

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	18.09.2019
Judgment pronounced on	24.09.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.679 of 2012

M/s.MKV Agencies
Partnership Firm
Rep. by its Managing Partner
Mr/K.V.Alegasan
Bangalore Bye Pass Road,
Near Konalampatti Circle,
Salem - 636 010.

... Petitioner/Claimant

Vs.

1.M/s.TVS Motors Company Ltd,
Jayalakshmi Estates,
5th Floor,
No.8, Haddows Road,
Chennai - 600 006.

... 1st Respondent/Respondent

2.Hon'ble Mr Justice K.Govindarajan
Former Judge, Madras High Court,
Sole Arbitrator,
Chennai.

... 2nd Respondent

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 08.04.2012 passed by the Arbitral Tribunal.

For Petitioner : Mr. V.Ramakrishnan
Senior Counsel for
M/s. Pushpa Menon and
Mr.Vivek Menon

For Respondents : Mr. M.S.Krishnan
Senior Counsel for
M/s.Sarvabhauman Associates
for R-1

ORDER

The Claimant before the Arbitral Tribunal is the Petitioner before this Court. By Arbitral Award dated 08.04.2012(the Award), all the claims made by the Petitioner were rejected and the said Award is challenged by filing the present petition.

2.The dispute between the parties arises out of a Dealership Agreement dated 01.04.2003 relating to the establishment of a show room for the retail sale of two wheelers, which are manufactured by the First Respondent and sold wholesale to the Petitioner. It appears that the business relationship between the parties commenced even earlier and was carried on in terms of an earlier Dealership Agreement dated 08.03.1998. It is the admitted position that the Petitioner carried on the dealership business based on the Dealership Agreement dated 01.04.2003 until the business was closed in the year 2008. Pursuant to such closure, it appears that notices were issued on 07.06.2008 and 28.07.2008 requesting the First Respondent to settle the disputes arising out of such

business and in view of the inability of the parties to settle the dispute amicably, an Arbitral Tribunal was constituted, as provided in the Dealership Agreement, to adjudicate the dispute. The Petitioner filed its Statement of Claim(SoC) before the said Arbitral Tribunal on 06.08.2009 and raised 17 claims for an aggregate sum of Rs.1,74,51,462/-. Upon completion of pleadings, the learned Arbitrator framed six issues, which are set out in Pages 290 and 291 of Volume -I of the documents filed by the Petitioner. Both parties, thereafter, adduced both oral and documentary evidence. The Petitioner/Claimant adduced evidence through Mr.K.V.Alegesan, C.W.1, and Exhibits C-1 to C-182 were marked through the said witness. The Petitioner/Claimant also examined Mr.T.N.Ramachandran, an Auditor, as C.W.2, and Mr.K.Nagarajan, as C.W.3, and Exs.C-183 to C-190 were marked through the said witnesses. All the three witnesses for the Petitioner/Claimant were cross examined by the learned senior counsel for the Respondent. Upon closure of the Petitioner's evidence, the Respondent adduced evidence by examining R.W.1(Mr.Murali) and Exhibits R-1 to R-23 were marked through the said witness. R.W.1 was subject to cross examination by the learned counsel for the Petitioner/Claimant. Thereafter, both parties made oral arguments and upon consideration of the pleadings, oral and documentary evidence and the oral arguments, the Award dated 08.04.2012 was pronounced by the Arbitral Tribunal.

3.I heard the learned senior counsel, Mr. Veeraraghavan Ramakrishnan, assisted by Mr.Vivek Menon, on behalf of the Petitioner and Mr. M.S.Krishnan, the learned senior counsel appearing for M/s.Sarvabhauman Associates on behalf of the First Respondent.

4.The learned senior counsel for the Petitioner opened his submissions by referring to Paragraph 29 of the Award so as to point out that the learned Arbitrator agreed that a breach of Clause 21(2) of the Dealership Agreement was established by the Petitioner and to state that in spite of that all the claims were rejected on account of the stated failure to prove the individual claims. After referring to the said finding, the learned senior counsel stated that he would deal with individual claims with a view to establish that the Award in respect of the said individual claims is patently illegal and liable to be interfered with under Section 34 of the Arbitration and Conciliation Act, 1996(the Arbitration Act). Out of the 17 claims, Claim No.1 was given up before the Arbitral Tribunal. During the course of arguments, the learned senior counsel submitted that he would focus attention on Claim Nos.3 to 16. His submissions in respect of the said claims 3 to 16 were as under:

