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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 07th September, 2018
Pronounced on: 17th September, 2018**

+ O.M.P.(I) (COMM.) 103/2018, IA No.3966/2018, 3802/2018

**CONNAUGHT PLAZA RESTAURANTS
PRIVATE LIMITED**

..... Petitioner

Through Mr.Jayant K Mehta, Mr.Bhargav R
Thali, and Mr.Rahul Kukreja,
Advocates.

versus

**RADHAKRISHNA FOODLAND
PRIVATE LIMITED**

..... Respondent

Through Mr.Gopal Jain, Sr Advocate with
Ms.Tine Abraham, Ms.Varuna
Bhanrale and Mr.Akshay Puri,
Advocates for respondent.

Mr.Rajiv Nayar, Sr Advocate with
Ms.Niti Dixit, Mr.Amit Dhingra,
Mr.Rohan Jaitley, Ms.Raunaq B.
Mathur, Mr.Sumit Chopra,
Mr.Shivam K Raheja, Mr.Mohit
Negi, Ms.Zahra Aziz,
Mr.Suryaveer Berry, Advocates
for applicant/IA No.3802/2018

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under Section 9 of the Arbitration and Conciliation Act 1996 (hereinafter referred as 'the Act') seeking interim relief. The brief facts of the case are:

a) The petitioner - Connaught Plaza Restaurants Private Limited (for short '*CPRL*') operates fast food restaurants across the whole of North and East India under the name of "McDonald's". The respondent was (till recently) acting as the sole Purchasing and Forwarding Agent of the petitioner in terms of the agreement between the parties. The duties of the respondent under the said agreement included *inter alia*, warehousing, placement of orders, distribution and ensuring safe custody of the products/ goods being handed over to the petitioner. However, post the wrongful and illegal termination of the said agreements by the respondent, the respondent has refused to release the products/ goods, (which products/ goods also include perishable products) to the petitioner with the intention of causing unlawful harm and injury to the business of the petitioner. The illegal withholding of the products/goods has caused irreparable loss to the petitioner and crippled its business operations. It may be noted the products/goods withheld by the respondent include. *i*) Perishable products having short shelf life and which would be imminently if not already past their expiry; *ii*) various items designed as being seasonal, viz. keeping in mind the specific time and month of the year, like pamphlets, posters, marketing materials toys etc.; *iii*) various other items related to the critical business activities of the petitioner like materials relating to sales, marketing, merchandising, regular consumables etc.

b) It is evident the respondent has no lawful claim to these products/goods whether by way of ownership/ lien/ hypothecation etc., and the illegal withholding of the same is severely prejudicing the operations of the petitioner, and the interests of all its stakeholders, including its 6500 employees. The petitioner has a number of claims against the respondent for its illegal actions and as regards which it reserves all its rights to initiate appropriate proceedings. In the interim, however, if the custody of the products/goods is not released to the petitioner, it will cause further irreparable loss to the products/goods as well as to the business of the petitioner, hence, this petition.

2. The petitioner has filed this petition under Section 9 of the Act on the premise there exists a subsisting arbitration agreement between the parties and since the Agent Agreement dated 22.06.2009 extended till date says the respondent has no lien in respect of the food/non-food products lying in their storage and the respondent is illegally withholding the same, the same be ordered to be returned to the petitioner.

3. This petition is challenged by *(i)* respondent herein and *(ii)* by McDonald's India Private Limited as an intervenor.

4. Let me take the intervenor's application first.

5. The learned senior counsel for the intervener qua its *locus standi* to intervene has relied upon *Mohammad Ishaq Bhat vs Tariq Ahmed Sofi* AIR 2010 J & K 56 wherein the court held a person holding a *material and substantial interest* in the subject matter of the proceedings under Section 9 of the Act or *is likely to be affected by the order* in such proceedings should be allowed to be a party in such proceedings.

6. The intervener MIPL has two principal contentions in relation to present petition filed by CPRL viz. – *a)* petition has been filed by suppressing the material facts and is as an attempt to overreach the proceedings initiated by the intervenor in CS (COMM) No.24/2018 and IA No.409/2018 pending before another Bench; and *b)* the petitioner has filed this petition without proper authorization as MIPL though holds 92.95% of the total issued and paid up share capital and has two directors on the – CRPL Board but neither the CRPL Board nor MIPL has ever approved of the filing of the present petition.

