IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.08.2016

DELIVERED ON : 09.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE **RAJIV SHAKDHER**

C.P.No.362 of 2015

GMS Motors Private Limited,
B-9, Housing Society,
NDSE-1, New Delhi-110 049. .. Petitioner

Vs.

Nissan Motor India Private Limited,
Plot No.1A, SIPCOT Industrial Park,
Mattur Post, Oragadam,
Sriperumbudur Taluk,
Kancheepuram District – 602 105

also at Nissan Motor India Private Limited,
ASV Ramana Towers,
37 & 38, Venkatanarayana Road,
T. Nagar, Chennai – 600 017. .. Respondent

**Preayer :** Petition filed under Sections 433(e) and Section 434(1)(a) of the Companies Act, 1956 praying (a) that the respondent company, i.e., Nissan Motor India Private Limited, a company incorporated under the Companies Act, 1956 having its registered address at Plot No.1A, SIPCOT Industrial Park, Mattur Post, Oragadam, Sriperumbudur Taluk, Kancheepuram District, PIN Code – 602 105, be wound up by and under the orders and directions of this Court under the provisions of the Companies Act, 1956 ; and (b) the Official Liquidator of this Hon'ble Court be appointed Liquidator of the respondent Company with all powers under Section 457 of the Companies Act, 1956 to take charge of the assets, business affairs, properties, bank accounts, books of account vouchers, documents, etc., of the respondent company with all powers under the provisions of the Companies Act, 1956.

| | | |
|---|---|---|
| For Petitioner | : | Mr.V.Raghavachari<br>assisted by Mr.Avinash Wadhwani |
| For Respondent | : | Mr.G.Kalyan Jhabakh<br>for M/s.Surana and Surana |

**<u>O R D E R</u>**

1. This is a petition, effectively, filed under Section 433(e) of the Companies Act, 1956 (in short "the 1956 Act").

2. The petitioner is a company by the name of GMS Motors Private Limited (hereinafter referred to as "GMS"), which claims, in a nutshell, recovery of dues from the respondent company, i.e., Nissan Motor India Private Limited (hereinafter referred to as "Nissan") in respect of warehousing charges qua vehicles parked and maintained at its warehouse located at Maljipada, Vasai, Mumbai.

2.1. It is GMS's case that it has leased out the entire warehouse, which has an area of 15,000 sq.ft. at an agreed rent of Rs.22/- per sq. ft. per month. Since GMS was required to take care of vehicle parked therein, the charges leviable are compendiously described as maintenance charges.

2.2. GMS, thus, claims unpaid dues for the period commencing from February 2013, up till, the stage, when the captioned petition was instituted in this Court. According to GMS, arrears towards maintenance charges had mounted to a figure of Rs.1,07,58,664/-. In addition, GMS has also claimed interest at the rate of 24% per annum.

2.3. The aforesaid, in a nutshell, is the gravamen of the charge laid by GMS against Nissan.

3. Before I proceed further, let me sketch out the broad facts, which obtain in the present case :

3.1. Nissan, which is, *inter alia,* in the business of manufacture and sale of vehicles, apparently, imported vehicles, were referred marketed as "X-Trials". These vehicles, after they were discharged at the NhavaSheva Port at Mumbai, were parked in a stockyard managed by an entity by the name of TVS. This stockyard was located at Bhiwandi in Mumbai.

3.2. It appears that the arrangement that Nissan had with TVS came to an end, on expiry of lease, with the said entity. At this point in time, attempts were made for arriving at an arrangement between GMS and Nissan.

3.3. GMS, which is a public limited company, had amongst its shareholders, two shareholders, namely, Mr.Sumeet Nindrajog and his brother Mr.Praveen Nindrajog. The record shows that Sumeet Nindrajog was also a point person of another entity by the name of Hover Autmotive India Private Limited (hereafter referred to in short as "Hover"). Hover, was the distributor for vehicles manufactured by Nissan. It appears that, since, Mr.Sumeet Nindrajog was the common link between Hover and GMS, he suggested to Nissan that he could obtain warehousing facilities at the GMS warehouse.

3.4. As a matter of fact, the record shows that GMS itself had taken the warehouse located in Maljipada, Vasai, Mumbai, on lease which is to end in the usual course in November, 2028. It was this very warehouse, which was sought to be made available, via Mr.Sumeet Nindrajog to Nissan.

