

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 08.03.2018

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P. No.564 of 2017

Ramya Auto Agency,
Rep by its Proprietor,
P.Muthusamy

.. Petitioner

Versus

1.TVS Motor Company Ltd
Jayalakshmi Estate,
29, Haddows Road,
Chennai 600 007.

2.B.A.Muchandi
District and Session Judge (Retd)
No.1469, 2nd Cross
Judicial Layout, JK VK Post,
Bangalore 560 065.

.. Respondents

Prayer: Original Petition filed under Section 14, 15 & 11 (6) (c) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator to terminate the mandate of the 2nd respondent and appoint an arbitrator to adjudicate upon the differences and disputes between the parties.

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For Petitioner : Mr.S.Raveekumar for
Mr. M.Hariharan

Mr.D.Nishanshiya Velankanni

For Respondent 1 : Mr.M.S. Krishnan, Senior Counsel
for Sarvabhauman Associates

For Respondent 2 : No appearance.

ORDER

This petition prays for an order terminating the mandate of the second respondent in terms of sections 14 and 15 of the Arbitration and Conciliation Act 1996 ('Act') and appointment of an Arbitrator in terms of section 11 thereof to adjudicate upon disputes and differences that have arisen between the parties from out of a Dealers Agreement dated 01.03.2013.

2.The petitioner is a dealer of the first respondent company for more than two decades in respect of its two and three wheelers.

3.Heard Mr.S.Raveekumar, learned counsel for the petitioner and Mr.M.S.Krishnan, learned senior counsel for Sarvabhauman Associates, for the first respondent. There is no appearance on behalf of the second respondent who has been appointed by the company as Arbitrator and is arrayed as R2 in this petition. The petitioner, 1st and 2nd respondents are referred to hereinafter as 'dealer', 'company' and 'arbitrator' respectively.

4.The dealership had commenced in the year 2006 and substantial investments had, according to Mr.Raveekumar, been made by the dealer in the same. While this was so, based on a complaint dated 04.10.2012 from a third party, subsequently withdrawn, the main dealer of the company based in Salem had stopped supplies of vehicles from 27.05.2014 thus prejudicing the business of the dealer considerably. The reduction in supply of vehicles was, according to the dealer, at the instigation of the Company. On 13.04.2016 the dealer had addressed a

letter to the company seeking a renewal of dealership agreement that had expired on 31.12.2015. There was no reply. The arbitration clause was thus invoked on 22.09.2016, proposing to refer the disputes that had arisen between the parties to arbitration.

5. In response to notice invoking the arbitration clause, the company issued a letter dated 19.10.2016 proposing to renew the agreement till 31.03.2017 and stating that all terms and conditions of the original agreement would apply to the period of renewal.

6. The dealer sought renewal for a period of three years to which the company replied on 22.11.2016, stating that the question of longer renewal would be considered at later date. While this is so, letter dated 01.03.2017 was issued by the company terminating the dealer agreement with effect from 31.03.2017.

7. The dealer thus filed Original Petition No.8 of 2017 before the District Court, Krishnagiri seeking interim relief under section 9 of the Act. This is in line with the dispute resolution clause which states as under:

'CLAUSE 22

DISPUTE RESOLUTION

22.1. Except as otherwise specifically provided in this Agreement, any dispute, controversy or claim arising out of or relating to this Agreement or breach of termination or invalidity thereof or any other matter or any claim of whatsoever nature or any other agreement or contract or

any breach, termination or invalidity thereof, shall be settled in the following manner (The 'Dispute')

22.2.A Dispute will be deemed to arise when one Party serves on the other Party a notice in writing stating the nature of the Disputes(s) (hereinafter referred to as a 'Notice of Dispute')

22.3.The Notice of Dispute or any other notice of information in writing shall be sent in the following manner: (i) By AD to the Company: To the Registered Office of the Company (ii) By the Company to AD: To the last known address of the AD. The service of Notice of Dispute shall be deemed to be completed only when the sender of the Notice of Dispute provides proof of, delivery to and receipt by the recipient, of such Notice of Dispute.

22.4.The parties hereto agree that they will use all reasonable efforts to resolve between themselves, any Disputes through negotiations.

