

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :25.03.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.954 of 2016

M/s.Palghat Automotives (P) Ltd.

Rep by its Managing Director Mr.George Kurian,

Having its Registered Office at

5/429, Marutha Road,

Kootupatha, Palakkad,

Kerala - 678 007.

... Petitioner

VS.

M/s. Hyundai Motor India Ltd.

Rep by its Managing Director

Having its Registered Office at:

H -1, SIPCOT Industrial Park, Irungattukottai,

Sriperumbudur Taluk, Kancheepuram District,

Tamil Nadu

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, that this Court may be pleased to pass an order to set aside the award dated 28/04/2016 which was received on 09/05/2016 and to allow the claim of the Petitioner and pass such suitable orders.

For Petitioner : Ms. Umamaheswari Ganesh

For Respondent : Ms. Vandana Raheja for M/s.Surana & Surana

ORDER

Instant 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an 'arbitral award dated 28.04.2016' (hereinafter 'impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator.

2. Instant OP has been filed under Section 34 of A & C Act. Section 34 of A & C Act is under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 of A & C Act reveals that recourse to a Court against an arbitral award may be made by an application. Section 34 itself is captioned 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, the nomenclature ' Original Petition' is being assigned to proceedings under Section 34 of A & C Act and therefore, I am referring to the instant proceedings as 'OP' for the sake of convenience and clarity.

3. In the Instant OP, there is a sole petitioner and there is a lone respondent. Sole petitioner in instant OP is the sole claimant before AT and lone respondent in instant OP is the sole respondent before AT. Therefore, for the sake of convenience and clarity 'petitioner' in instant OP shall be referred to as 'petitioner/claimant' and 'respondent' in the instant OP shall be referred

to as 'respondent' as the respondent in the instant OP is the respondent before AT also.

4. Ms.Umamaheswari Ganesh, learned counsel on record for petitioner/claimant and Ms.P.Vandana Raheja of M/s. Surana & Surana (Law Firm) on behalf of respondent are before this Court.

5. The entire OP is under Section 34 of A & C Act and it also turns on a very narrow compass. Therefore bare minimum facts or in other words a thumbnail sketch of facts would suffice.

6. The entire dispute pertains to an agreement/arrangement between the petitioner/claimant and respondent with regard to a car showroom and sale of cars/auto mobiles, manufactured by respondent.

7. While counsel for petitioner/claimant would refer to the aforesaid agreement/arrangement as 'Dealership Agreement', the respondent would contend that it is a principal to principal arrangement/agreement. It is not necessary to delve into this aspect of the matter owing to the narrow compass on which the instant OP turns and therefore, it would suffice if the arrangement/agreement between the petitioner/claimant and respondent is referred to as 'said contract' for the sake of convenience and clarity.

8. There is no dispute or disagreement before this Court that there is an Arbitration Clause in the said contract. That Arbitration Clause is Clause 11 and the same reads as follows:

'11. ARBITRATION

All questions, differences, controversies or disputes whatsoever between the PARTIES or their representatives touching upon responsibilities and obligations of the PARTIES or any matter connected with the terms of this Agreement, whether as to construction or otherwise, shall be referred to arbitration of a sole Arbitrator to be appointed by the Managing Director of HMI. The Provisions of the Indian Arbitration & Conciliation Act, 1996 or any other re-enactments or statutory modifications thereof for the time being in force shall be applicable for settlement of the dispute, controversies or differences. The decision of the Sole Arbitrator shall be final and binding on the parties. The Venue of the Arbitration shall be Chennai and the language of arbitration shall be English.

The Arbitration proceedings will be on a fast track basis. Any of the parties proceeding for arbitration will submit its claim petition and documents to the Sole Arbitrator within one week of the reference being made to the Sole Arbitrator, with a copy to the party that initiated the arbitration proceedings, within two weeks thereafter. The Parties can file their further replies or documents within two weeks thereafter. Immediately after the fifth week, the Sole Arbitrator will endeavour to commence the

hearing on the 36th day and will endeavour to go on with the hearing of the case on day-to-day basis without any adjournment, as far as possible. The Sole Arbitrator will also endeavour to give his award as early as possible in view of urgency of the matter. The arbitration proceeding will be completed as far as possible within 60 days from the date of reference.'

