IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 14TH DAY OF FEBRUARY 2019

THE HON'BLE MR. JUSTICE M.GOVINDARAJ

A.No. 8027 of 2018

In the matter of Indian Arbitration and Conciliation Act, 1996

And

In the matter of dispute between M/s. Magic Motors and M/s. Nissan Motor India Pvt. Ltd., and M/s. Nissan Renault Financial Services India Pvt. Ltd., In respect of Dealership Agreement Dated 12.02.2016 and Loan A/c. No. NKIA dated 21.07.2015.

M/s. Magic Motors
A Partnershp Firm,
Rep.by its Partner
Mr.Nishant P.Bhutada
Plot No.2, Near ABB Circle, Trimbak Road,
Nasik, Maharastra - 422005. ... Applicant

-Versus-

1. M/s. Nissan Motor India Pvt. Ltd.,
Rep.by its Director
Plot No.1A, SIPCOT Industrial Park,
Oragadam, Mattur (P.O)
Sriperumbudur,
Kancheepuram District - 602 105.

2. M/s. Nissan Renault Financial Services
India Pvt. Ltd.,
Rep.by its Senior Manager -
Risk Management K.B.Hari Shankar
ASV Ramana Towers, 5th Floor,
No.52, Venkatanarayana Road,
T.Nagar, Chennai 600 017. ... Respondents

Application praying that this Hon'ble Court be pleased to grant an order of ad-interim injunction, restraining the 1st respondent company from disbursing any amount to the 2nd respondent or any person or persons claiming or acting through them, and consequently direct the 1st respondent to pay the sum of Rs.39,61,695/- directly to the applicant herein, pending preferring a claim arising out of the Dealership Agreement dated 12.02.2016 before the Arbitral Tribunal.

This Application coming on this day before this court for hearing the court made the following order:

This application has been filed by the applicant seeking an order of ad-interim injunction restraining the first respondent company from disbursing any amount to the second respondent or any person or persons claiming or acting through them and for a consequential direction to the first respondent to pay the sum of Rs.39,61,695/- directly to the applicant herein pending preferring a claim arising out of the Dealership Agreement dated 12.02.2016 before the Arbitral Tribunal.

2. The applicant is a Dealer under the first respondent company. In order to facilitate financial resources to run the said Dealership, the applicant entered into a Facility Agreement with the second respondent on 21.07.2015. Originally, credit facility for a sum of Rs.5,00,00,000/- (Rupees Five Crores Only) was granted as against the hypothecation of stock and not as against any immovable property or other collateral security. The Facility Agreement was for a period of one year from 09.07.2015 to 08.07.2016 and on the expiry of the Facility

Agreement, the credit facility was reduced to Rs.4,00,00,000/- (Rupees Four Crores Only) through a Supplementary Agreement to the Facility Agreement dated 03.10.2016. Thereafter, the second respondent insisted upon the applicant to provide immovable properties for security. The applicant requested the second respondent not to insist on immovable properties, but provide them credit limit on hypothecation of stock. But, the second respondent reduced the credit limit from Rs.4,00,00,000/- to Rs.2,50,00,000/-.

3. Due to the financial slump in economy, the automobile sales faced huge setback and the stocks of the applicant firm piled up. Despite the applicant's request, the first respondent also failed to disburse the amount. When the expenses were mounting up, the first respondent failed to reimburse the expenses, but attempted to appropriate the dues payable to the applicant through the second respondent.

4. In view of the reduction of credit limit and on other issues with regard to the financial transactions, the second respondent moved this Court under Section 9 of the Arbitration and Conciliation Act, 1996 vide A.No.480 of 2018 for appointment of Receiver to seize the vehicle. This Court, by an order dated 23.01.2018 appointed two Advocate Commissioners to seize the vehicle and hand over the same to the second respondent. Against the said order, the

applicant moved the Hon'ble Supreme Court in SLP (C) No.4735 of 2018. Initially, the Hon'ble Supreme Court granted an order of status quo on 19.02.2018 and later, an Arbitrator was appointed and the parties were directed to approach the Sole Arbitrator appointed by the Supreme Court on 14.09.2018 for further interim protection under Section 17 of the Arbitration and Conciliation Act, 1996. When the matter was pending before the Arbitrator, the second respondent preferred three applications under Section 17 of the Arbitration and Conciliation Act, 1996. The applicant filed a counter and also sought for certain counter reliefs.

5. While the matter stood thus, the Dealership Agreement also came to an end. The first respondent issued notice that the servicing and repairing activities should also be closed by 09.10.2018. According to the applicant, the first respondent without settling the dues, has closed down all the activities of the applicant and also disbursing the money to the second respondent using Clause 18.4 of the Facility Agreement. The respondents are Group Companies and they have attempted to defeat the rights of the applicant and therefore, the applicant has approached this Court for the above said relief.

6. Controverting the averments of the applicant, both the respondents have filed detailed counter affidavits

and also questioned the maintainability of the very application.

