
(2023) 08 BOM CK 0018

In the Bombay High Court

Case No : Commercial Arbitration Petition (L) No. 16800 Of 2023

Echjay Industries Pvt Ltd

APPELLANT

Vs

Indus Powertech Inc

RESPONDENT

Date of Decision : 08-08-2023

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9

Citation : (2023) 08 BOM CK 0018

Hon'ble Judges : Bharati Dangre, J

Bench : Single Bench

Advocate : Sharan Jagtiani, Rahul Dwarkadas, Areez Gazdar, Shireen Mistri, Zubin Behramkamdin, Yoginder Handoo, Vyom Shah, Jimish Shah

Final Decision : Dismissed

Judgement

Bharati Dangre, J

1 The petitioner, is a Company incorporated under the provisions of the Companies Act, and is inter alia, engaged in manufacturing of forgings, machines and assembled components for automotive, non-automotive and general engineering appliances. The respondent, on the other hand is a Company incorporated in United States of America (USA) having its registered office in Bandford way, Raleigh N.C and it specializes in supplying engineering components to North American manufacturers by sourcing them from the manufacturers in low cost countries.

The petitioner and respondent entered into a Master Supply Agreement (for short 'MSA') on 31st March 2015, under which the petitioner became the Master Supplier of forging parts/ products/engineering components to the respondent and its customer based in USA. The Master Supply Agreement was entered for initial term of 3(three) years and thereafter, automatically extended for three successive years. As per the agreement, the petitioner was to manufacture various forgings/ parts/ products/ engineering components against inquiries

generated by or customer designs provided by the respondent and was to supply the same to the respondent for onward supply to the end customers located in North America.

2 The MSA comprise of various terms and conditions, recording the understanding between the parties, and it also consist of clause no.3 in form of 'Non-compete/Non-solicitation' clause, and it is this clause which is sought to be enforced by the petitioner through the petition filed u/s.9 of the Arbitration and Conciliation Act, where an injunction is sought against the respondents, its subsidiaries, affiliates, office bearers, members, agents, or any one acting on its behalf from, in any manner, directly or indirectly, sourcing forgings or placing inquiries, or engaging in discussions with any forging company in India except the petitioner.

3 The Master Supply Agreement dated 31/3/2015, has described the respondent as the 'Company' and the petitioner is referred to as 'Supplier', which shall include any of those subsidiaries or those affiliates of the supplier that supply products to the Company or Company's customers under, or pursuant to the MSA.

The agreement is dynamic in its scope, as it contemplate that the supplier is desirous of manufacturing various products against inquiries generated by, or customer designs provided by the Company and supply them to the Company or its customers and is intending to enter into a long term business relationship with the Company, whereas the Company which is specialized in supplying engineering Components to Non-American manufacturers by sourcing it from low cost countries is also assisting the suppliers in developing the North American market, using its knowhow, domain knowledge and expertise and as such, it desires to source components from the supplier through the established relationship.

A meaningful reading of the agreement would make it evident that the supplier shall manufacture 'product' as per the enquiries generated by, or customer design provided by the Company and supply it to the Company, which shall in turn, take it to the end consumer. The 'Supplier', therefore, is expected to manufacture a 'Product' as desired by the Company and as per the specifications provided by it.

The MSA between Supplier and Company highlight its scope as under :-

"2 Scope of Agreement : The Supplier hereby agrees to become a master supplier of products to the Company and its customers. The Company may either buy the products directly from the supplier for onward sale to its customers or cause its customers to place orders directly on the Supplier. The Company may also from time to time and at its sole discretion cause the Supplier to ship the products directly to the end customers or route them through the Company's warehouse. The Supplier agreed to great all orders received pursuant to this Agreement as Company's orders and undertakes to execute such orders fully conforming to the specifications and delivery requirements as specified in each

order”

Under the Agreement it is the duty of the Supplier to invest its best efforts and devote such resources as may be reasonably necessary to assist the Company in marketing, selling and servicing the products. The Supplier agreed to remain guided by the Company in matters of pricing, approval of drawings and samples and being assisted in the scheduling, customs clearing, warehousing and shipping of the products.