9. It is also not in dispute before this Court that first hearing/first sitting of AT was on 22.04.2014. On this basis, both learned counsel before me submitted that there can be no dispute qua the factual position that the date of commencement of arbitral proceeding within the meaning of Section 21 of A & C Act is prior to 22.04.2014, though the exact date of commencement within the meaning of Section 21 of A & C is not available in the case file placed before me. However, the submission made without dispute that the date of commencement of arbitral proceedings within the meaning of Section 21 of A & C Act is prior to 22.04.2014 is noted.

10. Reverting to the narrative of thumbnail sketch of facts, it is common case of both sides that communications dated 10.07.2006 and 19.07.2006 exchanged between the petitioner/claimant and respondent culminated in said contract. It is also not in dispute that said contract was terminated by respondent vide letter dated 20.09.2012. Post termination, the

petitioner/claimant made a claim of Rs.8 Crores and this sum of Rs.8 Crores, according to the petitioner/claimant, is towards investment that was made by the petitioner/claimant and losses suffered by petitioner/claimant owing to alleged influences and compulsion of respondent, who had promised adequate profit and sharing. There is no factual disagreement with regard to the nature of the dispute and the factual position that this is the claim before AT.

11. Before the AT, petitioner/claimant filed a statement of claim dated 12.05.2014 and the same was met by the respondent by way of a counter in June of 2014. This completed the pleadings.

14. On rival pleadings, AT framed 5 issues, which are as follows:

'Issues / Points for Consideration:-

1) *Whether the Claimant was granted an exclusive Dealership in Palghat area by the Respondent?*

2) *Whether the Respondent had put the Claimant at his mercy and the sales and promotion offer for all products were exclusively and unilaterally decided by the Respondent as alleged by the Claimant?*

3) *Whether the Dealership agreement dated 15-09-2009 was extended beyond the period of three years? If extended, for what period of time?*

4) *Whether the termination of the Dealership agreement vide letter dated 20-09-2012 was valid and legal in the eyes of law?*

5) Whether the Claimant is entitled to claim a sum of Rs.8,00,000/- (Rupees Eight Crores Only) as compensation from the Respondent for the investment made in raising infrastructure for establishing showroom and workshops and as damages for the alleged losses suffered by him?

12. Ultimately, after full contest vide impugned award, AT dismissed the claim of petitioner/claimant. Records of the AT pertaining to Arbitral Proceedings contained in a file was before this Court and this Court had the benefit of perusing the file of AT containing records of the arbitral proceedings.

13. In the instant OP before this Court, without entering into the arena of merits of the matter, challenge to impugned award was articulated as a two pronged challenge. While one limb of challenge was that the procedure for arbitration as agreed between the parties was not followed, the second limb of challenge was delay in making/passing the impugned award. It was made clear that the second limb of challenge is predicated on proceedings post 18.04.2015.

14. Learned counsel for petitioner/claimant submitted that on 18.04.2015, before the AT, both sides requested time for filing written

arguments. The minutes of the proceedings of AT dated 18.04.2015 were adverted to and the same reads as follows:

'Minutes of the proceedings held at 2.30P.M on 18.04.2015 at Arbitration Mediation Council, YMIA Building, Royapettah, Chennai 600 004

Respondent side oral arguments and reply by the Claimant side heard. Both sides requested the Forum to grant time for filing their written arguments. Time granted till 27.04.2015. Within that time they would send written arguments to the Arbitrator marking a copy to the other side. After that the date for final order will be fixed and intimated to the concerned counsels.

Dated at Chennai on this the 18th day of April 2015.

*sd/-
Sole Arbitrator
18.04.2015'*

15. It is submitted that thereafter, adverting to the typed set of papers dated 12.03.2019 captioned 'INDEX TO THE CORRESPONDENCES' filed by the respondent was adverted to. Before I proceed further, it is to be noted that plural of 'correspondence' is 'correspondence' only. However, this Court ignores this syntax and reads this as 'Index to Correspondence'. Be that as it may, adverting to 'INDEX TO THE CORRESPONDENCE' dated 12.03.2019, learned counsel for petitioner submitted that an 'Electronic mail' (hereinafter 'E-mail' for brevity) dated 04.01.2016 has been sent by AT. According to learned counsel for petitioner, this E-mail was sent only to the counsel for respondent.