7. Regarding contention *a)* above, it was argued CS(COMM) No.24/2018 has a material bearing on the present petition as the products of which the petitioner herein is seeking custody are the property of MIPL which CRPL is not authorised to use or deploy. Secondly, the CPRL is a party to the *Franchise Agreement* and is defendant No.1 in such Suit and is aware of the proceedings, having entered an appearance therein on its first date of hearing i.e. 11.01.2018. The copies of Franchise Agreement; Suit and IA are

already in possession of the petitioner herein and it ought to have been filed by the petitioner with this petition. Since the aforesaid Franchise Agreement, Suit and IA have been suppressed in this petition without any explanation offered and since this petition is filed in order to overreach the proceedings in said Suit and IA, without due authorization by MIPL or without impleading MIPL; or without disclosing the term of the Franchise Agreement; etc., on these grounds alone in accordance with the settled principle of *suppression veri exclusion falsi*, the petitioner is not entitled to any relief and the petition is liable to be dismissed. Heard.

8. Admittedly the franchise agreement does not contain any reference to the agency agreement entered into between the parties herein, either directly or indirectly. The effect of the termination of the Franchise agreement is given in its Clause No.20 and such agreement was terminated vide a notice dated 21.08.2017 by the intervenor. Now this termination raises a question as to how the respondent had understood the franchise agreement and the effect of its termination i.e., whether the relationship between the petitioner and the respondent was effected with the execution or termination of the franchise agreement. Admittedly post 21.08.2017 (date of termination) not only the respondent had provided services to the petitioner but had continued writing letters describing its relationship with the petitioner and even wrote email dated 17.11.2017 (supra) and another mail dated 29.11.2017 (supra). These mails were sent four months after the termination of

the franchise agreement. Even in its letter dated 26.12.2017 to the administrator appointed by NCLT the respondent wrote *they are not privy to the dispute between CPRL and MIPL*. All these show as per respondent's understanding its relationship was never co-terminus with the franchise agreement, but was independent of that. Moreso, it is an admitted fact MIPL never filed any proceedings against the respondent. The MIPL has rather filed a suit against the petitioner wherein it sought injunction against the petitioner from pursuing the relief under Section 9 of the Act before this Court, but did not get any stay. Now, if the intervenor failed to get relief in the suit, cannot be allowed to plead its cause here.

9. Moreso Clause No.31 of the Agent agreement dated 25.03.2013 notes:-

"31 This Agreement shall supersede the earlier agreements/arrangements if any with respect to the subject matter of the Agreement. Any change in the terms herein shall be effective only upon the written concurrence of both the Parties herein."

10. Further the law as it stands considers the intervenor being actually an *inter lopper* and its application if, motivated to cause unlawful harm and injury to the petitioner by illegally intervening with the petitioner's business and abusing the present *lis* to arm-twist the petitioner cannot be allowed. It is trite an intervenor cannot seek any relief for itself or agitate its own cause; and can only make submissions in support of one or the other party to the matter. See *Sarswati Industrial Syndicate Ltd vs Commissioner of Income Tax Haryana, Rohtak* (1999) 3 SCC 141 and *State of UP &*

Others vs Committee of Management Anjuman Madrsa Noorul Islam Dehra Kalan, Gahzipur 2009 SCC OnLine All 689.

11. The Intervener, therefore, seeks to indirectly create a situation what the intervener was unable to do directly. Therefore, its application is plainly in gross abuse of the process of law.

12. The second argument raised by the intervenor is qua its share holdings in the petitioner company to the extent of 50% having 92.53% paid up capital also does not lead it anywhere. The share holder does not own the property of the company, as is held in *Mrs.Bacha F Guzdar, Bombay vs Commissioner of Income Tax, Bombay* AIR 1955 SC 74:-

“xxxxx

The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up, but not in the assets as a whole as Lord Anderson puts it.”

13. Thus the application of the intervenor stands dismissed.

14. The learned senior counsel for the respondent herein also raises three pertinent issues – *a)* there exists no valid arbitration agreement between the parties; *b)* the relief sought for cannot be granted at interim stage; and *c)* the relief if granted would lead the respondent to breach its duties to the supply chain team.

