IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2019

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

CMA NOS.2968, 2972, 2973 AND 2975 OF 2018
AND
CMP NOS.22506, 22550 AND 22557 OF 2018

1.M/s.Magic Motors
Rep. by its Managing Partner
Mr.Nishant P.Bhutada
Abb Circle, Mahatma Nagar,
Nashik, Maharashtra - 422 005.

2.Nishant Prakash Chandra Bhutada
Managing Partner

3.Prakash Chandra Gangabisan Bhutada
Partner: M/s.Magic Motors

4.Kanchan Prakash Chandra Bhutada
Partner: M/s.Magic Motors

5.Sarita Nishant Bhutada
Partner: M/s.Magic Motors
2 to 4 are at Gurukripa
At Post - Saikheda, Tal-Niphad,
Nashik, Maharashtra - 422 210. ... Appellants 1 to 5 in all CMAs'

Vs.

M/s.Nissan Renault Financial Services India Pvt. Ltd.,
Rep. by its Deputy Manager - Risk and Collection Mr.Y.Gokulakrishnan
ASV Ramana Towers, 5th Floor,
No.52, Venkatanarayana Road,
T.Nagar, Chennai - 600 017. ... Respondent in all CMAs'

PRAYER: Civil Miscellaneous Appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996, to set aside the order dated 15.10.2018 made in I.A.No.5 of 2018; I.A.No.1 of 2018; I.A.No.3 of 2018 and I.A.No.2 of 2018 respectively, in Arbitration Case No.7 of 2018 passed by the Hon'ble Sole Arbitrator.

For Appellants : Mr.R.Thiagarajan

For Respondent : Mr.S.Namasivayam

COMMON JUDGMENT

These Civil Miscellaneous Appeals have been filed by the appellants against the common order dated 15.10.2018 passed in I.A.Nos.5, 1, 3 and 2 of 2018 respectively, in Arbitration Case No.7 of 2018, by the Sole Arbitrator.

2. The appellants entered into a Contract with the respondent for the purpose of financing the dealership for selling and servicing vehicles manufactured by Nissan Motor Company. As per the agreement dated 21.07.2015, the respondent agreed to provide financial facility to an extent of Rs.5 Crores for a period of one year i.e. ending with 08.07.2016. During the first year, the appellants availed finance facility from the respondent to the tune of Rs.4 Crores. However, during renewal of the finance facility by way of a Supplementary Agreement dated 03.10.2016, financial limit was restricted to Rs.4 Crores. The appellants in view of the restriction of financial facility, were constrained to commit defaults in adhering to the repayment of the amounts borrowed. After issuing legal notices, the respondent recalled the loan account and demanded the dues payable by the appellants. The respondent has also approached this Court by way of an application in A.No.480 of 2018 under Section 9 of the Arbitration and Conciliation Act, 1996, wherein, two Advocate Commissioners were appointed to seize the 41 vehicles, lying with the appellants, vide order dated 23.01.2018. In the meanwhile, the respondent has also suggested a retired District Judge, as an Arbitrator to resolve the disputes. The Advocate Commissioners appointed by this Court visited the appellants' show room and seized only 6 vehicles on 29.01.2018.

3. Aggrieved over the seizure of the vehicles, the appellants directly moved the Hon'ble Supreme Court in S.L.P.(C) No.4735 of 2018, challenging the order dated 23.01.2018 passed in Application No.480 of 2018. The Hon'ble Supreme Court vide its order dated 14.09.2018, appointed a retired Judge of the Supreme Court and directed the parties to seek for any interim orders, within a period of two weeks from the date of receipt of a copy of the said order viz., 14.09.2018.

4. The respondent filed four applications viz., I.A.Nos.1 to 3 and 5 of 2018 respectively. As far as the applications in I.A.Nos.1 and 5 of 2018 are concerned, the respondent sought permission to sell the 6 vehicles, seized by the Advocate Commissioners appointed by this Court, which were in their possession, as detailed in Schedule "A" to the application in I.A.No.1 of 2018. As far as I.A.No.2 of 2018 is concerned, the respondent sought direction to the appellants to surrender 33 vehicles, which were in possession of the appellants. As far as I.A.No.3 of 2018 is concerned, the respondent sought direction to the appellants to furnish security to tune of Rs.2,78,51,652/- as on 25.09.2018, or in the alternate for attachment of "C" Schedule properties.

5. The appellants have also filed an application for a direction to the respondent to return the six vehicles mentioned in Schedule "A " to I.A.No.1 of 2018, seized by the Advocate Commissioners and hand over to the appellants, or in the alternate to credit the loan account of the appellants, with the value of the said vehicles as on the date of its seizure i.e., on 29.01.2018.

