

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.167 OF 2008

Jayabharat Automobiles Limited,)
a company registered under the provisions)
of the Companies Act, 1956 having its)
registered office at Electric Mansion,)
Lucas Near Century Bazar,)
Appasaheb Marathe Marg, Prabhadevi,)
Mumbai 400 025) .. Petitioner

..Versus..

B.R. International, a proprietary firm)
having its office at 20, Sunshine Bldg.,)
Dr. Annie Besant Road, Worli,)
Mumbai 400 018.) .. Respondents

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Mr.Chirag Shah a/w Mr.Rushil Mehta a/w Mr.Dilip Rai i/by Aruna Singh for the Petitioner.

Ms.Mamta Sadh a/w Mr.Yajuvendra Singh i/by Waqar Ahmed for the Respondent.

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CORAM : R.D. DHANUKA, J.

DATE : 29th APRIL, 2015

JUDGMENT :-

. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short the said “Arbitration Act”), the petitioner has impugned the arbitral award dated 14th September 2007 rendered by the learned arbitrator allowing some of the claims made by

the respondent and partly rejecting the counter claims made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are under :

2. The petitioner was the original respondent whereas the respondent was the original claimant in the arbitral proceedings. The petitioner had also filed counter claims against the respondent in the arbitral proceedings. For the sake of convenience, the parties are described in the later part of the judgment as they were described in the arbitral proceedings.

3. The respondent carries on the business of selling cars, accessories and also providing after sales services. The claimant carries on business in the name of his proprietary concern. The claimant carries on the business of importing and selling car's air conditioning systems and accessories.

4. Some time in the month of June 2000, the claimant approached the respondent to allow the claimant to sell the accessories from the showroom of the respondent as the respondent was carrying on the business of selling cars and the claimant was in the business of providing accessories and car air conditioning system. An understanding was arrived at between the parties that the claimant was allowed to approach the respondent's customers and to sell the car accessories which were required to be fitted in the cars as per the customers requirements. The respondent allowed the claimant to occupy a portion of the premises of the respondent to conduct the business activities and to sell car accessories in the premises of the

respondent through the respondent. It is the case of the respondent that it was agreed that no compensation would be charged to the claimant for the initial period of six months till the claimant would establish its business. The respondent was an authorised dealer of Hyundai and was selling cars manufactured by the said Hyundai Company.

5. It is the case of the respondent that at the end of the year 2000, the said Hyundai Company started promoting on a large scale its own accessories through its authorised dealers. The respondent being one of the authorised dealers was offered the accessories manufactured by the Hyundai Company at very reasonable prices. It was, therefore, decided between the parties that the claimant would start purchasing car accessories from the respondent as per requirements of the customers of the respondent. It was agreed between the parties that bills would be raised by either parties and would be adjusted against each others bills towards the payment to be made by either of the parties. The parties used to raise bills for car accessories purchased by either of the parties. It was the case of the respondent that with respect to the bills raised by the claimant, credit was given to the claimant and on payment of the said amount debit was given to the claimant, the entry of the same was made in the ledger accounts of the respondent.

6. It was the case of the respondent that the business generated by the respondent was not upto the mark. The claimant was liable to pay compensation of Rs.30,000/- per month from July 2002. From July 2002, the respondent claimed and recovered compensation of Rs.30,000/- per month from the claimant. It was the case of the

respondent that difference between two accounts showed that the amount payable by the claimant to the respondent towards outstanding and overdue bills was Rs.3,38,144/- i.e. actual outstanding and overdue bills was Rs.4,38,144/- inclusive of Rs.1,00,000/- towards compensation).

7. It was the case of the respondent that in the year 2003, a sharp decline was observed in the sales made by the claimant. The sales of the claimant were going down and no efforts were being made by the claimant to improve the sales. The respondent demanded increase in compensation of Rs.30,000/- per month to Rs.50,000/- from January 2003 onwards. It was the case of the respondent that since the claimant did not show any improvement in the sales, the respondent had no option but to ask the claimant to rescind/cancel the agreement. In the month of 2003, the claimant left the showroom of the respondent. It was the case of the respondent that vide their letter dated 17th October 2003 to the claimant, the respondent called upon the claimant to pay a sum of Rs.26,38,144/-.