15. It is argued by the learned senior counsel for the respondent that existence of a valid arbitration agreement is a mandatory condition to maintain a petition under Section 9 of the Act and if

existence of a valid arbitration agreement is in dispute, the Court is obligated to resolve this issue before considering the interim relief sought under Section 9 of the Act. Accordingly, the existence of a valid and subsisting arbitration agreement at the time of cause of action ought to be determined as a preliminary issue.

16. Further, it is argued under Section 7 of the Act, an arbitration agreement is valid only if it is in writing since parties specific intention to resolve their disputes by arbitration is to be clear. Further under Section 7(5) of the Act in case of incorporation of arbitration agreement through reference there should be a clear and conscious acceptance by the parties of the arbitration agreement being incorporated by reference and a mutual intention to so incorporate it.

17. In *Duro Felguera SA vs Ganavaram Port Limited* (2017) 9 SCC 729 it was held:-

“35..... Section 7(5) requires a conscious acceptance of the arbitration clause from another document, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties ”

53. Section 7(5) deals with incorporation by reference. The words ‘the reference is such as to make that arbitration clause part of the contract’ are of relevance. Essentially, the parties must have the intention to incorporate the arbitration clause....”

18. In *M R Engineers & Contractors Private Limited vs Som Datt Builders Limited* (2009) 7 SCC 696 it was held:-

“15. Section 7(5) therefore requires a conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties. ... ”

24. The scope and intent of section 7(5) of the Act may therefore be summarized thus:

(i) xxx

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

19. In *Indowind Energy Limited vs Wescar (I) Limited & Another* 2010(4) UJ SC 1961 it was held:-

"12. Wescare has not entered into any agreement with Indowind, referring to the agreement dated 24.2.2006 containing the arbitration agreement, with the intention of making such arbitration agreement, a part of the their agreement. It therefore follows that neither sub-section (5) nor clauses (b) and (c) of sub-section (4) of section 7 applies.

17..... A contract can be entered into even orally. A contract can be spelt out from correspondence or conduct. But an arbitration agreement is different from a contract. An arbitration agreement can come into existence only in the manner contemplated under section 7. If section 7 says that an arbitration agreement should be in writing, it will not be sufficient for the petitioner in an application under section 11 to show that there existed an oral contract between the parties, or that Indowind had transacted with Wescare, or Wescare had performed certain acts with reference to Indowind, as proof of arbitration agreement."

20. It was argued on expiry of the contract the arbitration agreement contained in the contract will perish unless it was specifically renewed. In *Union of India and Another vs Jagdish Kaur* AIR 2007 ALL 67 the Court held:-

"20. The suit was instituted by the landlady on 1 -7-2004 after expiry of term of agreement. Courts below have rightly held that after expiry of five years, the agreement was non-

existent and the arbitration clause was not applicable. This view finds support from the law laid down by Hon'ble the Apex Court in Union of India v. Kishori Lal Gupta and Brothers AIR 1959 SC 1362."

21. In *Viom Networks Limited vs M.Veeramani* 2015 (6) ALD 218 it was held:-

"24. An issue similar to the present case was considered by a Division Bench of this Court in Penumalli Sulochana v. Harish Rawtani, MANU/AP/1425/2013 : 2013 (5) ALD 573 (DB) : 2013 (5) ALT 515 (DB). In that case also a contract covered by a lease deed containing an arbitration clause commenced on 1.2.2007 and ended on 31.1.2012. A Division Bench of this Court held that subsistence of the lease under the deed would be up to the specific period mentioned in it. Once the period ends, the relationship between the parties ceases to be governed by the lease deed and that once the lease deed becomes redundant, any clause contained in it also ceases to be of any relevance to the parties. It relied upon the observations of Justice K. Subbarao in Union of India v. Kishorilal Gupta and brothers, MANU/SC/0180/1959 : AIR 1959 SC 1362. In that case it was held:

"Uninfluenced by authorities or case-law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. "

25. a suit for eviction of the petitioner who had entered into possession of the property under a leave and licence deed, after the expiry of the period of leave and licence cannot be subject-matter of arbitration under the arbitration clause contained in the leave and licence deed "

22. It was further argued by the learned senior counsel for the respondent when the dispute arose in September 2017 there was no valid and subsisting arbitration agreement governing the disputes and the last subsisting written agreement between the parties was of dated 25.03.2013 which expired on 31.03.2016 and was never

renewed and clause No.31 of the agreement of 2013 stipulated *any amendment to the 2013 agreement shall be only upon the written agreement*. No further amendments were made to extend the term of 2013 agreement which expired on 31.03.2016.

