

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.03.2017

+ **FAO(OS) (COMM) 66/2016 & CM No.31593/2016**

BENARA BEARINGS & PISTONS LTD ... Appellant

versus

MAHLE ENGINE COMPONENTS INDIA PVT LTD ... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr Rajiv Nayar, Sr. Adv. with Mr Kartik Nayar,
Mr Prakhar Deep, Mr Saurabh Seth, Mohd Umar Iqbal Khan
and Mr Rishab Kumar

For the Respondent : Mr Arvind K. Nigam, Sr. Adv. with Mr Sudhir Sharma,
Mr Sanjeev K. Sharma, Mr Abhishek Swaroop, Mr Anirudh K
Gandhi and Ms Abhilasha Vij

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J

1. The present appeal is directed against the judgment and/or order dated 26.08.2016 delivered by a learned Single Judge of this Court in OMP(I) (COMM) 153/2016 which was a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'). The present appeal has been preferred under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate

Division of High Courts Act, 2015 (hereinafter referred to as ‘the Commercial Courts Act’) read with Section 37 of the said Act.

2. The said petition under Section 9 of the said Act was filed by the appellant seeking interim directions. It was, *inter alia*, prayed that the respondent (Mahle) be restrained from terminating the alleged distribution agreement dated 17.03.2016 (hereinafter referred to as ‘the said distribution agreement’) or from acting in furtherance of its (Mahle’s) communication dated 21.04.2016. It was also prayed on behalf of the appellant that Mahle should be restrained from dealing with automotive parts which were stuffed in the container (TEMU682885-2) which had been imported by Mahle. As noted by the learned Single Judge, in effect, the appellant sought specific performance of the distribution agreement and thereby sought to restrain Mahle from effectively carrying on any business of selling automotive parts in India, except through the appellant as its exclusive distributor.

3. The appellant 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 and air cooled blocks. Mahle is also an Indian company and is, *inter alia*, engaged

in the manufacturing of engine components for automotive and off-road vehicles. The bone of contention between the parties is with regard to an alleged distribution agreement dated 17.03.2016. The appellant claims that the distribution agreement was entered into and was a binding contract with Mahle for exclusively distributing Mahle's specified products in India. The respondent/Mahle took the stand that no binding contract had resulted and that the alleged distribution agreement dated 17.03.2016 only remained a draft.

4. The sequence of events leading up to the filing of the petition under Section 9 of the said Act needs to be set out. Initially, an agreement dated 21.11.2006 had been entered into between Mahle Trading (Shanghai) Company Limited (which was a company incorporated in China and engaged in the manufacture of automotive parts) and the appellant. Under that agreement, the appellant was appointed as the authorized distributor of motorcycle pistons in the territories of India, Nepal, Sri Lanka and Bangladesh. That agreement was valid for a period of five years from January 2007 to December 2011.

5. On 01.01.2014, the respondent/Mahle (which is an Indian company) entered into a distribution agreement with the appellant, whereby the

appellant was appointed as an exclusive distributor for the territory of India in respect of certain specified products of Mahle and by the same agreement Mahle had agreed not to appoint or seek to appoint any other retailer or dealer in the territory of India. That agreement was for a period of one year, that is, till 31.12.2014. Clause 7.2 of that agreement 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 said term indicating its intention not to renew.

6. On 24.06.2015, Mahle sent a notice to the appellant in terms of the said Clause 7.2 exercising its right not to renew the agreement on its expiration on 31.12.2015. From these facts, it is clear that Mahle had indicated its intention not to renew the agreement dated 01.01.2014 beyond 31.12.2015. In point of fact, a memorandum of understanding was entered into between the appellant and Mahle on 29.09.2015 with the objective of entering into a new distribution agreement which would take effect from 01.01.2016. Of course, the parties were exploring the possibility of continuing the business association but this was under different terms and a different business model. It is relevant to point out that Article 4 of the MOU stipulated that the MOU would be valid till 31.12.2015 or till the

execution of a detailed distribution agreement between the parties whichever was earlier. It may be stated at this point itself that no distribution agreement had been entered into between the parties post the MOU and prior to 31.12.2015. This is an admitted position. Consequently, the MOU lived its life on 31.12.2015.