(i) **Claim Nos.3 and 4** relate to advertising and publicity expenses. In this regard, the learned senior counsel pointed out that the Petitioner had relied upon two exhibits, namely, Ex.C-80 and C-81. According to the

learned senior counsel, both these exhibits were not duly considered by the learned Arbitrator while reaching a conclusion with regard to Claim Nos.3 and 4 and that, therefore, the Award is liable to be interfered with on the basis that relevant and material evidence was disregarded. In addition, he submitted that the learned Arbitrator erred in rejecting the claim on the basis that Clause 18.1 of the Dealership Agreement requires the prior approval, in writing, of the respondent with regard to advertisement charges. In this regard, he contended that Ex.C-80 and C-81 were prepared on the basis of the ledger accounts of the Petitioner in the books of account of the First Respondent and that, therefore, it is implicit that the prior approval of the First Respondent had been obtained in respect of the said expenses. He also pointed out that there was no cross examination with regard to the requirement of prior approval in writing as per Clause 18.1.

(ii)**Claim No.5** relates to losses arising out of sale of equipments and tools at less than book value. In this regard, he contended that the Petitioner had relied largely on Ex.C-184, which is a certificate dated 07.01.2011 from the Auditor to the effect that these items, which were of the aggregate book value of Rs.8,90,200/-, were sold for the aggregate price of Rs.2,50,200/- thereby resulting in a loss of Rs.6,40,000/- when compared to the book value thereof. He submitted that the learned Arbitrator disregarded Ex.C-184 on the tenuous basis that the

Petitioner/Claimant cannot simply rely on the certificate issued by the Auditor. He further submitted that the learned Arbitrator had relied upon irrelevant oral evidence to conclude that this claim could not be proved without producing documents relating to the purchase value, depreciated value and book value of the equipments mentioned in Claim No.5. In particular, he submitted that it was not the First Respondent's case that the Auditor's certificate is false and that, therefore, the learned Arbitrator disregarded the said relevant and material evidence.

(iii)**Claim No.6** relates to the losses allegedly incurred on sale of office equipments such as furniture, computer etc. With regard to this claim, the learned senior counsel, once again, referred to the Auditor's certificate dated 07.01.2011(Ex.C-185), wherein it is certified that the written down book value of the said office equipment and other accessories is a sum of Rs.3,40,100/-, in the aggregate, and that the said equipments were sold for a total consideration of Rs.65,000/- thereby resulting in a loss of Rs.2,75,000/-. In spite of the production of this relevant and material evidence, the learned senior counsel contended that the learned Arbitrator did not refer to this document at all. Instead, he submitted that the learned Arbitrator rejected the claim on the basis that the sale value of individual items was not proved by filing documentary evidence.

(iv) **Claim No.7** relates to the alleged reduction in sales between the years 2000 and 2008 on account of the "money spinner" scheme of the First Respondent. With regard to this claim, the learned senior counsel pointed out that the First Respondent removed three Authorised Service Centres(ASCs) and thereby impaired the ability of the Petitioner to meet the targets under the money spinner scheme. As a result, he submitted that the Petitioner suffered a notional loss of turnover, which is claimed as per details set out in the annexure to the proof affidavit. Once again, he submitted that the learned Arbitrator disregarded the evidence and rejected the claim on the basis that the allotment of ASCs is discretionary under the Dealership Agreement.

(v)**Claim No.8** relates to the alleged losses incurred on account of the loss of the margin or commission on sales. As in the case of Claim No.7, the learned senior counsel submitted that the evidence in respect of this claim is contained in the annexure to the proof affidavit and that this was supplemented during cross examination by stating that the losses related to the commission on unsold vehicles. Notwithstanding such evidence, he pointed out that the learned Arbitrator rejected the claim on the basis that the appointment of ASCs is discretionary and that, therefore, there is no obligation to appoint ASCs or undertake any financial liabilities for not appointing ASCs.

(vi)**Claim No.9** relates to the alleged losses arising out of unsold stock. With regard to this claim, the learned senior counsel submitted that the learned Arbitrator erroneously referred to Ex.C-51-A, which relates to the pending claim list and is irrelevant as regards this claim. In addition, he submitted that the rejection of the documentary evidence, namely, Ex.C-51, on the basis that it is not signed is arbitrary and whimsical. He also pointed out that there was oral evidence with regard to the purchase price of dead stock in paragraph 23 of the proof affidavit.