8. The claimant vide their advocate's letter dated 21st October 2003 to the respondent, replied to the said letter dated 17th October 2003 and denied the allegations as well as the demand raised by the respondent. By the said letter, the claimant informed that the respondent was liable to pay an amount of Rs.17,52,301.23 to the claimant and called upon the respondent to pay the said amount with interest @24% p.a. The claimant also threatened to file winding up proceedings against the respondent in the said notice issued under Section 434 of the Companies Act, 1956.

9. The respondent vide their advocate's notice dated 13th November 2003 replied to the said letter dated 21st October 2003 and denied the allegations made therein. The respondent alleged that the claimant was liable to pay a sum of Rs.26,38,144/- comprising of a sum of Rs.3,38,144/- alleged to be paid to the respondent, at the foot of the ledger account for the period from January 2003 to May 2003, compensation @ Rs.50,000/- per month and a sum of Rs.22,00,000/- towards alleged non performance and loss towards business not done from April 2001 to May 2003.

10. The claimant by their letter dated 27th March 2004 to the respondent sent reminder to pay outstanding amount of Rs.17,52,300/- after giving credit of Rs.26,50,000/- liable to be paid to the respondent by the claimant for the supply of auto accessories during the period 2000-2003. The claimant also made it clear that if the respondent was not comfortable to meet the claimant, the claimant would like that an arbitrator be appointed. On 20th April 2004, the respondent addressed a letter to the claimant and informed that the matter was in the hands of their advocate and the respondent was thus not in a position to look into the matter except calling upon the claimant to make the payment of Rs.26,50,000/-. The respondent was contended that nothing was due and payable by the respondent to the claimant.

11. On 23rd November 2004, the claimant through their advocate issued a notice to the respondent and informed that in view of various statements of accounts submitted which were duly verified by the respondent, a sum of Rs. 38,71,606.23 was due and payable under

the running bills from 12th June 2003 to 27th June 2003, a sum of Rs.50,000/- was lying as security deposit as per letter dated 11th May 2001, a sum of Rs.90,000/- was due and payable for the showroom display furniture and aggregate sum of Rs.40,11,606.23. By the said notice, the claimant called upon the respondent to pay a sum of Rs. 52,95,314/- with interest on Rs. 40,11,606.23. There was no response to the said notice issued by the claimant.

12. Some time in the year 2005, the claimant filed a Summary Suit being No.1482 of 2005 against the respondent, inter alia, praying for an amount of Rs.24,70,038.50 with interest @24% p.a. from the date of filing of suit till payment. Some time in the year 2005, the claimant filed a Company Petition being No.229 of 2005 against the respondent in this Court.

13. By an order dated 8th August 2005 passed by this Court in Company Petition No.229 of 2005, the disputes between the parties in company petition as well as in summary suit were referred to arbitration. The company petition was to be treated as statement of claim of the claimant and the suit filed by the claimant was to be treated as statement of claim (counter-claim) of the respondent.

14. Before the learned arbitrator, both the parties led oral evidence. The claimant examined their sole proprietor Mr.Vinay B. Khanna who filed his affidavit in lieu of examination-in-chief along with documents. The respondent examined Mr.Chandrabali C. Prajapati who filed his affidavit in lieu of examination-in-chief along with documents. Learned arbitrator marked various documents as exhibits

after hearing both the parties. Both the witnesses were cross-examined before the learned arbitrator.

