

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2019

PRONOUNCED ON : 30.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE R. SURESH KUMAR

O.P. No.562 of 2018

M/s. Ashok Leyland Ltd.,
No.1, Sardar Patel Road,
Guindy, Chennai - 600 032.

.. Petitioner

-vs-

M/s. G.N.B. Motors Pvt. Ltd.
Todi Mansion,
P-15, India Exchange Place Extension
Kolkatta - 700 073.

.. Respondent

Prayer: Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator and decide the disputes that have arisen between the petitioner and the respondent under the Vehicle Dealer Agreement dated 31.12.2009.

For Petitioner : Mr.Kuberan
for M/s. Rank Associates

For Respondent : Ms.Pushpa Menon
for M/s.Shubharanjani Ananth

O R D E R

<https://hcservices.ecourts.gov.in/hcservices/> This Original Petition has been filed under
Section 11(6) of the Arbitration and Conciliation Act, 1996,

hereinafter referred to as the 'Act' with the prayer to appoint an Arbitrator and decide the dispute that have arisen between the petitioner and the respondent, under the Vehicle Dealer Agreement dated 31.12.2009.

2.The case of the petitioner is that, the petitioner engaged in the business of manufacturing Commercial vehicles, Industrial / marine engines and related parts, components and accessories. The respondent agreed to become a distributor of the products of the petitioner and to perform the services in a particular area. Accordingly, an Agreement had been entered between the petitioner and the respondent, i.e., called Vehicle Dealer Agreement dated 31.12.2009 hereinafter referred to as 'Agreement'.

3. As per the said agreement, the petitioner had appointed the respondent, as the dealer for the Territory mentioned in the agreement. The agreement had provided for the rights and obligations of the respective parties, and the agreement was effective from 01.01.2010 till 31.12.2012 and it would be renewable between the parties by mutual consent.

4. Though the said agreement came to an end on 31.12.2012, the respondent did not come forward to renew the agreement. However, at the same time, according to the

petitioner, the respondent have spoiled the price of the products of the petitioner and in this regard there has been number of disputes between the parties pertaining to those issues, there has been number of correspondences. There were letters and e-mail correspondences between the parties in December 2015, April 2016 and May 2016. In all these series of letter correspondences between the parties in May 2016, i.e., on 03.05.2016, 05.05.2016 and 06.05.2016, the petitioner made a demand to the respondent to submit the 'C' Form, for which the respondent, either denied the collection of said 'C' Forms or was not ready to submit the 'C' Forms.

5. Thereafter, in the month of May 2016 itself, there had been further communications on 14.05.2016 and 19.05.2016 and ultimately on 29.05.2016, the petitioner had sent a legal notice to the respondent.

6. Thereafter, on 26.04.2018, the respondent issued a demand letter demanding payment under the Insolvency and Bankruptcy Code, 2016. In response to the said demand notice/letter dated 26.04.2018, issued by the respondent, the petitioner had sent a reply on 10.05.2018 wherein, the petitioner had infact invoked the Arbitration clause under the Vehicle Dealer Agreement dated 31.12.2009 and suggested a Former Judge of this Court, as Sole Arbitrator to be appointed to refer and adjudicate the

dispute which has arisen between the parties and the petitioner called upon the respondent, to give its consent, for the said appointment of Arbitrator, within a period of two weeks and further stated that, if no such consent has come from the respondent, the petitioner would approach this Court, by invoking Section 11 of the Act.

7. Since there was no reply to the said letter of the petitioner dated 10.05.2018 invoking the Arbitration clause, the petitioner has approached this Court, by filing this Original Petition with the aforesaid prayer.

8. Counter statement has been filed by the respondent, wherein, the allegations made and the contents raised by the petitioner in the Original Petition had been denied. That apart, the respondent has mainly raised the ground in the counter statement that, there has been no written contract entered into between the parties, to have the dispute adjudicated by an Arbitration Proceedings.

9. I have heard Mr.Kuberan, the learned counsel appearing for the petitioner and Ms.Pushpa Menon, the learned counsel appearing for the respondent.

