

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 26.8.2016

+ **O.M.P.(I) (COMM.) 153/2016 & CRL.M.A. Nos.9221/2016,
10230/2016 & IA No.6008/2016**

BENARA BEARINGS & PISTONS LTD.

.....Petitioner

versus

**MAHLE ENGINE COMPONENTS INDIA
PVT. LTD.**

.....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rajiv Nayar, Senior Advocate with Mr Kartik Nayar, Mr Rishab Kumar, Mr Sourabh Seth, Mr Shivanshu Pandya, Mohammad Umar Iqbal Khan, Mr Prakhar Deep, and Ms Sonali Mehta.

For the Respondent : Mr Arvind Nigam, Senior Advocate with Mr Sudhir Sharma, Mr Sanjeev Sharma, Mr Abhishek Swaroop, Mr Anirudh Gandhi & Ms Abhilasha Vij.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The Petitioner, Benara Bearings & Pistons Ltd. (hereafter 'Benara'), is an Indian Company and is engaged in the manufacture and sale of automotive parts including Pistons, Piston Pins, Piston Rings, Engine Bearings and Bushes, Cylinder Liners and Sleeves, Air Cooled Blocks. The

Respondent, Mahle Engine Components India Pvt. Ltd. (hereafter 'Mahle') is an Indian Company and is, *inter alia*, engaged in the manufacturing of engine components for automotive and off-road vehicles. Benara claims that it has entered into a Distribution Agreement dated 17.03.2016 (hereafter 'Distribution Agreement') with Mahle for exclusively distributing Mahle's specified products in India; Mahle disputes this and contends that although discussions and negotiations were held with Benara, they could not arrive at a consensus and Mahle withdrew from the 'exercise' on 21.04.2016 and communicated the same to Benara.

2. Mahle has also imported a container of automotive parts (Container No. TEMU 682858-2 (hereafter 'the Container')) which it intends to sell in India.

3. In the aforesaid context, Benara has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that Mahle be restrained from terminating the Contract or acting in furtherance of its communication dated 21.04.2016. Benara further prays that Mahle be restrained from dealing with automotive parts - which are presently stuffed in the Container - imported by Mahle. In substance, Benara seeks specific performance of the Contract and thereby

seeks to restrain Mahle from effectively carrying on any business of selling automotive parts in India except through Benara as its exclusive distributor.

Factual Background

4. In terms of an agreement dated 21.11.2006, Mahle Trading (Shanghai) Co Ltd. - a company incorporated in China and engaged in manufacture of automotive parts - appointed Benara as its authorized distributor of motor cycle pistons (qua 2 and 3 wheeler applications upto 500 CC.) in the territories of India, Nepal, Sri Lanka and Bangladesh. The said distribution agreement was valid for a period of five years from January 2007 to December 2011. Benara claims that the said Agreement was renewed even after 2011.

5. Thereafter, on 01.01.2014, Mahle (which is the Indian Arm of the Mahle group) entered into a Distribution Agreement with Benara. In terms of that agreement, Benara was appointed as an exclusive distributor for the territory of India in respect of certain specified products (hereafter 'Mahle products'); and, Mahle agreed not to appoint or seek to appoint any other retailer or dealer in the territory of India. The term of the said Agreement was one year, that is, till 31.12.2014. Clause 7.2 of the said

Agreement further provided for an automatic renewal of the Agreement for an additional period of one year and thereafter, unless either party gave a notice six months prior to the expiry of the term.

6. On 24.06.2015, Mahle gave a notice to Benara in terms of clause 7.2 of the aforementioned Agreement dated 01.01.2014 exercising its right not to renew the said Agreement on its expiry.

7. Apparently, after Mahle had issued the aforementioned notice dated 24.06.2015, the parties decided to explore the possibility of continuing their business association, albeit under a different business model.

8. Pursuant to the discussions as mentioned above, the parties entered into a Memorandum of Understanding (hereafter 'MOU') on 29.09.2015 with the objective of entering into a distribution agreement effective from 01.01.2016 subject to the business requirements of Mahle being met. Article 4 of the MOU expressly provided that MOU would be valid till 31.12.2015 or the execution of a detailed distribution Agreement between the parties, whichever is earlier.

9. The parties held discussions and exchanged a series of e-mails, *inter alia* in their endeavor to agree to commercial terms and a new distribution

agreement. Apparently, several versions of the draft Distribution Agreement were exchanged and finally on 16.03.2016, Mahle sent a soft copy of the Draft Distribution Agreement as an attachment to an email of the said date. The title of the attachment indicates that it was the 7th draft of the proposed agreement. Subsequently, the said agreement was printed on a stamp paper and two copies were sent to Benara for signatures. Benara claims that the said agreement was duly executed by them and forwarded to Mahle on 21.03.2016. There is a controversy – which in my view may not be material - with regard to the date when Benara executed the said agreement; although, the said agreement is dated 17.03.2016, the signatures of Mr P.L. Benara on the said agreement indicate that they were affixed on 22.03.2016, that is, after the signed agreement is stated to have been forwarded to Mahle.