15. On 14th September 2007, learned arbitrator made an award allowing the claim of the claimant of Rs.38,71,606.23 with interest @6% p.a. from the date of reference till payment. Learned arbitrator rejected the claim of the respondent in respect of damages and also the amount of Rs.3,38,144/-. Learned arbitrator, however, allowed the claim of Rs.1,00,000/- made by the respondent towards compensation and directed the claimant to pay the said amount with interest @6% p.a. The respondent has impugned the said award dated 14th September 2007 in this petition. The claimant did not challenge any portion of the award.

16. Mr. Shah, learned counsel for the respondent invited my attention to various correspondence referred to aforesaid and also to various portions of the oral evidence led by both the parties, findings rendered by the learned arbitrator in the impugned award. It is submitted by the learned counsel that though the notice of demand was issued by the respondent to the claimant, the learned arbitrator marked the said document for identification and did not mark the same as exhibit. He submits that in view of chain of correspondence exchanged between the parties and in view of the respondent having proved the other correspondence, the learned arbitrator ought to have marked the said notice of demand also as exhibit.

17. Learned counsel submits that the claimant was demanding

different amount from the respondent in their correspondence which would show that there was inconsistency in the claim made by the claimant against the respondent. He submits that in the winding up petition which was treated as statement of claim of the claimant, the claimant had claimed amount even higher than what was demanded in the correspondence from time to time. He submits that though the learned arbitrator himself had observed in paragraph 13 of the impugned award that from pleadings filed by the claimant, the amount claimed did not tally with the demand notice issued to the respondent, nor in the affidavit in lieu of examination-in-chief, the learned arbitrator considered such higher amount of claimant in the statement of claim and thus, the awarded sum in favour of the claimant.

18. Learned counsel for the respondent invited my attention to ledger accounts maintained by the respondent for the period from 1st April 2002 to 31st March 2004 and would submit that there was a debit balance in the account of the claimants in the sum of Rs.9,97,643/- which was due and payable by the claimant to the respondent. According to the respondent, the claimant was liable to pay net amount of Rs.3,38,144/- to the respondent under the said ledger account.

19. Learned counsel for the respondent submits that the claim of the claimant has been allowed by the learned arbitrator based on the statement of bills submitted in the arbitral proceedings which were admittedly not supported by production of original bills. He submits that merely on the basis of statement of bills, learned arbitrator could not have allowed the claims made by the claimant. In support of this

submission, the learned counsel invited my attention to various portions of the oral evidence led by the claimant.

20. Learned counsel for the respondent submits that though the learned arbitrator marked all the ledger accounts produced by the witness examined by the respondent as exhibits, he has not considered all the entries of the said ledger accounts produced by the respondent in the impugned award. He invited my attention to some portions of the impugned award and would submit that the learned arbitrator has accepted only those entries which reflected the amount paid by the claimant to the respondent and did not consider the other entries which would reflect the amount paid by the respondent to the claimant. He submits that the learned arbitrator could not have marked selected entries from the ledger accounts and ought to have considered the entire ledger accounts in the impugned award. He submits that if the learned arbitrator would have considered the entire ledger accounts in the impugned award, the learned arbitrator would have rejected the claim made by the claimant and would have allowed the counter-claim made by the respondent. It is submitted by the learned counsel that none of the contentions raised by the respondent has been considered by the learned arbitrator in the impugned award. On that ground also, the impugned award shall be set aside.

21. Learned counsel for the respondent submits that though the respondent had called upon the claimant to produce relevant copies of the invoices alleged to have been issued by the claimant, the witness examined by the claimant admittedly did not produce those copies of

the invoices and thus the claim made by the claimant was not proved. The learned arbitrator has allowed unproved claim of the claimant. The award thus deserved to be set aside.

22. Mr.Sadh, learned counsel appearing for the claimant, on the other hand, invited my attention to various pleadings, documents and oral evidence led by both the parties and supported the findings rendered by the learned arbitrator in the impugned award. She submits that in so far as the claim made by the respondent before the learned arbitrator is concerned, the same was in three parts. Since the respondent failed to prove their claim for damages as well as for payment for car accessories, the learned arbitrator has rightly rejected those claims and only allowed the claim of Rs.1,00,000/- towards monthly compensation demanded by the respondent at higher amount. She submits that the learned arbitrator has rendered various findings of facts which are not perverse and thus this Court cannot interfere with such findings of facts under Section 34 of the Arbitration Act.

