terms: (at pp. 425-26).*

*“In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.”*

*As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is*

*ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.”*

*This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.*

20. At the same time, the petitioner also cannot dispute that it continued with the business relationship even after 10<sup>th</sup> June, 2017 in form of certain goods having been received by it.

21. In terms of Clause 23(I) of the Agreement the petitioner was under an obligation to return all the pharmaceuticals products to the respondent forthwith upon termination of the agreement. I do not find

any clause in the Agreement that would give a right to claim a lien over the goods by the petitioner.

22. The learned counsel for the petitioner has further drawn my reference to the “Master Data” of the respondent company from the Ministry of Corporate Affairs website to show that while the paid-up-capital of the respondent is only Rs. 13.87 crores, its current liabilities are to the tune of Rs. 171.08 crores and non-current liabilities of Rs. 745.93 crores. He submits that there is a real apprehension that the petitioner would not be in a position to honour the Decree/Award, that may be made in favour of the petitioner at the end of the arbitral proceedings.

23. On the other hand, the learned counsel for the respondent has handed over a purported certificate from the Company Secretary of the respondent which claims that the Company has fixed assets to the tune of Rs. 342.46 crores. However, I find from the documents annexed with this purported certificate that this figure of Rs.342.46 crores is based on a loose sheet of paper having no title and no relevance and also includes “Non-Current Assets”. Another document annexed with this purported certificate shows that the entire tangible assets of the respondent as on 31<sup>st</sup> March, 2017 was to the tune of Rs. 148.18 Crores. The said document, however, does not disclose the liabilities /encumbrances against such assets. In my opinion, therefore, as there is no denial of the fact that the respondent has to return the security deposit to the petitioner, at the same time its claim for damages and for the products lying with the petitioner are yet to be adjudicated,

balance of convenience would require the respondent to secure the amount of Security Deposit and the Commission amount totaling Rs. 2.71 Crores in form of a bank guarantee, during the pendency of the Arbitral Proceedings.

24. The learned counsel for the respondent has relied upon the Judgment of Supreme Court in ***Raman Tech & Process Engg. Co. and Another v. Solanki Traders*** (2008) 2 SCC 302 and of this Court in ***C.V. Rao v. Strategic Port Investments KPC Ltd.*** MANU/DE/2033/2014 and ***Mala Kumar Engineers Pvt. Ltd.(MKE) vs. B.Seenaiah & Co. (Projects) Ltd. (BSCPL)*** MANU/DE/0058/2005 to contend that in the present case the petitioner has not made any averment in the petition that may satisfy the requirements as provided in Order 38 Rule 5 of the Code of Civil Procedure, 1908 and therefore, no order of deposit or security can be passed in its favour. I am unable to agree with the said submission of the respondent. As noted above, the liability of the petitioner is not and cannot be denied by the respondent, as proved from the own legal notice of the respondent. It is also evident from the website of the Ministry of Corporate Affairs that the petitioner would have a genuine apprehension on the security of its dues, in case the arbitral award is passed in its favour. In my opinion, therefore, the petitioner has made out a strong case for seeking protection in terms of Section 9 of the Act.

25. Counsel for the petitioner submits that he is even today willing to return back all the pharmaceutical products that are lying with it.

He submits that the products of a value of only about Rs.8 lacs have expired its validity whereas the other are still within the shelf life. Counsel for the respondent, however, submits that the respondent is not ready to accept these goods as they are of no value as they have made alternate arrangement for the same; the respondent has already suffered loss of business of three months for the non supply of goods and thereafter the respondent has already arranged for goods and incurred cost of more than Rs.2.5 crores. I have recorded the above stand of the parties as this is also relevant in determining the genuineness of the claim of the respondent, at legal prima facie and at this interim stage.

26. In *Ajay Singh vs. Kal Airways Private Limited & Ors.* 2017 *SCC Online Del 8934*, this Court further held that Section 9 of the Act grants wide powers to the Court in fashioning an interim order and the Court should not find itself unduly bound by the text of provisions of Order XXXVIII and XXXIX of the Code of Civil Procedure, 1908, rather, it is to follow the underlying principles.

27. In view of the above, I direct the respondent to furnish a bank guarantee for a sum of Rs.2.71 crores to the satisfaction of the Registrar General of this Court. The bank guarantee shall be kept alive for a period of one year or the termination of the arbitration between the parties whichever is later and would be subject to further orders of the arbitral tribunal and/or court in such other proceeding in accordance with law. The bank guarantee will be furnished within a period of four weeks.

28. I may hasten to add here that all the above observations are only prima facie in nature and would not be in any manner binding or influence the Arbitrator while adjudicating the disputes in the arbitral proceedings.

29. Both the petitions are disposed of in the above terms.

Dasti.

**NAVIN CHAWLA, J**

**DECEMBER 21, 2017/Nk**