10. Thereafter, Benara made enquiries regarding the said Distribution Agreement but Mahle did not sign the said agreement and on 21.04.2016 sent an email stating that although the parties had spent considerable time to understand the business requirement of each other but had not made any significant progress qua the same during the first quarter of 2016 and, therefore, Mahle was withdrawing from this exercise.

Rival contentions

A. Preliminary objections

11. At the outset, Mr Nigam, learned Senior Advocate appearing for Mahle submitted that the present petition is liable to be dismissed on the ground that Benara had concealed the Agreement dated 01.01.2014, which expired on 31.12.2015. He further submitted that Mahle had issued a notice expressly stating that it was not renewing the Agreement dated 01.01.2014 and Benara had suppressed this vital document. He further submitted that Benara had also suppressed the email dated 21.03.2016 which clearly indicated that the issue of Maximum Retail Price (hereafter 'MRP') had not been resolved between the parties and there was no meeting of minds.

11.1 Mr Rajiv Nayar, senior counsel appearing for Benara did not counter the aforesaid submissions and offered no explanation whatsoever as to why the agreement dated 01.01.2014 and the aforesaid letter dated 24.06.2015 were not mentioned in the pleadings. However, he submitted that the MOU had overridden the letter dated 24.06.2015.

B. Disputes as to the existence of a contract

12. As is apparent from the factual background of this case, there is a dispute between the parties as to whether the Distribution Agreement is a binding contract between the parties. It is Benara's case that the contract stood executed latest by 18.03.2016 and even prior to the execution of the contract, the parties were acting in furtherance of their mutual agreement to continue with an exclusive distribution arrangement in favour of Benara; the Distribution Agreement dated 17.03.2016 only formalized their *inter se* relationship that had already been agreed to.

12.1 Mr Rajiv Nayar referred to the decision of the Supreme Court in **Trimex International Fze Ltd., Dubai v. Vedanta Aluminum Limited, India: 2010 (3) SCC 1** in support of his contention that a contract between the parties could be inferred from the exchange of emails and correspondence and the Distribution Agreement was binding even though the same had not been signed by Mahle. He referred to Section 4 of the Contract Act, 1872 (hereafter 'the Contract Act') and contended that the exchange of emails clearly indicated that parties had negotiated and arrived at the final version of the Agreement which was then presented to Benara for signatures by Mahle. Benara having signed and forwarded the same to Mahle brought into existence a binding contract.

12.2 Mahle disputes the existence of a contract. It is Mahle's case that parties were endeavoring to arrive at an agreed business model but there was no meeting of minds between the parties. Despite extensive negotiations, the parties were unable to agree to the commercial terms; the issues relating to affixing of the MRP and margins remained unresolved. Mr Nigam, Senior Advocate appearing for Mahle submitted that there was paradigm shift in the business model that was proposed to be put in place after 01.01.2016. He submitted that whereas under the earlier arrangement, Benara was the importer of Mahle Products, under the new business model it was proposed that Mahle would import the products directly; fix the MRP; and invoice Mahle products to Benara at a price less than the MRP. Thus, Mahle would also determine the maximum margins available with Benara. This was materially different from the earlier model where Benara would purchase the product at high seas and import the same in India and thus, would fix the MRP and consequently, also determined its margins. He referred to various emails and submitted that despite extensive discussions, the parties were not able to arrive at a consensus as to the issue of fixing the MRP. He referred to Mahle's email dated 18.03.2016 whereby it confirmed that the selling structure and the MRP would be as per its

email dated 03.02.2016 and further sought a signed copy of the Distribution Agreement forwarded earlier. He pointed out that in response to the aforesaid mail, Benara had sent a mail stating that it was sending the signed copy of the agreement but at the same time also mentioned that it was sticking to its stand on the issue of MRP as per its confirmation in September, 2015. He submitted that this clearly indicated that there was no meeting of minds and, therefore, no contract came into existence. He emphasized that even though the issue of MRP was not a term of the proposed Distribution Agreement, it was fundamental to the business model being discussed by the parties. The Distribution Agreement was premised on the basis that the parties were in agreement on the commercial terms.

12.3 Mr Nayar countered the aforesaid arguments and earnestly contended that the issue of MRP was not a term of contract and, therefore, was not determinative of whether the contract had come into existence or not.

C. Relief not maintainable

13. Mr Nigam further contended that even assuming that there was a contract between the parties, the relief sought by Benara in the present petition is in the nature of specific performance of a contract and since the

contract itself was determinable, no injunction as sought for could be granted. He further contended that Benara had no right in the subject goods imported by Mahle, which were lying in the Container.

