IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **28.10.2022**

CORAM

THE HONOURABLE Ms. JUSTICE P.T.ASHA

C.M.A.No.2338 of 2022
and C.M.P.No.18212 of 2022

Vivek Automobiles Private Limited,
Kanipath Kathmandu, Nepal
and also having its branch office at
11, Allenby Road, Kolkata-700 020. ... Appellant

Vs.

Eicher Motors Limited
3rd Floor, Select City Walk,
A-3 District Centre, Saket,
New Delhi-110 017
alo having its branch office at
Thiruvottiyur High Road,
Thiruvottiyur,
Chennai-600 019. ... Respondent

PRAYER : Appeal filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, against the orders of the learned Arbitral Tribunal dated 12.09.2022 passed in M.A.No.21 of 2022 in Arbitration Case No.4 of 2022 received by the Appellant on 22.09.2022.

For Petitioners : Mr.A.R.Ramanathan
for Mr.S.Karunamoorthy

For Respondent :Mr.Vijay Narayan
Senior Counsel
for Mr.Arun C.Mohan
Caveator counsel for sole respondent

JUDGMENT

The appellant has filed the above appeal challenging the dismissal of their Section 17 application by the learned Arbitrator.

2. The brief facts which are necessary for considering the above application are herein below narrated:

(i) The appellant is engaged in the business of marketing, selling, distributing and servicing of automobiles in the State of Nepal. They were appointed as a dealer of the respondent, who in turn is engaged in the business of manufacturing, marketing, distributing and servicing of Motor Vehicles in the name of Royal Enfield. The Distributor Agreement was entered into on 09.02.2016. The distributorship was a non-exclusive one.

As per Clause 3 of the Agreement, the term of contract was fixed for a period of 2 years from the effective date of the contract and thereafter, the parties were free to extend the agreement from time to time on such term as may be mutually agreed in writing. If however on expiry of the term of agreement, the same is not extended in writing or neither party notifies to the other party that it does not wish to extend the term of the agreement, there is a deemed extension for a period of 3 months for each instance until the same is terminated in writing by either party or when an agreement is executed. The terms of agreement further provided that the party would agree upon a business plan immediately on signing of the agreement and such business plan should be executed atleast 3 months prior to the expiry of the term of the business plan every year. Therefore, the parties had to necessarily agree to a business plan every year and such business plan shall be in writing in the form specified in Annexure 3 of the agreement. Unlike in the case of the extension of the agreement, the business plan has to be extended in writing. Clause 15 of the Agreement provided for the termination of the contract.

(ii) It is the case of the appellant that pursuant to the execution of the agreement, they have been selling, marketing and distributing the products of the respondent and had increased the sales of the respondent's product. The original Agreement had come to end on 08.02.2018. Since neither party had intimated any intention to terminate the agreement or to extend it, the agreement was periodically extended by a period of 3 months each. The business plan was also being exetended every year. The parties were adhering to the yearly business plan as contemplated under Clause 4 of the Agreement.

(iii) It is the case of the appellant that they had incurred substantial expenses and costs for setting up the infrastructure, professional manpower, plan development etc., for effectively selling the respondent's products in the state of Nepal and also to ensure the growth and popularity of the respondent's brand. The annual sale of units of motorcycles of the respondent increased from 35 units in the FY (Financial Year) 2016 to 5200 units in the FY 2021, which would speak volumes about the work put in by the appellant. The agreement was being extended after the initial period for about 4 years. However, all of a sudden and out of the blue, the respondent, by a letter dated 07.03.2022 informed the appellant that they were not willing to continue the agreement and that the same would expire by 08.05.2022. In the said letter, the respondent had also stated that the appellant had misrepresented itself as an exclusive distributor of the respondent in the market, defaulted in payment of the requisite excise duty for importing motorcycle 400 CC category and raised inflated and forged invoices for stall charges at NADA Auto Show 2011 which had also prompted the termination.

