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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 30th January, 2019

+ **O.M.P. 1107/2012**

INDIA YAMAHA MOTOR PVT. LTD. Petitioner

Through: Mr. Sachin Datta, Senior Advocate
with Mr. Rahul Malhotra, Mr. Varun
Garg and Mr. Manmeet Singh
Nagpal, Advocates.(M:9793124305)

versus

DIVYA ASHISH JAMWAL Respondent

Through: Mr. Mohit Yadav, Proxy counsel.
(M:9711940952)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the Petitioners - India Yamaha Motor Pvt. Ltd. and Yamaha India Sales Pvt. Ltd., challenging the award made by the Ld. Sole Arbitrator dated 16th April, 2012.

2. The Petitioners - India Yamaha Motor Pvt. Ltd. and Yamaha India Sales Pvt. Ltd. (collectively referred as 'Yamaha') are manufacturers and sellers of two wheelers and other automobiles, including spare parts for the same. Yamaha appointed Divya Ashish Jamwal as its dealer in Jammu region. It is the case of the dealer that he was allotted the dealership initially in the year 1980 and by the time disputes arose he had been a dealer of Yamaha for more than 27 years. The dealer, claims that he had opened the dealership showroom in Gandhi Nagar, Jammu, which was widely publicised and was also converted into a high tech service centre. However, in the year 2006, he was harassed by the General Manager, Sales and

Marketing of Yamaha, who started making unfair demands on him and also neglected to supply vehicles to him. Disputes thus arose out of the last dealership agreement, dated 10th October, 2005. The said dealership agreement had an arbitration clause. Respondent – Divya Ashish Jamwal (*hereinafter 'Dealer'*) invoked the arbitration clause under the aegis of Indian Council of Arbitration. and initially sought the following reliefs:

- “(i) An award be passed in the favour of the applicant for sum of Rs.9,20,000/- nine lacs twenty thousand rupees) together with future interest at the rate 24% p.a. from the date of filling this application till the payment and/or realization and*
- (ii) A direction to the respondents to resume supplies of the Bi-wheelers product to the applicants and*
- (iii) Cost of this Arbitration Proceedings, and other incidental costs to the present reference; and*
- (iv) And any other relief which this Applicants may be found entitled to in the circumstances of the case.”*

3. While arbitral proceedings were under progress, the Petitioner terminated the dealership vide letter dated 4th June, 2007. The dealer, thereafter, amended his claim petition. Prayers sought by the dealer in the amended claim petition are as under:

“That the applicants prays in the interest of justice that this Hon’ble Arbitration Tribunal may be pleased to pass:

- i. An award be passed in the favour of the applicant for sum of Rs.9,20,000/- (nine lacs twenty thousand rupees) together with future interest at the rate 24% p.a. from the date of filling this application till the payment and / or realization and for every subsequent month till disposal of this application as mentioned in par 18a & b with 18% interest*
- ii. Award cost of unsold spares parts amounting*

to 13 lacs and to direct to take back the said stock

- iii. A direction to the respondents to resume supplies of the Bi-wheelers product to the applicants and*
- iv. Cost of this Arbitration Proceedings, and other incidental costs to the present reference; and*
- v. And any other relief which this Applicants may be found entitled to in the circumstances of the case.”*

4. The case of Yamaha before the Ld. Arbitrator was that the dealer, though an old dealer, did not service the dealership in a diligent manner. There was a steep reduction in sales, which had resulted in loss of market share in the Jammu region. The showroom was being misused and no interest was shown by the dealer in running the dealership. Under these circumstances, Yamaha had no option but to terminate the dealership as per clause 10.6 of the Dealer Agreement. Photographs of the showroom were also placed on record before the Arbitral Tribunal. The Dealer on the other hand argued that it was only due to the high-handedness of a senior official that disputes arose and a long standing relationship had soured.