13.1 Mr Nayar, countered the aforesaid submissions and submitted that although the Distribution Agreement was determinable, the negative covenants of the said agreement could be enforced. He referred to clause 3.1 of the Distribution Agreement and contended that the same contained a negative covenant, which could be specifically enforced by way of an injunction. Next, he referred to clause 7.6 of the Distribution Agreement and submitted that certain provisions of the Distribution Agreement were meant to survive the termination of the Distribution Agreement, which included non-compete clauses. He submitted that in terms of Clause 8 of the Distribution Agreement, the parties had agreed not to compete with each other and, therefore, Mahle could not be permitted to sell its products except through Benara as that would amount to Mahle directly competing with Benara.

13.2 *Reasoning and conclusion*

14. At the outset, it must be mentioned that the averments made in the petition are silent as to the agreement dated 01.01.2014 between Benara

and Mahle. Paragraph 5 of the petition refers to the Distribution Agreement dated 21.11.2006 between Mahle Trading (Shanghai) Co Ltd. and Benara and also refers to a Supplementary Agreement dated 20.03.2015 but there is no averment regarding the Distribution Agreement dated 01.01.2014. The petition is also silent in respect of the notice dated 24.06.2015 whereby Mahle had unequivocally communicated its decision to not continue the distribution agreement dated 01.01.2014 beyond 31.12.2015. The email dated 21.03.2016, forwarding the final Distribution Agreement was also not disclosed. There is no explanation whatsoever as to why these relevant documents were not mentioned in the petition. Although the petition is supported by an affidavit affirming that all documents in the control of Benara have been disclosed, these vital documents were withheld. In my view, the petition is liable to be dismissed on this ground alone.

15. In view of the above, although it is not necessary to consider the rival contentions, I consider it appropriate to do so as the counsels had advanced arguments on other issues.

16. The principal dispute between the parties is whether the Distribution Agreement dated 17.03.2016 is a binding contract between the parties?

17. There is no quarrel with the principle that where the facts clearly indicate that parties are *ad idem* and the necessary ingredients of the contract can be inferred - that is, there is an offer followed by an unconditional acceptance thereof- the absence of signatures of party(ies) would not be material. It is well settled that a contract could also be spelt out from correspondence exchanged between the parties. The principal question to be addressed is whether there was a meeting of minds between the parties.

18. It is clear from the correspondence between the parties that the distribution agreement that existed between Benara and Mahle Trading (Shanghai) Co Ltd. since 2006 had come to an end. On 01.01.2014, Benara entered into an agreement with Mahle. The term of the said agreement expired on 31.12.2015. Admittedly, Mahle sent a notice dated 24.06.2015 clearly indicating its intention that it shall not be renewing the Distribution Agreement dated 01.01.2014. The contents of the said notice are important as it indicates Mahle's reason for not continuing with the distribution arrangement with Benara. The relevant extracts of the said notice are as under:-

“In recent times MAHLE has made a critical review of its status in India and, in that context, has realized the strategic limitations imposed by the current distribution model. Consistent with our global strategy, our new business model for India envisions a direct access of the MAHLE brand to the Aftermarket customers, without intermediaries. In doing so, MAHLE will pursue this policy for its business in India, which has been afflicted by stagnant sales and margins close to the negative figures in the last two years.

Unfortunately, this situation generates constant losses in our income statement and is no longer acceptable.”

19. It is apparent from the above that Mahle now wanted to have a direct access to aftermarket customers; the business model where Benara imported the products directly did not conform to the business requirements/plans of Mahle. Apparently, in the aforesaid context, the parties started negotiations for arriving at a new distribution agreement. At the outset, Mahle had - by its email dated 25.08.2015 - made it clear that the discussions were for exploring new business opportunities under a new setup with different working terms and the discussions would not have any impact on the agreement dated 01.01.2014 including the notices already issued under that agreement.

20. In view of Mahle's email of 25.08.2015, it cannot be disputed that the Distribution Agreement dated 01.01.2014 between the parties stood

terminated on 31.12.2015. Benara's contention that notice dated 24.06.2015 was overridden by the MOU signed on 29.09.2015 is wholly without merit. The MOU clearly indicated that it was executed with the object of entering into a detailed distribution agreement *provided that all the business requirements of MAHLE are accepted and complied by BENARA*. The business requirements of Mahle were briefly indicated in the notice dated 24.06.2015, that is, to access the customers without intermediaries. The MOU also stood terminated on 31.12.2015 as, admittedly, no agreement was entered into between the parties prior to that date.