10. Learned counsel for respondent mainly has raised objection for invocation of Section 11 of the Act by

the petitioner, on the ground that, there has been no Arbitration Agreement between the parties and the agreement dated 31.12.2009 was only for three years period and it was over on 31.12.2012 and thereafter, the said Agreement had not been renewed and therefore, as on 10.05.2018, when the petitioner raised the dispute by referring the matter to the Arbitrator and nominated a sole Arbitrator, seeking the consent/ approval of such nominee, there was no existence of contract between the parties i.e, the petitioner and the respondent, to initiate Arbitration Proceedings.

11. The learned counsel for the respondent in support of his contention would submit that, admittedly, the Agreement was only for three years from 31.12.2009. Therefore, it came to an end on 31.12.2012. Thereafter, it was not renewed and in this context, the learned counsel for the respondent submitted that, even in the Original Petition under Clause "f", four issues have been mainly raised by the petitioner, which necessitated the invocation of Arbitration clause wherein, the very first issue, according to the petitioner, was that, the respondent failed to come forward to renew and execute the New dealer agreement. Therefore, it is an admitted fact that, the dealer Agreement dated 31.12.2009 was expired on 31.12.2012 and thereafter, it was not renewed.

12. Learned counsel for the respondent would further submit that, when there has been no agreement beyond 31.12.2012 between the parties, whether the petitioner has got any right for invocation of Arbitration clause, itself is questionable. Such an invocation of Arbitration clause therefore, was not possible for the petitioner sometime in May 2018. Therefore, the learned counsel for the respondent would submit that, there has been no valid agreement between the parties and when there is no valid agreement, there is no arbitral clause and in the absence of any Arbitration Agreement between the parties, neither party can have any right to invoke Section 11 of the Act, by approaching this Court, to seek indulgence of this Court, for appointment of an Arbitrator.

13. In this context, the learned counsel for the respondent has relied upon the following judgements:

(i) In **S.B.P. and Co. vs. Patel Engineering Ltd. and Ors.** reported in **AIR 2006 SC 450.**

(ii) In **Velugubanti Hari baby vs. Parvathini Narasimha Rao and Another** reported in **2016(14) SCC 126;**

14. By relying upon the aforesaid judgments, the
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learned counsel for the respondent would submit that, the

law has been well settled in this regard and the Courts have consistently held that, the Court must see first, Whether there exist any agreement between the parties; Whether there is any Arbitration clause and in the absence of any existence of any agreement between the parties containing the clause for Arbitration, the Court shall refrain from appointing an Arbitrator by invoking Section 11 of the Act.

15. The Court since exercising the jurisdiction under Section 11 of the Act as a judicial action and not as an Administrative action, must see, whether there is any agreement between the parties and if so, there is any Arbitration Clause in such agreement.

16. Learned counsel for the respondent would further submit that, in the absence of any agreement between the parties, the question of invocation of Section 11 of the Act does not arise, as it is a pre-requisite condition that, there exist an Agreement between the parties, where there is an Arbitration Clause.

17. By making these submissions, the learned counsel for the respondent would contend that, since the Agreement between the parties lapsed on 31.12.2012 and the same admittedly has not been renewed beyond such date, on 10.05.2018, there is no agreement between the parties and in

the absence of any such agreement, no Arbitral proceedings can be commenced or no party can have any right to refer any dispute between them to an Arbitration Proceedings and in that context, in the absence of either of parties agreeing for such invocation of Arbitration Clause in a non-existing agreement, the Court also cannot invoke Section 11 of the Act, for appointment of Arbitrator at the instance of one of the party. Therefore, the learned counsel submits that, this Original Petition has to be dismissed for the aforesaid reasons.

18. Per contra, Mr.Kuberan, learned counsel for the petitioner would contend that, no doubt, the Agreement was entered into between the parties on 31.12.2009 and it was valid for three years i.e., upto 31.12.2012 and thereafter, normally the parties should come forward to agree mutually to renew the same and though the petitioner was ready and willing to renew the agreement, the respondent did not come forward to renew the agreement and infact, the action on the part of the respondent in not coming forward to renew the agreement is also one of the issue to be referred to the Arbitrator.