5. The Ld. Arbitrator, held in favour of the dealer and awarded the following sums.

“5. As per documents referred to above, the net profit of the claimant exceed Rupees ten thousand per month. I therefore, assess loss of expected profits to be at Rs.10,000/- per month. As regards loss caused to the claimant to the claimant on account of maintenance of its establishment, the claimant has claimed the same to be Rs.50,000/- per month; whereas, as per P & L account, it works out to be Rs.67125/- per month which includes interest paid to the bank for the capital

borrowed by the claimant for the business. I assess the same to be Rs.50,000/- per month for four months prior to the date of termination of the contract by the respondent and Rs.45,000/- per month for the period subsequent to the date of termination till date of the contractual date of termination; this includes interest as stated above rent (warehousing of the stocks) man power and incidentals.

6. Both the above amounts would carry interest @ 16% p.a. w.e.f. 04/06/2007. This rate of interest is being awarded on the principles of reciprocity; as on the date, the nationalized banks are charging interest @ 12.5 % and above compounded quarterly.

.....

9. Cost of this Arbitration Proceedings, and other incidental costs to the present reference. In view of the claimant succeeding in the matter, it is entitled to cost of the Arbitration Proceedings. It is assessed besides the amounts paid by it to ICA for conducting arbitration proceedings and providing other services at Rs.1,00,000/-. It is computed as under:-

- i. Lawyer's fees for 35 hearings.*
 - ii. Drafting of statement of claim, affidavit of evidence, application and reply to the applications of the respondent and getting copies of the documents etc;*
 - iii. For secretarial services;*
 - iv. For producing four witnesses (the witnesses had come to Delhi from Jammu. Their traveling and other expenses).*
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I have already held that termination of the dealers' agreement by the respondent was motivated. The agreement between the parties is one sided; it was authorized by the respondent and claimant had no option but to sign the same on the dotted line. While the agreement is silent on the guidelines for exercise of

the right of termination of agreement by the respondent under Claimant: 10.6; it is capable of not only being misused but also playing fraud upon the dealer. I find lack of good faith on part of the respondent and misuse of its dominant position. The counsel for the claimant drew my attention to Claimant : 4.7 of the agreement and argued that the claimant was required maintain stocks of spare and various fittings as per requirements of the respondent. These stocks were held by the claimant in pursuance of the requirements of the respondents. Therefore, it would be unjust if the respondent does not take back the stock back from the claimant. The respondent cannot be permitted to protect its profits and/or protect its own losses at the cost of its dealers. I therefore, agree with the claimant.

I therefore, award: that the respondent takes back all the stocks of the spares, accessories and other fittings as per list therefore filed by the claimant irrespective of their condition (used and/or violently damaged items, and items not purchased by the claimant from the respondent are excluded) and refund to the claimant full price including taxes etc. thereof with 16% interest per annum with effect from 04/06/2007 till date of payment. The respondent shall collect the said stocks from the claimant at its own cost within two months from the date of this award.”

6. Mr. Sachin Datta, Id. Senior Advocate appearing for Yamaha, submits that Ld. Arbitrator has gone behind the dealership agreement between the parties and has held that the agreement is one sided and Yamaha was in a dominant position. This was not even the case of the dealer. The observations by the Ld. Arbitrator, that the contract is one sided and that termination was motivated, are totally beyond the case pleaded by the dealer. He submits that the award is not based on sound reasoning and is

clearly based on conjecture by the Ld. Arbitrator as to the relationship of dealer with the General Manager, Sales and Marketing. It is submitted that Ld. Arbitrator has, in fact, awarded monetary claims, which are higher than those claimed by the dealer.

7. He relies on the judgment of the Supreme Court in ***Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49***, to argue that one of the basic objections under Section 34 of the Act, that renders the award as being perverse and contrary to public policy, would be, if the Arbitrator awards more than what the claimant even seeks. He relies on paragraph 36 of the said judgment. It is further submitted by Mr. Datta that the dealer has not placed any evidence to support the monetary claims and hence the award is totally unsustainable.

8. On the other hand, Mr. Mohit Yadav, Id. counsel appearing for the dealer submits that Yamaha being a dominant party, the contract is actually one-sided and worded in favour of Yamaha. The dealer, being a very old dealer and carrying on business of Yamaha in the Jammu region, was treated badly by the company and the award is wholly justified. It is further submitted by learned counsel for the dealer that the termination was done by Yamaha after arbitration was invoked by the dealer, which itself shows that the termination was *malafide*. He relies upon the award to submit that the award is based on sound reasoning.