21. The correspondence between the parties indicates that the discussions and negotiations were carried on two fronts simultaneously. The first being, the finalization of the Distribution Agreement; and the second being the commercial terms. The parties were also simultaneously engaged in planning for the proposed supplies to be made in 2016. One of the principal stumbling block between the parties appears to be the issue as to the commercial structure of the business model and particularly, the fixing of the MRP. Admittedly, the parties adopted a business model where Benara directly imported the products in question and sold the same to retailers at the price fixed by Benara. Under the new business model being

discussed by the parties, Mahle would directly import the products and then invoice the same to Benara. This led to certain issues relating to fixing the MRP and the margins available to Benara. The fact that the parties were unable to come to mutually agreed commercial terms is clearly evident from the exchange of emails which are briefly referred to below:-

22. By an e-mail dated 15.09.2015, Benara responded to Mahle's mail and in the context of MRP stated that "*we shall try to adjust to most of the issues as mentioned above except the ones which decrease our margins from here on.*" The 'issues' referred to also included the following:-

- MRP, will be applied as per the revised file (sent on 4th Sep) and agreed upon.
- MAHLE to check the possibility of applying MRP in China. There also remains a scope of applying MRP on the Master Box. In case possible, BENARA will apply individual MRPs on unit boxes.
- xxx
- Price list (for New Business Plan) for other product lines to be established and shared by MAHLE"

23. Thereafter, on 04.12.2015, Benara wrote another email, *inter alia*, stating as under:-

"We re iterate (sic) the fact that we are still waiting for the following:

- Elimination of CST with stock transfer (c & f) agreement.
- MRP declaration to be done by Benara.
- Difference of Piston Rings - that we discussed to get better pricing for new orders.”

24. On 06.12.2015, Mahle responded to Benara’s email of 04.12.2015, *inter alia*, stating as under:-

“# Elimination of CST with stock transfer (c & f) agreement

-We already discussed this option and still hold on to the same opinion (as confirmed by our legal counsel) that MECI and Benara being two separate entities, stock transfer (to avoid CST) is not permissible. Still, incase you have other opinion available, we remain available to discuss.

MRP declaration to be done by Benara

- Per latest Excise opinion shared with you on 2nd Dec, we discussed that the MRP declaration will be done by Benara. Again, this being subject to approval of excise and custom department that we jointly need to seek.”

25. On 21.01.2016, Benara sent an email which reads as under:-

“Dear Mr. Bhatia,

This refers to our meeting yesterday and we would like to submit the following for your consideration / decision at an earliest:

- Billing Prices: These were finalised for Piston assemblies conceptually. We had approached Mr. Franz for the request for looking into almost 17% price revision at one go by Mahle. We are awaiting a confirmation as was decided to meet and discuss for

final margins / price revision during the upcoming visit of Mr. Franz. Please consider the time until we meet and decide. For other items also, we feel there is hardly any scope for price revision acceptance at our end.

- C & F model is the best suited for our concept of business and the same has been explained by the concerned consultants yesterday with yourself and the team. We await confirmation for feasibility and acceptance for the same.
- Piston Rings price negotiation has not been done in last few months and has been avoided for reasons best known to you. We need to get that reduction done by DY for that benefit to be passed to us fairly. Please confirm that the same is being done and passed on to us with the first shipment in January.
- Currency adjustment to be done as per our request sent to you last week.
- Contract to be finalised on similar lines as last year and making requisite changes as agreed mutually.
- Shipments to be effected only after signing of the contract and resolution of all above points.”

26. On 03.02.2016, Mahle wrote to Benara as under:-

“Dear Mr. Benara,

Per our meeting held dtd 1st Feb together with our consultants, Nitya Associates, we concluded on the 2016 Business Model as detailed below:

#MAHLE to import parts from China

MAHLE to carry out custom clearance and discharge the related tax liability

This business transaction will happen under the "Sales in the course of Imports" to help you save 2% CST

#MAHLE to declare and affix MRP labels

Note: in the meeting, we were advised by our consultant that the MRP relationship should not be changed at a later stage since it is the responsibility of MAHLE to declare and maintain MRP through the national distributor after the import and declaration at Customs.

It is mandatory to check input costs at various levels inclusive of applicable taxes / VAT and draw a selling price structure. In accordance, pl find attached the worksheet.

Now, per our previous requests, we will appreciate to receive import prices of Rings by Benara to draw a comparison against MAHLE's established prices.

Thank you,

Kind regards

Sharad Bhatia

General Manager (MAHLE AfterMarket- India)"

27. On 08.02.2016, Benara wrote to Mahle as under:-

"Dear Mr. Bhatia,

This refers to our meeting with Mr. Arnd Franz & yourself in the recently concluded Auto Expo.

Based on our meetings, we request you to help us resolve the issues at an earliest for smooth working and to develop the business to achieve greater heights.

We look forward for working very closely to achieve growth in 2/3 wheeler segment in India.

Thanking You,

Best Regards,

Vivek Benara”

28. On 09.02.2016, Benara sent an email as under:-

“Dear Mr. Bartolozzi,

I am fine. Hope the same for you too. Thanks for your email.

I am enclosing the meeting points that were discussed with Mr. Franz during his visit to Auto Expo last week. We hoped that you shall be there too but didn't had an opportunity to discuss the issues together with Mr. Bhatia also.

