

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.09.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.601 of 2019

M/s.Nissan Renault Financial Services
India Private Limited rep. by its
Commercial Credit Head K.P.Amarnath
ASV Ramana Towers, 5th Floor,
52, Venkatanarayana Road,
T.Nagar, Chennai-600 017.

.. Petitioner

Vs.

1. M/s.GENNEXT Motors Limited
rep. by its Director,
Mr.Sumit Vinod Gupta,
Plot No.A/70, TTC Industrial Area,
Near Thane Belapur Road,
Khairane, Navi Mumbai-400 709.

2. Sumit Vinod Gupta,
Director, M/s.GENNEXT Motors Limited,
No.130, Motobhoy Mansion M.K.Road,
Church Gate, Mumbai-400 020.

3. Sheela Gupta, Director,
M/s.GENNEXT Motors Limited
Ramsarovar First Street,
Nadiawala Colony SV Road,
Malad, Mumbai-400 064.

4. E.Padmanabhan, Judge (Retd.),
High Court, Madras,
residing at No.11,
Madha Church Road,
Mendavelipakkam,
Chennai-600 028.

.. Respondents

* * *

Prayer : Petition filed under Section 14 read with Section 11 of the Arbitration and Conciliation Act, 1996, praying to (a) terminate the mandate of the fourth respondent Hon'ble Mr.Justice E.Padmanabhan, Judge (Retd.), High Court, Madras, the sole arbitrator appointed by this Court and direct the fourth respondent handover the files to new arbitrator ; (b) appoint an independent and impartial sole arbitrator to adjudicate the disputes between the parties ; and (c) fix a time limit for conclusion of the proceedings as the extended period ends on 14.11.2019.

* * *

For Petitioner : Mr.S.Namasivayam

For Respondent : Mr.Thriyambak J.Kannan
for RR 1 and 2

Mr.T.K.Bhaskar for R3

ORDER

This Original Petition is filed under Section 14 read with Section 11 of the Arbitration and Conciliation Act, 1996 (in short, "the Act") seeking to terminate the mandate of the fourth respondent as the sole arbitrator and to appoint an independent and impartial sole arbitrator to adjudicate the disputes between the parties with a direction to conclude of the proceedings within a time limit, as the extended period ends on 14.11.2019 and direct the fourth respondent handover the files to new arbitrator.

2. The petitioner is a Non-Banking Financial Company rendering customised financial services, which includes, financing and dealer inventory financing facilities for Nisan and Renault branded cars. The first respondent is the borrowing company, to which, the second respondent respondent is the Director and third respondent is the Director and Guarantor. The said respondents entered into a Facility Agreement with the petitioner on 06.05.2015. The first respondent executed a Deed of Hypothecation of even date qua floating charge over the cars, accessories, receivables and cash for the present and future, which was extended subsequently. The second and third respondents also executed personal deeds of guarantee, besides furnishing Bank Guarantee.

3. It is stated that the respondents violated the terms and conditions of the Facility Agreement and defaulted in payment and also sold away the vehicles out of trust, without making repayment to the petitioner. Such amount ascended to a whopping figure of Rs.17,76,65,630/- without there being any symptom of repayment, the petitioner invoked Clause 29 of the Facility Agreement and appointed a retired District Judge as the Arbitrator. The petitioner also filed claim Statement on 20.06.2018 and the first and second respondents filed statement of defense with counter claim on

20.08.2018, while third respondent filed her statement of defense on 14.11.2018.

4. It is stated that when the arbitration proceedings were going on, the petitioner filed two applications under Section 9 of the Act before this Court seeking a direction to the respondents to furnish security, failing which, attachment of the properties. The respondents 1 and 2, vide order dated 22.10.2018 have been directed to furnish security within four weeks, failing which, the petitioner was given liberty to initiate legal action under Section 17 of the Act. Accordingly, petitioner filed a memo before the learned Arbitrator seeking attachment.

5. In the meanwhile, the order dated 22.10.2018 was questioned in O.S.A.No.442 of 2018, wherein, by order dated 12.12.2018, a Division Bench of this Court, while dismissing the appeal, granted two more weeks time to the said respondents to furnish security.

6. While so, the third respondent filed O.P.No.870 of 2018 seeking for change of arbitrator and also disputed her signature in the Facility Agreement. This Court vide order dated 26.10.2018 dismissed

the petition. The first and second respondents also challenged the action of the arbitrator in O.P.No.1031 of 2018, wherein, this court, in the order dated 28.01.2019, permitted the continuation of the arbitration proceedings substituting the fourth respondent as the sole arbitrator in view of the joint memo filed by the parties to that effect.

