

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 703 OF 2017

FCA India Automobiles Pvt. Ltd.
(formerly known as Fiat Group Automobiles
India Private Limited) Petitioners

VERSUS

Torque Motor Cars Pvt. Ltd. & Anr. Respondents

Ms.Rajani Iyer, Senior Advocate, a/w. Mr.Aditya Chitale, Mr.Avinash R. Belge, i/b. MNSQ Legal for the Petitioners.

Mr.Pallav Mongia, a/w. Mr.Akash Menon for the Respondent no.1.

CORAM : R.D. DHANUKA, J.

DATE : 12th FEBRUARY, 2018

P.C.

By this petition filed under sections 13, 14 and 29-A of the Arbitration and Conciliation Act, 1996, the petitioners have prayed for a declaration that the action of the respondent no.1 in refusing to grant their consent for extension of time to dispose of the earlier arbitration proceedings before the learned sole arbitrator initiated by the petitioner against the respondent no.1 is liable to be quashed and set aside, seeks extension of time to dispose of the arbitral proceedings initiated by the petitioners against the respondent no.1 before the learned arbitrator by further period of six months or such other period as this court may deem fit. The petitioner also seeks a declaration that the fresh/second arbitral proceedings initiated by the respondent no.1 against the petitioners and conducted by the respondent no.2 is liable to be set aside.

2. Some of the relevant facts for the purpose of deciding this petition are as under :-

3. The respondent no.1 was appointed as a dealer for the territory of Gurgaon, Haryana under a Letter of Intent dated 28th September,2012 by the petitioners. Similar dealership agreement was granted in favour of the respondent no.1 by other two Letters of intent. The dealership of the respondent no.1 is terminated by a separate notice issued by the petitioners. The petitioners invoked arbitration under clause 17 of the Dealership Agreement on 28th March,2016. Since the respondent no.1 failed to appoint any arbitrator within 14 days from the date of receipt of the notice from the petitioners, the nominee arbitrator of the petitioners automatically became the sole arbitrator on 14th March, 2016. On 7th June, 2016 the learned arbitrator issued various directions for filing pleadings, discovery and inspection, payment of fees etc.

4. The respondents were absent in the said meeting. The petitioners thereafter published a public notice in the newspaper. Pursuant to the said notice, the respondent no.1 appeared before the learned arbitrator on 10th August,2016 and sought time to file written statement. The matter was adjourned on several occasions at the request of the respondents by the learned arbitrator. On 14th September,2016, the respondent no.1 filed an application under section 16 of the Arbitration and Conciliation Act,1996 raising an issue of jurisdiction and more particularly contenting that there did not exist any arbitration agreement or that the same was in conflict with public

policy. The application under section 16 was argued before the learned arbitrator on 20th December, 2016. In the meanwhile on 17th December, 2016 the respondent no.1 filed an application via e-mail under sections 12 and 13 of the Arbitration and Conciliation Act, 1996 alleging that the learned arbitrator had not made disclosure as contemplated under section 12(1B) of the Arbitration and Conciliation Act, 1996. The learned arbitrator decided the said application under section 16 on 17th February, 2017.

5. On 18th March, 2017, the learned arbitrator re-scheduled the meeting to be held on 20th March, 2017 to 3rd April, 2017. It is the case of the petitioners that on 20th March, 2017, the respondent visited the office of the learned arbitrator and unilaterally got the matter adjourned to 4th May, 2017. The petitioners objected to such unilateral re-scheduling of the matter and requested the learned arbitrator to fix the matter on the scheduled date of 3rd April, 2017.

6. On 31st March, 2017, the learned arbitrator addressed a letter to both the parties enquiring whether they were agreeable for extension of period for disposal of the proceedings by six months. The petitioners immediately granted its consent for such extension of time. The respondent no.1 however refused to give any written reply to the extension request.

7. On 3rd April, 2017, none appeared for the respondents. The learned arbitrator suggested three alternate dates i.e. 10th April 2017, 11th April 2017 or 12th April 2017. The respondent no.1 however

preferred to argue application under sections 12 and 13 on 11th April, 2017 before the learned arbitrator.

8. On 11th April, 2017, itself the learned arbitrator passed an order rejecting the application filed by the respondent no.1 under sections 12 and 13.

9. It is a common ground that 12 months period expired on 15th April, 2017. On 7th July, 2017, the respondent no.1 invoked arbitration agreement and appointed the respondent no.2 as a sole arbitrator. The petitioners did not appoint any arbitrator in response to the said notice. It is the case of the respondent no.1 that the respondent no.2 accordingly has been conducting the fresh arbitral proceedings.