7. From the perusal of the materials available before this Court, it is seen that there are two separate agreements between the applicant and the respective respondents. The applicant and the first respondent entered into a Dealership Agreement dated 12.02.2016 for selling Cars manufactured by the first respondent company. The applicant and the second respondent entered into a Facility Agreement dated 21.07.2015 to provide financial assistance to the applicant for running the business on hypothecation of stocks. Now that, the Hon'ble Supreme Court appointed a Sole Arbitrator with respect to the dispute that arose between the applicant and the second respondent in respect of Facility Agreement dated 21.07.2015. The applicant is also facing the application filed by the second respondent under Section 17 of the Arbitration and Conciliation Act, 1996 before the Arbitrator and is effectively contesting the case.

8. It only remains that the dispute which arose out of the Dealership Agreement dated 12.02.2016 between the applicant and the first respondent. It is relevant to read Clause 18.4 of the Facility Agreement dated 21.07.2015 referred in para 13 of the above application, which reads as under:

> " 18.4. The Borrower hereby undertakes to assign and transfer in favour of the Lender, if so required by the Lender, all outstanding monies, receivables, claims and bills which are now due and owing or which may at any time thereafter become due and owing to the Borrower in the course of business from any customer, persons, firm, company or body corporate or government department, and to authorise the Lender to receive payments on its behalf from any of its representatives / agents or its business associates and apply the same towards liquidation of the Borrower Obligations."

9. A reading of the above Clause makes it very clear that the applicant assigned and transfer all the rights in favour of the second respondent to recover the dues which are due to the applicant. This authorisation empowers the second respondent to recover the dues from the first respondent. This being a contractual obligation, the applicant cannot find fault with the action taken by the second respondent. However, this issue is subjudiced before the Sole Arbitrator appointed to resolve the disputes between the applicant and the second respondent.

10. In such view of the matter, the relief restraining the first respondent from disbursing any amount to the second respondent and also to direct the first

respondent to pay directly to the applicant will go against the contractual obligation undertaken by the applicant. As such, the attempt to secure an order of interim injunction restraining the first respondent from making payment to the second respondent will indirectly hit the contractual obligation cast upon the applicant and the first respondent. What could not be achieved directly is sought to be achieved indirectly. In the guise of getting interim protection on the basis of agreement dated 12.02.2016, the applicant seeking restriction of the contractual obligation cast upon him in the Facility Agreement dated 21.07.2015. The application as such is not legally sustainable.

11. Clause 14-1 of the Dealership Agreement dated 12.02.2016 reads as under:

> " 14-1. Dealer shall indemnify, defend and hold harmless and keep indemnified, defended and hold harmless, NMIPL and Nissan Affiliates, and their respective directors, officers, agents, advisors and employees, from and against, and shall pay and reimburse to each of them the monetary value of, any liabilities, claims, demands, losses, expenses or costs (including, without limitation, legal costs), whether or not involving a third-party claim, incurred or made by or against any of them arising directly or indirectly out of any (i) alleged or actual breach by or

> obligation of Dealer under or in connection with this Agreement, (ii) Dealer's negligent or faulty repair or service of the Products, (iii) Dealer's alleged misleading statements, misrepresentations or similar deceptive practices, (iv) Dealer's modification or alteration of a Product unless expressly permitted by NMIPL, (v) hiring, retention or termination of any person by Dealer in connection with the performance of this Agreement or termination or expiration hereof, (vi) otherwise arising out of Dealer's negligent actions or omissions or willful misconduct or (vii) claim by or in connection with a Dealer in relation to the subject matter of this Agreement."

12. The applicant has indemnified the first respondent and its affiliates of the liabilities, claims, demands, losses, expenses or costs. In that view of the matter, the second respondent is an affiliate of the first respondent company. The indemnification given by the applicant in favour of the first respondent, is a matter for arbitration. Therefore, without examining the exact details of money due to the applicant from the first respondent and without verifying the statement of accounts, the applicant cannot seek for the blanket order of interim injunction restraining the first respondent from making any payment to the second respondent or its affiliates.

13. In so far as the present application is concerned, it is based on the Dealership Agreement dated 12.02.2016. The second respondent is not a party to the agreement. There is no privity of contract between the applicant and second respondent in so far as the Dealership Agreement is concerned. When the second respondent is invoking the contractual clause on the basis of Facility Agreement entered into between the applicant and the second respondent, the applicant cannot indirectly put spokes to the enforcement of that contract indirectly.

14. From the consideration of the above aspects, this Court is of the considered view that the interim injunction restraining the first respondent from performing his contractual obligation cannot be granted. That too, against the third respondent who is not a party to the arbitration agreement. In such circumstances, this Court is of the view that the application filed by the applicant for interim injunction merits no consideration and is accordingly, dismissed.

Sd/- M.G.R.J.
14.02.2019

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

DL:19.02.2019 COURT OFFICER

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