4 The MSA cast reciprocal obligations upon the ‘Supplier’ and the ‘Company’ in form of a Non-compete/Non-solicitation clause, which read to the following effect :

“3 Non-compete/Non-solicitation : The Supplier agrees that the Company shall have exclusive rights to deal with all customers or clients introduced to it by the Company (hereinafter referred to as “Customers”) from within the geographical boundaries of United States of America, Canada and Mexico (hereinafter “Territory”). The current list of such customers is detailed in Annexure I and all transactions with the customers in the Territory shall be through and shall accrue to the benefit of the Company. During the term of this Agreement and for a period of twenty four (24) months after termination of this Agreement for any reason, the Supplier shall not sell or solicit business from or conduct business with the Customers. Similarly, the Company will also not source forgings from any other forging company from India unless pursuant to Supplier’s refusal to quote or supply such items”

5 Reading of the distinct clauses of the MSA will make it evident that the supplier is to be guided by the Company and he has become a master supplier of products to the Company and its customers and it was open for the Company to either buy the products directly from the supplier for onward sale to its customers or cause its customers to place orders directly on the supplier.

The scope of the services to be rendered by the supplier under the agreement included furnishing quotes for enquiry sent by the Company expeditiously, and handling the development/ manufacture and supply of all the products ordered by the Company or its customers.

6 The MSA was agreed to be continued for period of 3 years unless terminated earlier in the manner provided under the Agreement and it contemplated automatic extension for successive three years unless terminated.

The agreement contemplate for two types of termination; default termination in clause 14 and termination for a cause in clause 15.

Default termination occur upon the contingency of bankruptcy, insolvency or similar proceedings or going into liquidation for winding up, commencement of the liquidation proceedings, whereas the cause termination empower either party to terminate the agreement prior to its expiry or any renewed term, upon a ‘cause’, by giving 180 days prior notice to the other party, setting forth the

breach complained of.

Clause 23 prescribe a mechanism for resolution of any unresolved controversy or claim arising out of, or relating to the agreement or a breach thereof by mode of arbitration under the Rules of Conciliation of Arbitration of the International Chamber of Commerce, Paris.

7 It is the case of the petitioner, that as per the terms of the MSA, it communicated with the customers of the respondent, and at times, participated in conference calls and respondent encouraged the petitioner to conduct business with one of its end customers, 'Linamar Corporation' and facilitated it to execute a supply agreement with it on 1/7/2017. The respondent, later objected to the participation of the petitioner in the correspondence with Linamar and tried to impose itself by claiming that, it is the respondent who has an exclusive right to communicate with Linamar and its other customers and any communication by the petitioner directly with Linamar or any other customer is significant breach of the Master Supply Agreement and demanded that the petitioner shall cease from all communications or attempts to communicate with the customers/ clients of the respondent as it would amount to soliciting or conducting the business. A legal notice was also addressed to the petitioner, alleging the breach.

In any case, the dispute was resolved by entering into a Memorandum of Understanding on 2/1/2019 and certain additional terms governing the relationship between the parties were drawn, which are agreed to be read as supplemental to the MSA.

The relationship of the parties to the MSA however, suffered from various twist and turns, as it is alleged by the petitioner that the respondent sought to unilaterally change the contractual terms between the parties and failed to make timely payment of debit notes raised by the petitioner and withheld the increased benefits to the petitioner as provided by the end customer.

The petitioner allege that the respondent was guilty of breach of several provisions of the MSA and the MOU which resulted into additional expenditure being incurred by the petitioner and bear the losses. When there was complete break down in the mutual trust and understanding, and the petitioner concluded that it is not viable to continue the arrangement, on 27/1/2023, the petitioner issued a notice of termination, of the MSA and MOU to the respondent by exercising its right under Clause 15 of the MSA.

The termination notice was issued, alleging several breaches, though the MSA continued to be in effect till six months notice period in the agreement, which came to an end on 28/7/2023.

8 The petitioner approached this Court when it reliably learned and possessed a tangible evidence to prove that the respondent had sourced forgings from another Company in India i.e. Ramkrishna Forgings Ltd (for short 'RKFL') and/or its subsidiaries, affiliates in the month of May 2023 when RKFL made six Air

shipments forwarding 982 parts, out of which 582 parts of Alloy Steel Forging Machine Gear pinion; Semi pinion and 440 parts of Alloy Steel forging machine gear ring(semi-finish) to the respondent in USA.