6. Before the learned Arbitrator, the learned counsel for the appellants would contend that they will shoulder the responsibility of selling those vehicles for the best price in order to enable them to get maximum value for those vehicles, which would in turn enable them to get maximum benefit in getting their liability reduced with the respondent. Considering the submissions made on behalf of the appellants, the learned Arbitrator directed the respondent to return the vehicles to the appellants and entrusted the task of selling those six vehicles to get higher monetary value by way of a sale price for being adjusted in the repayment of whatever financial facility availed by them from the respondent. The sale was directed to be held under notice to the respondent.

7. In so far as the application viz., I.A.No.2 of 2018 made by the respondent for surrender of 33 vehicles is concerned, it was held that the vehicles were not in possession of the appellants and therefore, such prayer cannot be granted and it was dismissed as infructuous.

8. In so far as the application viz., I.A.No.3 of 2018 for furnishing security to the tune of Rs.2,78,51,652/- is concerned, after elaborately discussing the factual aspects of the matter, the learned Arbitrator had relied on the legal notice dated 07.12.2017 demanding a sum of Rs.77,20,621/- as outstanding due and the amount which had fallen due in favour of the respondent as on 05.12.2017. Further, in the e-mail dated 27.12.2017, the respondent disclosed the total outstanding of the appellants as Rs.1,03,28,389/- and the learned Arbitrator

had found that the appellants are disputing only the extent of liability and not the very liability itself.

9. Considering the initial demand made in the legal notice dated 07.12.2017, under Ex.A16, a direction was issued to the appellants to deposit a sum of Rs.75,00,000/-, by way of an interim measure, in three equal installments, within a period of four weeks each commencing from 20.10.2018 onwards. The said common order dated 15.10.2018 passed by the learned Arbitrator in I.A.Nos.1 to 3 and 5 of 2018 in Arbitration Case No.7 of 2018 which is under challenge before this Court.

10. The learned counsel appearing for the appellants would vehemently contend that this Court and the District Court have powers to set aside the order passed under Section 17 of the Arbitration and Conciliation Act, 1996. He would rely on a judgment of the Hon'ble Supreme Court in ALKA CHANDERWAR VS. SHAMSHUL ISHRAR KHAN [2017 (16) SCC 119] wherein it has been held as under:

> "9. Pursuant to this 246th Report, sub-section (2) to Section 17 was added by the 2015 Amendment Act, so that the cumbersome procedure of an Arbitral Tribunal having to apply every time to the High Court for contempt of its orders would no longer be necessary. Such orders would now be deemed to be orders of the Court for all purposes and would be enforced under the Civil Procedure Code, 1908 in the same manner as if they were orders of the Court. Thus, we do not find Shri Rana Mukherjee's submission to be of any substance in view of the fact that Section 17(2) was enacted for the purpose of providing a "complete solution" to the problem."

11. The second limb of argument made by the learned counsel for the appellants is that entertaining of application under Section 17 of the Arbitration and Conciliation Act, 1996, even before claim petition is not maintainable in law or on facts. The learned counsel for the appellants would rely on the provisions of Order 38 Rule 5 of Civil Procedure Code; Order 39 Rules 1 and 2 of Civil Procedure Code and Section 94 of Civil Procedure Code. He would rely on a judgment of this Court in SUNDARAM FINANCE LTD. VS. P.SAKTHIVEL AND OTHER [2018 (8) MLJ 585]. Paragraph nos.9 and 12 of the said judgment reads as under:

> "9.The Law Commission took up the matter and bemoaned the fact that Section 17 of the Act stood seriously compromised because of lack of

suitable statutory mechanism for the enforcement of the interim orders of the Arbitral Tribunal. The Commission wanted to provide teeth to the interim order of the Arbitral Tribunal as well as to provide for their enforcement. The Commission therefore recommended certain amendments which would not only give teeth to the orders of the Tribunal, but also make it statutorily enforceable in the same manner as the orders of a Court. Pursuant to the Law Commission's 246th report, amendments were made to Section 17 of the Act. Post amendment, the provision reads as under:-

> ?17.Interim measures ordered by arbitral tribunal:- (1) A part may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal-
>
> (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a)the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
>
> (b)securing the amount in dispute in the arbitration;
>
> (c)the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the

purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were an order of the Court.?

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11....