Owing to the nature of submissions made, it is necessary to extract the entire E-mail dated 04.01.2016, this Court does so and the same reads as follows:

'From : kaliyamurthi n <nkmkjudge@gmail.com>
Subject : M/s Palghat Automotive VS HMIL
To : Kalyan Jhabakh <kj@lawindia.com>
Cc: tonygeorgekurian@gmail.com, advthomas<advthomastj@gmail.com>

In the matter of Arbitration proceedings between M/s.Palghat Automotive (P) Ltd., and HMIL.

Due to my continuous ill-health and a surgery in the eye, it was unable to proceed with the matter. Any how the proceedings will be finalized in a short spell.

The counsel for respondent (Hyundai) is required to sent the copy of the written argument to me at the earliest so as to proceed further.

N Kaliyamurthi
 Sole Arbitrator'

16. It is submitted that post 18.04.2015, AT has entered into correspondence with the respondent and has sought for written arguments from the respondent alone.

17. Thereafter, the very next day i.e., 05.01.2016, a E-mail was sent by counsel for respondent to the counsel for petitioner/claimant, this was adverted to and the same reads as follows:

'From : Litigation Manager <manager.litigation@lawindia.com>

Subject : Arbitration proceedings between Palghat Hyundai Vs HMIL

To : advthomas<advthomastj@gmail.com>

Cc: kaliyamuthi n<nkmkjjudge@gmail.com>, kj<kj@lawindia.com>

Dear Mr.Thomas,

Greetings!

In the matter of Palghat Hyundai Vs HMIL, we kindly request you to finish us a copy of the written arguments by your client Plaghat Hyundai.

Regards

for G.Kalyan Jhabakh

Rajan Narayanan

Litigation Manager

Surana & Surana International Attorneys

Cell:99623 90000'

18. Ultimately, it comes to light that the counsel for petitioner/claimant under cover of a letter dated 06.01.2016 addressed to AT (copy marked to learned counsel for petitioner/claimant) has sent its written arguments to the AT. Considering the importance, this covering letter dated 06.01.2016 is also extracted and the same reads as follows:

'To

Mr.N.Kaliyamurty, B.A.B.L.,
(Retd. District Judge), Sole Arbitrator,
No.20/18 'C', 'Suprabhath',
Bharathidassan Street,
Nilamangai Nagar, Adampakkam,
Chennai - 600 088.

Your Honour,

*Sub: Before the Arbitral Tribunal - Sole Arbitrator
Mr.N.Kaliyamurthy, B.A.B.L., District Judge - [Retd]. - In the
matter of Arbitration between M/s. Palghat Automotive Pvt, Ltd.,
(Claimant) and M/s. Hyundai Motor India Ltd., (Respondent).*

*As requested, we are forwarding herewith a copy of the written
Arguments and Citations filed by the Respondent. A copy of the
same is forwarded to the Petitioner's Counsel.*

*No Written Arguments till date has been served on us by the
Petitioner.*

Regards,

Yours faithfully,

For SURANA & SURANA

sd/-

G.KALYAN JHABAKH

Counsel for Respondent

Encl: as above

Copy to:

*Mr.Thomas T.Jacob
for Thomas and Associates,
Advocates,
Opp. Gurudev Motors,
4/ 1, P.H.Road,
Koyambedu,
CHENNAI - 600 107.'*

19. Learned counsel for petitioner submitted that though the last sitting qua oral hearing was on 18.04.2015, notwithstanding the aforesaid

letter dated 06.01.2016, the impugned award came to be passed only on 28.04.2016.

20. In the light of the narrative supra, relying on the material adverted to above, learned counsel for petitioner submitted that this is both a case of agreed procedure not been followed and delay in passing the impugned award. Specific attention of this Court was drawn to the last sentence in the arbitration clause. To be noted, arbitration clause, which for all practical purposes and legally is by way the arbitration agreement between the petitioner/claimant and the respondent within the meaning of Section 7 of A & C Act, has been extracted and reproduced supra. This was referred to and it was pointed out that the arbitration proceedings will have to be completed as far as possible within 60 days from the date of reference and there is a clear violation of the same.