It is the case of the petitioner that the parts supplied by RKFL are similar in nature to the parts which the petitioner has currently supplied to the respondent company as per its specification, and it is the claim of the petitioner that it has not, at any point of time, refused to provide to quote or supply these parts to the respondent and therefore, the exception to the Non-compete or Non-solicitation clause contained in the Master Service Agreement has not kicked in, for the respondents who are bound by the clause which precluded it from sourcing such forgings from other manufacturers in India, as the petitioner has an exclusive right to supply the forgings to the respondent as per the Master Service Agreement.

9 The learned senior counsel Mr. Sharan Jagtiani representing the petitioner would invite my attention to the detailing in the agreement in its various clauses, to canvass his submission, that the petitioner supplied to the respondent, very specialized parts of the machinery, and it has set up specific production lines and built up a production capacity, targeted at the requirement and timelines of the respondent, and this has incurred substantial expense. As per the learned counsel, upon the enquiries being generated by, or customer designs provided by the Company, what is manufactured is the 'Product', which is supplied to the Company or its customers, and in the wake of clause 3, the Company has undertaken not to source forgings from any other forging Company in India and this is subjected to two exceptions being, when the Supplier i.e. the petitioner has refused to quote or supply such items.

In absence of such a contingency in existence, Mr. Jagtiani would submit that the action on part of the respondent to invite products from its competitor in the country, amounts to breach of the agreement.

Apart from this, he would submit that as far as the company is concerned, the restriction is wider, as what it cannot source, is not only the 'Product', but the forgings, which may be of any type ranging from a forged piece of metal to any other metal component produced by the process of forging and according to him, by raising queries and calling for the products from RKFL, the respondents have committed breach of the non-compete/non solicitation clause in the MSA and this action of the respondent is highly objectionable according to Mr. Sharan Jagtiani.

10 The case of the petitioner is, that even post period of the termination notice, the petitioner continued to supply the forgings in compliance of the MSA and MOU. It is alleged that in the last nine months, the respondent has not made any enquiries for new parts, nor has it placed the orders at the volume previously indicated by the respondent, but on 12/6/2023, when the petitioner accessed the shipment records of one private website, which maintains log of the shipments to and from India and it gained knowledge that in the month of May 2023, RKFL

and/or its subsidiaries or affiliates had made six air shipments, pertaining to the product which is already supplied by the petitioner to the respondent. It is inter alia stated that RKFL is also forging company in India that is engaged in production, development, manufacture, sell and distribution of forgings/products, parts, engineering components that are similar to the one, produced by the petitioner and supplied to the respondent and this act would fall within the ambit of clause 3 of the MSA which forbid the company from sourcing forgings from any other country.

Mr.Jagtiani would submit that the restraint imposed in clause 3 of the MSA would also cover making of representations, warranties or commitments, binding the third party without the others consent and he would submit that if the petitioner is precluded from contracting with the end customers in USA, then, very same clause bind the respondent, who cannot enter into business relationship for the purpose of forgings with any Company in the country.

11 Mr.Zubin Behramkamdin, Sr. Advocate strongly contested the submission of Mr.Jagtiani, that, the respondent is in breach of clause 3. By relying upon affidavit filed on behalf of the respondent, he would specifically assert that there is an unambiguous refusal by the petitioner to supply the part, MEC-1968-F, and it is the petitioner who had asked the respondent to cancel the order from the purchase order (PO) forwarded to the petitioner on 20/4/2023, and he would submit that upon the purchase order being issued in respect of supply of certain parts, the petitioner sought its cancellation. Another ground pressed into service is, the delay in supply of the product which has been effectively construed as refusal to supply.

While dealing the product known as 'pinions', the argument advanced on behalf of the respondent is, the delay in supply of the parts in essence, amounts to refusal and reference is made to the correspondence exchanged from October 2022 to May 2023, and by relying upon the same, it is sought to be argued, that the petitioner is either refusing to supply the parts ordered by the respondent or innovating ways and means to create impediments in supply of part/items, to the detriment of the respondent, who is in turn, is accountable to the end customer.

He would place reliance upon the decision of the Kings Bench Division in case of J. Aron & Co (Incorporated) vs. Comptoir Wegimont, 3 K.B (435) which has propounded a principle of law that an express requirement of a contract, that the goods shall be shipped at a particular time, is not merely a description of the goods, but it is a condition precedent.