7. It is stated that the petitioner filed applications under Section 26 of the Act to refer the signature to forensic expert and under Section 27 of the Act to examine the third party witness before the substituted Arbitrator, which are pending. At this stage, the petitioner claimed that it was noticed that the Arbitrator did not make mandatory disclosure at the time of commencement of proceedings. In view of the said act and alleging some more instances of bias, the petitioner filed a petition under Section 12(3)(A) of the Act seeking to change the appointment of arbitrator. Subsequently, the learned substituted Arbitrator withdrew himself from the arbitration on 13.07.2019. In this backdrop, the petitioner made the aforesaid prayer in this petition.

8. Resisting the prayer, the first and second respondents filed the counter affidavit dated 04.09.2019, while the third respondent filed a separate counter-affidavit dated 18.09.2019. The third respondent, *inter alia*, stated that she was the Director of the first

respondent company for a brief period and she never signed the Facility Agreement or the other documents purportedly relied on by the petitioner in support of the claim. It is submitted that the arbitration proceedings has been now proceeding as per schedule and in order to stall the proceedings, the petitioner filed this petition. It According to her, since the learned present Arbitrator is substituted based on the joint memo filed by the parties, this petition is not maintainable and thus, she prayed for dismissal of this petition.

8.1. According to the first and second respondents, the present Arbitrator has followed every procedure mandated under the Act and since he is impartial and acting in the manner known to law, which only irked the petitioner to move this application. Narrating the events took place during the course of the arbitration proceedings, the first and second respondents submitted that the acts of the learned Arbitrator were never in their favour nor in favour of the petitioner and thus, they have faith in the Arbitrator, who may be permitted to continue the proceedings. According to them, this petition was filed with some ulterior motive and thus, the same is liable to be dismissed.

9. Heard the learned counsel appearing on behalf of the petitioner, first and second respondents and also the third respondent.

10. Admittedly, the present Arbitrator is the substituted by this Court in O.P.No.1031 of 2018 vide order dated 28.01.2019, though the similar prayer made by the first and second respondents was rejected in O.P.No.870 of 2018 on 26.10.2018. The erstwhile arbitrator was appointed by the petitioner. Throwing some aspersions on him, the first and second respondents filed O.P.No.1031 of 2018. Now, it is the turn of the petitioner. The parties have agreed to resolve their disputes by arbitration, for which, they seek to substitute a private forum in preference to the adversarial system. In my view, since the Arbitral Tribunal derives its mandate from the agreement of the parties, it follows that as long as this agreement does not provide for a certain procedural system, the Tribunal cannot be said to be biased or unjust, when it adopts a system suitable for conduct of its proceedings. Now the parties failed to repose confidence on the forum constituted based on their agreement.

11. At this juncture, it is apt to quote the judgment of the Hon'ble Apex Court in **ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board, (2019) 4 SCC 401**, wherein, while speaking of the object of the arbitration act, it was held as follows :

"25. Several judgments of this Court have also reiterated that the primary object of arbitration is to reach a final disposal of disputes in a speedy, effective, inexpensive and expeditious

manner. Thus, in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 :

"39. In *Union of India v. U.P. State Bridge Corpn. Ltd.* (2015) 2 SCC 52, this Court accepted the view [Indu Malhotra, *O.P. Malhotra on the Law and Practice of Arbitration and Conciliation* (3rd Edn., Thomson Reuters, 2014).] that the A&C Act has four foundational pillars and then observed in para 16 of the Report that:

'16. First and paramount principle of the first pillar is 'fair, speedy and inexpensive trial by an Arbitral Tribunal'. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to.'"

(emphasis in original)

26. Similarly, in *Union of India v. Varindera Constructions Ltd.* (2018) 7 SCC 794] , this Court held:

"12. The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is known as the Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled

to intervene in the dispute which is the subject-matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties."

27. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10 per cent would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive."

12. It is to be stated that throwing aspersions on the Arbitrators one after another by the parties will defeat the very purpose of the enactment of the Act. It is not that the parties are remediless. If aggrieved by the orders of the Arbitral Tribunal, the parties can very well invoke the jurisdiction of this Court for appropriate relief. However, since the learned substituted Arbitrator also already recused from the arbitration, another arbitrator has to be necessarily substituted in his place.

13. Accordingly, this Court appoints Hon'ble Mr. Justice D. Murugesan, Chief Justice (Retd.), Delhi High Court, residing at No.11-A, M.D. Sitaraman Avenue, 7th Cross Street, V.G.P. Layout, Injambakkam, Chennai-115, as the Sole Arbitrator to enter upon

reference and adjudicate the disputes inter se the parties. The learned Arbitrator may, after issuing notice to the parties, resume the proceedings from the point, where the erstwhile learned Arbitrator had recused himself, and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings shall be conducted preferably in the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

14. The Original Petition is ordered accordingly. The parties shall bear their own costs.

26.09.2019

Index : Yes / No

Internet : Yes

Speaking Order/Non-Speaking Order

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