10. Ms.Iyer, learned senior counsel for the petitioners invited my attention to various exhibits annexed to the arbitration petition. When the matter was called out, learned counsel for the respondent no.1 tendered affidavit in reply and served a copy upon the petitioners' learned senior counsel in court. Since the matter was partly argued on the last date, I have permitted the learned senior counsel for the petitioners to proceed with the matter on the basis of the denial.

11. Learned senior counsel submits that the respondents on one or the other ground was seeking adjournment from the learned arbitrator. She submits that the learned arbitrator had shown maximum indulgence to the respondent no.1 by granting various adjournments. She submits that the learned arbitrator could not dispose of the arbitral

proceedings within a period of 12 months because of various adjournments sought by the respondent no.1 from the learned arbitrator. She submits that the learned arbitrator has already rejected the application filed by the respondent no.1 under sections 12, 13 and 16.

12. It is submitted by the learned senior counsel that the respondent no.1 deliberately got the date of the hearing re-scheduled from 20th March, 2017 to 4th May, 2017 keeping in mind that the 12 months period will expire on 15th April, 2017. She submits that admittedly on 11th April, 2017, the respondent no.1 appeared before the learned arbitrator to make its submission on the application filed under sections 12 and 13 of the Arbitration and Conciliation Act, 1996.

13. Insofar as appointment of the fresh arbitrator by the respondent no.1 is concerned, learned senior counsel invited my attention to the minutes of the arbitral meeting held on 7th June, 2016. She submits that in the said meeting, the learned arbitrator had issued directions not only to file statement of claim but also written statement and counter claim if any.

14. It is submitted that the respondent no.1 did not raise any objection before the learned arbitrator that the respondent no.1 did not propose to file any counter claim pursuant to the said directions issued by the learned arbitrator nor raised any issue of payment of fees. She submits that the respondent no.1 has made only part payment of fees to the learned arbitrator.

15. It is submitted that since the respondent no.1 did not agree for extension of time deliberately and 12 months time expired, the petitioner is justified in filing of the application under section 29A of the Arbitration and Conciliation Act, 1996 *inter alia* praying for extension of time. She submits that such application can be filed by either party before expiry of 12 months or 18 months or even after expiry of such period. Insofar as the invocation of sections 13 and 14 by the petitioner in this petition is concerned, it is submitted that since the respondent no.1 has illegally appointed the respondent no.2 as an arbitrator and instead of filing counter claim before the learned arbitrator has chosen to appoint such arbitrator contrary to the pleadings of the respondent no.1 that the arbitration agreement did not exist or was in conflict with public policy or was fraudulent respondent no.1 and has chosen to invoke the same arbitration agreement under the Dealership Agreement entered into between the parties, the appointment of the arbitrator being illegal, the learned arbitrator cannot proceed with the second arbitration.

16. Learned counsel for the respondent no.1 on the other hand submits that the learned arbitrator was not prompt in deciding the application filed by the respondent no.1 under sections 12 and 13 and also under section 16. He submits that the learned arbitrator took lot of time to dispose of those applications.

17. It is submitted by the learned counsel that under section 12(1B) of the Arbitration and Conciliation Act, 1996, the learned arbitrator

ought to have disclosed his interest read with schedule 5. He submits that the learned arbitrator was already appointed by the petitioner in another arbitration between the petitioner and another party. At the same time, the petitioner also nominated the same arbitrator in these three matters. It is submitted that since the learned arbitrator was appointed in more than two matters at the same time, the learned arbitrator ought to have disclosed such facts under section 12(1B) read with schedule 5. He submits that this court shall consider this crucial aspect while deciding this application under section 29A of the Arbitration and Conciliation Act, 1996.

18. Insofar as payment of fees is concerned, it is submitted by the learned counsel that the respondent no.1 has made part payment of the fees decided by the learned arbitrator. He submits that the learned arbitrator could not have decided the fees without consent of the respondent no.1. He submits that in the minutes of the meeting, the learned arbitrator has erroneously recorded that the fees were fixed by the learned arbitrator by consent of both parties.