(vii)**Claim Nos.10 and 11:** These claims relate to loss on account of interest paid to ICICI Bank and losses arising on account of the alleged collusion between the First Respondent and ICICI Bank with regard to the provision of a credit facility to the Petitioner. With regard to the said claims, the learned senior counsel pointed out that as per Clause 10.5 of the Dealership Agreement read with the credit policy of the First Respondent, the Petitioner could only avail credit from M/s.Trans America Apple Distribution Finance Limited(TADFL) or ICICI. He further submitted that out of the two, only ICICI Limited extended a credit facility and that, therefore, the Petitioner had no option in this regard. He further submitted that the First Respondent committed a clear breach of Clause 13.3 of the Dealership Agreement which mandates that the First Respondent should provide assistance to the Petitioner with regard to the conduct of its business. He also referred to the order of the Consumer

Court whereby the Petitioner's claim for deficiency of the service was upheld as regards ICICI. In spite of the above, he submitted that the learned Arbitrator rejected this claim on the basis that there is no obligation on the part of the First Respondent to provide credit facilities to the Petitioner.

(viii)**Claim No.12:** This claim relates to alleged losses incurred on account of the sale of the building that housed the showroom of the Petitioner at a low price. With regard to this claim, he submitted that the learned Arbitrator disregarded the sale deed which would have reflected the sale value of the building. He further submitted that the learned Arbitrator was under the misconception that the claim was for losses arising out of termination, whereas, the claim was on the basis that the business had to be closed and the showroom sold as a consequence of the breaches of the Dealership Agreement by the First Respondent. In other words, he submitted that the learned Arbitrator entered patently erroneous findings by asking himself the wrong question. Such findings are technically perverse according to the learned senior counsel.

(ix)**Claim No.13:** This claim relates to the non reversal of debit notes that were issued by the First Respondent. As regards this claim, the learned senior counsel submitted that the list of debit notes (Ex.C-80) was produced before the Arbitral Tribunal and that the learned Arbitrator disregarded the relevant and material evidence on the basis that the said

list was unsigned. According to the learned senior counsel, this conclusion is perverse because the list of debit notes was prepared entirely on the basis of the ledger accounts of the Petitioner that were maintained in the books of account of the First Respondent.

(x)**Claim No.14:** This claim relates to debit notes that were issued by the First Respondent in respect of advertisement expenses. As regards the claim, the learned senior counsel submitted that the list of debit notes were submitted(Ex.C-81) and that the said list of debit notes was disregarded by the learned Arbitrator merely because it was not signed in spite of the fact that the said list of debit notes was prepared on the basis of the ledger account of the Petitioner, as maintained in the books of account of the First Respondent. In this connection, he further submitted that once the debits were entered into the ledger account by the First Respondent, it is implicit that it had the approval of the First Respondent and that, therefore, it was patently erroneous to reject the claim on the basis that prior written approval of the First Respondent was not obtained.

(xi)**Claim No.15:** This claim relates to the issuance of debit notes by the First Respondent in respect of interest on the supply of spares. According to the learned senior counsel, the contract does not enable the First Respondent to charge interest with regard to such supply of spares or the issue of debit notes in respect thereof. Consequently, he submitted that the said action on the part of the First Respondent is clearly contrary

to the contract. In this connection, he relied upon Ex.C-82, which contains the details of the debit notes. Once again, he submitted that this material evidence was disregarded by the learned Arbitrator merely on the basis that the debit notes had not been produced.

(xii)**Claim No.16:** This claim relates to unsold spare parts. As regards this claim, the learned senior counsel submitted that the conclusion of the learned Arbitrator that the stocks were purchased prior to the year 2002 and that, therefore, the claim is not sustainable is patently flawed inasmuch as the cause of action for the claim arose only when the First Respondent committed breaches of the contract, which resulted in the Petitioner being constrained to close the business in the year 2008. In effect, it was submitted that the rejection of the claim on the basis of limitation is fundamentally flawed.

5.The legal submissions of the learned senior counsel were largely based on paragraphs 29 and 31 of the judgment of the Hon'ble Supreme Court in **ASSOCIATE BUILDERS Vs. DELHI DEVELOPMENT AUTHORITY (2015) 3 SCC 49**, wherein the Hon'ble Supreme Court held that not adopting a judicial approach amounts to a violation of the fundamental policy of Indian law and is consequently in violation of the public policy of India. In this connection, he submitted that non-application of mind is fatal to the adjudication and that the decision of the

Arbitrator would be technically perverse, if the learned Arbitrator either took some thing irrelevant into account while arriving at the decision or ignores relevant and material evidence. According to the learned senior counsel, as regards Claims 3 to 16, the learned Arbitrator consistently disregarded relevant and material evidence and also took into account irrelevant evidence and that, therefore, the Award is liable to be set aside under Section 34 of the Arbitration Act.