19. Learned counsel for the petitioner would further submit that, assuming that the said agreement was expired on 31.12.2012 and thereafter, it was not renewed,

the only effect would be that, there could not be any further business between the parties beyond 31.12.2012. The issue arisen between the parties out of the business or transactions taken place between them during the life time of the agreement i.e., upto 31.12.2012, can very well be referred for resolvment, as contemplated under the said agreement.

20. Learned counsel would further submit that, in other words, if the agreement between the parties expires on 31.12.2012 notwithstanding that, either party can refer the dispute arisen between the parties during the course of business till 31.12.2012, to an Arbitrator, by invoking the clause of Arbitration available in the said agreement.

21. In support of his contention, the learned counsel for the petitioner has relied upon the decision in 2009(5) SCC 182 [N.Srinivasa vs. Kuttukaran Machine Tools Limited] and in 2017 (9) SCC 729 [Duro Felguera, S.A. vs. Gangavaram Port Limited].

22. Learned counsel for the petitioner also submitted that, there has been number of communications between the parties in all these years upto 2018 and the dispute between the parties has not been denied by both parties, since the petitioner made some demands and also the

respondent made some demand from the petitioner, which culminated in the demand notice issued by the respondent on 26.04.2018 . Therefore, the learned counsel submitted that, there has been a dispute arisen out of the transactions between the parties during the agreement period and therefore, what are all the issues arises between the parties out of the said Agreement, during the agreement life period, shall also be resolved, as per the method contemplated under the said agreement itself. Therefore, the invocation of Arbitration clause as contemplated under the said Agreement, by either party cannot be said to be out of the purview of the agreement and therefore, the petitioner has got every right to invoke the Arbitration clause.

23. I have considered all those submissions made by the learned respective counsel appearing for both sides and have perused the materials placed before this Court including the decisions cited by both sides.

24. It is an admitted fact that, there has been an agreement i.e., Vehicle Dealer Agreement entered into between the petitioner and the respondent on 31.12.2009. Under Article 4 the duration of agreement has been mentioned which reads thus:

Article 4

DURATION OF AGREEMENT

This Agreement shall be effective from 1st January 2010 to 31st December 2012 but subject to determination as hereinafter mentioned. If the DEALER desires to enter into a fresh agreement for a further period, and AL receives notice from the DEALER to that effect so as to reach AL at least three calendar months before the expiry of this agreement, then AL will enter into an agreement with the DEALER for such further period accordingly subject to the following conditions and AL continuing to trade in the TERRITORY."

25. Under Article 33, there is a provision of Arbitration under the said Agreement which reads thus:

Article 33

ARBITRATION

In the event of differences/disputes, the parties will resolve the same by mutual negotiations. Any unresolved disputes shall be referred for arbitration under Indian Arbitration & Conciliation Act, 1996 to a suitably appointed arbitrator under mutual consent. The decision of the arbitrator will be final and

binding on both parties and the venue of such arbitration shall be in Chennai. The language shall be English.

Judicial Jurisdiction : The parties subject to this agreement shall subject themselves to the jurisdiction of courts in Chennai alone."

26. From these two clauses it became certain that, there has been a written agreement between the parties where, there is an Arbitration clause. No doubt, the said agreement was for the period of three years and thereafter, the discretion of the parties to renew the agreement also has been given and admittedly, the respondent had not come forward to renew the agreement.

27. However nowhere it has been restricted or mentioned that, after the three years period, if any dispute arose between the parties pertaining to the business transactions taken place during the agreement period, shall not be resolved by invoking Article 33 of the Agreement i.e., Arbitration clause.

communications between the parties at various point of time in the year 2015 and 2016. Ultimately, on 26.04.2018, the respondent made a demand to the petitioner to settle the due to resolve the issues the said demand letter issued by the respondent reads thus:

"The undersigned requests you to unconditionally repay the above mentioned unpaid operational debt (in default) in full within 10 (ten) days from the receipt of this letter, failing which we shall initiate a corporate insolvency resolution process in respect of Ashok Leyland Limited.