19. The next submission of the learned counsel for the respondent no.1 is that even if the respondent no.1 would not have paid the fees as demanded by the learned arbitrator, the remedy of the learned arbitrator to demand fees is already contemplated under section 38 of the Arbitration and Conciliation Act, 1996. The learned arbitrator could have demanded the arrears of payment of contribution of the respondent no.1 from the petitioner. He submits that the learned arbitrator should not have mentioned in the minutes of the meeting

again and again that the respondent no.1 had committed default in making payment of fees of the learned arbitrator.

20. It is submitted by the learned counsel for the respondent no.1 that even if the respondent no.1 had asked for number of adjournments before the learned arbitrator, it was for the learned arbitrator to control the proceedings and he ought not to have granted several adjournment to the respondent no.1.

21. Insofar as invocation of sections 13 and 14 by the petitioner is concerned, it is submitted by the learned counsel that since 12 months period as contemplated under section 29A has already expired, the mandate of the learned arbitrator stood terminated. He submits that upon termination of the mandate of the learned arbitrator, the respondent no.1 is entitled to invoke the arbitration agreement again. He submits that in any event, the claims made by the respondent no.1 before the respondent no.2 are independent claims and have nothing to do with the subject matter of the arbitration of the petitioner made before the learned arbitrator.

22. Learned counsel also placed reliance on Order 8 Rule 6A of the Code of Civil Procedure and also section 23 of the Arbitration and Conciliation Act, 1996 and would submit that even if the respondent no.1 could not have file the counter claim before the learned arbitrator, the respondent no.1 is not precluded from filing a separate claim by invoking the arbitration agreement again. The next submission of the learned counsel for the respondent no.1 is that in any event, the remedy

of the petitioner to oppose ongoing arbitration proceedings would be by filing an application under section 16 of the Arbitration and Conciliation Act, 1996 and not filing an application under section 14 of the Arbitration and Conciliation Act, 1996.

23. Ms.Iyer, learned senior counsel for the petitioner in rejoinder submits that on one hand the respondent no.1 had alleged in the application under section 16 filed before the learned arbitrator that the arbitration agreement did not exist or that the same was in conflict with the public policy or that was obtained fraudulently and on the other hand has invoked the same arbitration agreement for making huge claim by appointing the respondent no.2. She submits that on one hand, the respondent no.1 has urged in the said application that there ought to have been three arbitrators and not a sole arbitrator and on the other hand has refused to pay the fees of the learned arbitrator. She submits that in these circumstances, since the proceedings filed by the respondent no.1 before the respondent no.2 are totally illegal, the present petition filed also under section 14 of the Arbitration and Conciliation Act, 1996 is maintainable.

24. A perusal of the record indicates that the learned arbitrator had issued directions in the first meeting on 7th June, 2016. The learned arbitrator had directed the petitioner to file statement of claim and at the same time granted an opportunity to the respondent no.1 to file written statement and the counter claim. The respondent no.1 did not appear in the said meeting. The respondent no.1 appeared for the first time before the learned arbitrator on 10th August,2016 and sought time

to file written statement. The matter was adjourned from time to time. A perusal of the record indicates that atleast on more than six occasions, the respondent no.1 took time from the learned arbitrator on one or the other ground. A perusal of record indicates that the learned arbitrator has shown more indulgence to the respondent no.1 by granting adjournment to the respondent no.1 though the adjournment application was opposed by the petitioner through its counsel.

25. The application filed under sections 12, 13 and 16 are already rejected by the learned arbitrator. This court cannot go into the merits of those two orders passed by the learned arbitrator in this petition filed under section 29A read with sections 13 and 14. A remedy of the respondent no.1 would be to challenge those two orders along with final award if the respondent no.1 is aggrieved by the said award under section 34 of the Arbitration and Conciliation Act, 1996.

26. A perusal of the record indicates that the learned arbitrator had fixed the meeting on 4th May, 2017. On 20th March, 2017 however the respondent visited the office of the learned arbitrator and unilaterally got the matter adjourned between 4th May, 2017.

27. A perusal of the record indicates that an application on the part of the respondent no.1 in getting the date re-scheduled to 4th May, 2017 was with a view to raise an objection in future that 12 months had expired on 15th April, 2017. The respondent no.1 had appeared before the learned arbitrator on 11th April, 2017 and made its submission on its application filed under sections 12 and 13 of the Arbitration and

Conciliation Act, 1996. In my view, the respondent no.1 was solely responsible in the learned arbitrator not having been able to make an award within a period of 12 months.