23. It was argued after 31.03.2016 the relationship between the parties was governed by the business arrangements between the petitioner, the respondent and the supply chain team and not by any written contract which contained the arbitration agreement. Additionally, the parties did not execute any independent written arbitration agreement reflecting their unequivocal intention to resolve, through arbitration, any disputes arising after expiry of 2013 agreement i.e. after 31.03.2016. Hence when the dispute arose between the parties in September 2017, there was no subsisting written arbitration agreement between them.

24. It was also argued the business relations may though have continued to be governed by the terms of 2013 agreement, but the same could not be construed as an extension of the agreement dated 2013 as it could be extended only by conscious, intentional and unequivocal reference or renewal in writing – which never took place. Hence a stray reference to 2013 agreement in the correspondence dated 29.11.2017 cannot be construed as an extension of the arbitration agreement under 2013 agreement by reference as there was no mutual intention of extension of any arbitration agreement specifically expressed in writing which would meet the requirements of Section 7 of the Act.

25. Secondly, it is argued in a petition under Section 9 of the Act the Court is not bound by the principle governing the grant of interim reliefs in Civil Suits. In *Adhunik Steels Limited vs Orissa Manganese and Minerals Private Limited* (2007) 7 SCC 125 it was held:-

“11.The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

21. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection.....”

26. It was also argued that Court cannot grant final relief at an interim stage unless the final relief would become infructuous by the time of adjudication of the disputes. In *Deoraj vs State of Maharashtra* (2004) 4 SCC 697 it was held:-

“7. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. In such cases the availability of a very strong prima facie case -- of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases.”

27. Thus, it was argued this Court cannot grant a mandatory injunction under Section 9 of the Act unless very high prima facie case is made out by the petitioner and any order of delivery of products from respondent's possession shall be in the nature of final relief.

28. Heard.

29. Before coming to the contentions raised by the respondent, let me examine the case of the petitioner. Admittedly, the parties have entered into an Agent Agreement dated 22.06.2009 wherein the petitioner had appointed the respondent as its sole purchasing and forwarding agent with effect from 11.08.2008 in respect of food and non-food products for its McDonald restaurants which were in existence as on the date of the such agreement and those which were to be opened in the future. The services to be provided by the respondent were - warehousing facilities, receipt of the goods, its safe custody/transportation to the designated restaurants, insurance etc. Clause No.8 of this agreement is relevant and it notes:-

"8. This agreement shall take effect w.e.f. 11th August, 2008 and shall be valid for a period of 2 years, except for the fact that, the consideration payable hereunder shall be reviewed by the parties on an annual base, by mutual agreement."

The above clause makes the agreement operative from a *retrospective* date.

30. This agreement, admittedly, was superseded by another agreement dated 25.03.2013. The relevant clause thereof notes:-

"5 It is agreed hereby between the parties that, the ownership of the products in the warehouse as well as those in transit to the restaurants shall vest in CPRPL and the CPRPL shall have the absolute discretion to directions with respect to the products. CPRL shall also undertake any losses as may be occasional in respect of the products and their storage on all counts, except those losses which occasioned through the negligence of RFPL, In which case CPRL shall be entitle to recover the cost from RFPL , RFPL shall not have any right of lien over any products in the warehouse to the extent of their outstanding.

11. In the event, of any dispute arising between the parties hereto in respect of the interpretation of this agreement or any part thereof, the dispute shall be referred for arbitration under the arbitration and' conciliation act 1996. The arbitration shall be made by a panel of three arbitrators, one each to be appointed by either party and the third to be appointed by the arbitrators by mutual consent. In such an event, the decision of the arbitrators with reference to the dispute shall be final and binding between Parties hereto.