This demand notice in Form No.3, being a demand notice demanding payment under the Insolvency And Bankruptcy Code, 2016, under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is without prejudice to the several rights and contentions of GNB Motors Private Limited."

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29. Even prior to this demand notice, there has been number of demands and communications from the petitioner requiring the respondent to settle the dues and also submit the 'C' Form collected by them. When such a demand letter was issued on 26.04.2018, the petitioner sent

reply, also informed the respondent that, the petitioner has invoked the Arbitration clause of the Agreement dated 31.12.2009 and also indicated that, it has nominated a Former Judge of this Court, as a Sole Arbitrator to adjudicate the dispute which has arisen between the parties.

30. The aforesaid factors would go to show that, there exist an Agreement between the parties, which is in writing and both parties have agreed and signed in the said agreement. There is an Arbitration clause in the said Agreement as set out above. No doubt, the Agreement is only for three years and thereafter, admittedly, it was not renewed. The effect of non-renewal would naturally be that, there can be no further business transactions between the parties and no parties can compel the other party to transact the business even beyond the three years period, which admittedly expired on 31.12.2019.

31. At the same time, if at all any dispute arose between the parties, which specifically arises out of the business transactions taken place between the parties during the life time of the Agreement i.e, within the three years period from 31.12.2009, certainly, those disputes can be resolved by invoking the Arbitration Clause.

contention of the respondent through its counsel that, after 31.12.2012, there was no existence of agreement and therefore, the Arbitration Clause cannot be invoked beyond 31.12.2012.

33. The said submission made by the learned counsel for the respondents and the proposition projected by them, in the opinion of this Court, may not be acceptable for the simple reason that, the Courts have taken the view that, before invocation of Section 11 of the Arbitration Act for appointment of an Arbitrator, while exercising the judicial power, the Chief Justice concerned of the High Court or his or her nominee who also exercises, the judicial power, must see whether, there has been an agreement existed between the parties in writing and the said agreement does have the Arbitration Clause.

34. In this context, it is further to be added that, the duty of the Court to see whether there exist an Agreement between the parties means, whether there has been an agreement between the parties and such agreement has been made in writing signed by both sides and such signed agreement is having a clause for Arbitration. Therefore, the duty of the Court to see, whether the agreement is existed between the parties means, as to whether there had been an written agreement between the parties consist of

Arbitration Clause. It does not mean that, the said agreement between the parties enabling the business transactions between them if expires, after the expiry period, neither parties can invoke the Arbitration Clause even to resolve the dispute arises out of said agreement that too, during the business transactions taken place between the parties within the life time of the agreement.

35. In support of this contention, the learned counsel for the petitioner has rightly relied upon the judgement in 2009 5 SCC 182 wherein the Honourable Apex Court has held as follows:

It is well settled that even if an agreement ceases to exist, the arbitration clause remains in force and any dispute pertaining to the agreement ought to be resolved according to the conditions mentioned in the arbitration clause. Therefore, in our view, the High Court was not justified in setting aside the order of the trial court directing the parties to maintain status quo in the matter of transferring, alienating or creating any third-party interest in the same till the award is passed by the sole arbitrator."

36. Like that, in the matter of **Velugubanti Hari**

2016 (14) SCC 126, the Honourable Apex Court has held that, before invocation of Section 11 of the Arbitration Act, the Court must see the legality, validity and genuineness of Arbitration Agreement and it is required to be decided by the Court, before appointment of the Arbitrator under Section 11.

37. In the said judgement, the Honourable Apex Court has also said that, the question whether there is an Arbitration Agreement has to be decided only by the Chief Justice or his designate and it should not be left to the decision of the Arbitral Tribunal.