9. This Court has heard the submissions of the parties. Some of the findings of Ld. Arbitrator are important and are set out herein below:

“5. I have gone through the pleadings and evidence (documentary and oral) of the parties and written arguments. I have come to the following conclusions:

(i) *The dealership agreement dated 05/10/2005 between the parties was authored by the respondent. It is exhaustive but one sided. The respondent is a dominant party to command and enforce its dictates. The claimant had to accept the agreement as it was, so as to carry on its business as authorised dealer of the respondent or not to do its business. It was an implied condition of the agreement that both parties would act in good faith qua each other.*

(ii) *Frictions in relations between the parties developed during 2006-2007. The claimant has attributed these frictions to Mr. Bakshi. The respondent admits that Mr. Bakshi was no longer in its employment but it has not disclosed why and when Mr Bakshi left the employment of the respondent; it has also admitted that the relations between the parties gradually deteriorated due to allegation levelling attitude of the claimant. Attitude of a person is behavioural character personal to it. Certainly it was not there prior to re-appointment of the claimant as an authorised dealer by the respondent. Within a short span, Mr. Bakshi ceased to be in the employment of the respondent. I therefore conclude that the disputes and differences had crept in in the relations between the parties during the tenure of Mr Bakshi. Letter dated October 2006 is very enlightening.*

(iii) *Loss of confidence is often subjective response of a person to another person. The respondent has not adduced any evidence to establish objectivity in its assertion that it had lost confidence in the claimant.*

(iv) (vi)

(vii) *The respondent has placed on record*

some reports of inspection of show room and workshop of the claimant. The respondent has not alleged such condition as depicted in the photographs was a regular feature. It has also not placed on record standards of the show room and workshops laid down by it. Since the respondent has admitted (not disputed) that the claimant had already worked as its authorised dealer for more than two decades, the respondent did not have serious complaints against the standards of the workshop maintained by the claimants. In my view, this allegation has no merit for suspension of supplies of its products by the respondent to the claimant. It could only have some value to terminate the agreement and that too if the complaint persisted after repeated warnings.”

10. A perusal of the above paragraphs shows that the Ld. Arbitrator has unfortunately gone beyond the dealership agreement between the parties. When there was no challenge to the legality or validity of the dealership agreement, Ld. Arbitrator could not have commented on the same and arrive at far reaching conclusions that the dealership agreement is ‘one sided’ or that Yamaha is a ‘dominant party’. Such findings, which may be given in arbitral proceedings, can have extremely serious consequences for the parties involved, especially when there was no challenge raised to any of the clauses in the agreement. Further, paragraphs 5 (i) & (iii) extracted above also show that the award is conjectural and Ld. Arbitrator has made surmises regarding the relationship between officer of Yamaha and the dealer. The findings travel beyond the facts and evidence presented before the Ld. Arbitrator. It is impermissible for the Arbitrator to comment on human relationships in a purely commercial contract, especially when there is no

evidence to base the same on. Ld. Arbitrator ought to have tested the termination by Yamaha on the basis of clauses in the contract and evidence placed on record and not on the basis of how human relationships ought to be. The Ld. Arbitrator has held clearly in paragraph 4 of the award as under:

“4. In support of the relief claimed by it under item (a), (b) and (c), above, the claimant has filed and relied upon balance sheet and P & I account for the year 2006-07 and a copy of Income-Tax return for the same year filed by it with the concerned authorities. The claimant has not produced its books of accounts. The evidence produced by the claimant is scanty. However, it has not been disputed by the respondent. There can also be no doubt that on consideration of the totality of the facts and circumstances of this case, the claimant must have suffered besides losing expected profits (AIR 1984 SC 1703), some loss for maintaining its establishment and on payment of interest to the banks from whom it had borrowed capital particularly on stocks held by it. The claimant is therefore, entitled to compensation for loss of expected profits and also reimbursement of the loss caused to it on maintenance of its establishment.”