20 TERM AND TERMINATION

a. This Agreement shall be for a Period of 90 days, i.e., with effect from 15th of March, 2013 to 30th of May, 2013, unless terminated earlier in terms hereof; The parties shall enter into a definitive agreement within abovementioned period of 90 days.

b. Notwithstanding any other provision contained in this Agreement, Client shall have right to terminate this Agreement by providing to RFPL thirty (30) days prior written notice to that effect. RFPL can terminate this Agreement by providing the other Party at least sixty (60) days prior written notice to that effect.

25. ARBITRATION

All disputes, differences or disagreements arising out of, in connection with or in relation to this Agreement including its interpretation, performance or termination, in the first instance shall be settled through mutual discussions between the officials of the Parties. If no settlement can be reached through mutual discussion and negotiations between the Parties within 30 days of the first written communication of such disputes, differences or disagreements from either Party to the other, then all such disputes, differences or disagreements shall be finally decided by arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Any arbitration pursuant hereunder shall be a domestic arbitration, under the applicable laws of India.

The arbitration shall take place before 3 arbitrators, one to be appointed by each Party within thirty days of the invocation of

the arbitration. The 'two arbitrators appointed by the Parties shall appoint the third presiding arbitrator in the event of dispute between the two arbitrators regarding the appointment of the presiding arbitrator, the same shall only and exclusively be appointed by the Hon'ble 'High Court of Bombay. The arbitral award shall be rendered in English language. The venue of arbitration shall be Mumbai or such other place as may be mutually agreed between the Parties In writing and the language of arbitration shall be English.

28. GOVERNING LAW AND JURISDICTION .

This Agreement shall be governed and interpreted by and construed in accordance with the laws of India. Both Parties hereby agree to submit to the exclusive jurisdiction of the competent courts in Delhi in all matters arising out of this Agreement.

31. This agreement shall supersede the earlier agreements/arrangements if any with respect to the subject matter of the Agreement. Any change in the terms herein shall be effective only upon the written concurrence of both the Parties herein."

31. Admittedly vide a letter dated 31.03.2015 the agreement dated 25.03.2013 was extended *retrospectively* till 31.03.2016. Even after 31.03.2016 the parties continued with its business viz. the respondent being carrying on its duty till September 2017 when suddenly the respondent started asking to revisit its commercial terms viz. to increase the storage charges and on the basis of outstanding dues denied the petitioner the delivery of its goods lying in storage. An email dated 17.11.2017 written by the respondent is relevant in this context and it notes:-

"We have written a letter to your board on September 14 2017 to understand the implications of the ongoing situation on us. More specifically, we wanted to understand- "Given the termination of the franchise agreement between MIPL and CPRL, we would like to understand the status of our present and ongoing business arrangement with CPRL?"

Since we have received no response, we have continued to operate assuming the existing business arrangement, systems and process continues.

Look forward to your response, and we remain available to you for any questions or clarifications you may have.”

32. The respondent on 29.11.2017 wrote a letter to the petitioner wherein they noted the following:

*“As mentioned above, INR 4.19 crore is currently outstanding, and is putting tremendous pressure on us, including challenging our ability to remain afloat as an organisation. If you fail to pay the entire outstanding amount by 15th December 2017, **our obligations under the agreement dated 25 March 2013 stand suspended.** You are also aware **we are currently holding your stock in our warehouses**, the position of which has been updated to you periodically. We will not be held liable for any loss, damage or deterioration of the stock that could be caused due to suspension or stoppage of operations caused due to the non-payment of our dues. Furthermore, you will be liable for damages, storage and the losses incurred by us including opportunity cost. Under no circumstances will we be liable for any damage or expiry of stocks due to delays in responses or resolution of the current situation. Look forward to your prompt response.”*

33. It is pertinent to note in its correspondence the respondent allege suspension of its obligations under the agreement dated 25.03.2013 and *never alleged the agreement was not in existence.* These assertions of outstanding dues were made on the basis of the invoices raised from time to time and such outstanding dues, of course, are disputed by the petitioner since settlement of accounts could only be done at the end of financial year, as per the terms of the agreement between them.