38. Here in the case in hand, no doubt there has been an Agreement, which is in writing and signed by both parties and the same agreement is having an Arbitration Clause. The word, 'Whether the Agreement existed or not,' means, whether there had been an agreement between the parties. The word "exists" does not mean that, the said agreement, if it is lapsed for the purpose of business transactions, the Arbitration Clause also dies with the lapse of said Agreement and therefore, it cannot be invoked, even in respect of disputes arises between the parties during the life time of the Agreement or arises out of the said Agreement.

39. If the said proposition, as brought by the respondent is accepted, all Arbitral issues should be decided only during the life time of the agreement and not beyond that. The intention of having the Arbitration Agreement between the parties is to resolve the issue amicably by referring the matter to an Arbitral Tribunal, within the meaning of the provisions of the Arbitration and Conciliation Act, 1996 only to resolve those issues, which are arisen out of the said agreement in respect of whatever business transactions taken place between the parties during the life time of the agreement. If the proposition as projected by the respondents is accepted, that will destroy the very workability of the Arbitration Act as no reference before the Arbitral Tribunal can be made, by invoking the Arbitration Clause of the Agreement between the parties, after the lifetime of the agreement. The lifetime fixed in the agreement restricts only the business transactions between the parties, at the same time, it does not restricts the right of the parties to invoke the Arbitration Clause contained in the Agreement.

40. Even in the judgement referred to by the petitioner's side, it is reiterating the position that, the Court can only look into the aspect as to whether there exists an Arbitration Agreement and whether such agreement

was legally valid and genuine one.

41. In the said scenario, the present Arbitration Agreement cannot be said to be illegal or invalid or ingenuine. Therefore, the said Agreement between the parties that lapsed on the expiry of three years period, can very well be considered as a valid, genuine and legal agreement between the parties, therefore, the Arbitration Clause contained in such agreement, can very well be invoked by either of the party to the agreement, in respect of the disputes arisen between them out of the said agreement.

42. On factual matrix, since the dispute between the parties arises only out of the said agreement, i.e., business transactions taken place between the parties during the lifetime of the agreement and this has been evidenced from the very demand letter issued by the respondent on 26.04.2018, this Court has no hesitation to hold that, there has been a valid, legal and genuine agreement between the parties, which consist of Arbitration Clause and since the dispute arises between the parties arising out of the business transactions taken place during the life time of the agreement, such dispute can very well be referred or referrable to an Arbitral Tribunal consist of Sole Arbitrator to be appointed in this regard, by invoking the Arbitration Clause of the said Agreement.

43. This Court also reiterate that, by mere lapse of the agreement at the completion of three years period, the Arbitration clause available in that agreement did not die and it exists and continue to exist, ofcourse for the resolvment of disputes arises only during the lifetime of the Agreement and out of the transactions between the parties in terms of the said agreement. Therefore, this Court has no hesitation to hold that, the dispute arises between the parties can very well be referred to an Arbitral Tribunal and which action of the petitioner by nominating the Arbitrator since questioned and the same was not accepted by the respondent, as no consent to that effect has been given by the respondent, the petitioner has rightly approached this Court, under Section 11 of the Act. Hence, the plea raised by the petitioner for appointment of independent Arbitrator by this Court, by invoking the Section 11 of the Act is well founded and can be well accepted.

44. In the result, the following orders are passed in this Original Petition:

(i) That the issue arises between the parties out of the Arbitration Agreement, i.e., Vehicle Dealer Agreement dated 31.12.2009 shall be resolved by an Arbitral Tribunal consist of a sole Arbitrator.

(ii) In order to resolve the dispute between the parties, Honourable Mr. Justice J.A.K. Sampathkumar, a Former Judge of this Court is hereby appointed as a Sole Arbitrator.

(iii) The learned Arbitrator shall immediately enter upon to the reference and proceed further in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and pass the final award giving resolvment to the issues to be referred by both parties to the Arbitrator.

(iv) The learned Arbitrator shall be at liberty to fix his remuneration as well as expenses incidental thereto and the remuneration and expenses shall be borne by both parties equally.

With these directions and appointment of Arbitrator, this Original Petition is ordered accordingly.

Sd./-R.S.K.J
30.04.2019

Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 16/07/2019

COURT OFFICER(O.S.)

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