(iv) The appellant would contend that the respondent itself had represented that the appellant was their sole and the exclusive distributor for the territory of Nepal. In a meeting held in March 2019, the respondent had agreed to the claimant using the expression “Sole Distributor” and requested the appellant to focus on market development and network expansion. The appellant would deny the allegations that had been raised in the letter dated 07.03.2022. The appellant would submit that the termination was in violation of Clause 15 of the Agreement as no prior notice has been issued and the appellant would further submit that there were ulterior motives in the termination, since the Officers of the respondent-Company had alloted the same to the third party. Since the disputes and differences have arisen in relation to the distributorship agreement dated 09.02.2016, the appellant had invoked the arbitration in terms of the Arbitration clause contained in the Distributor Agreement. The appellant had also filed an application in O.A.No.162 of 2022 under Section 9 of the Arbitration and Conciliation Act seeking an order of injunction restraining the respondent, their men, agents and assigns from giving effect to the purported letter of termination dated 7.03.2022.

(v) This Court, by order dated 28.03.2022, was pleased to direct the parties to maintain status quo and in the same order, this Court was pleased to appoint Mr.Kannan.J (Retd) as sole Arbitrator for adjudication of the disputes and differences between the parties.

(vi) By order dated 08.04.2022, the learned Arbitrator was pleased to extend the order of status-quo dated 28.03.2022. The appellant would fairly concede that during the pendency of the proceedings before this Court that they on a wrong legal advice, simultaneously approached the District Court at Katmandu, Nepal in relation to the very same disputes. Therefore, the respondent had taken out an application under Section 17 of the Arbitration and Conciliation Act before the learned Arbitrator to vacate the order of status-quo granted on 08.04.2022. By order dated 12.09.2022, the learned Arbitrator had dismissed the said Section 17 application filed by the appellant and it is against the said order the appellant is before this Court.

3. The learned counsel appearing on behalf of the appellant would contend that as per Clause 15, the respondent is bound to give three months notice before terminating the contract. However, the impugned letter terminates the contract forthwith, which is breach of the terms of Clause 15 of the said contract. He would further submit that under Clause 3, the contract was for a period of 2 years and thereafter, there is a deemed extension, if the agreement is not extended in writing or either party to the contract does not notify the other party that they do not have an intention to

continue the contract. Such a deemed extension is for a period of 3 months. He would submit that the contract has been extended in this fashion for over 4 years only on account of the excellent work that has been done by the appellant who has expanded the footprint of the respondent in Nepal. The learned counsel would further submit that this Court in its order dated 28.03.2022 in O.A.No.162 of 2022 had granted an order of status-quo, which has been continued till the impugned order. He would submit that the basis on which the letter of termination has been issued is totally contrary to the terms of the agreement. He would submit that the allegations had to be substantiated by the respondent and till such time it will only remain an allegation. Therefore, taking into account the good work that has been done by the appellant and which has not been controverted by the respondent, the Arbitral Tribunal ought not to have dismissed the application, but should have continued the interim order till the disposal of the Arbitral proceedings.

4. Per contra, the learned senior counsel appearing on behalf of the respondent would at the outset submit that the argument that the

appellant has to be given 3 months time is totally contrary to the terms of Clause 15, since the termination is one under Clause 15.3, which does not contemplate issuance of a prior notice. Learned counsel would further submit that each and everyone of the reasons for termination has been substantiated with the *prima-facie* proof which has nudged the Tribunal to vacate the interim order. Further, the order of status-quo that has been granted is not the interim order that was sought for by the appellant in Section 17 application. The interim order that was being extended by the Tribunal was the order of status-quo that was granted by this Court in O.A.No.162 of 2022. He would draw the attention of the Court to paragraph 8 of the said order, wherein, this Court has clarified the status-quo that was granted was confined to the respondent not appointing any further distributor, except for M/s.Alpha Motors, Kathmandu, who had already been appointed. It was this interim order that was being extended. The learned counsel would further submit that the conduct of the appellant who has come to this Court seeking an order of status-quo is far from appreciable. Not only has the appellant obtained orders of status-quo from this Court, but has also approached the Court at Kathmandu, which clearly amounts to forum shopping. That apart, despite given an undertaking that all the proceedings in the High Court, Nepal would be withdrawn, the appellant had failed to do so and continued to keep the suit pending till the dismissal of their appeal at High Court, Nepal. He would submit that taking note of the above, the learned Arbitrator had dismissed the interim application.