7. In the meanwhile, the parties held discussions and exchanged a series of e-mails. This was in furtherance of their objective of agreeing to new commercial terms and entering into a new distribution agreement. Several versions of the proposed draft distribution agreement were exchanged. The seventh such draft was sent by Mahle on 16.03.2016 in soft copy form as an attachment to an e-mail of that date. The said agreement was printed on a stamp paper and two copies were sent to the appellant by Mahle for signatures. As per the appellant, the said agreement was duly executed by them and forwarded to Mahle on 21.03.2016. However, Mahle did not sign the agreement. On 21.04.2016, Mahle sent an e-mail stating that although the parties had spent a considerable time in understanding each other's business requirements, significant progress had not been made in that context and, therefore, Mahle was withdrawing from the exercise.

8. In this factual backdrop, several questions arose before the learned Single Judge. One of them was the preliminary objection raised on behalf of Mahle that the appellant was not entitled to any relief inasmuch as the appellant had concealed material facts. It was submitted that the appellant had concealed the agreement dated 01.01.2014 as also the notice dated 24.06.2015 and the e-mail dated 21.03.2016 which had been sent by Mahle to the appellant clearly indicating that the issue of Maximum Retail Price (MRP) had not been resolved between the parties and that there was no meeting of minds on that aspect. On this issue, the learned Single Judge noted that the petition under Section 9 of the said Act was silent as to the agreement dated 01.01.2014. Although the appellant had referred to the distribution agreement between Mahle Trading (Shanghai) Company Limited and the appellant on 21.11.2006 as also the supplementary agreement dated 20.03.2015, but there was no averment regarding the distribution agreement dated 01.01.2014. The learned Single Judge also noted that the petition was also silent in respect of the notice dated 24.06.2015, whereby Mahle had exercised its option not to continue the distribution agreement dated 01.01.2014 beyond 31.12.2015. It was also found as a fact that the e-mail dated 21.03.2016 was also not mentioned. Consequently, the learned Single Judge found, and in our view correctly,

that there was no explanation whatsoever as to why the said documents, which were relevant, were not mentioned in the petition at all. The learned Single Judge also noted that the petition was supported by an affidavit affirming that all the documents in control of the appellant/petitioner had been disclosed, yet these important documents were withheld. We agree with the learned Single Judge that on this ground of non-disclosure of relevant documents alone, the petition under Section 9 was liable to be dismissed.

9. However, as the learned Single Judge considered other contentions raised by the parties and the same were re-agitated before us, we are also expressing our opinion thereon.

10. The other point that was raised and considered by the learned Single Judge was the important aspect of whether the alleged distribution agreement of 17.03.2016 resulted in a binding contract. Associated with this question was the MRP issue and whether that was a condition precedent or condition collateral without which the proposed distribution agreement could not be regarded as a binding contract?

11. After having heard the learned counsel for the parties at length and having examined the detailed and well reasoned judgment of the learned Single Judge, we are of the view that the learned Single Judge was absolutely correct in observing that the correspondence between the parties indicated that the discussions and negotiations, after the signing of the MOU on 29.09.2015 and even after its expiration on 31.12.2015, were carried on two fronts simultaneously. The first being the finalization of the distribution agreement and the second being the commercial terms. An important issue between the parties was as to the commercial structure of the business model and, in particular, the issue with regard to MRP.

12. Under the earlier arrangement the appellant functioned as the importer of Mahle products. Under the new proposed business model Mahle wanted to import the products directly, fix the MRP and invoice Mahle products to the appellant at a price less than the MRP. This would enable Mahle to determine the maximum margins available to the appellant. This proposed restructuring amounted to an entirely new business model from the earlier one where the appellant purchased the products at a high seas from Mahle and imported the same into India and was thus able to fix the MRP and consequently to also determine its margins.

13. It is, therefore, clear that while Mahle wanted a new business model with different commercial terms, the appellant wanted to stick to the old business model and commercial terms which existed under the old distribution agreement dated 01.01.2014 which had expired on 31.12.2015. We find that the learned Single Judge extensively analysed the correspondence between the parties in the shape of e-mails dated 15.09.2015, 04.12.2015, 06.12.2015, 21.01.2016, 03.02.2016, 08.02.2016, 09.02.2016, 25.02.2016, 26.02.2016, 29.02.2016, 01.03.2016, 02.03.2016, 07.03.2016, 14.03.2016, 15.03.2016 and 16.03.2016. Under the last e-mail sent on 16.03.2016 by Mahle to the appellant, a draft of the proposed distribution agreement was also sent.