22.5.Any Dispute of whatsoever nature as contemplated in clause 22.1 above and/or differences which could not be settled by the Parties through negotiations, after the period of thirty (30) Days from the service of the Notice of Dispute, shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and/or the amendments/modification thereof; the arbitral panel shall be empowered to adjudicate and resolve the Dispute(s) as mentioned in the Notice of Dispute and the arbitral panel shall not be empowered to adjudicate and resolve any other matter or claim of whatsoever nature which are not mentioned in the Notice of Dispute and:

a.All proceedings shall be conducted in English.

b.The arbitral panel shall comprise of a sole arbitrator selected by the Chairman and Managing Director of the Company or the person nominated/delegated by him for this purpose. The Chairman and Managing Director of the Company or his nominee/delegated person is the Appointing Authority for constituting arbitral panel comprising of a sole arbitrator. The power of appointment of arbitrator by the Appointing Authority shall include substitution of arbitrator if any required at any stage of the arbitration. The Company may at its discretion require resolution of the Dispute by an arbitral panel comprising of three (3) arbitrators one to be selected by the Company, one to be selected by the AD and the third to be selected by the two arbitrators appointed by the Company and the AD who shall serve as presiding Arbitrator of the Arbitration Panel; and

c.The venue of arbitration shall be in Hosur, Tamil Nadu or at such other place as it is convenient to the arbitral panel'

8.The company filed a counter bringing to the notice of the District Court that one Sri.S.B.N.Prakash, District and Session Judge, (Retd.) had already been appointed as Arbitrator vide their letter dated 07.04.2017. Recording the same, the Original Petition was closed.

9.The matter was thereafter posted for hearing before the Arbitrator to whose appointment the dealer objected vide communication dated 01.05.2017, requesting that the proceedings be dropped.

10.Consequently, the sole arbitrator vide his proceedings dated 02.05.2017 withdrew his consent to be an Arbitrator on the basis of the objection raised to his unilateral appointment by the company. He also observed that appropriate orders may be obtained from the Court for the appointment of an Arbitrator. An appeal has been filed by the company against the aforesaid proceedings on the ground that the same were contrary to the procedure for appointment of arbitrator as agreed to between the parties.

11.The Company thereafter took steps to initiate the process of appointment of arbitrator all over again and by letter dated 08.05.2017 sought the intervention of the Chairman and Managing Director to appoint

an Arbitrator. On 09.05.2017, Sri.B.A.Muchandi, was appointed as the sole arbitrator.

12.The dealer immediately objected to the aforesaid appointment on 17.05.2017. The Arbitrator has however expressed his consent to the appointment, and has filed a statutory declaration as contemplated under section 12(1) (b) of the Act.

13.On 24.05.2017, the dealer addressed a notice to the company objecting to the appointment of the Arbitrator as being utterly unlawful. Objections dated 14.05.2017 and 24.05.2017 have been addressed to the Arbitrator as well, who, in response thereto, has issued notice of hearing dated 31.05.2017 stating that the objections raising a challenge to his appointment would be considered at the time of hearing.

14.The prayers for termination of appointment and denovo appointment of arbitrator by this Court have been advanced in the light of the aforesaid factual matrix.

15.The first argument is to the effect that there has been no reference to arbitration as contemplated under section 21 of the Act thus invalidating the appointment of the arbitrator and rendering the same ab initio void.

16. Section 21 of Act deals with the commencement of proceedings and states that unless otherwise agreed upon, proceedings commence on the date on which a request for the dispute to be referred to Arbitration is raised.

17. The exchange of communication between the parties in this case would show that a legal notice was issued by the dealer on 04.06.2015 calling for compensation of one crore for non-supply of vehicles by the company. Thereafter on 22.09.2016, the dealer has specifically invoked the Arbitration Clause and requested the company to appoint an Arbitrator from the panel of names maintained in the High Court Arbitration Centre within 21 days from the receipt of notice.

18. As regards the above notice, the dealer states unequivocally in the present Original Petition at paragraph 15 as follows:

'The petitioner further submits that if the 1st respondent had failed to comply with the same, the petitioner would have been constrained to move to the appropriate court for appointment of an arbitrator'

19. Thereafter, he appears content with the extension of dealership periodically till the termination of the agreement on 01.03.2017 when he files an application seeking interim protection before the District & Sessions Court, Krishnagiri. Inter alia, in the Section 9 Application, the dealer states as follows:

20. The Petitioner submits that disputes have arisen between the parties and the respondent has failed to appoint an arbitrator and hence the Petitioner is taking steps for appointment of an arbitrator by filing an application before the appropriate Court under Section 11 (6) of the Arbitration Act. The Petitioner submits that pending appointment of an arbitrator and adjudication of the disputes by the Arbitrator the Petitioner's interest need to be protected. The Petitioner further submits that in the letter dated 1st March 2017 received by it on 6th March 2017, the Respondent has called upon the Petitioner not to do certain things as stated in that letter and this will adversely affect the interests of the petitioner. Interests of justice warrant that pending adjudication of the issues by an arbitrator it is necessary that this Hon'ble Court pass an order of injunction restraining the Respondent from giving effect to the letter dated 01.03.2017 till the issues are settled through arbitration contained in the agreement.