6.In response and to the contrary, the learned senior counsel for the First Respondent, Mr. M.S.Krishnan, opened his submissions by stating that the SoC of the Petitioner before the Arbitral Tribunal did not satisfy the most fundamental requirements of a pleading. In particular, he submitted that the said SoC makes generic statements and allegations with no particulars at all in respect of the 17 individual claims made therein. Consequently, he submitted that the First Respondent found it difficult to prepare and submit the Statement of Defence(SoD). He further submitted that the business relationship dates back to the year 1996 and that there were no complaints at all from the Petitioner until the year 2006. He further submitted that the Dealership Agreement was entered into on a principal-to-principal basis and that the Petitioner did not act as an agent or partner of the First Respondent. In other words, it was his submission that the Petitioner was solely responsible for the

consequences of conducting the business, including all losses arising as a result thereof. With regard to the various claims that were made by the Petitioner, the learned counsel for the First Respondent submitted illustratively, as under:

(i) Claims regarding debit notes:

Claim Nos.3, 13, 14 and 15 relate to the issuance of debit notes. As regards each of the claims, the learned senior counsel referred to the cross examination of C.W.1 before the Arbitral Tribunal and pointed out that C.W.1 in answer to questions 40 to 49(Claim No.3), 184 to 190 (Claim No.13), 191 to 207 (Claim No.14) and 208 (Claim No.15) admitted that no documentary evidence had been provided in respect of the said claims. In particular, it was admitted by C.W.1 that the relevant debit notes were not produced before the Arbitral Tribunal. On that basis, the learned senior counsel submitted that the said claims were not capable of being proved without producing the relevant debit notes and thereafter establishing as to how the said debits were liable to be reversed. Instead, he submitted that the Petitioner relied upon the list of debit notes which is totally insufficient for the purpose of establishing the said claims. Consequently, he submitted that there is no infirmity in the Award whereby the said claims were rejected either on the basis of lack of pleadings or on the basis of lack of evidence.

(ii) **Claim No.5:** As regards Claim No.5, the learned senior counsel referred to the cross examination of C.W.2 by the First Respondent and pointed out that the accountant (C.W.2) admitted that he is unsure as to whether all the bills were produced before him at the time of issuing the certificate(Ex.C.183). He further pointed out that C.W.2 also admitted that Ex.C-84 was not issued on the basis of the bills that were submitted before the Arbitral Tribunal but on the basis of other bills.

(iii)**Claim No.6:** As regards Claim No.6, he submitted that no documents were produced with regard to the purchase price of office equipments and that the said claim could not be sustained on the basis of the Auditor's certificate.

(iv)**Claim Nos.7 and 8:** With regard to the Claim Nos.7 and 8, he submitted that the details contained in the annexure to the proof affidavit are so sketchy that it is unclear as to the basis on which the said claims were made. Accordingly, he submitted that the said claims were liable to be rejected.

(v)With regard to **Claim Nos.10 and 11**, the learned senior counsel referred to the cross examination of C.W.1, wherein C.W.1 admitted that the credit scheme is optional in answer to question 150. He further pointed out as to how, in answer to question 153, C.W.1 admitted that he was happy with the scheme from the years 2001 to 2006.

7.The learned senior counsel submitted that all the claims are bereft of both requisite pleadings and evidence and that, therefore all claims were rejected on that basis. He further submitted that, in this case, the Dealership Agreement was not terminated. Instead, it was a voluntary closure of the business by the Petitioner. Consequently, he submitted that the Petitioner is not entitled to raise claims relating to the alleged losses suffered as a consequence of the closure of the business because the Petitioner had conducted the business and earned profits from the said business over many years. The learned senior counsel referred to and relied upon the following judgments:

(i)In **BACHHAJ NAHAR Vs. NILIMA MANDAL AND ANOTHER (2008) 17 SCC 491**, wherein, at paragraph 12 and 13, the Hon'ble Supreme Court held as follows with regard to the object and purpose of pleadings:

12.The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side

intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no

amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

(ii) In **NAVODAYA MASS ENTERTAINMENT Vs. J.M.COMBINES, (2015) 5 SCC 698**, wherein, at paragraph 8, the Hon'ble Supreme Court held that the Court would not be justified in reappraising evidence in a petition under Section 34 of the Arbitration Act and that the Award could be interfered with only if there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position.

(iii) In **SWAN GOLD MINING LIMITED Vs. HINDUSTAN COPPER LIMITED (2015) SCC 739**, wherein, at paragraph 11 and 12, the Hon'ble Supreme Court held that the Arbitral Award would be interfered with only if it is patently illegal or in contravention of the provisions of the Arbitration Act.