14. On 18.03.2016, Mahle again wrote to the appellant. The said letter/e-mail is relevant as also the e-mail dated 21.03.2016 from the appellant to Mahle. The same are reproduced hereinbelow. The e-mail dated 18.03.2016 reads 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)”

The e-mail dated 21.03.2016 reads as under:-

“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”

15. It will be seen from the e-mail dated 18.03.2016 that Mahle was insisting that the MRP be affixed by them before invoicing the goods to the appellant and they propose to adopt the MRP/selling structure as per their earlier e-mail dated the 3rd of February. On the other hand, the e-mail of 21.03.2016, while it indicates that the appellant had signed the distribution agreement, also makes it clear that the appellant was sticking to its stand on the MRP as per its final confirmation in September, 2015. By virtue of the e-mail dated 21.03.2016, the appellant also requested Mahle to sign the distribution agreement before commencement of business for the year. It is an admitted position that Mahle never signed the distribution agreement. It is also clear that Mahle withdrew from the negotiations with regard to the distribution arrangement by virtue of its subsequent letter dated 21.04.2016. Furthermore, there was no consensus with regard to the issue of MRP. We are of the view that without the business model and the issue of MRP having been sorted out, the distribution agreement, even if it had been signed by Mahle, would be unworkable. We agree with the learned Single Judge who found that although the parties could be regarded as being *ad idem* insofar as the terms of the distribution agreement were concerned, they were certainly not *ad idem* with regard to the commercial terms. We also entirely agree with the observation of the learned Single Judge that the

commercial model on the basis of which the distribution agreement was to be worked remained a subject of discord. We also agree with the finding that the issues relating to MRP and margins were not divorced from and, in fact, were intertwined and interlaced with the distribution agreement that was being proposed by the parties. We fully endorse the following observations of the learned Single Judge on this aspect of the matter.

“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.”

16. We may also point out that if the e-mail dated 18.03.2016 is a proposal, then the e-mail dated 21.03.2016 could have been regarded as an acceptance of the proposal only if it had not been clarified by the appellant that they would stick to the stand of MRP as per their final confirmation in September, 2015. The e-mail dated 21.03.2016 would, therefore, not operate as an acceptance but as a counter-proposal which was never accepted by Mahle and negotiations were finally dropped by Mahle's letter of 21.04.2016.

17. A point had been raised by the learned counsel for the appellant that Mahle had by its conduct indicated that the distribution agreement dated 17.03.2016 had culminated into a binding contract. However, we are in complete agreement with the observation of the learned Single Judge that the fact that Mahle supplied its products to the appellant while the distribution agreement and the commercial terms were being negotiated, did not mean that the appellant was appointed as an exclusive distributor of Mahle products or that the proposed distribution agreement dated 17.03.2016 had matured into a binding contract.

18. Another point that was raised before the learned Single Judge as also before us and particularly by the learned counsel for the respondent/Mahle was that even if it were to be assumed that a binding contract had come into being between the appellant and Mahle, an interim injunction could not, in any event, have been granted. The first point taken was that the contract being a determinable one could not be specifically enforced in view of the provisions of Section 14 of the Specific Relief Act, 1963. The second point taken was that the distribution agreement entailed several commercial transactions and the performance of which could not be overseen by this Court. The third was that the distribution agreement, being a commercial agreement, the appellant could be sufficiently compensated by way of damages in case it is held that the respondent breached any of the terms of the distribution agreement. Finally, it was contended that the balance of convenience also was in favour of the respondent and that an injunction restraining the respondent to sell its products in India would amount to effectively preventing the respondent from doing business in India. On all these counts, the learned Single Judge held in favour of the respondent and against the appellant. We agree with the conclusions arrived at by the learned Single Judge.

19. Even if we assume that the distribution agreement had matured into a binding contract, it was clearly a contract which could be terminated as it was determinable. Such a contract cannot be specifically enforced in view of Section 14(1)(c), which clearly stipulates that a contract which is in its nature determinable, cannot be specifically enforced. It is also clear that under Section 14(1)(a) of the Specific Relief Act, 1963, a contract, for the non-performance of which, compensation in money is an adequate relief, cannot be specifically enforced. The appellant, even if it succeeds in its claim that Mahle is in breach of the distribution agreement, it can be easily compensated in terms of money. We also agree with the learned Single Judge that in the absence of any consensus as to the commercial terms between the parties and particularly the price at which the goods are to be invoiced and the price at which they are to be sold to retailers, an injunction, as sought by the appellant, would virtually shut out Mahle from doing business in India. The balance of convenience clearly lay in favour of the respondent and in not granting an injunction as prayed for.

