



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.03.2021

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.A.No.2331 of 2017

&

C.M.P.Nos.1967 & 1968 of 2021

N.Rajagopal,
Proprietor,
MR Motor Company,
No.19, Commercial Complex,
D.D.Road,
Salem.

...Appellant

Vs

1.TVS Motor Company Limited,
II Floor,
No.383, 16th Main Road,
3rd Block,
Koramangala,
Bangalore - 560 034.

2.P.A.Muchandi
Sole Arbitrator,
C1, 1e Chatle,
No.90, Infantry Road,
Bangalore - 560 001.

...Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 37 (1) and (b) of the Arbitration and Conciliation Act, 1996, praying to set aside the order of the learned Principal District Judge, Krishnagiri, in Arbitration O.P.No.10/2016 dated 03.04.2017 confirming the Award of the 2nd respondent in Arbitration Case No.1 of 2015 dated 24.03.2016.

For Appellant	:	Mr.Richard Wilson for M/s.K.Suhasini
For Respondents	:	Mr.Sathish Parasaran, Senior Counsel for Mr.R.Parthasarathy for R1
		R2 - Not Ready in notice



JUDGMENT

The short question that arises for the consideration of the Court in the above appeal under Section 37 of the Arbitration and Conciliation Act, 1996, hereinafter called the Act, is whether in the absence of a dispute / demand being raised by one party arbitral proceedings can be initiated and proceeded with by the other party.

2. In order to answer the issue arising in the instant case we have to briefly allude to the facts which preceded the appointment of the Arbitrator by the Chairman cum Managing Director of the 1st respondent Company.

3. The 1st respondent had accepted the request of the appellant to appoint him as the Authorized stockist of the 1st respondent's company's spare parts. They had issued a letter of offer dated 16.10.2003 informing the appellant that they were pleased to accept the request of the appellant and appoint him as their stockist. The business was to be conducted in a 800 Sq.ft area for the sales counter and a further extent of 800 Sq.ft as godown / stores at BD Road, Chindamani Commercial Complex, Salem. The appellant was allotted a unique stockist code 30085 which was to be quoted in all the correspondence. Further, the letter of offer provided for resolution of disputes arising out of this arrangement through arbitration. The sole Arbitrator was to be appointed by the Managing Director of the 1st respondent Company. The appellant was required to sign a copy of the letter of offer as a token of his acceptance. The appellant had also signed it and therefore the contract between the parties had been concluded.

4. From the documents filed before the Arbitral Tribunal it appears that the appellant was originally an Authorized Parts Stockist (APS) of the 1st respondent company at Namakkal from the year 1982 and thereafter at Salem in the year 2003. The appellant was concerned about the withdrawal of the credit limit and the trade incentives and had addressed the Executive Director of the 1st respondent company to restore the same taking into consideration the long association, sales achievement of the appellant and their capacity to achieve the targets. This request was put forward vide letters dated 05.08.2014, 01.09.2014, 25.12.2014 and 05.03.2015. These letters had only requested the Executive Director to restore the incentives that were originally given to him.

5. However, without the appellant raising a dispute or requesting for the appointment of an arbitrator stating that disputes have arisen between him and the 1st respondent, the 1st respondent had proceeded to request their Chairman and Managing Director to appoint an Arbitrator. The 2nd respondent was thereafter appointed as the Arbitrator. When the appellant had



received the notice from the 2nd respondent he had by letter dated 09.02.2015 / 09.04.2015 and 17.02.2015 informed that there was no dispute requiring an Arbitrator to be appointed and his request could be resolved through discussions.

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6. Despite such a letter from the appellant the arbitrator had proceeded with the matter. The appellant has not even filed his claim statement and the arbitrator has treated the letters sent by the claimant to the Executive Director of the 1st respondent on 05.08.2014 and 01.09.2014 as the claim statement. The Arbitrator had passed an award dismissing the claim petition and directed the claimant to pay the entire cost of the Arbitral proceedings.

7. The appellant had challenged this award by filing a petition under Section 34 of the Act, before the Principal District Court, Krishnagiri in Arb.O.P.No.10 of 2016 to set aside the award. However, the learned Judge by order dated 03.04.2017 dismissed the petition and it is challenging this order that the appellant is before this Court.

Submissions:

8. Mr. Richard Wilson who made his submissions for the appellant would primarily argue that there is no cause of action for invoking and continuing with the Arbitral proceedings since the appellant had not raised any dispute. Even in the 2 letters which has been treated as the claim statement neither has the appellant raised a dispute nor sought to have a Arbitrator appointed. He would submit that on this sole ground the entire proceedings has to be quashed as non-est and void.