28. Insofar as submission of the respondent no.1 that the arbitral proceedings were terminated in view of the learned arbitrator having not rendered an award within 12 months and thus the respondent no.1 was entitled to appoint another arbitrator is concerned, a perusal of section 29A of the Arbitration and Conciliation Act, 1996 and more particularly section 29A(4) clearly indicates that if the award is not made within the period specified in section 29A(1) or within extended period specified under sub-section 3, the mandate of the learned arbitrator shall terminate unless court has extended the period. It is thus clear that the application for extension of time can be made under section 29A before expiry of 12 months period or even thereafter. Admittedly in this case, 12 months period had expired on 15th April, 2017.

29. Before the petitioner could invoke section 29A, respondent no.1 issued a fresh notice invoking arbitration agreement on 7th July, 2017. The respondent no.2 conducted a meeting on 25th September, 2017. The petitioner has already lodged this petition on 5th October, 2017. I do not find any delay on the part of the petitioner in filing this petition under section 29A of the Arbitration and Conciliation Act, 1996 *inter alia* praying for seeking extension of time and challenging the appointment of respondent no.2. In my view, the mandate of the learned arbitrator would not expire immediately upon expiry of 12

months for all purposes in view of the provisions being made under the said provision under section 29A for making an application for extension of time even after expiry of 12 months period.

30. Insofar as submission of the learned counsel for the respondent no.1 that the learned arbitrator had wrongly mentioned in the minutes of the first meeting that the fees of the learned arbitrator was fixed by consent of both the parties is concerned, it is not in dispute that the respondent no.1 has made part payment of fees to the learned arbitrator based on the same directions issued by the learned arbitrator. Be that as it may, the issue of payment of fees cannot be gone into by this court while deciding an application under section 29A of the Arbitration and Conciliation Act, 1996 and the said issue is thus irrelevant at this stage.

31. Insofar as submission of the respondent no.1 that the learned arbitrator ought to have disclosed in terms of sections 12 (1-B) read with schedule 5 is concerned, it is not in dispute that the application was made by the respondent no.1 under sections 12 and 13 challenging the appointment of the learned arbitrator which application is already rejected by the learned arbitrator. This court thus cannot go into the validity of the said order passed by the learned arbitrator in this proceedings under section 29-A of the Arbitration and Conciliation Act, 1996.

32. Insofar as submission of the learned counsel for the respondent no.1 that the respondent no.1 is entitled to invoke the arbitration clause again for the purpose of filing a separate claim before the respondent

no.2 is concerned, a perusal of the averments made in the application filed under section 16 of the Arbitration and Conciliation Act, 1996 by the respondent no.1 clearly indicates that the respondent no.1 had urged before the learned arbitrator that there does not exist any arbitration agreement or that the same is in conflict with the public policy or that the same was obtained fraudulently by the petitioner. In reply to the notice invoking arbitration agreement, the respondent no.1 itself had demanded the claim more than Rs.50 crores from the petitioner arising under the same Dealership Agreement. The respondent no.1 having raised such plea that the arbitration agreement does not exist in my view could not have filed a separate claim before the respondent no.2 invoking the same arbitral agreement. The learned arbitrator has already granted liberty to the respondent no.1 to file a counter claim.

33. Be that as it may, since there is no time limit prescribed under section 29A of the Arbitration and Conciliation Act, 1996 for making an application for extension of time, the petitioner having made an application for extension of time within reasonable time, respondent no.1 could not have invoked the arbitration agreement again. In my view, the petitioner has made out a case for termination of the mandate of the respondent no.2.

34. I, therefore pass the following order :-

- (a) The learned arbitrator is granted 12 months extension from the date of the next meeting to complete the arbitration proceedings.

(b) The learned arbitrator shall not grant any unnecessary adjournment to any of the parties. Both the parties shall co-operate with each other and with the learned arbitrator in rendering the award within the extended period.

(c) If any of the parties do not co-operate with the learned arbitrator in proceeding with the matter expeditiously and to make an award within the extended period, conduct of such party shall be recorded in the minutes of the meeting or in the arbitral award.

(d) Insofar as prayer clause (c) of the arbitration petition is concerned, the same is also allowed.

35. Arbitration petition is disposed of in the aforesaid terms. The respondent no.1 is directed to pay cost of Rs.50,000/- to the petitioner within two weeks from today.

36. At this stage, learned counsel for the respondent no.1 states that the cost would be paid within four weeks from today. Statement is accepted.

37. It is made clear that this order will apply to all the three proceedings which were pending before the learned arbitrator.

[R.D. DHANUKA, J.]