He would further submit that since the goods were delivered belatedly, the respondent itself had sustained huge losses as the goods were to pass further. Justifying the rationale in supplying the goods despite termination of the agreement by the supplier for any reason and the obligation to continue to supply the 'Product' for two years, he would submit that, when the product is directed to be manufactured by the Company, lot of research and development

goes into it and the actual supply of product may come at a later stage and therefore, despite termination of the contract, the Company shall continue to accept the product for a period of two years from the date of termination.

While dealing with the allegation that an order is placed by the respondent on the RKFL, and this is in breach of clause 3, and while dealing with Exhibit-G appended to the petition, which reflect the shipment from RKFL, the learned counsel would submit that a bare look at the quantities described in the said Exhibit, would make it evident that they are only the samples and after the samples are received, the purchase order for the product would be placed, which would involve a period ranging between 1 – 2 years for its actual supply and therefore, he would raise a question, as to whether clause 3 would even forbid any research and development of the product through any Company.

In any case, his specific submission is, since the supplier has failed to deliver the product in time, the company was left with no option than to raise query with some other forging company in the country, to meet its demand of the engineering components, which are to be supplied to the North American Manufacturers in North America.

12 During the course of argument, specific stand was taken on behalf of the respondent that the order placed with RKFL as reflected in Exhibit G is only for samples and not for supplies and in support of the said statement, an additional affidavit is filed on 17th July, 2023.

The Chief executive officer of the respondent affirmed the following statement :

“2 I state that the respondent has only procured samples of certain automotive parts for the purpose of testing and validation from M/s.Ram Kishan Forgings Limited. The fact that the order was placed only for samples is clear from the very small quantities of automotive parts which have been ordered. Further, the other parts that have been ordered are different from what has been ordered in the past from the petitioner”

The affidavit has further highlighted the process followed in supply of the product by the supplier to the company and a table is provided in the Affidavit reflecting the time taken to develop each product range , with reference to certain part number. A specific statement is contained in the affidavit to the following effect :

“7. The manufacturing of such automotive components used by the automotive manufacturers is so controlled that any change in the manufacturing process or manufacturing location requires such automotive manufacturer to direct conduct of fresh testing and evaluation of products, which usually takes around 1-3 years depending upon the product. The Petitioner is seeking to prevent the Respondent from developing products that it will require post the termination of the two year period under Clause 3 and Clause 17 of the Master Supply Agreement. The parts/ components which have been ordered by the Respondent as mentioned in Exhibit G to the Petition are thus only for the purpose of testing and development and

were not and are not going to be used as components in cars which will be sold commercially.”

13 Dealing with the said affidavit, the General Manager (Finance) of the petitioner has filed a further affidavit to deal with the contention, that Exhibit-G contain only samples and candidly, a following statement is made in the affidavit:-

“6 I say that I am not in a position to confirm or deny whether the supply is procured by the respondent from RKFL, are in fact limited to samples, however, suffice it to say that even procuring of the samples from RKFL by respondent in May 2023 is in complete contravention of the various obligations under the Master Supply Agreement.”

However, the contention that the parts of which the order is placed on RKFL are different from what has been supplied in the past by the petitioner, is denied by relying upon the compilation of documents placed on record, which has enlisted the parts supplied by the petitioner and it is submitted that they are of similar nature.

14 When the petition was listed before me, for the first time, on 30/6/2023, I recorded the statement made by the learned Senior Advocate representing the respondent and the order reads thus :-

“1. Mr.Kamdar, Sr. Advocate for the respondent has placed on record exchange of communication between the parties and he would submit that there is failure on part of supplier to adhere to the required quantities as are indicated in the purchase order.

2. In contrast, the specific statement is made in the Petition in para 44 to the effect that, even after issuance of termination notice i.e. from 01.02.2023 to 31/05/2023, the petitioner has supplied the goods worth quantum of approximately 11 million parts, having an aggregate value of USD 12.83 Million.

3 Let the learned counsel for the petitioner, place on record a chart reflecting this quantity as indicated in distinct purchase orders.

The respondent is also at liberty to place on record its affidavit.”

15 In furtherance thereof, Mr.Jagtiani has placed on record two tabulated charts; the first reflecting all the supplies made by the petitioner/ supplier to the respondent/company from 20/1/2023 along with the few corresponding purchase order and invoices and the second chart detailing the supplies made to the respondent from 2021, of part similar to those sourced by the respondent from Ramkrishna Forging Limited, along with corresponding purchase order and invoices.