9. Per contra, Mr. Sathish Parasaran, learned senior counsel appearing on behalf of the respondent would submit that the appellant had demanded the restoration of the trade incentive and the credit limit which was turned down by the respondent which gives rise to a dispute. Therefore, the respondent who under the letter of offer was entrusted with the task of appointing an Arbitral Tribunal has discharged its duty. He would submit that it was the appellant's case that he had sustained a loss on account of the trade incentive and credit limit being withdrawn and the respondent company should make good this loss.

Discussion:

10. The entire case revolves around the issue as to whether the appellant had raised a dispute which necessitated the appointment of an Arbitral Tribunal and whether the award passed by the Tribunal without a statement of claim being filed by the appellant, who has been described as the claimant, is sustainable.



11. Before discussing the case on hand it would make useful reading to extract the scheme of the Act. Section 2 (1) (a) defines the term "arbitration" as any arbitration whether or not administered by permanent Arbitral institution and Section 2 (1) (b) defines "arbitration agreement" as an agreement that is referred to in Section 7 of the Act. A party is defined in Section 2 (1) (h) as a party to the Arbitration agreement. The word "dispute" has not been defined. Section 7 (1) of the Act defines the Arbitration Agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

12. Chapter V of the Act deals with the conduct of proceedings. The chapter contemplates that the arbitral proceedings would commence with a request being made by one party to the respondent to refer the dispute that has arisen between the parties to Arbitration as provided in Section 21 of the Act. A reading of Section 21 would highlight the following:

- (i) that a definite dispute has arisen between the parties to the arbitration agreement;
- (ii) that a request has been made by the aggrieved party to the respondent to refer this dispute to arbitration; and
- (iii) that there is no other procedure agreed between the parties with regard to the commencement of the arbitral proceedings.

In case parties have agreed on a different procedure for commencing an arbitral proceedings, then such procedure shall prevail. In all other cases, the person raising the dispute shall call upon the respondent (other party) to refer that dispute to arbitration. If the parties agree to the existence of the dispute and agree upon an Arbitration such Arbitrator can be appointed. However, if there is no consensus on this, then any one of the party can move the High Court under Section 11 of the Act to appoint an Arbitrator to arbitrate the disputes. Once an arbitrator enters reference, either through consent or through orders of the court, he shall after complying with the provisions of Sections 18, 19, 20 and 22 fix the time for the claimant to file his claim statement with the documents and thereafter permit the respondent to file their statement of defense (which could also be in the form of a counter claim or a set off) with the relevant documents as contemplated under Section 23 of the Act. Thereafter, the Arbitrator shall follow the provisions of Section 24 and ultimately make the award.



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15. Nowhere in the said letters has the appellant stated that if the same is not restored it would constitute a refusal of his request thereby giving rise to a dispute. In fact, the respondent company has understood the request as made by the appellant which is evident from a perusal of the letter dated 25.12.2014 addressed by the respondent Company to the appellant wherein they have expressed their inability to concede to the request and giving a counter offer as a gesture of their goodwill and good faith in order to continue their relationship. The respondents had called the appellant for meeting at the factory on 05.01.2015 and 09.01.2015. Thereafter, it appears that the Vice President – Legal of the respondent Company has addressed a letter to the Chairman and the Managing Director of the respondent Company, who is the authority under the Agreement, to appoint an Arbitrator stating that disputes have arisen between the parties. He has put forward the letters dated 05.08.2014 and 01.09.2014 as the claim / demand of the appellant Company. In the letter dated 12.01.2015, the Vice President – Legal would submit that the parties were unable to reach an amicable solution. Therefore, according to him it gives rise to a prima facie case of existence of a dispute and therefore he would request the appointing authority to appoint an arbitrator. It is pertinent to note that the aggrieved party i.e., the



appellant, has not raised any dispute nor had he requested that an arbitrator be appointed.

16. In response to the said letter, the Chairman and the Managing Director by letter dated 04.02.2015 has appointed the Arbitrator. Copies of the letter was sent to the appellant herein as well. The arbitrator, the 2nd respondent herein has thereafter sent a letter dated 12.02.2015 informing the parties about his appointment as an Arbitrator. Without raising a dispute or requesting for an arbitration the appellant is described as the claimant. Immediately, by letter dated 17.02.2015, the appellant clearly stated that there is no dispute and it is only a discussion for restoring certain trade incentives and credit limits which was required and there is no necessity to arbitrate or to conduct the Arbitral proceedings. Despite this letter the 2nd respondent proceeded with the Arbitral proceeding.