As and when we talk - which could be anytime convenient to you tomorrow in the second half of Indian time, I can call you once you have gone through the contents of email/ point discussed with Mr. Franz:

- Shanghai Visit was fruitful until we realised that the last mail exchanged with you before you closed this issue had very little left for us in margins. We agreed for the concept and are with you to help us be established for some time - till we are able to sustain our business / develop it - so that I can personally sustain with income that is being generated with this business. You had very kindly accepted our request in Shanghai but later on we realised that the margins are not what were discussed with us. We feel left out and have no choice but to plead to the authorities concerned.
- We are always committed to Mahle for long term. We are ready to share margins in appropriate manner and

don't want that everything should be taken away by us at one go.

- We have objections with the approach of an employee in Mahle who was working with us as an employee and is now acting as my boss. We can't forget that you had taken him to establish other side of business and not to take away this business. We find that the approach taken by him is convincing you few things are misleading and not appropriate for our business as agreed as per his appointment terms. He should first look at his huge scope / are of operation and leave us for time being with ours. We are very comfortable working in the way as we were before with you but we cannot work with him anymore. We are also very comfortable with Mr. Bhatia as he has been very supportive. Please try and understand our sentiments also.
- We are also uncomfortable with only a couple of issues in the contract proposed. Please help us in resolving the same.
- Piston Rings price issue - with Margin co relation is still unresolved. This shall help us to work more comfortably without any loss to Mahle.
- We are willing to share all details for Margins that shall be earned by us in the new proposal for billing for 2016.

We assure you that we are there with you as your team but please support us as you have kindly agreed during our visit to China. Looking forward to speak to you and work with you closely.

Best Regards,

Vivek Benara”

29. On 25.02.2016, Mahle sent the following email:-

“Dear Mr. Benara,

In reference to the MOM circulated, please find attached the revised draft of the proposed agreement.

Additionally, we await to understand the legal opinion from your end that allows us the possibility of not applying MRP labels before invoicing / delivering goods to you.

Let us address above two urgent issues separately to the other operational issues mentioned in the MOM.

Thank you,

Kind regards

Sharad Bhatia
General Manager (MAHLE AfterMarket - India)”

30. On the same date, Benara sent another mail listing out various commercial issues for resolution. This also included the issue as to margins as well as the MRP related issues. On the same date, Benara has sent yet another mail listing out certain issues regarding language of the proposed agreement. Mahle responded to the aforesaid mails on 26.02.2016, *inter alia*, stating as under:-

“Dear Mr. Benara,

Despite the concessions made on our side, which I thought could meet your expectations and speed up the signing of the agreement, I see that the finalization of the agreement looks to be protracted by a list of further requests from your side.

I hereby summarize what was done on our side:

1 - Extension of the contract from 31 Dec 2016 to 31 Dec 2017

2 - Removal of the initial generic non-competition agreement to more relaxed terms which will allow your company to engage in similar businesses in case of termination

3 - Removal of the target of 1 million units of pistons as a condition to the validity of the contract

We have prepared plans that have been formalized in our company and the proposal from your side to maintain the previous arrangement of high-sea-sales undermines such plans approved at the MAHLE Group level.

In view of the above I have to express here the term in which we would be pleased and honored to have your approval of the contract as per the latest version at your hands by and not after March 24th, 2016.

Concerning the discussion of the several (I counted 15) points you have listed below, my team and myself commit to find the best possible compromise in a separate context.

I really hope that you can understand that it was never my intention to get to the point in which I had to come express the above statement.

However, with all due respect, I can't allow for more time going by and energy from my team being spent with such a little progress in a situation of constant uncertainty.

I look forward for your positive reply and to a restart of a constructive business relationship.

Thank you.

Kind regards

Mr. Serafino Bartolozzi
MAHLE Aftermarket
Asia/Pacific”

31. On 29.02.2016, Benara responded to the aforesaid mail referring both to commercial issues as well amendments to the proposed Distribution Agreement. Benara *inter alia* stated as under:-

“Let us keep this contract issue separate and try and close the issue at an earliest. We are equally keen as you are to move head with a positive mindset and growth for the business. Other issues mentioned are for moving in the same direction - which is common for both of our companies. For the points as big as 15 in no., these are related with day to day operations and clarity on pending issues - which are required as before. We expect your fair treatment after our call last week.”

32. On 01.03.2016, Mahle responded by requesting Benara to specify the contractual amendments required by them.

33. On 02.03.2016, Benara wrote as under:-

“Dear Mr. Bartolozzi,

Thanks for your patience. I wish you were involved in all the discussions we've had with your team – thereby making this process run bit faster. Anyways, I do not doubt your speed in this case.