23. Learned counsel for the respondent submits that even if the notice demanding Rs.26,00,000/- by the respondent which was not proved by the respondent would have been marked as exhibit, since the respondent ultimately could not prove the said claim of Rs.26,00,000/-, no prejudice has been caused to the respondent.

24. In so far as the alleged inconsistencies in the amount claimed in the notice and statement of claim is concerned, it is submitted by the learned counsel that initially the claimant had made

the claim of about Rs.17,00,000/- only. However later on, on the basis of verification of the bills, the claimant had revised their claim to Rs.40,00,000/- approximately and had demanded interest thereon.

25. In so far as the submission of the learned counsel for the respondent that the claimant had not submitted the originals invoices referred in the statement of the bills submitted by the claimant is concerned, learned counsel for the respondent invited my attention to those entries made in the statement of bills and also to the ledger accounts produced by the respondent themselves and would submit that each and every such bills referred in such statement of bills is reflected in the ledger accounts produced by the respondent themselves. She submits that all such entries in the ledger accounts produced by the respondent themselves were reflected what were shown in the statement of bills produced by the claimant and could not have been disputed by the respondent.

26. Learned counsel for the respondent submits that in the said ledger accounts produced by the respondent, the respondent had made large number of general voucher entries which were disputed by the claimant. She submits that general voucher entries which were not supported by the documents could not be proved by the witness examined by the respondent before the learned arbitrator. She invited my attention to major portion of the oral evidence led by the witnesses examined by the respondent on this issue. In so far as the payments alleged to have been made by the respondent to the claimant as reflected in the said ledger accounts were concerned, the said witnesses

could not explain those general voucher entries and also could not produce other supported documents in support of those payments alleged to be paid by the respondent to the claimant.

27. Learned counsel submits that the learned arbitrator did not allow the claim made by the claimant only on the basis of selected entries in the said ledger accounts which was reflecting the payment made by the claimant to the respondent but the award is based on the appreciation of the entire evidence. It is submitted that since the award is based on appreciation of such oral evidence and finding of fact rendered is not perverse, no interference is permissible under Section 34 of the Arbitration Act.

28. Learned counsel for the claimant submits that the claimant had not only proved their case independently by examining their own witness but also proved their case by cross-examining the witness of the respondent. Both the parties have made their respective claim in the arbitral proceedings. Learned arbitrator has thus considered the entire evidence in the impugned award. She submits that this Court has to consider the entire evidence as a whole and not any particular part of evidence, on the basis of which the learned counsel for the respondent has sought to point out alleged inconsistencies.

29. Learned counsel for the claimant placed reliance on the judgments of the Supreme Court in the cases of ***J.G. Engineers Private Limited Vs. Union of India and Anr.***, reported in (2011) 5 SCC 758, ***Delhi Development Authority Vs. R.S.Sharma and Company, New***

Delhi, reported in **(2008) 13 SCC 80, Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.**, reported in **(2006) 11 SCC 181** and also the judgment of the Madras High Court in the case of **The Chairman, Guindy Industrial Estate Infrastructure Upgradation Company Vs. Gurumurthy Engineering Enterprises, Civil Engineering Contractors and Ors.**, reported in **2012 (4) Arb.L.R. 185 (Madras)** in support of her submission that the findings of facts rendered by the learned arbitrator based on appreciation of the evidence cannot be interfered with unless the such findings are perverse. Those judgments are also relied upon in support of the submission that the Court cannot interfere with the pure question of fact under Section 34 and scope of the said provisions to interfere with the arbitral award is very limited. This Court cannot correct the errors of the learned arbitrator.