3.5. It was, thus, in this connection, that an attempt was made to execute a written agreement so as to provide the said warehouse for extending, what were termed as, maintenance services by GMS to Nissan. The proposed agreement envisaged, not only that, GMS provide space for parking the vehicles, but that, it would also ensure upkeep of the vehicles parked in the warehouse.

3.6. The record shows that though a draft agreement was exchanged between the representatives of GMS and Nissan, no written agreement was executed. The record also reveals that GMS had at one point, agreed that the vehicles could be parked at the warehouse with effect from July 2012.

3.7. As a matter of fact, vehicles were parked and upon invoices being raised, the payments were made by Nissan. The record further shows that this arrangement, which was not based on any written agreement, obtained till January 2013. Even according to GMS, it has received payments till January 2013.

3.8. As indicated right at the outset, GMS is claiming payment of dues towards maintenance services provided with effect from February 2013 ; a demand, qua which, continues to date.

3.9. GMS has filed, with the petition, a voluminous set of documents, which are, communications exchanged between the parties to demonstrate that there was an agreement between the parties, and, that, against maintenance services rendered by GMS, it had to be paid dues at the rate of Rs.3,30,000/- per month.

4. On the other hand, the stand of Nissan is that it wanted to terminate the arrangement at the end of January 2013 as the maintenance charges were too high and, therefore, had taken a decision to shift the vehicles, from the GMS warehouse.

5. Therefore, to my mind, what is required to be examined in this petition is : Whether Nissan is liable for payment of maintenance

charges qua the vehicles parked in the GMS warehouse for the period commencing from February 2013 ?

6. Before I do so and in order to complete the narrative, it may be relevant to mention that GMS had sent its first demand notice to Nissan on 27 May, 2014. Via this demand notice, GMS averred that its arrangement with Nissan commenced from July 2012, and that, payments were made by Nissan, within reasonable time, albeit, till November 2012. GMS, further indicated that while, there was a delay in payments, for the period beginning from December 2012, with persistent follow up, all dues were cleared, till the month of January 2013, though, by March 2013.

6.1. It was further stated in the very same communication that, since, Nissan had indicated that it wanted to discontinue the arrangement, with effect from February, 2013, the said position was accepted, despite which, Nissan instead of removing the seven (7) vehicles parked at its warehouse, went on to park another five (5) vehicles in the warehouse. In other words, GMS averred that it was, as a matter of fact, maintaining twelve (12) vehicles at its warehouse.

6.2. On account of non-payment of maintenance charges, from February, 2013, GMS claimed a sum of Rs.59,32,608/- for the period spanning between February, 2013 and May, 2014, along with interest at the rate of 24 % per annum.

6.3. GMS, followed the aforementioned demand by a formal notice, sent via its Advocate, which is dated 22 September, 2014. In the said notice, GMS reiterated that it was holding on to 12 vehicles. The monetary claim, via this notice, stood by now, enhanced to Rs.70,44,972/-. This claim is made for the period commencing from February, 2013 till August, 2014 ; in addition, interest at the rate of 24% per annum, is also demanded.

6.4. Nissan, vide a communication dated 17 December, 2014, sent via its Attorneys, replied to the legal notice of GMS. In short, Nissan denied its liability to make the payment. Nissan called upon GMS to produce the copy of the agreement, as there was an assertion with respect to this aspect, in the legal notice dated 22nd September, 2014. It was also asserted, on behalf of Nissan, by its Attorneys that disputes had arisen between Hover and itself, and Hover and GMS had Common Directors. More importantly, details of the twelve (12) vehicles parked at the warehouse of GMS, was sought along with the relevant documents.

6.5. Pertinently, via this communication, Nissan, whilst, denying its liability to make any payment to GMS, indicated that it was, as a gesture of goodwill, ready and willing to remove the twelve (12) vehicles ; purportedly, parked at the GMS warehouse, once details qua them were received.

6.6. Evidently, Nissan did not want to elaborate too much on merits of the case, in view of its pending dispute with Hover.

6.7. GMS, by a written communication, which is, incidentally, also dated 17 December, 2014, for the first time, sought to clarify that it had erroneously in its earlier communications of 27 May, 2014 and 22 September, 2014, alluded to the fact that twelve (12) vehicles were parked in its warehouse. GMS, thus, sought to emphasise the fact that there were only seven (7) vehicles parked in its warehouse.