Discussion:

5. Heard the learned counsel on either side and perused the materials available on record.

6. The challenge is to the order of the learned Arbitrator dismissing the Section 17 application filed by the appellant. In the application before the Arbitral Tribunal, the appellant has sought the following relief:- an order of interim injunction restraining the respondent, its men, agents and any persons acting on its behalf from acting upon and giving effect to the termination letter dated 07.03.2022 pending disposal of the adjudication of the disputes between the parties. The case of the

appellant is that the termination without issuing a prior notice is bad in the light of Clause 15.1 of the contract. In this regard, useful reference can be made to the said clause in the contract entered into between the appellant and the respondent.

> *15. TERMINATION*
>
> *15.1*
>
> *This Agreement and the appointment herein may be terminated by RE on 30 days written notice at any time after the occurrence of any of the following events:*
>
> *(i) If Distributor and RE fall to agree upon any Business Plan as specified in Article 4 of this Agreement or if the Distributor attempts to unilaterally modify the same.*
>
> *(ii) If controlling shareholding, voting control or management in Distributor is transferred, directly or indirectly to any other person.*
>
> *(iii) If the Distributor commits a breach of any term of this Agreement which is incapable of remedy, or in the case of a breach capable of remedy, any such breach should continue without remedy after 30 days ("Cure Period") written notice thereof, provided that no additional notice period beyond the Cure period shall be required to be served.*
>
> *(iv) In the event:*
>
> *A. At least 30% of the projected revenue for any Year as set out in the Business Plan is not achieved within first 6 months of such year, or*
>
> *B. At least 85% of the projected revenue for any Year as set out in the Business Plan is not achieved within such year*

15.3 Either Party may terminate this Agreement without notice if:

15.3.1.1 A receiver is appointed for the other Party or its property;

15.3.1:2 The other Party becomes insolvent or unable to pay its the benefit of its creditors;

15.3.1.3 Proceedings are commenced under any bankruptcy, insolvency or debtor's relief law and such proceedings shall not be vacated or set aside within 30 days from the date of admission thereof; BHAT

15.3.1.4 The other is liquidated or dissolved.

Further, RE may terminate this Agreement if:

(i) Conduct of the Distributor and /or any person acting on his behalf or instructions is likely to damage the interest of RE.

(ii) Conviction of Distributor of a serious criminal offence.

(iii) Distributor represents/acts as an agent/dealer/ distributor for any two-wheeler manufacturer/ dealer/ agency/ representative, without the due acknowledgement and permission from RE under Articles 2.4 and 2.5 herein above.

7. A perusal of the above clauses indicate two kinds of termination. (i) termination by issuing a 30 days notice and (ii) termination without any notice. The termination with a 30 days written notice is contemplated in the following instances:

a) Where the parties failed to agree upon a business plan as specified in Article 4 of the Agreement or if the distributor (appellant herein) attempts to unilaterally modified the same.

b) If the management of the distributor get transferred either directly or indirectly to any other person.

c) Where the distributor commits a breach of any of the terms of the contract, which is incapable of remedy or in the case of a breach, which is capable of remedy, the breach continues without remedy after the 30 day written notice thereof expires.

8. The termination without notice can be done in the following circumstances:

a) Where a receiver is appointed for the other party or its property

b) The other party becomes insolvent or is unable to pay its debts.

c) Proceedings are commenced for bankruptcy, insolvency or debtor's relief law and such proceedings has not been vacated or set aside within 30 days from the date of admission thereof.

d) The other party gets liquidated or dissolved.

This termination can be made by either party.

9. There are additional grounds of termination provided only for the respondent herein, which are in the following circumstances:-

(a) Where the conduct of the distributor and / or any person acting on his behalf or instructions is likely to damage the interest of the respondent

b) Conviction of distributor of a serious criminal offence.

c) Distributor represents / acts as an agent / dealer / distributor for any two wheeler *manufacturer.*

d) Distributor represents any other manufacturer without acknowledgment or permission from the respondent.