17. A perusal of the proceedings of the arbitrator, 2nd respondent would indicate that on 23.02.2015 the 2nd respondent arbitrator had sent notices under Section 23 of the Act to the appellant to file their statement of claim along with supporting documents within 15 days and a copy of the same was to be sent to the respondent. The notes paper would show that the arbitrator had received a letter dated 04.05.2015 from the claimant that he will not participate in the proceedings. The arbitrator even then has held the proceedings and on 22.08.2015 has recorded the following along with other details:

"Since the claimant has been stating that he will not participate in the arbitration proceedings and as he is making statements and producing documents the same is taken as claim statement and his supporting documents."

18. This order/notation of the Arbitrator does not clarify as to what is taken as the claim statement. However, in paragraph 3 of the award the Arbitrator has stated that the 2 letters of the appellant dated 05.08.2014 and 01.09.2014 has been treated as the claim statement. On what basis the Arbitrator had treated these letters as the claim statement has not been elaborated by the arbitrator.

19. The above narration throws up 2 glaring procedural irregularities:

I. (i) The appellant who has been described as the claimant before the Arbitral Tribunal has not raised any dispute nor has he requested for the appointment of the Arbitrator.

(ii) The letters dated 05.08.2014 and 01.09.2014 are the letters which are quoted by the respondent company in their letter to the appointing authority as the genesis for the



dispute. On a reading of these letters by no stretch of imagination can it be called a demand. The tenor of the letter is only a request for discussion. There could be a situation where one party may not specifically deny or repudiate a claim like in the case of a money claim. The party upon whom the demand is made may not respond to the demand. It does not automatically follow that there is no dispute. The silence can be presumed to be a denial. However in the case on hand there is no such doubts as the appellant has expressly denied the existence of a dispute and had also refused to participate in the proceedings as the dispute had not been raised by them.

(iii) As already stated the Act does not define "dispute" therefore we have to fall back on the dictionary meaning of "dispute". Black's law dictionary defines dispute as follows:

"A conflict or controversy"

Oxford dictionary defines it as "a controversy, a debate, a quarrel".

Therefore dispute contemplates the existence of a conflict or a controversy which ingredients are missing in the instant case.

(iv) The Calcutta High Court was called upon to consider the validity of an award passed by the Arbitrator where the petitioner before the Court would contend that there was no disputes between the parties giving rise for a cause of action for invoking the arbitral agreement. In this judgment reported in AIR 1954 Cal 245 -Nandram Hanutram v. Raghunath and Sons Ltd, although the learned Judge has ultimately held that there was a dispute between the parties, however, had observed as follows in paragraph 7.

"There is no doubt that the existence of disputes or differences contemplated by the Arbitration Clause is an essential condition of a pre-requisite to the exercise of jurisdiction by the Arbitrator.

A dispute implies an assertion of right by one party and a repudiation thereof by another--"

This judgment was rendered under the Arbitration Act, 1940.

(v) In another judgment of the Delhi High Court, reported in 2008(3) RAJ page 486, Surana Telecom Ltd. vs Bharat Sanchar Nigam Ltd, the learned Judge was considering an application filed under Section 11(6) of the Act. The respondent therein had raised a defence that neither the petitioner nor the letter



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invoking arbitration would specify the "dispute or difference". After hearing the parties the learned Judge while holding that the invocation of the arbitration clause to review/modify the existing terms and conditions is outside the scope of arbitration and rejecting the Section 11 petition, observed as follows:

"It is therefore held that the petitioner has failed to specify any dispute in the petition or correspondence exchanged with the respondent, which can be termed as a "dispute/difference" in respect of the contract governing the parties for the purposes of being referred to an arbitrator for adjudication".

(vi) The Hon'ble Supreme Court in the Judgement reported in 2011 (11) SCC 375 - Deutsche Post Bank Home Finance Ltd Vs. Taduri Sridhar and others, while considering the issue regarding the existence of a dispute to be referred to arbitrations held as follows:

"A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim/demand against the other party to the arbitration agreement and the other party refuses/denies such claim or demand."

(vii) These ingredients to constitute a dispute are sadly lacking in the instant case. Section 21 of the Act provides that the Arbitral proceedings would commence with a request being made by the aggrieved party to the respondent. No such request has been made by the Appellant. Its rather strange that without a request being made by the appellant the respondent company has taken it upon themselves to presume a dispute, request the appointing authority to appoint an arbitrator and participate in an Arbitral proceedings which the appellant has refused to participate. Though it is the respondent who had invoked the Arbitral clause the appellant is described as the claimant by the Arbitral Tribunal.

II. (i) The 2nd glaring procedural irregularity is the arbitrator going ahead with the Arbitral proceedings despite the applicant / claimant expressly refusing to participate in the proceedings and refusing to file his statement of claim.