6.8. Furthermore, in this communication, GMS gave the details of the seven (7) vehicles parked. The information given pertained to :

the make and model of the vehicle ; the Colour ; the Chassis Number ; and the Engine Number. By this communication, once again, GMS reiterated its demand for payment of dues. It gave time till 31 December 2014 to pay upto the amounts, failing which, it put Nissan to notice that it would face requisite consequences for its inaction.

6.9. The aforesaid communication was followed by yet another communication dated 23 December, 2014. GMS, via this communication, in no uncertain terms informed Nissan that it would be exercising its right to retain the seven (7) vehicles, till such time, the entire sum equivalent to Rs.85,28,124/- were paid to it ; which were dues, according to it, payable for the period spanning between February, 2013 and 31 December, 2014.

7. On, 05 January, 2015, Nissan sent a reply to the earlier communication of GMS, dated 17 December, 2014. Via this communication, Nissan relied upon its counsel's reply of even date, i.e., 17 December, 2014. In this communication, Nissan reiterated the fact that no amount was payable to GMS. This stand, taken by Nissan, was pivoted on the e-mail dated 28 January, 2013 addressed by Mr.Sumeet Nindrajog of Hover to, one Mr.John Kullu, an employee of

Nissan. Based on the said communication, Nissan indicated to GMS that Hover had taken upon itself the responsibility of selling the seven (7) vehicles parked in the GMS warehouse.

7.1. Pertinently, the e-mail of 28 January 2013 would show that this responsibility was taken up by Hover with effect from February, 2013 and, accordingly, it was indicated to Nissan that it need not worry about making payment for the maintenance charges or even take the trouble of finding a new place.

7.2. Evidently, the endeavour of GMS to recover its dues did not rest with the aforesaid communication, and therefore, it served a statutory notice dated 13 January, 2015 on Nissan via its Advocates. This statutory notice was followed by yet another statutory notice ; this time sent by another Advocate, which is dated 06 April, 2015. GMS, via this notice, called upon Nissan to pay a sum of Rs.96,40,888/-, which were, according to it, dues payable for the period spanning between February 2013 and 31 March, 2015 ; as in the past, interest at the rate of 24% p.a. was demanded.

7.3. As indicated at the outset, the said amount got enhanced to a figure of Rs.1,07,58,664/- by the time, the petition was presented in this Court, on 30 June, 2015.

8. Upon notice being issued, Nissan filed its counter-affidavit. Nissan, in its counter-affidavit, pivoted its defence to the claim raised by GMS, on the following communications :

i. e-mail, dated 28 January, 2013, exchanged between Mr.John Kullu and Mr.Sumeet Nindrajog ;

ii. e-mail, dated 28 January, 2013, sent by Mr.Sumeet Nindrajog of Hover to Mr.John Kullu of Nissan, with copies to Mr.Sachin Damle of GMS ;

iii. e-mail, dated 31 January, 2013, sent by Mr.Sachin Damle of GMS to Mr.Agrasen Singh of Nissan, with copies to Mr.Hardik Dodia of GMS, Mr.John Kullu of Nissan and Mr.Sumeet Nindrajog of Hover ;

iv. e-mail, dated 14 February, 2013, sent by Mr.Sachin Damle of GMS to Mr.John Kullu of Nissan, with copies to Mr.Agrasen Singh of Nissan, Mr.Hardik Dodia of GMS and Mr.Sumeet Nindrajog of Hover ; and

v. lastly, e-mail, dated 14 March, 2013, sent by Mr.Sachin Damle of GMS to Mr.Agrasen Singh of Nissan, Mr.John

Kullu of Nissan and Mr.Hardik Dodia of GMS, with a copy to Mr.Sumeet Nindrajog of Hover.

8.1. Based on these communications, the stand taken by Nissan, in brief, is, that it was agreed that no dues would be payable for the vehicles parked in the GMS warehouse, since, Mr.Sumeet Nindrajog had taken the responsibility of selling the vehicles. This stand of Mr.Sumeet Nindrajog was in the knowledge of GMS, which had accepted the fact that, once, the payments had been made till January 2013, nothing was due and payable by Nissan.

8.2. Nissan, therefore, contended that this petition had been filed with malafide intent to coerce Nissan into making payments, which were not due and payable.