21. The cause of action for the Petition arose on and from 28.07.1992 when Shri. P.A. Janakiraman was appointed as the authorized dealer of the respondent, on and from 28.02.1996 when Ramya Auto Agency represented by the Petitioner herein was appointed as the authorized service centre of the respondent, on and from 04.06.2004 when the revised conditions were entered into between the Petitioner and Respondent, on and from 16.02.2013 when the Petitioner and Respondent entered into an Agreement from the period 01.01.2013 to 31.03.2015, on all dates when the respondent did not supply vehicles, on and from 04.06.2015 when the petitioner issued a notice through his advocate claiming damages of Rs.1 Crore, on and from 22.09.2016 when the Petitioner invoked the arbitration clause and issued a notice of arbitration and on all dates when the respondent has not appointed the arbitrator, on and from 01.03.2017 when the respondent issued a notice determining the agreement without following the due process set out in the agreement dated 16.02.2013 and on all dates when the Petitioner is entitled to the relief prayed for and at Krishnagiri within the jurisdiction of this Hon'ble Court'

20. The above petition was itself closed in the light of the appointment of an arbitrator by the company. The first arbitrator recuses himself consequent upon an objection raised in this regard by the dealer.

The second appointment made has also been objected to on various grounds.

21. Then again, in the present petition the petitioner himself states at paragraph 15 that had the company not appointed an Arbitrator, the dealer would have been constrained to move the appropriate court for such appointment.

22. It is thus clear that the dealer is merely vacillating between various positions and has been raising objections left, right and centre to all attempts of the company to appoint an arbitrator pursuant to his letter seeking reference dated 22.09.16. In the above facts and circumstances, there is no doubt in my mind that a dispute has arisen and a reference to arbitration sought under section 21 of the Act on 22.09.2016. This argument is rejected.

23. The second argument is a challenge to the appointment of Sri.B.A.Muchandi as Arbitrator on the ground that the appointment is unilateral, at the instance of the company.

24. The parties are bound by the arbitration clause that has been agreed upon. Clause 22 of the agreement deals with dispute resolution and provides that the appointment of a sole Arbitrator shall be by the

Chairman and Managing Director of the company or a person nominated and delegated by him for this purpose. The parties have thus agreed that the appointing authority shall be the Chairman and Managing Director of the company.

25.This does not however mean the opposing party is left to the mercy of the company's appointee. This statute provides for a challenge to the arbitrator so appointed if the opposing party is of the view that the Arbitrator is not impartial and independent. Section 12 provides for grounds for challenge and section 13 for the procedure for such challenge.

26.The Supreme Court in its recent judgement in the cases of *HRD Corporation (Marcus Oil and Chemical Division vs Gail (India) Limited (formerly Gas Authority of India Ltd (2018-1L.W.420)* and *Voestalpine Schinenern GmbH vs Delhi Metro Rail Corporation Ltd. (Manu/SC/0162/2017)* have drawn a distinction between impartiality/lack of independence and ineligibility concluding that it is only the latter that may be questioned directly before the Court and not the former.

27.The dealer in this case has, in fact, filed an application under section 13 before the Arbitrator challenging his appointment on 18.06.2017 referring inter alia to his letters dated 14.05.2017 and

17.05.2017 and concluding by expressing his apprehension that the Arbitrator would not act in an independent, unbiased or impartial manner.

28.The objections raised by the dealer challenge, admittedly, the impartiality/independence of the Arbitrator and fall within the ambit of section 12(3) of the Act liable to be challenged in terms of the procedure set out under section 13 of the Act. The Arbitrator is thus requested to dispose of the challenge on priority and as a preliminary objection before proceedings to the merits of the matter, if at all.

29.That apart, the prayers sought for in terms of Section 14 and 15 of the Act seeking a termination of the mandate of the arbitrator appointed cannot be considered by this Court , in view of the bar under Section 42 of the Act. As noticed elsewhere, the petitioner had moved the Court at Krishnagiri seeking interim relief under section 9 of the Act.

30.The provisions of section 42 of the Act mandate that once a party to an arbitration agreement has approached a particular Court with an application, both parties are enjoined thereafter to approach only that Court for all subsequent applications thus barring the exercise of jurisdiction by any other Court in this regard. (See *State of West Bengal and others Vs. Associated Contractors* (2015) 1 SCC 32)). The prayers under Section 14 and 15 are thus dismissed on this ground.