30. Mr.Shah, learned counsel for the respondent in the rejoinder submits that since the learned arbitrator himself had marked all the ledger accounts produced by the respondent as exhibits 'R1' to 'R4', the learned arbitrator could not have discarded any portion of the said ledger accounts and ought to have considered the entire ledger accounts as proved. He submits that there was no cross-examination of the witness examined by the respondent in so far as the entries made by the respondent from 1st April 2001 to 31st March 2002 was concerned. In his rejoinder arguments, learned counsel for the respondent did not seriously press the relief in so far as the rejection of the two claims made by the respondent in the arbitral proceedings by the learned arbitrator is concerned.

REASONS AND CONCLUSIONS :-

31. It is not in dispute that both the parties had filed separate proceedings against each other arising out of the same transactions between each other. The dispute raised by and between the parties in these proceedings were referred to arbitration by an order passed by this Court. The pleadings filed by both the parties in those proceedings were considered as their respective claim. Both the parties were also allowed to lead oral evidence by the learned arbitrator.

32. Some of the documents produced by the respondent were disputed by the claimant which were marked for identification by the learned arbitrator. The learned arbitrator framed seven issues. The learned arbitrator has held that it was an admitted position that there was oral understanding arrived at by and between the parties wherein the claimant was allowed to sell the car accessories and spare parts from the showroom or from the Accessories Counter at Prabhadevi and at Sewri which were necessarily required to be fitted as per the customer requirements of the respondent. It is held that it was also an admitted position that initially no compensation of whatsoever nature was to be charged from the claimant till the claimant generated the business. It is held that the claimant had supplied spare parts and accessories till Hyundai entered into market as a competitor. In so far as the notice dated 14th November 2003 alleged to have been addressed by the advocate of the respondent is concerned, the respondent could not prove the existence and contents of the said notice. The respondent did not prove the receipt of the said demand notice by the claimant. The said document was thus marked 'X' for identification by the learned arbitrator.

33. In so far as the submission of the learned counsel for the respondent that the said document was one of the documents and was one in chain of the other correspondence, the learned arbitrator ought to have marked that document as exhibit is concerned, in my view, since the respondent did not prove the factum of delivery of the said letter, the learned arbitrator rightly did not mark the said document as exhibit. Be that as it may, the respondent failed to prove their claim before the learned arbitrator even by leading the oral evidence. It is thus clear that even if the said document had not been marked as exhibit, since the respondent had led evidence in support of their entire claim including the ledger accounts, merely because the said notice had not been marked as exhibit, it would not cause any prejudice to the case of the respondent and would not improve the case of the respondent any further. In my view, there is thus no merit in this submission of the learned counsel for the respondent.

34. In so far as the submission of the learned counsel for the respondent that the learned arbitrator having marked the entire ledger accounts as exhibits and thus the entire ledger accounts ought to have been considered as proved and not any particular entries from such ledger accounts is concerned, in my view, merely because the document is marked as exhibit, the contents thereof are not automatically proved. The claimant had disputed several entries reflected in such ledger accounts. In my view, since some of the entries in the ledger accounts were disputed by the claimant, the onus was on the respondent to prove the correctness of each of such entries before the learned arbitrator.

35. A perusal of the cross-examination of the witness examined by the respondent clearly indicates that there was cross-examination of the witness not only on the entries reflecting the payment made by the claimant but also on various entries by which the respondent had alleged to have been made the payments to the claimant and/or adjusted the amount alleged to have been due to the respondent from the claimant. Though the said witness admitted all such entries which had reflected payments made by the claimant to the respondent and though the respondent was thus called upon to support the other entries, by way of journal vouchers entries, the said witness could not prove any of those entries in the cross-examination.

36. A perusal of the impugned award indicates that the learned arbitrator has allowed the claim made by the claimant not only on the basis of the admission of payment made by the witness of the respondent but has considered the overall evidence in the impugned award. My attention is also invited to various portions of the oral evidence led by the respondent. With the assistance of the learned counsel for the respondent, I have gone through almost the entire evidence though was not necessary for deciding the petition under Section 34 of the Arbitration Act and have noticed that witness examined by the respondent has failed to produce any supporting documents in support of their claim made against the claimant including the claim based on journal vouchers entries.