The Chart submitted in Annexure-B refer to distinct products, like the shaft, motor, spindle machine, gear ring, gear idler etc. The purchase order refer to the product, its quantity and the unit price.

In the name of the petitioner supplier, every purchase order mention the P.O number, it's date, payment terms and the shipping date. Annexure 'C' is the table which is in form of a chart of the supplies made by the petitioner to the respondent from 2021 and this include the product 'gear pinion', which is supplied in terms of, from 5/10/2021 onwards, the last supply being datd 27/6/2023. The invoice set out the detail of the product, it's quantity, date and the description of the product. The two products, gear pinion and pinion gear are assigned distinct job numbers, indicating that they are different. The list contains other products i.e. 'pinion drive', 'pinion drive forge' as well as 'ring gear'.

16 In the compilation submitted by Mr.Jagtiani, he has invited my attention to the purchase order with different dates, like 17/11/2022, with the shipment date as 26/1/2023, and an invoice dated 26/5/2023, for pinion drive forge, showing the shipment from Mundra (India). Another purchase order dated 1/1/2023 do not bear the date of delivery, but the whole emphasis of Mr.Jagtiani is on one point, i.e. there is no failure on part of the petitioner to supply the product, for which the order was placed with it's competitor, the said product being 'pinion'. He would therefore assert that the existence of the contingency contemplated for waiving the requirement of the Company, in seeking sourcing forgings from rival groups in India, is not satisfied, as the respondent company has failed to demonstrate that pursuant to the supplier's refusal to quote or supply such items and in this case the pinion, the Company was forced to source the forgings from any other RKFL.

17 From the agreement executed between the parties and the nature of business transacted amongst themselves, it is evident that the respondent as a part of it's business, procures and then supplies various automotive components that go to United States Automotive Manufacture and these components go into manufacturing of the automobile, as a fnal product. Needless to state that whatever component that is to be supplied, has a specifcation and the manufacturer of the automotive have set processes to be followed for development of a new component for their use and this involves a framework of procedure and technique used to develop the product, which may necessarily involve fve phases, (i) Product Planning and Quality Programme Definition, (ii) Product Design, Development and Verifcation, (iii) Process Design, development and Verifcation, (iv) Validation of Product and Process, and (v) Product Launch Assessment and Corrective Action.

The respondent is involved at a stage where the component is to be procured for the end consumer and necessarily, even for a component, howsoever, small it may be, which is to be ultimately consumed into a fnal product and it involve various stages like Planning, Designing, and Development, Sampling, Testing, Validations etc.

It is not difficult to understand that this is a highly controlled process, which is expected to be long drawn and may consume a period of one to two years, when the component reaches mass level production, and when the product is supplied

by the supplier in terms of the MSA, it necessarily involve furnishing quotes for enquiries send by the Company and the supplier shall manufacture products against these enquiries generated or as per custom design provided by the company and then supply the product to the Company or to its customers. As indicated in the affidavit fled by the respondent, distinct parts may take suitable time for a large scale manufacturing from the date of initial sample supply.

18 The question that arise for consideration is whether the Company has sourced the product from RKFL since there was a refusal of the supply or quote or supply such items as contemplated in the Non-compete/Non-solicit clause.

Exhibit G annexed to the Petition is the list of the products, for which the order is placed with RKFL and the product described therein is Gear Pinion Semi-finish/ Gear Ring Semi Finish of the Alloy Steel Forgings. The quantity reflected in the supply order ranges from 46 to 272, as against the product and the shipping address is shown to be USA.

Though the learned counsel Mr.Zubin Behramkamdin for the Respondent has argued and the case of the Respondent in its Affidavit is, the components which have been ordered by the Respondent are only for the purpose of testing and developing and not for commercial sale, this argument deserve to be tested within the bounds of Clause 3, which has imposed an embargo in form of reciprocal obligations upon the supplier as well as the Respondent Company.

The said Clause provide that during the continuation of MSA and for a period of 24 months after its termination for any reason, the supplier shall not sell or solicit business from or conduct business with the customers and similarly, the Company shall not source forgings from any other forging company from India unless the supplier has refused to quote or supply such items.