8.3. The fact that Mr.Sumeet Nindrajog was involved in the arrangement, and, that, he was inextricably linked with GMS, was sought to be established by referring to the annual returns filed by GMS, which indicated that both Mr.Sumeet Nindrajog and his brother Mr.Praveen Nindrajog had an equity stake in GMS equivalent to 5.55% and 8.31% respectively, as on 31.03.2015.

8.4. Furthermore, Nissan also relied upon the Linkedin profile page of Mr.Sumeet Nindrajog to establish that he claimed that he was the owner of GMS between October, 2005 and April, 2015 and, the Executive Director of Hover between September, 2008 and August, 2013.

8.5. In sum, it is the stand of Nissan that invoices raised by GMS for payment of dues for the period commencing from February, 2013 were not payable, and that, it had time and again indicated to GMS that it was willing to remove the vehicles from its warehouse. According to Nissan, GMS has wrongly linked the payments of dues with the removal of vehicles from the warehouse.

9. Based on the aforesaid, arguments on behalf of GMS were advanced by Mr.V.Raghavachari, assisted by Mr.Avinash Wadhwani, while on behalf of Nissan submissions were made by Mr.G.Kalyan Jhabakh.

10. It was submitted, on behalf of GMS, that on account of the arrangement obtaining with Nissan, it was obliged to make payment of maintenance charges for the period commencing from February, 2013

and, as the vehicles continued to be parked and maintained by GMS, the liability continued to accrue.

10.1. It was submitted that the reference to communication exchanged with Mr.Sumeet Nindrajog by Nissan was a red-herring, only to avoid liquidation of an admitted liability. As in the past, since, parties had agreed that maintenance charges will be paid at the rate of Rs.3,30,000/- per month, Nissan was obliged to honour the arrangement arrived at with GMS in that behalf. In other words, it was submitted that any assurance given by Mr.Sumeet Nindrajog to Nissan could not bind GMS.

11. On the other hand, Mr.G.Kalyan Jhabakh, who appeared for Nissan, contended that the entire attempt of GMS was to arm-twist Nissan into making payments, which were clearly, not payable.

11.1. It was the learned counsel's submission that due to pending litigation with Hover, this petition was being used to mount pressure on Nissan to fork out moneys, which, otherwise it was not liable to pay. Learned counsel submitted that Nissan has time and again called upon GMS to allow removal of subject vehicles ; an exercise which, GMS, has thwarted by linking the removal of vehicles to the payment of dues, which are, according to Nissan, not payable.

11.2. Learned counsel for the respondent says that the captioned petition has been filed with a malafide intent, and hence, deserves to be dismissed with costs.

**REASONS :**

12. I have heard the learned counsel for the parties and perused the record.

13. What has emerged on a perusal of the record is as follows :

13.1. There was no written agreement executed between GMS and Nissan ; contrary to what was sought to be suggested by GMS's Advocate, Mr.Pushkar P.Patankar, in his notice, dated 22 September, 2014.

13.2. I have carefully used the word “suggested”, as the notice while alluding to the fact that a warehousing agreement was entered into between GMS and Nissan in the year 2012, has not used the expression “written agreement”.

13.3. Notwithstanding the absence of a written agreement, an arrangement did obtain between GMS and Nissan, whereby, Nissan parked its vehicles in the Maljipada warehouse of GMS, qua which, invoices were raised between July, 2012 and January, 2013.

13.4. Nissan, admittedly, has made payments to GMS, till January, 2013, for the warehousing facilities provided by GMS.

13.5. That Mr.Sumeet Nindrajog was involved in forging this arrangement between GMS and Nissan, is fact, which is evident on perusal of e-mail dated 14 June, 2012 sent by, one, Mr.Rajiv Gupta of Hover to Mr.Prafulla Kodule of Nissan, with copies to Mr.John Kullu of Nissan and Mr.Harish Hegde of GMS. This is an e-mail, which is indicative of the fact that an agreement was drafted, to which, Mr.Rajiv Gupta made changes and had them conveyed to Mr.Prafulla Kodule.

13.6. There is yet another e-mail dated 15th June, 2012, sent by Mr.Agrasen Singh to Ms.Reshma Ravindran on this aspect of the matter and, a return e-mail from Ms.Reshma Ravindran with regard to her comments on the agreement.