12.As rightly contended by the learned Senior counsel appearing for the Revision petitioner, the power of the Arbitral Tribunal to grant interim relief is not less than that of a regular Court, which has the power to grant interim order under Section 9 of the Act. Section 17(1) (b) and (e) of the Act contain expressions that are of great import. The Arbitral Tribunal can pass an order for securing the amount in dispute in the arbitration and can order such other interim measure of protection, as may appear to it to be just and convenient. It is also made clear that the Arbitral Tribunal shall have the same power for making orders as a Court has for the purpose of and in relation to any proceeding before it. "

12. According to the learned counsel for the appellants, Order 38 Rule 5 of the Code of Civil Procedure, the language employed therein states that where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that

the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. The import and meaning of the sentence "the Court is satisfied" means that it shall apply to the claims and counter claims of the contesting parties, which is raised before them. When the claim petition itself is not filed by the respondent, entertaining an application under Section 17 of the Arbitration and Conciliation Act, 1996, which is akin to Order 38 Rule 5 of Code of Civil Procedure, is without consideration of the materials.

13. The appellants were not put on notice as to what is the claim made by the respondent and under what consideration the interim protection under Section 17 of the Arbitration and Conciliation Act, 1996 was granted. As long as an order is passed even before filing of the claim petition, it cannot be construed to consider the interlocutory application as maintainable in law. He would rely on the language employed under Order 39, wherein any suit it is proved by affidavit or otherwise, that any property in dispute in a suit is in danger of being wasted, damages or alienated by an party to the suit or wrongfully sold in execution of a decree, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the property, as the Court thinks fit, until the disposal of the suit or until further orders. Such measure shall be taken only after the commencement of the suit by filing the plaint and not before that. In the instant case, even before filing a claim petition, interim order granted by the Arbitral Tribunal, which is not sustainable in law.

14. In support of his contention, the learned counsel for the appellants would rely on the judgment of the Hon'ble Supreme Court in NATIONAL HIGHWAYS AUTHORITY OF INDIA VS. GWALIOR JHANSI EXPRESSWAY LIMITED [2018 (8) SCC 243].

15. Per contra, learned counsel for the respondent would contend that Section 19 of the Arbitration and Conciliation Act, 1996 empowers the Arbitral Tribunal to determine its own rules of procedures. The Arbitral Tribunal shall not be bound by the Code of Civil Procedure and on the other hand, the parties are free to agree on the procedures to be followed by the Arbitral Tribunal in conducting its

proceedings.

16. Secondly, as per Section 21 of the Arbitration and Conciliation Act, 1996, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Once the arbitration is said to have commenced on the issuance of notice under Section 21 of the Arbitration and Conciliation Act, 1996, it cannot be said that it would commence only after filing of the petition.

17. Thirdly, the Hon'ble Supreme Court, while appointing an Arbitrator, has directed the parties to approach the Arbitrator for any interim order under Section 17 of the Arbitration and Conciliation Act, 1996, within a period of two weeks from the date of that order. Therefore, the contention that the Arbitrator has no power to grant interim orders even before filing of plaint is not sustainable.

18. The learned counsel for the respondent would further contend that even though the total amount due was Rs.2,78,51,652/-, the Arbitrator, considering the initial demand made in the legal notice dated 07.12.2017, directed the appellants to deposit a sum of Rs.75,00,000/-, that too, in three equal installments, by way of an interim measure. The materials on record would go to show that the outstanding is more than Rs.2.50 Crores. Further, the appellants have also accounted for the sale of 33 vehicles, which were in possession of the appellants. The value of those vehicles were run around Rs.2.50 Crores. Therefore, the contention of the appellants that without even ascertaining the claims and counter claims of the parties, the order passed by the Arbitrator, amounts to be passing an interim award is not sustainable.

19. I have considered the rival contentions.

20. At the outset, it is made clear that on an application filed under Section 9 of the Arbitration and Conciliation Act, 1996, this Court appointed two Advocate Commissioners to seize the vehicles, which were under the custody of the appellants and hand over the same to the respondent. The appellants have approached the Hon'ble Supreme Court and the Supreme Court, by order dated 14.09.2018, passed the following order:

> "The parties are agreed that the present dispute is referred for the sole arbitration of Hon'ble Mr.Justice F.M.I.Kalifulla, former Judge of this Court, at Chennai.

The parties are at liberty to approach the learned Arbitrator for interim order(s) under Section 17 of the Act within a period of two weeks from today.

Status quo to continue till the learned Arbitrator passes an interim order on the application of both parties.

Liberty to approach this Court, in case the Special Leave Petitioner(s) does not appear on the first date of hearing before the learned Arbitrator.

The Special Leave Petition stands disposed of accordingly."