37. I am thus not inclined to accept the submission of the learned counsel for the respondent that the learned arbitrator has

allowed the claim of the claimant based only on the some selected entries which would reflect the payments made by the claimant to the respondent and has overlooked the entries which had alleged to have proved the payments made by the respondent to the claimant. Be that as it may, the findings rendered by the learned arbitrator, in my view, are based on the appreciation of evidence led by both the parties which findings are not perverse. This Court cannot re-appreciate the evidence under Section 34 of the Arbitration Act and cannot interfere with such findings of fact which are not perverse.

38. In so far as the submission of the learned counsel for the respondent that there was inconsistency in the amounts claimed by the claimant in the correspondence and in the company petition which was treated as statement of claim is concerned, in my view, learned counsel for the claimant is right in her submission that the claimant had claimed higher amount in the notice before filing the company petition and the same was also reflected in the company petition which was based on the scrutiny and verification of the bills. Be that as it may, the claimant could always amend their claim before the learned arbitrator subject to period of limitation. There is thus no merit in this submission of the learned counsel for the respondent.

39. In so far as the submission of the respondent that the learned arbitrator could not have awarded the claim made by the claimant only on the basis of the statement of bills is concerned, a perusal of the record indicates that the entries referred in the statement of bills were also reflected in the ledger accounts by the respondent

themselves. In the cross-examination of the witness examined by the respondent, the said witness had admitted all such entries reflecting the payments made by the claimant to the respondent. A party can prove his case by examining his own witness and also by cross-examining the witness examined by the other party. In this case, the claimant had proved their case by examining their witness and also by confronting the witness examined by the respondent with the statement of bills and in view of the said witness having admitted the payments made by the claimant to the respondent, the claimant had proved their case even by cross-examination. The learned arbitrator has considered the oral evidence led by both the parties. In my view, since the witness examined by the respondent himself has admitted the receipt of various payments made by the claimant to the respondent, merely because those invoices were not produced by the claimant, it would not prove the case of the respondent otherwise. In my view, there is thus no merit in the submission of the learned counsel for the respondent.

40. In so far as the rejection of two claims of the respondent by the learned arbitrator is concerned, a perusal of the record indicates that the respondent could not prove any of those claims though had examined a witness. The witness examined by the respondent admitted before the learned arbitrator that he had not produced any documents to justify his claim. The witness examined by the respondent could not prove that under the agreement entered into between the parties, the claimant was bound to carry on business of any particular amount as guaranteed sum and in case of any short fall, the claimant was liable to pay the difference in margin, if any, to the respondent. Be that as it may, in his

rejoinder arguments, Mr. Shah, learned counsel for the respondent fairly conceded that the respondent was not pressing relief in respect of rejection of those two claims by the learned arbitrator is concerned. Since the claimant herein has not challenged the award of Rs.1,00,000/- in favour of the respondent, this Court need not go into that issue in this judgment. There is no merit in the submission of the respondent that the learned arbitrator has not considered any of the submissions of the respondent.

41. In so far as three judgments of the Supreme Court and judgment of the Madras High Court relied upon by the learned counsel for the claimant referred to aforesaid are concerned, all the aforesaid judgments supports the case of the claimant and squarely applies to the facts of this case. I am of the view that the findings rendered by the learned arbitrator are not perverse and are rendered after considering the pleadings and oral as well as documentary evidence and thus cannot be interfered under Section 34 of the Arbitration Act. This Court cannot re-appreciate the evidence considered by the learned arbitrator. Jurisdiction of the Court under Section 34 is supervisory and not appellate. In my view, the petition is devoid of merits.

42. I, therefore, pass the following order:-

- a) The Arbitration Petition No.167 of 2008 is dismissed.
- b) There shall be no order as to costs.

R.D. DHANUKA, J.