19 On the very first day of hearing, the Respondent took a stand that the order was placed on RKFL as the Petitioner had refused to make the supply. In the Affidavit fled it on 12.07.2023, as regards Part MEC1968F some correspondence is mentioned and the communication of the Petitioner requesting to cancel the said order from the PO is heavily relied upon. The email addressed by one Mr.Mangesh Kadekar on behalf of the Petitioner to Shri Vijay Raina of the Respondent Company no doubt make a request to the following effect :

"Please re : dated 06.04.2023.. Where we have confirmed that we do not want to continue the supply of both parts MEC1392F and MEC 1968F considering the complexity of the part with very close tolerances and high rejections, after completing the existing orders in hand. In view of this, please cancel the order of this part from PL."

The further trail mails are placed on record with the Affidavit, but definitely this do not relate to the product Pinion, with RFQ No. 102022081 and PO No.112023032.

As far as the product MEC 1968F is concerned, the Respondent has taken a specific stand that there is huge delay in supplying the part effectively leading to

its refusal to supply. Then there is reference to another part i.e. Part no.10461327 and Part No.10391670 in respect of which the Affidavit make a reference to email communications and delay is attributed in supply of this product in year 2022.

20 As regards the Pinions, the product for which the Respondent had approached RKFL , the Affidavit in Reply contains the following averment.

“(h) The emails exchanged between the parties exemplify the petitioner’s deliberate ways of delaying the supply of parts thereby in essence refusing to supply the same to the respondent. On 25.10.2022 the respondent issued a RFQ requesting the petitioner for quotes on four pinion parts. In response the petitioner on 03.11.2022 sends its quotations for the said four parts; pursuant thereto the respondent issued PO for samples of the parts for testing and validation on the basis of the commitments of the petitioner towards delivery schedules. Contrary thereto from 24.11.2022 onwards the petitioner kept revising the delivery schedules and finally shipping one of the parts in second half of May 2023 making it a delay of approximately 23 weeks. The copies of the emails exchanged in this regard from October 2022 to May 2023 are Exhibit G.”

Since the Non Solicit/Non compete clause is invoked by the Petitioner/supplier by relying upon Annexure G, the order that has been placed by the company on RKFL for “Alloy Steel Forging Machined Gear Pinion Semi-Finish” and “Alloy steel Forging Machined Gear Ring Semi -Finish” and the specific case of the Petitioner is it is the same product which was being supplied by it, though the respondent has bluntly denied that these parts are similar. Except making a bald statement that it is not the same product, the Respondent has failed to adduce any convincing proof that it is not so, and therefore, prima facie it can be inferred from Exhibit G as well as the earlier purchase orders placed upon the supplier, that the Respondent has placed order on RKFL in respect of 542 parts of Gear Pinion Semi Finish and 440 parts of Gear Ring Semi-Finish, which is the same product, which were in the past supplied by the supplier.

The Respondent has failed to establish that there was failure to supply the said product, upon the order being placed on the supplier and since these orders are placed on 08.05.2023, it is imperative for the Respondent to establish that the order for the said part/product was placed on the Petitioner and there was a refusal on its part to supply the said part.

The correspondence placed on record by Mr.Jagtiani in form of compilation is for the period of October-November 2022 and January 2023, where there is a discussion about development of some additional parts and some difficulty is expressed, but the email also make a reference to the development of four parts of Pinion coupled with the dispatch of the samples on four distinct dates, three samples for each part.

From the email communication emanating from the Respondent in respect of a new product i.e. ZH Shaft, it is evident that the Respondent has trusted the

Petitioner on the time commitment of 12 weeks and has ordered huge quantity of part APW (12,688 pcs.) and MPW (15,226 pcs.). While granting the approval for the Pinion, though some quibble is expressed over its actual supply, the Petitioner was directed to plan accordingly by taking 6 weeks lead time in place of 8 weeks as quoted.

21 From the entire correspondence placed before me, it is not possible for me to deduce that there was a failure on part of the petitioner to supply the parts which has constrained the Respondent to turn to another forging company in India and as regards Pinion, when the part is already supplied with the discussion entered in the month of December, 2022-January, 2023, without raising the demand of the said product/part upon the petitioner by construing that the delay amounted to refusal, can be no ground to stake a defence for the alleged breach of non compete/non solicitation clause.