13.7. Briefly put, the parties, at that stage were grappling with two issues : firstly, as to whether or not GMS was to provide handling equipment ; and, secondly, as to whether or not the agreement should provide for jurisdiction with the Courts in Chennai.

13.8. There is an e-mail of the very same date, i.e., 15 June 2012, on record, sent by Mr.Agrasen Singh to Ms.Reshma Ravindran, wherein, he clarifies that Nissan would not require any specific equipment for handling vehicles, and therefore, he had removed the provision made in the draft agreement for levying manpower charges.

13.9. There is also yet another e-mail, dated 28 June 2012, on record, which, apparently, emanated from Ms.Reshma Ravindran and was directed to Mr.Agrasen Singh, whereby it was indicated that the agreement would provide only for rental.

14. Mr.Agrasen Singh of Nissan seems to have sent an e-mail dated 01 August, 2012 to Mr.Harish Hegde of GMS, which includes, the comments of its legal department. There is also a suggestion that he had forwarded the mail to, one, Mr.Rajiv, which, incidentally, he was not able to locate. To my mind, the reference to Mr.Rajiv, here, could only be Mr.Rajiv Gupta of Hover.

14.1. In sum, the aforementioned e-mails are suggestive of the fact that at a point in time when GMS and Nissan were trying to forge an agreement, there was involvement of Hover, which, admittedly, is a company, in which, Mr.Sumeet Nindrajog was the point man.

15. Therefore, logically the next aspect, which requires examination from here on is : Did Mr.Sumeet Nindrajog communicate to Nissan that, from February 2013, it need not pay maintenance charges in respect of vehicles parked in the GMS's warehouse ?

15.1. In this regard, the following e-mails have great relevance :

15.2. The first e-mail in point of time is the e-mail dated 28 January, 2013, written by Mr.John Kullu of Nissan to Mr.Sumeet Nindrajog of Hover, which reads as follows :

"Dear Sumeeet San,

**We are planning to shift the Xtrails from GMS stockyard to alternate location from Feb 1st. For 7 units the rentals is too high.**

We will be closing the pending payments shortly.

Best regards."

(emphasis is mine)

15.3. The aforestated e-mail was sent at 8.01 p.m., on 28 January, 2013. Response thereto was sent, on the very same date at 8.15 p.m. by Mr.Sumeet Nindrajog to Mr.John Kullu, which reads as follows :

"**From:** Sumeet [mailto:Sumeet@HAI.NET.IN]

**Sent:** Monday, January 28, 2013 8.15 PM

**To :** John, Kullu

**Cc:** <sachin@gmsgroup.in>; Agrasen, Singh; <hardik@gmsgroup>

**Subject:** Re: Warehouse payment – Nov'12 & Dec'12 and Jan'13

John,

**Since there are only 7 cars, we won't charge you and liquidate them in Feb itself.**
**Don't worry about payment from Feb 1st.**
**Don't waste time finding a new place and billing etc.**

Regards,
Sumeet NINDRAJOG"

(emphasis is mine)

15.4. As would be evident, this e-mail was copied to Mr.Sachin Damle and Mr.Hardik Dodia of GMS and, as also to Mr.Agrasen Singh of Nissan.

15.5. On 31 January, 2013, Mr.Sachin Damle of GMS wrote the following crucial e-mail to Mr.Agrasen Singh of Nissan, with copies to Mr.Hardik Dodia of GMS, Mr.John Kullu of Nissan and Mr.Sumeet Nindrajog of Hover :

"Hi Agrasen,

**We confirm having received an amount of Rs.333709 yesterday via NEFT and thank you for the same.**

**However since there were no details sent to us we are considering this payment against the Nov'12 Rent.**

**<u>Now there are two payments due for Dec'12 and Jan'13. Please let us know when these payments would be released.</u>**

**<u>As agreed we will not bill you from Feb'13.</u>**

Thanks
Sachin."

(emphasis is mine)

15.6. On 7 February, 2013, Mr.Sachin Damle of GMS again reminded Mr.Agrasen Singh of Nissan as to when he could receive the balance payments.