21. Responding to the aforesaid submission of learned counsel for petitioner/claimant, learned counsel for respondent referred to Section 4 of A & C Act and submitted that petitioner/claimant has participated in the proceedings before AT and the petitioner/claimant has not raised any objection with regard to non-compliance with procedure or delay and submitted on a demurer that even if there was non compliance with the

procedure and even if there was a delay, the same stood waived. To be noted, responding to this, learned counsel for petitioner/claimant submitted that the entire argument is predicated on proceedings before AT post 18.04.2015.

22. This takes us to examination of the aforesaid two E-mails dated 04.01.2016 and 05.01.2016 as well as letter dated 06.01.2016 under a cover of which the respondent has sent written arguments to the AT with a copy to the petitioner/claimant.

23. Adverting to the e-mail dated 04.01.2016, learned counsel for respondent submitted that it is incorrect to say that it has been addressed only to counsel for respondent as the CC shows that it has been addressed to both the petitioner/claimant as well as the counsel for petitioner/claimant. To buttress this, learned counsel for respondent referred to minutes of the preliminary meeting of AT dated 22.04.2014 wherein the name of the Managing Director of the petitioner/claimant company as well as the counsel for petitioner/ claimant have been set out.

24. With regard to the second e-mail dated 05.01.2016, it was submitted on behalf of the respondent that trigger for the same was the mail received earlier. As the petitioner/claimant has not served any copy of the

written arguments on the respondent, the e-mail dated 05.01.2016 was sent by counsel for respondent to the counsel for petitioner/claimant requesting for a copy of the written argument to be filed by the petitioner/claimant. There is nothing before this Court to show that there was any response to this. More importantly, there is nothing before this Court, to show that the petitioner/claimant had filed written arguments before the AT.

25. With regard to the letter dated 06.01.2016 from the counsel for respondent under cover of which written arguments of the respondent was sent to the AT, copy of which has been marked to the counsel for petitioner/claimant before AT, there is nothing on record to show that there was a response. To be noted, photo copy of the postal acknowledgement cards, both with regard to the AT and with regard to the counsel for petitioner/claimant before AT have also been placed before me with a copy of the covering letter dated 06.01.2016. There is nothing to show that there was any response or reply to this either to counsel for respondent or to the AT. Even before this Court, it is not the case of the petitioner that written arguments were filed and it has not been considered by the AT. To be noted, no copy of the written arguments has been filed before this Court and there is no assertion by petitioner/claimant that written arguments was filed before the AT. The records of AT before this Court also does not contain written

arguments of petitioner/claimant and it does not contain any material to show that written arguments was filed by petitioner/claimant.

26. On the contrary, the argument before this Court was, if it is to be presumed that the petitioner/claimant had filed written arguments, the same ought to have been considered and there should have been some reference to the same in the impugned award. In the considered opinion of this Court, all this is in the realm of surmises and conjectures. It may not be possible to enter into the arena of surmises and conjectures when undisputed material and records before this Court speak otherwise. This is impermissible even in regular appeal. In a proceedings under Section 34 of A & C Act, which has been held to be a summary procedure by the Hon'ble Supreme Court in the Fiza Developers case [**Fiza Developers & Inter - Trade (P) Ltd. Vs. AMCI (India) (P) Ltd.** reported in (2009) 17 SCC 796], which is referred to as Fiza Developers principle, it is not just impermissible, it is forbidden. In the considered view of this Court it can be described in literary parlance as a leap from forensic facts to fictional fantasy. This Court cannot examine a storyline by giving a go by to undisputed facts and records before it. To be noted, Fiza Developers principle has been subsequently reiterated by the Hon'ble Supreme Court in **Emkay Global Financial Services Limited Vs. Girdhar Sondhi** reported in (2018) 9 SCC 49 and while so reiterating Hon'ble Supreme Court has held that Fiza principle is a step in the right direction.