22 The Defendant has adopted mutually destructive stands during the course of the proceedings and by fling the additional affidavit a third stand has emerged, i.e. what has been solicited from RKFL is a different product /part of which no details are provided.

The Clause 3 in the Agreement imposes a wider obligation upon the Company as it contemplate that for a period of 24 months after termination of the Agreement, for any reason, the Company shall not source forgings from any forging company and this is not restricted to the part/the product as the Agreement contemplated supply by the supplier pursuant to an enquiry placed, resulting in a product by applying the procedure of forging and clause No.3 is not restricted to any such "Product" but is of a wide amplitude since what is prohibited is operation on a broader canvass as the clause is paraphrased as "it shall not "source forgings" ,which is definitely wider than the 'Product' created by the supplier upon the enquiry generated from the company.

23 When Clause No.3 is meaningfully read, one can notice reciprocal obligations, as far as the supplier is concerned, it is restrained from selling or soliciting business or conduct business with the customers who are introduced by the Company in the whole exercise. Reciprocal to this is the obligation of the Company that it shall not source forgings from any other forging company from India and with such a dynamic clause, operating as 'Non compete/Non solicit' clause, it is not permissible to constrict its effect and accept the submission of Mr.Zubin Behramkamdin.

Apart from this, I am also unable to accept the submission of Mr. Behramkamdin that what the Respondent is only engaged in the activity of calling for samples. In business terms 'sourcing' is understood as a process of selecting suppliers to provide the goods and services, one need to run its business. It would necessarily cover a stage on collecting the quality of the goods and services and as to who can offer the best goods and services.

If the restriction intended to be imposed by Clause 3 is to be given full effect to,

it would necessarily mean imposition of a restraint upon the company from sourcing the forgings and ultimately the Respondent has chosen a supplier, who has supplied the samples not in minuscule quantity but as is evident from Annexure G here is sourcing of 982 parts through 6 air shipments and this definitely cannot be construed to be 'samples' as they would fall within the ambit of "sourcing".

If the clause is to be read as per the understanding of the respondent, then Mr. Jagtiani submit that even the petitioner should be permitted to contact the end customers in USA, to provide samples interalia for the purpose of testing and /or development as the product will be supplied after the expiry of the period mentioned in clause 3 of the MSA.

I do not think the clause of Non compete/ Non solicit, a restrictive covenant, would be permitted to so read. Such a reading would defeat intention of such a clause.

The reliance placed on J. Aron & Co (Incorporated) vs. Comptoir Wegimont (supra) do not take the case of the respondent any further as there can be no doubt about the principle laid down by the Kings Bench Division, but it is not a case established here that there was delay in shipping / delivery of Pinions.

A statement is made on behalf of the Respondent that the parts/which has been sourced from RKFL shall not go into manufacturing process of the automotive is accepted as an undertaking to the Court.

24 In the above circumstances, sourcing 542 parts of "Alloy Steel Forging Machined Gear Pinion Semi-Finish" and and 440 parts of "Alloy Steel Forging Machined Gear Ring Semi-Finish", by the respondent in USA from RKFL in breach of clause 3 of the Master Supply Agreement entered between the parties. The Respondent, must, therefore, be enjoined from sourcing forgings/ parts or products from RKFL and injunction shall operate in terms of prayer clause (a) which reads thus :

"(a) Pass an order of injunction as per the terms of the Master Supply Agreement, restraining the Respondent, its subsidiaries, affiliates office-bearers, members, representatives, agents or anyone acting on its behalf, from sourcing forgings / engineering components/ parts/products from RKFL and/or its subsidiaries, and/or any other forging company / manufacturer / supplier in India other than the Petitioner, and from carrying out business approaching / communicating, either directly or indirectly, knowingly or unknowingly with RKFL and/ or its subsidiaries, and/or other forging companies in India to source forgings/parts /engineering components/ products".

Respondent shall not use the 942 products as components in the automotive, by supplying it to the end user.

CARBPL is made absolute in terms of prayer clause (a).

[BHARATI DANGRE, J]

At this stage, the learned counsel for the respondent, seeks stay of the Judgment, which I deem it appropriate to decline, since the matter has been considered on it's merits and on taking note of the fact that the respondent has indulged in soliciting the forgings from RKFL and, since, it has been held that this would attract clause (3) of the Agreement, I am not inclined to grant any stay.

Request is rejected.