20. Before the learned Single Judge as also before us, a plea had been taken on behalf of the appellant with regard to Clauses 3.1 and 8 of the distribution agreement containing a negative covenant which, according to

the appellant, would entitle it to an order of interim injunction. Clauses 3.1 and 8 of the distribution agreement dated 17.03.2016 read as under:-

“3. 1 MAHLE will not appoint or seek to appoint any retailer or dealer in the Territory unless one of the Party has expressed its intention not to renew the Agreement on Expiry.”

“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.”

21. Clause 3.1 requires 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 agreement on expiry. This clause will be of no help to the appellant because it pertains to renewal of the agreement on its expiry. Moreover, the e-mail dated 21.04.2016 clearly evidences the intention of Mahle not to continue with the negotiations and, therefore, not to enter into any relationship with the appellant. Therefore, Clause 3.1 is of no help to the appellant.

22. Insofar as Clause 8 of the distribution agreement is concerned, we find that the learned Single Judge has correctly analysed the same. The said Clause (including its sub-clauses) actually places restrictions on the appellant and not on the respondent/Mahle. We fully endorse the conclusion arrived at by the learned Single Judge on this aspect of the matter which is in the following words:-

“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 injuncted on the basis of this clause.”

23. The learned counsel for the appellant has also raised an issue with regard to the scope of Section 9(3) of the said Act. After the amendment introduced by Act 3 of 2016, with retrospective effect from 23.10.2015, Section 9 of the said Act has been altered/amended. One amendment is the introduction of, *inter alia*, sub-clause 3 of Section 9 which read as under:-

“(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

24. It was contended on behalf of the appellant that as the petition under Section 9 was filed on 27.04.2016 and the Arbitral Tribunal was constituted on 28.07.2016, the learned Single Judge ought not to have delivered the judgment dated 26.08.2016. According to the learned counsel for the appellant, when the Arbitral Tribunal had been constituted, that is, on 28.07.2016, this Court had already taken up the petition under Section 9 and on 29.04.2016 had passed an interim order in favour of the appellant. It was contended that because of the provisions of Section 9(3), once the Arbitral Tribunal was constituted on 28.07.2016, the Court ought to have relegated the parties to seek their remedy before the Arbitral Tribunal but with the injunction order of 29.04.2016 intact! There was a great deal of

debate as to what has meant by the word ‘entertain’ as used in Section 9(3). On the one hand, the learned counsel for the appellant submitted that the said word meant not only entertainment of application at the threshold but the continuation of the application. On the other hand, it was contended on behalf of the respondent that the word ‘entertainment’ only referred to the consideration of the application at the threshold. It was also contended on behalf of the respondent that as there was no arbitration agreement between the parties because of the fact that there was no binding contract, the provisions of Section 9 would not come into play at all. It was further contended that an appeal is a continuation of the original proceedings and, therefore, the submission that the application under Section 9 could not be entertained by the Single Judge would also apply to this appeal and would, therefore, be a self-defeating argument on behalf of the appellant. The provisions of Section 4 of the said Act were also relied upon to submit that the fact that the appellant participated and continued to participate in the Section 9 proceedings before the learned Single Judge amounted to a waiver, in any event. We are of the view that Section 9(3) does not operate as an ouster clause insofar as the courts’ powers are concerned. It is a well-known principle that whenever the Legislature intends an ouster, it makes it clear. We may also note that if the argument of the appellant were to be

accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes *coram non judice*, would create a serious vacuum as there is no provision for dealing with pending matters. All the powers of the Court to grant interim measures before, during the arbitral proceedings or at any time after the making of the arbitral award but prior to its enforcement in accordance with Section 36 are intact (and, have not been altered by the amendment) as contained in Section 9(1) of the said Act. Furthermore, it is not as if upon the very fact that an Arbitral Tribunal had been constituted, the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3) itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.

25. We may also note that there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted. It could also be argued that if the submission made by the learned counsel for the appellant were to be accepted that the learned Single Judge ought not to have delivered the

impugned judgment under Section 9 of the said Act, then the application itself ought to have been dismissed which would, in any event, leave the appellant without an interim order.

26. Therefore, for all these reasons, we are not inclined to agree with the learned counsel for the appellant on his submissions with regard to the powers of the Court under Section 9(3) of the said Act.

27. For the reasons indicated above, we do not find any error in the impugned judgment. The appeal is dismissed.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

MARCH 01, 2017
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