34. The learned counsel for the petitioner referred to stock report showing goods worth ₹ 10 crores of the petitioner lying in the warehouse of the respondent upon which the respondent has *no lien* and most of the perishable goods has since expired. It is alleged though the respondent demanded its dues of ₹ 4.19 crores but there are various attachments/adjustments need to be made as

their business was running upon the concept of *under recovery* and *over recovery* so as to say there was an annual and monthly plan between the parties as to the quantity of goods be taken in and out every month and it was only at the end of the financial year the parties would calculate its figures to determine actual dues. However, in its letter dated 29.11.2017 the respondent created a mid-way demand requiring the petitioner to pay or else it would retain goods, which per terms of the agreement, is illegal.

35. The petitioner also sent a letter dated 28.09.2017 to the respondent qua re-conciliation of accounts, para 3 of it notes:

“3. As a business practice, CPRL would give annual projections for the volume of materials, which RKFL would have to handle for the duration of the forthcoming year. These projections were a tentative assessment of the requirements of CPRL for the upcoming year, based on the past history of consumption and future plans for expansion. These were provided to R.KFL only to facilitate R.KFL in securing appropriate warehousing and transport facilities and was done purely for the ease of business and not by way of any contractual obligation. The projections and assessments in no manner indicated a minimum guarantee for the-volumes which RKFL would be handling for the duration of the year, and there is nothing in the Agreement to suggest anything to the contrary. However again as a courtesy of business and in light of the healthy business relations between the parties, in the event that the volumes exceeded the projections, it was treated as a case of "over recovery" whereas if the volumes were lower than the projections, it was treated as case of "under recovery". In the former situation CPRL would credit the additional amounts received by RKFL and in the latter situation, CPRL would compensate RKFL to the extent of under recovery, pursuant to re-conciliation of accounts between the parties at the end of the financial year.”

36. I would also refer to an email dated 25.12.2017 sent at 08:01PM by Justice G.S.Singhvi (Retd.) an administrator appointed by NCLT (hereafter referred as ‘the administrator’) which read:

“Today, I have received two e-mails from the Managing Director of Connaught Plaza Restaurants Private Limited, Shri Vikram Bakshi at 4.49 pm and 6.26 pm that you have not restored the supply of food articles to outlets of Connaught Plaza Restaurants Private Limited.”

37. It was replied by the respondent vide its letter dated 26.12.2017 and it notes:-

“We have always maintained that we would be willing to continue to support CPRL, provided:

1) Clearance of existing overdue amounts immediately (approx 1.2 crs)

2) Payment of under-recoveries due to lower volumes (est. 2 crs till December 31 2017)

3) Revised rates going forward (Based on lower volumes) - for both inbound and outbound which is given in our letter of 29th November 2017

4) no such clause in file

5) Bank Guarantee (irrevocable and fully funded) to cover for exit costs of 32.2 crs. The calculation for the exit cost is set out at Annexure A.

As regards the order passed by the NCLT on the 13th July, 2017 in relation to a private dispute between Mr. Vikram Bakshi and CPRL, we are not privy to the same and has nothing to do with our commercial arrangement with CPRL. Our suspension of services is as a consequence of CPRL failure to perform its obligations under the commercial arrangement between the parties and is not in any way connected with the ongoing shareholder disputes. RFPL being an independent company will have to assess -the commercial risk it is exposed to, given the ongoing shareholder disputes. We have been accommodating CPRL in good faith in hope of seeing an early resolution of the current business situation with us. Given that we have not got any kind of assurance in relation to the various concerns we have raised from time to time, we believe that we are exposed to an inordinately high commercial risk and we are within our right to protect our interest.”

38. Further the respondent also wrote in its letter dated 29.12.2017 to the administrator:-

“Considering the fact that we have not violated any of our obligations under any of our agreements, our board of directors is obligated to protect the interests of all our stakeholders and will always act in the best interests of RFPL. Consequently, we would not be able to incur any further costs to provide services to CPRL without full commitments and payments being made to us as specified by us in our letters

dated 14 September 2017, 29 November 2017 and 20 December 2017.”

39. The correspondences above reveal the conduct of respondent in extending the agreement retrospectively despite it came to an end twice by efflux of time. Thus the intention of the parties was to continue with their business arrangement under the agreement(s) till the disputes arose in September 2017 and their relations became sour.