11. Thus, the Arbitrator, despite holding that the evidence is scanty, and though there were no accounts filed by the Dealer, concludes that he ‘must have’ suffered a loss. Losses cannot be based on conjecture and surmises. They have to be pleaded and proved on record. It has to be proved that loss was suffered and that Yamaha was responsible for the loss. Award of loss of profits without holding that the dealer had conducted himself as per the contract is not sustainable. From the discussion above it is clear that Yamaha was not in the wrong in terminating the dealership. Thus no loss of profits could have been awarded. A perusal of paragraphs 5, 6 & 9 of the award

shows that there is no clarity in what manner and for what period Rs.10,000/- per month has been awarded for loss of expected profits. Further, there is no clarity as to why and on what basis Rs.45,000/- was fixed for the entire remainder period of the contract.

12. The contract in the present case was executed on 10th October, 2005. It was terminated on 4th June, 2007. As per clause 10 of the agreement, the dealership was valid for a period of three years. Clauses 10.1 and 10.6 are extracted hereinbelow:

“10. TERM AND TERMINATION:

10.1 This Agreement shall come into effect on the date mentioned in the heading of the Agreement. The Agreement shall be valid for a period of three (3) years from the date of its commencement and may be extended for such period and on such terms and conditions as are conveyed by YMI and YMS to the DEALER two (2) months prior to the expiry of the Agreement.

10.2..... 10.5.3.

10.6 The DEALER agrees that YMI and/or YMS have a right to forthwith terminate this Agreement by giving written notice without incurring any liability in case:”

13. Thus, Yamaha had a right to forthwith terminate the agreement by giving written notice. Admittedly, the dealer did not reply to the termination notice. The finding of the Ld. Arbitrator, of fraud being played upon the dealer, is too far reaching, not based on any evidence, and is wholly perverse. Grant of damages for a period of 16 months when the termination was as per the contract with immediate effect, especially when the evidence adduced was scanty, is not tenable.

14. The operative portion of the award directs Yamaha to pay back all the

stocks of spare parts, accessories and other fittings as per list. The grievance of the dealer in the claim petition was that adequate spare parts and products were not supplied, thus, it is surprising that the dealer claimed to have been having stocks worth Rs. 13 lakhs of spare parts, accessories and vehicles. Moreover, a perusal of the photographs placed on record, which have been completely ignored by the Ld. Arbitrator, though noticing the same in the award, clearly shows that there is no showroom operating from the premises. Photographs could not have been ignored by the Ld. Arbitrator by observing that the state of affairs as seen therein was not a 'regular feature'. The contention of ld. counsel for the dealer is that the dealer was not maintaining the stocks as per clause 4.7 of the agreement. A perusal of the termination letter shows that the same called upon the dealer to comply with the provisions of clause 11 of the agreement. Clause 11.6 read with clause 12 permitted the dealer to inform Yamaha of the stocks lying with him and upon inspection, Yamaha was to pay back to the dealer the cost of the products at the dealer price. The dealer having not shown any communication on record calling upon Yamaha to pay back the cost of the products, giving it the list of the existing spare parts and providing inspection thereof, Ld. Arbitrator could not have accepted the dealer's list of stock of spare parts etc., straightway without any evidence/inspection.

15. In *Associate Builders (supra)*, the Supreme Court has clearly held that any award passed ignoring the terms of the contract and granting claims, which are wholly baseless, would be contrary to public policy and also contrary to justice and morality. The relevant portion of the said judgment is set out herein below:

“23. In *Centrotrade Minerals & Metals Inc. v*

Hindustan Copper Ltd., (2006) 11 SCC 245, Sinha, J. held:

“103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act.”

24. In DDA v R.S. Sharma and Co., (2008) 13 SCC 80, the Court summarized the law thus:

“21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to the substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996 or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to public policy of India

42.3. *(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

“28.Rules applicable to substance of dispute.—

(1)-(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

16. Thus, it is the settled position that an Arbitral Tribunal has to decide the dispute in accordance with the terms of the contract. The award in the present case is based on surmises and the findings are also extraneous for e.g., on human behaviour. There is no evidence on record to support the award. The findings that the contract is one-sided and Yamaha is a dominant party are far-reaching and not borne out from the pleadings and evidence on record. The award passed by the Ld. Arbitrator, was contrary to the terms of the contract is not liable to be sustained. The impugned award is, accordingly, set aside.

17. OMP is allowed with no orders as to the costs.

**PRATHIBA M. SINGH
JUDGE**

JANUARY 30, 2019/dk