10. It is the case of the respondent that a termination notice is not required, since the termination has been made on ground(a) of the additional grounds available only to the respondent. No doubt, these allegations have to be proved by the respondent. This can be done only during the hearing of the main arbitration proceedings. That apart, the appellant would seek to have the order of injunction on the ground that he had the benefit of status-quo till the dismissal of Section 17 application. As rightly pointed out by the learned senior counsel appearing for the respondent, the status-quo was only with reference to the appointment of an additional dealer other than the dealer already appointed, namely, M/s.Alpha Motors, Kathmandu. The status-quo was not with reference to the impugned notice, which is the subject matter of challenge in the Arbitral proceedings. Therefore, from 28.03.2022, the appellant has only been enjoying the status-quo order with

reference to the appointment of new distributor.

11. It is an axiomatic principle of law when a person seeks a relief for an injunction, he has to come to Court with clean hands. Unfortunately, the conduct of the appellant, after the order of status-quo granted by this Court in O.A.No.162 of 2022 leaves much to be desired. After obtaining orders and initiating arbitration proceedings, the appellant has filed a suit before the District Court at Kathmandu on 18.04.2022 and obtained an *ex-parte* order restraining the respondent from carrying any activity that affects the distributor Agreement. This was followed by the appellant representing to the Ministry of Transport at Nepal to refrain the respondent from transferring ownership rights of the vehicle sold by Alpha Automotive who had been appointed as distributor even before the order of status-quo being granted by this Court. Such a representation to the Ministry was in total violation of the orders of this Court, particularly, when this Court had recognised the appointment in is order dated 28.03.2022, where this Court had observed as follows:

> *"6. On instructions, learned senior counsel for respondent submits that a distributor (Alpha Motors, Kathmandu) has since been appointed in and by a stamped agreement dated 25.02.2022. It was further submitted that the first Letter of Intent is dated 03.02.2022 and the first billing was on 18.02.2022. It was also submitted that the first consignment has left for Kathmandu. Learned senior counsel for applicant, on instructions submits that these facts are subject to disputation. Therefore this Section 9 Court refrains itself from expressing any view or opinion on these submissions. This is more so as both sides have agreed that the captioned application can now be presented before the agreed sole Arbitrator, who will constitute the 'Arbitral Tribunal' [AT] so that AT can examine the captioned application as one under Section 17 of A and C Act."*

Therefore, this communication is in total disdain of the order of this Court. Thereafter, the respondent has filed M.A.No.18 of 2022 before the Arbitrator for an anti-enforcement order since the appellant was re-agitating the same issue before the District Court, Kathmandu at Nepal on 29.04.2022. The learned Arbitrator was pleased to pass the anti-enforcement injunction on the very same day, ie. 29.04.2022. The appellant also undertook to withdraw the proceedings before the Court at Kathmandu, which they failed to do. Simultaneously, the appellant was contesting the arbitration proceedings as well as the suit before the District Court at Kathmandu, Nepal. On 08.05.2022, the appellant had filed a contempt petition against the respondent, its directors and its new distributor stating that they were in violation of the order dated 18.04.2022 passed by the District Court at Kathmandu, Nepal. On 30.05.2022, the respondent had moved a vacate application, which was allowed on 30.05.2022. On 31.05.2022, the appellant had filed a appeal before the High Court, Nepal, despite the anti-enforcement injunction passed by the Arbitral Tribunal on 29.04.2022.

12. On 26.06.2022, during the pendency of the Arbitration proceeding before the Arbitral Tribunal, the senior counsel for the appellant gave an undertaking to withdraw the appeal filed before the High Court at Nepal, which was reiterated on 01.07.2022 before the High Court at Nepal that the appellant had withdrawn the proceedings before the High Court at Nepal. However, this undertaking was observed in breach. Therefore, this is a clear case of forum shopping on the part of the appellant and an abuse of process of Court. The Arbitral Tribunal has considered all these aspects

and held that the conduct of the appellant herein in an attempt to over reach the order of this Court as well as the Arbitral Tribunal and declined to grant the order of injunction as prayed for. I see no reason to interfere with this detailed and well considered order of the Arbitral Tribunal. Accordingly, the Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

28.10.2022

Index : Yes/No

Internet: Yes/No

srn

P.T. ASHA, J,

srn

C.M.A.No.2338 of 2022
and
C.M.P.No.18212 of 2022

28.10.2022