15.7. On 14 February, 2013, Mr.Sachin Damle of GMS sent another reminder, though, this time it was directed to Mr.John Kullu of Nissan, with copies to Mr.Agrasen Singh of Nissan, Mr.Hardik Dodia of GMS and Mr.Sumeet Nindrajog of Hover. This e-mail is important, in the sense, that GMS clearly indicates that the assurance given by Mr.Sumeet Nindrajog that no dues will be payable by Nissan from February 2013 had its consent. For the sake of convenience, this e-mail is extracted hereinbelow :

"**From:** Sachin Damle [mailto:saching@gmsgroup.in]

**Sent:** 14 February 2013 09.42

**To :** 'John, Kullu'

**Cc:** 'Agrasen, Singh'; 'Hardik Dodia'; 'Sumeet'

**Subject:** FW : Warehouse payment – Dec'12 and Jan'13

Hi John

I have been following up with Agrasen on our rent payments but haven't got any update.

**Sumeet has agreed that wef 1st Feb'13 there would be no rental charges for the 7 cars that are in our stockyard.**

**However the Dec'12 and Jan'13 rentals are still due which we would appreciate if you can expedite and release these payments at the earliest so the account is settled.**

Thanks,

Sachin”

(emphasis is mine)

15.8. The aforementioned e-mail was followed up by Mr.Sachin Damle of GMS, by shooting of a reminder for receiving outstanding payments for December 2012 and January 2013 via e-mail dated 22 February 2013, to Mr.John Kullu of Nissan ; once again, copies of this e-mail were marked to Mr.Agrasen Singh of Nissan, Mr.Hardik Dodia of

GMS and Mr.Sumeet Nindrajog of Hover. For the sake of convenience, this e-mail is extracted hereinbelow :

> “**From:** Sachin Damle [mailto:saching@ gmsgroup.in]
>
> **Sent:** 22 February 2013 11.44
>
> **To :** 'John, Kullu'
>
> **Cc:** 'Agrasen, Singh'; 'harkid@gmsgroup.in'; 'sumeet@hai.net.in'
>
> **Subject:** RE : Warehouse payment – Dec'12 and Jan'13
>
> Hi John
>
> **Please update on the pending payments.**
>
> **It was 28th Jan'13 when you communicated that the payments would be closed shortly.**
>
> Thanks,
>
> Sachin”
>
> (emphasis is mine)

15.9. Finally, vide e-mails dated 25 February 2013 and 04 March 2013, Mr.Sachin Damle of GMS confirmed having received payments for December, 2012 on 22 February 2013. These e-mails, being relevant, are also extracted hereinbelow:

“**From:** Sachin Damle [mailto:saching@ gmsgroup.in]

**Sent:** Monday, February 25, 2013 10.17 AM

**To:** John, Kullu

**Cc:** 'Agrasen, Singh'; hardik@gmsgroups.in; sumeet@hai.net.in; 'Sachin Damle'

**Subject:** RE : Warehouse payment – Jan'13

Hi John

**We confirm having received Dec'12 Rent on 22nd Feb'13.**

**Thank you for the same.**

**Now there is the Jan'13 payment that is due.**

**Hope that will be cleared at the earliest so we can have closure on this account.**

Thanks,

Sachin

**From:** Sachin Damle [mailto:saching@ gmsgroup.in]

**Sent:** 04 March 2013 09:14

**To:** 'Agrasen, Singh'

**Cc:** 'John, Kullu'; 'Hardik'; sumeet@hai.net.in;

**Subject:** FW : Warehouse payment – Jan'13

Hi

**<u>Please give us an update on Jan'13 which is overdue now so we can close this issue.</u>**

Thanks

Sachin"

(emphasis is mine)

16. On 14 March, 2013, Mr.Sachin Damle of GMS wrote to Mr.Agrasen Singh of Nissan that GMS had received payments for January 2013 and thus, the account stood cleared. This mail was also, as in the past, copied to Mr.John Kullu of Nissan, Mr.Hardik Dodia of GMS and Mr.Sumeet Nindrajog of Hover. The said mail reads as follows:

**From:** Sachin Damle [mailto:saching@gmsgroup.in] Thu, Mar 14, 2013 04:38 PM

**Subject:** FW : Warehouse payment – Jan'13

**To:** Singh Agrasen <agrasen.singh@email.nissan.in>

**Cc:** Kullu John, 'Hardik Dodia' <hardik@gmsgroups.in>; 'Sumeet' <Sumeet@HAI.NET.IN>

Hi

**<u>Thank you for clearing the Jan'13 rent.</u>**

**<u>The account stands cleared now.</u>**

Thanks,
Sachin”
(emphasis is mine)

17. A careful perusal of the aforesaid communications would undoubtedly establish three things : Firstly, Mr.Sumeet Nindrajog was always kept in the loop with regard to payment of dues pertaining to GMS warehouse. Secondly, GMS affirmed that Mr.Sumeet Nindrajog's assurance that no dues with regard to maintenance charges would be payable by Nissan from February 2013, would hold good. Thirdly, GMS in no uncertain terms indicated to Nissan that having received payments up till January 2013, the account stood closed.