21. The Hon'ble Supreme Court has given a specific direction to the parties to approach the learned Arbitrator for interim orders under Section 17 of the Arbitration and Conciliation Act, 1996, within a period of two weeks from that date of the said order viz., 14.09.2018 and further, granted status quo till the interim order to be passed by the learned Arbitrator on the application of both the parties. It is pertinent to note that, in the said order, the Supreme Court has also observed that in case the appellants does not appear before the Arbitrator on the first date of hearing, liberty was given to the respondent to approach the Supreme Court. Therefore, it is crystal clear that the Hon'ble Supreme Court has given liberty to the parties to approach the Arbitrator for interim measures under Section 17 of the Arbitration and Conciliation Act, 1996 meaning that the proceedings have already commenced.

22. Even otherwise, it is noted from the records that notice was issued by the respondent invoking arbitration clause which is followed by appointment of Arbitrator. It is also submitted by the learned counsel for the respondent that a claim petition was filed before the learned Arbitrator appointed by the respondent. However, as directed by the Hon'ble Supreme Court, fresh arbitration proceedings have commenced and the schedule was also drawn and an Arbitrator was also appointed. In view of proceedings under Section 21 of the Arbitration and Conciliation Act, 1996 and the subsequent events that had taken place in appointing a retired District Judge as an Arbitrator and later, the appointment of Sole Arbitrator made by the Hon'ble Supreme Court, the arbitral proceedings have commenced and that a specific direction was given by the Hon'ble Supreme Court to the parties to file applications under Section 17 during the pendency of the arbitral proceedings and therefore, I

do not find any infirmity in filing the application under Section 17 of the Arbitration and Conciliation Act, 1996 before the learned Arbitrator and also the order passed thereon.

23. Further contention that the procedure laid down under Order 38 Rule 5 and Order 39 Rules 1 and 2 of Code of Civil Procedure, will not be applicable to the arbitration proceedings, as the Arbitration and Conciliation Act, 1996, is a statute very specifically declare that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908. It can formulate on its own procedure or it can rule on its own jurisdiction and form procedure to be followed. Therefore, the contention raised by the appellants that the non-adherence of the procedure laid down under the Code of Civil Procedure is not sustainable. It only remains as to the correctness of the order passed by the learned Arbitrator in so far as directing the appellants to furnish security. It is not in dispute that there exists liability on the part of the appellants. What is disputed, as rightly found by the learned Arbitrator is the quantum of repayment.

24. According to the appellants, the respondent had unreasonably restricted the financial limits and thereby he suffered serious financial crunch and also committed defaults. But for the restriction of financial limits from Rs.5 to Rs.4 Crores and thereafter to Rs.2.50 Crores, they would not have committed any default. The appellants have a larger establishment and individual shares and securities in the name of factory and other properties available for running the dealership business. When the appellants are in sound financial position and the respondents owe the appellants certain payments, the appellants are also entitled to make a counter claim to the respondent. Without ascertaining financial position, the counter claim and dues which are payable to the respondent by the appellants, a direction, to furnish security was erroneously passed. But the consideration of materials would go to show that after recalling the loan account, a sum of Rs.2,78,51,652/- claimed by the respondents as due. This amount is not disputed in specific terms. It is also not disputed that the 33 vehicles were sold by the appellants and it was not accounted to the respondents or any money is paid. The value of the unsold vehicles, which is quantified as Rs.2,78,51,652/- by the respondent, is not disputed by the appellants. Hence, prima facie it is clear that more than Rs.77,20,621/- is due to the respondents.

25. In such circumstances, the direction to deposit a sum of Rs.75,00,000/- on the basis of Ex.16- legal notice dated 07.12.2017 issued by the respondent demanding a sum of Rs.77,20,621/- appears to be very reasonable, protecting the interest of the respondent to certain extent. I do not find any improper, irregular or illegal approach on the part of the

learned Arbitrator for granting interim protection under Section 17 of the Arbitration and Conciliation Act, 1996.

26. In the above circumstances, the contention of the appellants is bound to fail and they have to comply with the directions issued by the learned Arbitrator vide order dated 15.10.2018. The appellants are directed to make payment in three installments, as directed by the learned Arbitrator, commencing from 11.03.2019.

27. In the result, all the Civil Miscellaneous Appeals are dismissed with the above observation and direction. No costs. Consequently, connected civil miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

TK
To,

The Arbitral Tribunal, chennai

+4ccs to Mr.S.Namasivayam , Advocate SR.No. 76970 to 76972

CMA NOS.2968, 2972, 2973 AND 2975 OF 2018

A.SK(21/08/2020)