I am attaching (after working overtime) a final draft proposal with comments in the respective clauses – to address the issues of concern - to prevent us from financial losses in case of termination of the contract. I hope you shall be reasonable to understand the issues from our perspective - fairly and accept the same – get the modifications approved and send me a final draft confirmation - to print and send a copy to you – duly signed much earlier than the dates mentioned (targets) by you. I am also very keen to resolve the issues especially when you try to make in a change in the business model after so many years & naturally it will take a lot of time to make things smoother for both of us. I appreciate your patience.

I would also like you to make a time frame for other issues to be resolved - especially the margins- which need your support as promised by you during your call. Thanks for your patience and understanding as always.

Best Regards,

Vivek Benara”

34. On 07.03.2016, Benara again wrote as under:-

“Dear Mr. Bhatia,

Thanks for your email. Please go ahead and finalise the final draft and send it to us with the changes as agreed as per your email as under.

We also look forward for quickly resolving MRP issue (we shall be submitting the clarifications in a day or two) &

Margins issue so that we can successfully achieve the time deadline for first Indian billing.

Also, please expedite the release of our pending payments / other issues to smoothly run the business.

Thanking you for your support.

Best Regards,
Vivek Benara”

35. On 14.03.2016, Mahle responded to the aforesaid mail as under:-

“Dear Mr. Benara,

Hope this finds you well.

This is a kind reminder that the deadline is approaching fast.

I see below that there are attached conditions, which I tend not to consider pursuant to the gentlemen’s agreement we had during our meeting in Shanghai.

Once again, I would be pleased to continue the business with your good self and company. Hopefully we can move forward and have the business conducted in line with the plans that have been presented to the MAHLE board.

To be completely honest and clear with you, the compliance to such plans is an imperative for the company and they won't be put in discussion. At any level.

Thank you very much.

Kind regards

Mr. Serafino Bartolozzi

MAHLE Aftermarket
Asia / Pacific”

36. On 15.03.2016, Benara wrote as under:-

“Dear Mr. Bartolozzi,

I am fine and hope the same for you too.

Please find enclosed a proposal of Contract sent to me with some omissions from your end. Please get the corrections done through your team and you can send us the same duly printed on a Stamp paper - 2 copies - with all annexures as missing but mentioned in the contract (annexures we have still to see and confirm the contents - which can be sent by email initially). We have been trying our best to conclude the issues but the delay is from your end - unfortunately.

For other issues we can always discuss them and finalise the same as what is best for our business with an open minded approach of your team. We shall stick to our stance as we have discussed and agreed as before. We also have been chasing for resolving all issues but they are being delayed in India. Hope you shall also push them to conclude the issues at an earliest. Thanking you for all your support as always.

Best Regards,

Vivek Benara”

37. On 16.03.2016, a draft of the proposed agreement was sent by Mahle to Benara. And, on 18.03.2016, Mahle wrote as under:-

“Dear Mr. Benara,

We understand that you have very well received 2 copies of the finalized agreement (duly printed on a Stamp paper) submitted by us, trust by now this would have been signed by you and Mr. P.L. Benara. Please let us have a confirmation if the signed copy has been sent across to our MAHLE Pithampur office.

Per our below mail, we await to receive Annexure 2 from your end.

Additionally, pl find attached legal opinion received from our consultant that suggests MRP to be affixed by us before invoicing goods to you. This already remains endorsed by our management.

In above context, we propose to adopt the MRP/Selling structure per our mail dtd 3rd Feb.

Thank you,

Kind regards

Sharad Bhatia
General Manager (MAHLE AfterMarket- India)”

38. And, on 21.03.2016, Benara sent the following email:-

“Dear Mr. Bhatia,

We are sending the contract duly signed. Hope you shall send us after getting signatures from your respective team members before commencement of the business for this year.

Moreover, we shall stick to the stand on MRP as per our final confirmation in September 2015. Please apply the same and clear the containers on the same.

Best Regards,

Vivek Benara”

39. It is clearly apparent from the above that the parties were ad idem as far as the terms of the Distribution Agreement are concerned but were unable to finalise the commercial terms. The clauses of the proposed Distribution Agreement had been effectively discussed and negotiated between the parties. However, other issues regarding their proposed commercial functioning continued to persist.

40. As indicated above in the Benara’s email of 25.02.2016, Benara had pointed out certain issues - 15 in number - which required to be resolved. Benara had sent an email requesting that the issues relating to the agreement be kept separate and the other issues be dealt with separately. Again by an email of 02.03.2016, Benara had requested for fixing of a time frame for resolution of the said issues. Benara had again referred to the issues of MRP as well as its Margins in its email dated 07.03.2016. Mahle’s response of 14.03.2016 to the aforesaid email is important. Mahle had unequivocally stated that they were not considering the conditions attached - which meant the MRP and Margin issues - as the business plan had been