18. Therefore, the stand taken by GMS, in its demand notice, dated 27 May, 2014, that dues were payable by Nissan for the period commencing from February 2013 was clearly mischievous. In fact, what was even more mischievous was the assertion made, whereby, Mr.Sumeet Nindrajog's assurance to Nissan, was sought to be explained away by adverting to the fact that Nissan was expected to remove the seven (7) vehicles parked in its warehouse, immediately,

after the closure of the account, and that, instead of doing so, Nissan went ahead and parked five (5) new cars in the warehouse.

19. The fact, is that, this stand was reiterated by GMS in its Advocate's notice, dated 22 September, 2014. It is when the Attorneys of Nissan, vide the communication dated 17 December, 2014, asked for the details, GMS, realising that it could be caught on the wrong foot, indicated that an error had crept in its earlier communication, where, reference was made to twelve (12) vehicles.

19.1. Interestingly, this communication, which emanated from GMS is also dated 17 December, 2014, which is the date of the communication sent by Nissan's Attorney, whereby, details of the twelve (12) vehicles said to be parked in GMS warehouse were sought. I suspect that this communication of GMS was dated 17 December, 2014, so that it could look as if this change in stand was brought about on its own and not on account of communication sent by Nissan's Attorneys on 17 December, 2014.

19.2. Furthermore, what is important is that as far back on 12 February, 2014, one Mr.Vijayendra Vikram of Nissan had written to

Mr.Harish Hedge of GMS that they could remove their vehicles. Though, in this e-mail Nissan adverts to six (6) vehicles, there is also an earlier mail exchanged between these two gentlemen, which is, dated 15 November, 2013, in which , Nissan has indicated that it had only seven (7) vehicles parked in the GMS Warehouse, and that, five (5) “new” vehicles (model name Micras) did not belong to Nissan.

20. Despite the aforesaid, GMS sought to take the stand that all vehicles parked belonged to Nissan. Furthermore, what emanates from communication dated 23 December, 2014, sent by GMS to Nissan, is that, GMS would not permit Nissan to remove the vehicles till such time, it pays the outstanding dues.

21. According to me, the material on record clearly establishes that there is no admitted liability, with which, Nissan, could be mulct. Nissan has brought on record enough material to establish that as per the arrangement subsisting between the parties, after February, 2013, it was not required to pay maintenance charges for the seven (7) vehicles parked in the GMS warehouse, and that, Mr.Sumeet Nindrajog of Hover, who was inextricably linked with GMS had, in fact, assured

that, since, he would sell the vehicles, Nissan need not find another facility for parking its vehicles.

22. Nissan has also brought on record, as indicated above, material to demonstrate that GMS was kept in the loop with regard to this assurance given by Mr.Sumeet Nindrajog of Hover and that, in fact, GMS had approved this new arrangement.

23. Therefore, to my mind, clearly, the defence put up by Nissan is one of substance and has been put up in good faith.

24. Apart from the above, Nissan, being a going concern, which has, undoubtedly, a substantive presence in the Indian market, this petition cannot be sustained on the ground of inability of debts.

25. It is not, as if, Nissan is not able to pay its debts, it chooses not to liquidate the claim made in the petition, based on a bonafide belief, which is backed by substantive material that the sum claimed is not payable.

26. I tend to agree with the submission of the counsel for Nissan that this petition has no merit, and that, it has been filed in tandem with Mr.Sumeet Nindrajog of Hover to exert pressure on Nissan in the on-going litigation with Hover. Accordingly, company petition is dismissed. However, the parties are left to bear their own costs.

09.09.2016

Index : Yes / No
Internet: Yes
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**RAJIV SHAKDHER,J.**

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Order in

C.P.No.362 of 2015

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