(ii) Section 25 of the Act enunciates the procedure to be adopted by the arbitrator in the event of a default of a party. Section 25 (a) provides as follows:

"(a) the claimant fails to communicate his statement of claim in accordance with Sub Section (1) of Section 23, the Arbitral Tribunal shall terminate the proceedings."



(iii) The language used is mandatory, it provides that the Arbitral Tribunal shall terminate the proceedings. Strangely the Arbitrator without terminating the proceedings has overreached his authority by suo moto considering 2 letters as the claim statement. The respondent company on their part has filed their statement of defense, adduced evidence and marked documents. The entire Arbitral proceedings is therefore non-est and void. The learned Arbitrator has adopted a procedure totally outside the scope of the Act.

(vi) The Hon'ble Supreme Court in the judgment of SREI Infrastructure Finance vs. Tuff Drilling Private Limited reported in 2018(11) SCC page 470 on an application of the claimant was dealing with the jurisdiction of an Arbitral Tribunal to set aside its order under Section 25(a) of the Act, terminating the arbitral proceedings for non-filing of the claim statement. While considering the said issue the learned Judges after extracting the provisions of Section 25 and Section 32, held as follows:

"Under Section 23(1) , the claimant is to state the facts supporting his claim within the period of time agreed upon by the parties or determined by the Arbitral Tribunal. The question of termination of proceedings arises only after the time agreed upon by the parties or determined by the Arbitral Tribunal comes to an end. When the time as contemplated under Section 23 (1) expires and no sufficient cause is shown by the claimant the Arbitral Tribunal shall terminate the proceeding."

Ultimately the learned Judges had held that the Arbitral Tribunal could use its discretion to set aside an order terminating the arbitral proceedings for non-filing of the claim statement. However in the case of hand the Appellant/claimant has clearly denied the existence of a dispute and refused to participate in the proceedings; the learned Arbitrator ought to have terminated the proceedings.

20. The learned Principal Judge, Krishnagiri has also abdicated the jurisdiction vested in him under Section 34 of the Act by dismissing the appeal totally overlooking the glaring procedural irregularities and the fact that the award passed is a patent illegality.

21. The learned Judge has totally overlooked the fact that the entire Arbitral proceeding right from the manner in which it has been commenced and the award thereafter passed is totally perverse and irrational. The learned Arbitrator did not have the jurisdiction to hear the matter. The learned Arbitrator has



totally failed to adopt a judicial approach and has overlooked the fundamental and rudimentary principles of the Act. The Hon'ble Supreme Court in the judgment reported in 2019 SCC Online SC 677 - Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India (NHAI), discussed the various judgments rendered pre and post 2015 Amendment with regard to what would constitute a patent illegality falling within the contours of a conflict with the public policy of India. The learned Judges after referring to the judgments in Associate Builders vs. Delhi Development Authority- (2015(3) SCC page 49) and ONGC vs Saw Pipes- (2003 (5) SCC 705) had held that after the judgement in ONGC vs Saw Pipes supra the Amendment in 2015 has introduced Section 34 (2A) and included patent illegality as a separate ground for setting aside the award.

The case of hand bristles with procedural irregularities, absence of jurisdiction to the Arbitral Tribunal and a total disregard to the fundamental procedure contemplated under the Act by the respondent company which is summarized hereinbelow.

I. The entire arbitration proceedings is without jurisdiction for the following reasons:

- a) The absence of any dispute;
- b) The appellant has not raised any dispute;
- c) The appellant has not requested for the constitution of the Arbitral Tribunal;
- d) The Arbitral proceedings has been commenced by the respondent and not the claimant by invoking the provisions of Section 21 of the Act in total violation of the provisions of Section 21 of the Act.
- e) The appellant after receiving the notice from the Arbitrator had very clearly stated that he will not participate in the proceedings.

II. The Arbitrator has failed to terminate the proceedings when the appellant/claimant had failed to file the claim statement within the time provided by the Arbitrator;

III. The Arbitrator has exceeded his jurisdiction by suo moto treating the two letters addressed by the appellant to the Executive Director of the respondent company as the claim statement.



22. In fine the appeal is allowed the order of the Principal District Judge, Krishnagiri in Arbitration O.P.No.10 of 2016 is set aside and consequently the award in Arbitration Case No.1 of 2015 of the 2nd respondent is declared as non-est and void and therefore set aside. Consequently, connected Miscellaneous Petitions are also closed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mps/kan

To

The Principal District Judge, Krishnagiri

+1cc to M/s.K.Suhasini, Advocate SR.No. 20658

Copy to

The SO, VR Setion, High court, Madras.

C.M.A.No.2331 of 2017

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