presented to Mahle's Board and the same would not be put in discussion at any level. This clearly indicated that Mahle was proceeding with the finalization of the Distribution Agreement on the basis that Benara was accepting its business plan and had unequivocally stated that Benara's issues with regard to MRP would not be entertained. It is seen that on 18.03.2016, Mahle asked for a confirmation of the signed contract and at the same time also forwarded a legal opinion with regard to fixing of the MRP before invoicing goods to Benara. Mahle further confirmed that Mahle's management had accepted the said opinion. Mahle's e-mails - particularly of 14.03.2016 and 18.03.2016 - made it clear that it was proceeding on the premise that the commercial issues with regard to the MRP and Margins between the parties stood concluded and the commercial model as indicated in the mail of 03.02.2016 would be implemented. Although Benara sent a signed agreement to Mahle alongwith its mail of 21.03.2016, it also asserted that it was standing by its stand of September, 2015 in respect of the issues related to MRP; in other words, it was not accepting Mahle's commercial terms/model. Thus the commercial model on the basis of which the Distribution Agreement was to be worked remained a subject of discord.

41. In the aforesaid context, on 21.04.2016, Mahle responded to Benara's query as to the contract as under:-

“Dear Mr. Benara

Post termination of our business agreement effective 31st December, 2015, and your requests / visits to us, we started discussions to explore the possibility to formalize a mutually beneficial business plan that would meet the changed business requirements of MAHLE.

With the positive note, we also executed an MOU signed by us dtd 29th September 2015 basically to list out the key business requirements and the applicable terms and conditions under the changed business scenario.

Post MOU, we together, spent considerable time to explain and understand our business requirements to each other.

We notice that despite of enormous follow-ups and meetings conducted together we could not make significant progress during the Quarter 1 of 2016 while the MAHLE Management Board was looking towards us for better business results.

During this period, we were unable to create a positive business case which could meet the requirements of both.

Now, we are convinced that there is no such business plan that exists, and accordingly, we would like to inform to you that with immediate effect we withdraw ourselves from this exercise.

Kind regards

Mr. Serafino Bartolozzi
MAHLE Aftermarket”

42. It is difficult to accept Mr Nayar's contention that the issues relating to MRP and Margins were completely divorced from the Distribution

Agreement that was being negotiated by the parties. The correspondence between the parties clearly indicates that the parties were *ad idem* in respect of the terms of the Distribution Agreement, which outlined their business relationship. However, an agreement as to the commercial terms/business model on the basis of which the parties were to conduct their business - which was also simultaneously being negotiated by the parties - remained elusive. The issues with regard to margin, invoicing, fixing of MRP are fundamental to the business arrangement proposed between the parties; clearly, without the consensus in regard to those issues, the question of proceeding forward would not arise. It is in this context, that Mahle had on 14.03.2016 unequivocally stated that the other issues being raised were not being taken into consideration and the business would have to conform to the business plan already approved by its management. The said e-mail must be read in the context of Benara's previous mail requesting that the day to day management issues be resolved separately from the issues related to the Distribution Agreement. The Distribution Agreement between the parties is for distribution of Mahle's products. In absence of the parties being *ad idem* as to the commercial terms, the Distribution Agreement would be a non starter.

43. It is trite law that a party's signatures are not necessary for a binding contract and the same can be inferred by correspondence between the parties. An agreement can also be oral. In the present case, Mahle's email dated 18.03.2016 which called upon Benara to sign the draft Distribution Agreement is clearly a proposal within the meaning of section 2(a) of the Contract Act and its acceptance would result in a binding contract. This is also Mr Nayar's contention and, to that extent, is merited. However, Mahle's e-mail apart from calling upon Benara to sign the Draft Distribution Agreement also stated that "*we propose to adopt the MRP/Selling structure per our mail dtd 3rd Feb*"; there is no reason to exclude this part of the e-mail from the scope of Mahle's proposal. In other words, Mahle's proposal as communicated to Benara was to enter into the Distribution Agreement for distribution of Mahle's products with the MRP/Selling structure as per their mail of 03.02.2016. Whilst, Benara accepted the Distribution Agreement, it did not accept the attendant commercial terms.

44. It is relevant to note that Clause 6.4 of Distribution Agreement expressly provided that *MAHLE reserves the right to supply BENARA out of its legal entity or entities in the Republic of India. In this case, MAHLE will propose prices with delivery terms and payment forms to be agreed*

upon by both the Parties. Although Benara signed the Distribution Agreement, it also communicated its decision not to accept the MRP/Selling price structure as proposed by Mahle. It is difficult to understand as to how a distribution contract could be implemented without any consensus as to the pricing structure. In an exclusive distribution arrangement, if buyer/distributor does not accept the selling price structure, it is impossible for the other to carry on business.