27. With regard to the argument qua delay on the part of AT, the sole arbitrator, who is a retired District Judge, has made it clear in the impugned arbitral award itself that owing to some continuous problems for him in the eye he was not able to proceed till about March 2016. Besides this, in the impugned arbitral award itself, there is a specific reference to eye surgery to the sole arbitrator who constituted the AT in the e-mail dated 04.01.2016.

28. Moreover, the arbitration clause makes it clear that the proceedings shall be completed as far as possible within 60 days from the date of reference. The expression 'as far as possible' assumes significance. It is a desire and not a dictum.

29. As the petitioner/claimant has not asserted that written arguments were in fact filed before the AT and as no copy of written arguments are before this Court and as it is not the stated position of petitioner/claimant that written arguments were filed before AT, this Court is unable to persuade itself to accept the submissions made on behalf of the petitioner/claimant. With regard to the aforementioned correspondence, as copies of correspondence have been sent to both parties, this Court is unable to persuade itself to believe that the AT has entered into private correspondence with the respondent alone to the exclusion of the petitioner/claimant.

30. Specific reference to eye surgery for the sole arbitrator is not disputed and now that the impugned award in any event has ultimately been passed on 28.04.2016 douses the fire if any in this argument.

31. Owing to all that have been set out supra, this Court is unable to persuade itself that instant OP is one which requires judicial intervention qua impugned award under Section 34 of A & C Act, much less judicial intervention warranting setting aside of impugned award.

In the light of the narrative supra, instant OP is dismissed and this Court refrains from imposing costs owing to the trajectory of hearings and the nature of the lis. In other words, the parties are left to bear their respective costs.

सत्यमेव जयते

25.03.2019

Speaking order/ Non-Speaking order

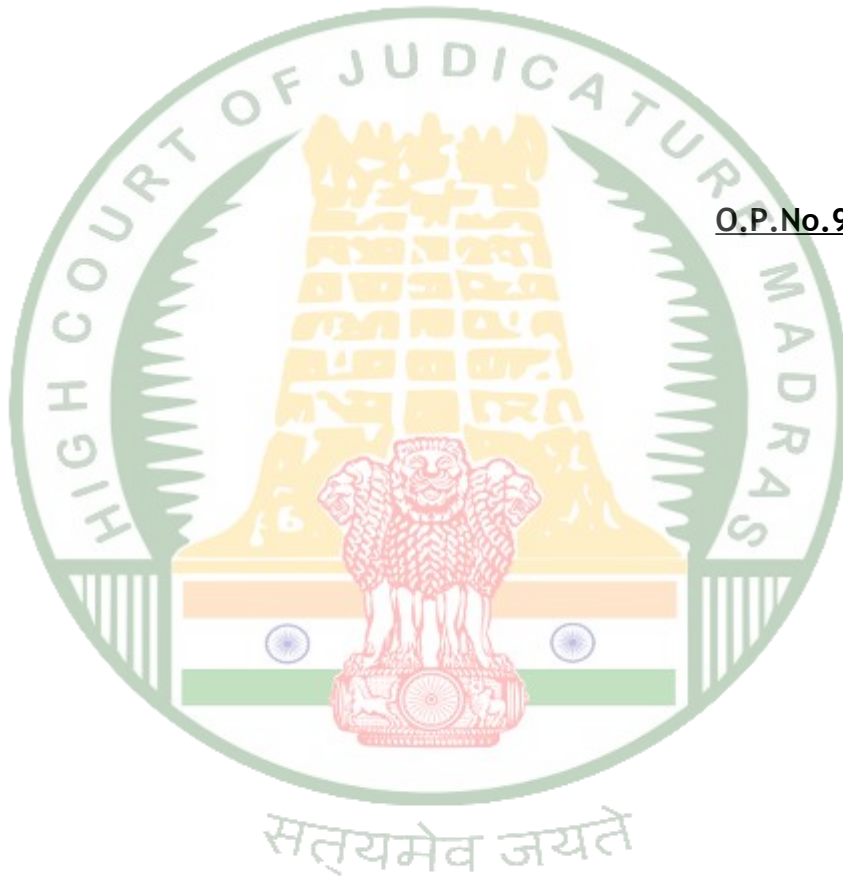
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