40. Would the conduct of parties herein determine the extension of terms of the agreement dated 2013. The answer is *M/s.Bharat Petroleum Corporation Ltd. vs. Great Eastern Shipping Co. Ltd. (2008) 1 SCC 503* wherein the time charter party was entered into between the appellant and the respondent on 06.05.1997 letting hire vessels for a period of two years which was subsequently extended for one month with an option for two further extensions for a period of 15 days each without altering the conditions, exceptions and exemptions contained in the charter party dated 06.05.1997. Later there were various offers and counter offers exchanged between the parties as to the terms on which the charter party was to continue pending the finalization of charter party from 01.09.1998, but the disputes arose and the Court in these circumstances held:-

“23.We are, therefore, of the opinion that though performance of the Charter Party agreement dated 6th May, 1997 may have come to an end on 31st August, 1998 but it was still in existence for some purposes, viz. the effect of vessels non re-delivery as per the prescribed mechanism and its continued use beyond the stipulated time and, thus, the arbitration clause in the said Charter Party operated in respect of these and other allied purposes. Therefore, the factual scenario in the instant case leads to an inescapable conclusion that

notwithstanding the expiry of the period fixed in the time charter party dated 6th May, 1997, the said charter party did not get extinguished, inter alia, for the purpose of determination of the disputes arising thereunder and the arbitration clause contained therein could be invoked by the respondent.”

41. Thus, in the circumstances of this case, **a)** considering the correspondence(s) on record; **b)** the conduct of the parties in extending the agreement(s) *retrospectively*; **c)** continuing with the business on similar terms and conditions; **d)** the assertions made by the respondent to continue its support / business relations with the petitioner, per communication addressed to the administrator, it can safely be said though the term of the agreement dated 2013 came to an end on 31.03.2016, but it continued even thereafter till disputes surfaced and hence the arbitration clause contained in the said agreement dated 2013 would continue to operate qua the disputes arisen thereunder.

42. The decisions in *Duro Felguera SA* (supra); *M R Engineers & Contractors Private Limited* (supra); *Indowind Energy Limited* (supra) and others as relied by the respondent would not come in the way of the petitioner since the facts in those cases were slightly different. Those cases were under Section 7 (5) of the Act where the parties tried to take benefit of an arbitration agreement incorporated in some other document by *implication* which was never allowed. The facts of this case do not match with the cited cases.

43. Further the decisions relied upon by the learned senior counsel for respondent namely *Viom Networks Limited* (supra) and

Jagdish Kaur (supra) are also not applicable as in these cases the lease agreements and license agreements expired and were never renewed and there was no plea of either of the parties that such agreement continued to be effective and binding by the parties subsequent to that date. It is not so in the present case. The glaring distinction is the parties in the present case continue to pursue each other on the basis of the agency agreement dated 25.03.2016 and as noted in various correspondences of the respondent, the agreement continued to operate between them and the respondent is now estopped by its conduct to claim there exist no arbitration agreement. The respondent does not deny that it expressly and impliedly accepted the continuation of the agency agreement dated 25.03.2016 and continued to deal with each other on such basis. Having taken this position in its correspondences clearly and expressly the respondent is estopped from claiming to the contrary.

44. This case relates to *retrospective extensions* of arbitration agreement dated 25.03.2013, per past practices till 31.03.2016. Thereafter the agreement continued by implication as the correspondences reveal the parties were acting under the agreement, do show it had *consciously accepted* the terms of the agreement dated 25.03.2013 including the arbitration clause even after its formal expiry and there was mutual intention to abide by such terms.

45. The Co-ordinate Bench of this Court in *Shine Travels & Cargo Limited vs Mitisui Prime Advanced Composite India Limited* (2016) 232 DLT 499 noted:-

“8. It is thus an admitted case that the contractual relationship between the parties continued even after 31.08.2014, that is, even after the term of the Agreement had expired. It is also not disputed that the services were availed at the same rates as specified in the Agreement.

11. There can be no dispute that an arbitration agreement is required to be in writing; the same is an essential condition under Section 7 of the Act. In the present case, there is no dispute that the Arbitration Agreement is in writing. The only question is whether the Arbitration Agreement has perished even though the parties continued to implement the Agreement, albeit, without any written extension.