45. As stated above, signatures on an agreement may not be material in a case where the contract between the parties can be ascertained; however, where the parties reduce their understanding to writing and it is understood that parties are to sign the agreement, it is not always safe to proceed on the basis that their signatures are not necessary. In most cases, affixing signatures on an agreement are meant to signify the party's commitment to the written agreement and its refusal to sign renders the agreement inchoate. Affixing signatures on an agreement cannot be readily inferred as an empty formality. The question as to whether the parties have mutually committed to each other has also to be viewed in the context of the nature of the contract. In a case of sale and purchase of goods, a commitment to supply within a specified period at a stated price and the acceptance of such

commitment by the other party – as in the case of *Trimex (supra)* - is sufficient to hold that there is a contract. But, in cases where the agreement is complex or entails defining a continual relationship/association, the number of material terms on which consensus is required for inferring a binding contract is significantly larger. In such cases, signatures on the agreement reduced in writing assume a larger significance. A party may withhold its signatures – as it appears to have happened in this case – unless it is sure the other party has also understood and agreed to perform the agreement in the same manner.

46. In order to result in a binding contract the offer must be accepted unconditionally. Benara's e-mail of 21.03.2016, cannot be read as an unconditional acceptance of the Mahle's proposal since the proposal to adopt MRP/Selling structure as per their e-mail of 3rd Feb, 2016 was not accepted by Benara. In this perspective the principal question as to whether there was any meeting of minds between the parties resulting in a binding contract must be answered in the negative.

47. The fact that Mahle supplied its products to Benara, while the Distribution Agreement and the commercial terms were being negotiated

does not mean that Benara was appointed as an exclusive distributor of Mahle products till 31.12.2017.

48. In my view, even if it is assumed that a contract exists between Benara and Mahle– which is difficult to do so in this case –the interim injunctions as prayed for by Benara cannot be granted. This is so for several reasons. First and foremost, the contract is a determinable one; admittedly, the term of the Distribution Agreement is only for two years and expires on 31.12.2017. And, the relief sought for by Benara is essentially in the nature of specific performance. By virtue of Section 14 of the Specific Relief Act, 1963, the Distribution Agreement is not specifically enforceable.

49. Secondly, the Distribution Agreement is also not specifically enforceable for the reason that it entails multiple commercial transactions, the performance of which cannot be overseen by this Court.

50. I am not persuaded to accept Mr Nayar's contention that the Distribution Agreement contains a negative covenant and, therefore, even though the Distribution Agreement may not be specifically enforceable, interim orders ought to be granted. Clause 3.1 of the Distribution Agreement merely states that Mahle will not appoint or seek to appoint any

retailer or dealer in the territory unless one of the parties has expressed its intention not to renew the Distribution Agreement on expiry. In the facts of the present case, even if it is held that there is a binding contract, there is no question of Mahle seeking to renew the same. Its intention not to continue with Benara as a distributor could not have been made any clearer. In the circumstances, Mahle cannot be restrained from selling its products either directly or through a retailer by way of an interim order.

51. The reliance placed by Mr Nayar on Clause 8 of the Distribution Agreement is also wholly misplaced. The said Clause reads as under:-

“8. NON-COMPETITION

- 8.1 In consideration of BENARA being the distributor of the Products in the Territory, BENARA shall not distribute engine components of other suppliers that can be reasonably deemed to be in competition with the Products during the tenure of this Agreement and a period of 01 (one) year thereafter, except its home brand BENARA.
- 8.2 Both Parties acknowledge and agree that if opportunities arise in future for either Party to deal in Products not mentioned in Annexure 1 then such Party shall consult the other Party prior to engaging into distribution of such new products.
- 8.3 When this contract comes into force, BENARA shall only have the distributorships or agencies described in ANNEXURE 2. BENARA shall

inform MAHLE without delay if it takes on any further distributorship or agency, even if they are for products which do not compete with MAHLE's products, giving the name and address of the other principal and describing exactly the subject matter of the distributorship or agency (products, territory, customers entrusted to it). BENARA will also promptly inform (MAHLE if any of its distributorships or agencies lapse.”

52. A plain reading of the aforesaid clause indicates that the negative covenant operates against Benara. It is Benara who is proscribed from distributing engine components of other suppliers that may be deemed to be in competition with Mahle's products. Mahle cannot be enjoined on the basis of this clause.

53. Thirdly, the Distribution Agreement is a commercial one and Benara can be sufficiently compensated by way of damages for any loss that it may have suffered on account of any breach of the said Distribution Agreement.

54. Lastly, the balance of convenience lies squarely in favour of Mahle. There is no consensus as to the commercial terms between the parties, particularly the price at which goods are to be invoiced and the price at which they are to be sold to retailers. In the circumstances, an injunction restraining Mahle to sell its products in India would amount to effectively preventing Mahle to do business in India.

55. The petition is, accordingly, dismissed with costs quantified at ₹1,00,000/-. The interim order dated 29.04.2016 is vacated. Benara shall also bear the demurrages for the Container from 29.04.2016 till date. Mahle shall inform Benara the amount of demurrages and also furnish the supporting documents within a week from today. Benara shall pay the same to Mahle within a period of one week thereafter.

56. All pending applications are also disposed of.

AUGUST 26, 2016
RK

VIBHU BAKHRU, J