(iv) In **STATE OF RAJASTHAN AND ANOTHER Vs. FERRO CONCRETE CONSTRUCTION PRIVATE LIMITED (2009) 12 SCC 1**, wherein, at paragraph 55, the Hon'ble Supreme Court held that the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator but an Award made on the basis of no evidence could be interfered with under Section 34 of the Arbitration Act.

(v) In **SUTLEJ CONSTRUCTION LIMITED Vs. UNION TERRITORY OF CHANDIGARH, (2018) 1 SCC 718**, wherein, at paragraph 10 and 11, the Hon'ble Supreme Court held that the Award

should not be interfered with if the Arbitral Tribunal takes a plausible view and that interference is warranted under the public policy ground only if the Award shocks the conscience of the Court.

8.By relying on the above judgments, the learned senior counsel concluded his submissions by stating that the First Respondent did not commit a breach of the Dealership Agreement and that the findings at pages 301 and 332 of Volume 1, i.e. at paragraph 15 and 29, in that regard, are flawed. In any event, he submitted that the individual claims were correctly rejected by appraising the evidence on record by keeping in mind the nature of the pleadings.

9.The records were examined and the oral and written submissions of both sides were considered carefully.

10.On perusal of the SoC, it is evident that the pleadings are bereft of particulars with regard to the nature of the claims or the basis thereof. Although the Code of Civil Procedure, 1908 does not bind the Arbitral Tribunal, as per Section 19 of the Arbitration Act, it does not follow that the principles relating to a pleading are not applicable to Arbitral proceedings. In other words, what is dispensed with under the Arbitration Act are the procedural requirements prescribed by Code of Civil Procedure

with regard to format, verification etc. Nevertheless, in substance, it is necessary to provide sufficient particulars in the pleading both to enable the leading of evidence within the scope of such pleadings and also to enable the respondent in the proceeding to respond appropriately to such pleadings and thereby enable the Arbitral Tribunal to focus its attention on the questions that would be required to be adjudicated. These requirements are not dispensed with in the context of Arbitration.

11.The main thrust of the arguments of the learned senior counsel for the Petitioner was that the learned Arbitrator disregarded material or vital evidence while deciding claims 3 to 16. On examining the Arbitral Award in respect of the said claims, it is clear that the learned Arbitrator has largely considered the material evidence on record and thereafter decided on the relevance, weight and materiality of the said evidence. For example, with regard to claims relating to debit notes, the learned Arbitrator has consistently taken the position that the said claims cannot be sustained in the absence of the debit notes. The said conclusion is eminently reasonable and it cannot be said that the assignment of a low weight to the list of debit notes produced by the Petitioner amounts to disregarding vital evidence. Likewise, the rejection of claims relating to the consequences of the removal of ASCs on the basis that the allotment of ASCs is not obligatory is based on a reasonable construction of the

contract. Therefore, it is not liable to be interfered with. The rejection of claims based largely on the Auditor's certificate is also reasonable because the Arbitrator is the final arbiter of the relevance, weight and materiality of evidence. The rejection of the claim relating to the provision of credit facility by ICICI on the basis that the First Respondent is not obligated to provide credit facility is also eminently reasonable and based on a reasonable construction of the Dealership Agreement. The rejection of the claims relating to loss on the sale of the building(show room)in the absence of the proof of purchase price is not a finding that is not liable to be interfered with. Over all, it cannot be said that the learned Arbitrator either disregarded vital evidence or took into consideration completely irrelevant evidence in arriving at findings in respect of individual claims. In this regard, the law relating to interference with an Arbitral Award has evolved over several judgments of the Hon'ble Supreme Court, including the judgments relied upon by the learned senior counsel on both sides in this case. In a nutshell, an Arbitral Award can be interfered with, on merits, if it is in contravention of substantive law or in contravention of the contract provided such contraventions render the award patently illegal or if it is in contravention of public policy. In this case, it is the admitted position that the Award is not in contravention of substantive law. The only issues to be considered are whether the Award is in violation of public policy on account of the alleged disregarding of material

evidence and whether there is a contravention of the contract. On close examination of the Award on individual claims, as discussed above, I am of the view that the Arbitral Tribunal has duly considered both the oral and documentary evidence and appraised such evidence by deciding on the relevance, weight and materiality thereof. Consequently, these findings are not liable to be interfered with under Section 34 of the Arbitration Act. The findings with regard to interpretation of the Dealership Agreement are also based on reasonable construction thereof and, therefore, interference is not warranted.

12. In the result, the Petition to set aside the Arbitral Award is rejected.

24.09.2019

Speaking order

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Internet: Yes

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SENTHILKUMAR RAMAMOORTHY, J.
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