31. Learned counsel for the dealer has also relied on the decisions of the Supreme Court in the case of *S.B.P. and Company vs Patel Engineering Limited and Another* ((2009) 10 SCC 293), *Rodemandan India Ltd. vs International Trade Expo Centre Ltd.* ((2006) 11 SCC 651), *Firm Ashok Traders and another vs Gurumukh Da Saluja and others* ((2004) 3 SCC 155), *Sundaram Finance Limited vs NEPC India Ltd* (199) 2 SCC 479 and *Vijay Kumar Sharma Alias Manju vs Raghunandan Sharama Alias Baburam and others* ((2010) 2 SCC 486) in support of his submissions. None of the judgements however, apply to the specific facts and circumstances of this case.

32. Notwithstanding my rejection of the prayers under sections 11(6), 14 and 15, I am conscious of the fact that the dealer has been associated with the Company for more than 25 years. I thus, believe that both parties should be giving an opportunity to resolve the dispute by way of mediation before proceeding to continue the proceedings for Arbitration. Thus, while dismissing this petition and on the basis of concurrence expressed by Mr.Raveekumar and Mr.Krishnan, I refer the parties to mediation by Mrs.Uma Ramanathan, Advocate. The process of mediation may be completed, one way or the other, within four weeks from the date of first sitting. In the event of mediation being successful the proceedings for Arbitration will stand automatically terminated. In the event of mediation failing, the proceedings for Arbitration will continue

from the stage of consideration of the dealers' challenge under section 13 of the Act.

33. I also record the undertaking of Mr.Krishnan, learned senior counsel for Sarvabhauman Associates for the company, that the appeal filed under section 37 of the Act challenging the proceedings of Sri.B.N.S.Prakash will be withdrawn by the company within a period of four weeks from the date of receipt of a copy of this order.

34. Let the parties appear before the learned Mediator on 05.04.2018 at 2.15 pm or on a date as proximate to the aforesaid date as may be convenient to the learned Mediator as well as the parties.

35. This Original Petition stands dismissed. No costs.

Index:Yes/No

Speaking order/Non-speaking order

08.03.2018

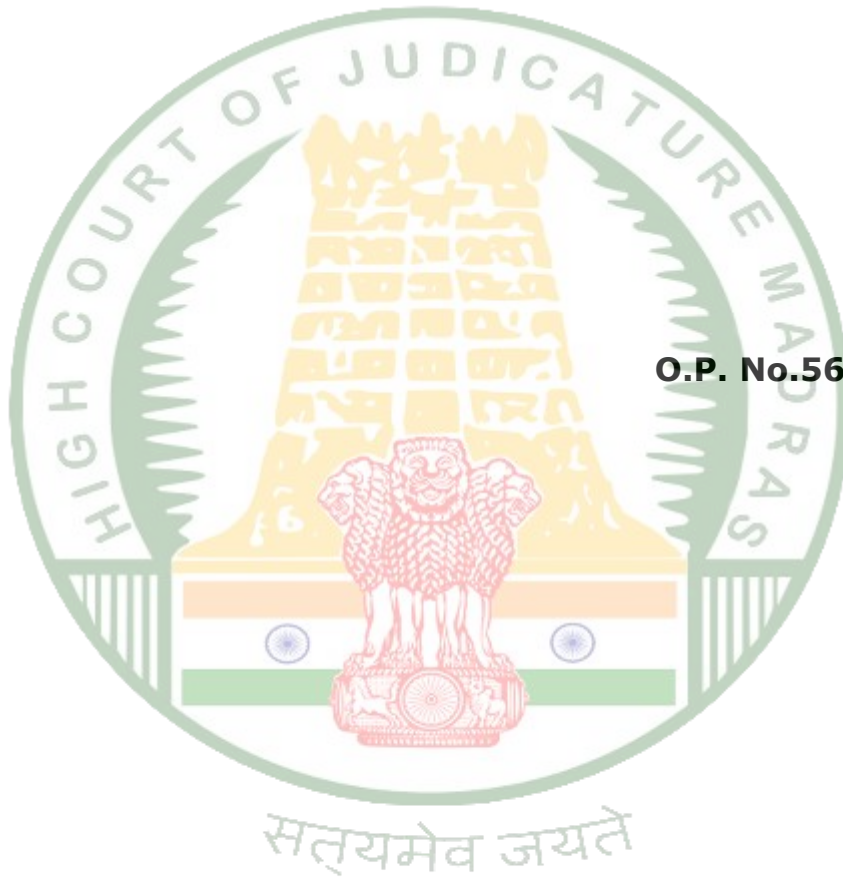
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Note: Registry is directed to send the bundle
to the Tamil Nadu Mediation and Conciliation Centre
forthwith.

Dr.ANITA SUMANTH,J.

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O.P. No.564 of 2017

08.03.2018

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