13. The Agreement further provided for the price payable to the Petitioner for its services. The Agreement further provided that the petitioner would raise invoices and charges relating to the services and the same would be paid by the respondent. Admittedly, the aforesaid contractual relationship did not end on 31.08.2014 even though the duration of the Agreement was till 31.08.2014. It is an admitted case that the parties continued the relationship thereafter; the petitioner continued to provide the services and the respondent continued to avail the same at the rates as agreed to in terms of the Agreement. According to Mr Bawa, although the Agreement could continue for all other purposes as there was no bar for the parties to contract orally but the same would not apply to the arbitration clause which necessarily has to be in writing.”

46. Hence I hold arbitration agreement was in existence till disputes arose and hence a petition under Section 9 of the Act, shall be maintainable.

47. Another question which arose for determination is if directions sought for can be given. The learned senior counsel for the respondent argued the final relief at the interim stage cannot be given as it would make the *lis* infructuous. The answer to this query need to be founded within the parameters of the agency agreement dated 25.03.2013 entered into between the parties.

48. The terms of the agreement do show the respondent shall have no right of *lien* over the products of the petitioner lying in its warehouse even to the extent of its outstanding, makes it clear the respondent cannot block the delivery of the products belonging the petitioner as it shall harm the business, customer relations/goodwill of the petitioner.

49. I may here refer to refer to Section 46 of the Sales of Goods Act and it notes:-

“46. Unpaid seller’s rights.—

(1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a) a lien on the goods for the price while he is in possession of them;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.”

50. The Benjamin’s Sale of Goods notes:

“Extent of the lien: The extent of the lien is limited to the price: the seller is not entitled to exercise his lien so as to claim from the buyer his expenses for detaining the goods until the price is paid, because during the period of the lien the seller is detaining the goods for his own benefit. The seller’s remedy against the buyer for these expenses will be a claim for damages if he can establish a ground for such a claim. If, however, there is an agreement that such expenses are to be treated as part of the price, the lien will extend to the amount of the expenses.”

Pollock & Mulla on Sale of Goods Act says:

“It is implied by s46(1)(a) and s 47(1) that the extent of the seller’s lien is limited to the price and he will not be entitled to exercise lien for claiming expenses for detaining the goods, unless there is an agreement that such expenses are to be treated as part of the price.”

51. Hence, there is no impediment to grant the relief to the petitioner as agreement itself stipulate the respondent *cannot exercise any lien* over the products of the petitioner, the quantum of the outstanding being in dispute; the business of the petitioner depends upon these supplies and any lack of supplies shall immensely affect the business of the petitioner in terms of loss of customers, opportunity, business goodwill etc. The petition is thus allowed, and the respondent is directed to release the custody of the goods lying in its two warehouses within four weeks from today.

- i. C/o Amrit Humifresh preservation Pvt. Ltd., Khasra No. 76/11/4/1, 20/1/2 & 75/16/1, Piao Maniyari, Narela road, Kundli, District Sonipat, Haryana;
- ii. C/o Radhakirhsna Foodland Pvt. Ltd., 442- Purbalok, Ananda Niketan building, Near Metro Cash and Carry, Kolkata- 700099.

52. I hereby appoint Ms.Aparna Agarwal, Advocate (Mobile No.9999969583) to visit Sonipat, Haryana and Mr.Piyush Pahuja, Advocate (Mobile No.8860459079) to visit Kolkata as Local Commissioners whose fee is fixed at ₹ 1,00,000/-, each to aid/assist in fully securing the reliefs as mentioned above. The reports of Local Commissioner be filed within two weeks after the above transmission.

53. In equity, admittedly, the petitioner is liable to clear some dues of the respondent. Such dues were ₹ 4.19 crores as on 15.12.2017, though petitioner alleges adjustments. Nevertheless

we are in late 2018, so in the interest of justice where the petitioner claims *no lien* then it should also make provisions qua claim of the respondent. Hence prior to execution of commission(s) aforesaid the petitioner to deposit with the Registrar General or to give bank guarantee for ₹ 4.50 crores to the satisfaction of the learned Registrar General, which shall, of course, be subject to directions/award passed in arbitration. The petition and pending applications if any, stands disposed of.

YOGESH KHANNA, J

SEPTEMBER 17, 2018

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भारतमेव जयते