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Arb.O.P (Com.Div.) No.308 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.03.2023

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THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.308 of 2022

Hyundai Motor India Limited,
Plot No.G-1, SIPCOT Industrial Park,
Irrungattukottai, Sriperumbudur Taluk,
Tamil Nadu,
Represented by its
Authorized Signatory, Mr.M.Sagadevan.

... petitioner

Vs.

Hilton Motors,
Zion, TC 36.58(6),
NH Bypass Road,
Enchakkal, Thiruvananthapuram,
Kerala.
Represented by its Sole Proprietor,
Mr.Josepherson Antony.

... Respondent

Arbitration Original Petition filed under Section 34(2)(b)(ii) and 34(2A) of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral amended award dated 08.12.2021 passed by the Hon'ble Tribunal



Arb.O.P (Com.Div.) No.308 of 2022

For petitioner : Mr.Murari, Senior counsel,
for Mr.Thriyambak Kannan

For Respondent : Mr.Ajit Joy

ORDER

This Arbitration Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) to set aside the Arbitral award dated 08.12.2021.

2. The Arbitral Tribunal had passed the said award directing the respondents to pay to the claimant a sum of Rs.1,15,40,000/- with interest at the rate of 9% from the date of commencement of the arbitration i.e., 23.01.2019 till the date of the award within 3 months from the date of award, failing which the same shall be paid along with an interest at the rate of 18% per annum till the date of payment and also directing the respondents to pay to the claimant a sum of Rs.23,38,514/- with interest at the rate of 18 % per annum from the date of demand till the date of payment.



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3. Mr.Murari, learned Senior counsel appearing on behalf of the petitioner would submit that the petitioner-company was incorporated under the provisions of the Companies Act, 1956 and engaged in the business of manufacturing, selling and service of auto mobile vehicles under the well known brand name “Hyundai” from the year 1997. The respondent is a dealer of the petitioner-company and was initially appointed vide Dealership Agreement dated 20.05.1999 on a non-exclusive basis for the sale and the service of the petitioner's products in the territory of Trivandrum and Kollam in Kerala. The respondent function as a dealer of the petitioner-company on a principal-to-principal basis as per the terms of the agreement from the aforementioned date of appointment for a period of 3 years.

4. On 30.11.2011, a fresh Dealership Agreement was entered into between the petitioner and the respondent for the purpose of sales and services on a non-exclusive basis for the territory of Trivandrum only. The term of the new Dealership Agreement was 3 years. It is an



admitted fact that the new Dealership Agreement was not renewed after its expiry by lapse of time on 24.11.2014.

5. Under these circumstances, the petitioner sent the warning notices on 03.06.2013 and 11.07.2013 and also sent a Show Cause Notice dated 16.08.2013 due to the poor performance of the respondent. On 26.08.2013, the respondent sent a reply to the Show Cause Notice wherein it has admitted its poor performance, deficiency of funds and existence of an unauthorised sale and further requested the petitioner to not to withdraw the dealership.

6. The learned Senior counsel would further submit that the petitioner had once again issued the letters dated 19.11.2014 and 15.12.2014 due to the continued non-performance of the respondent and subsequently a meeting for revival was also held on 23.12.2014. In spite of the above non performance letter and the revival meeting, the non-performance of the respondent was continued in the year 2015 and hence, a warning letter dated 05.03.2015 and a non-performance letter



07.05.2015 were issued to the respondent. Thereafter, on 14.07.2015, a

Show Cause Notice was issued to the respondent for its poor sales performance, lack of inventory funding, sales complaint, shortfall in manpower and calling upon the respondent to show cause as to why the new Dealership Agreement dated 30.11.2011 should not be terminated.

On 20.07.2015, the respondent sent a reply admitting the poor performance, lack of inventory funding and customer complaints.

However, the respondent continued to reflect the poor performance.

Therefore, the petitioner was constrained to terminate the new Dealership Agreement dated 30.11.2011 by issuing a termination letter dated 17.08.2015 by stating that the agreement stands terminated without

cost on the expiry of 30 days from the receipt of the termination letter by referring Clause 13.1 of the standard provisions of new Dealership Agreement which entitled both the petitioner and the respondent to terminate the said agreement by giving 30 days' notice and no reasons whatsoever need to be stated by the parties giving notice of termination.

Therefore, he would further contend that there is no need for providing any reason under Clause 13.1 of the new Dealership Agreement. The



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only requirement is the issuance of 30 days' notice by either party. In the present case, a clear 30 days' notice was issued and thereafter only the Dealership Agreement was terminated. Apart from that, on several occasions, the respondent had only reflected the poor performance and they have not maintained the inventory and there were also a lot of customers' complaint as narrated above. These were the reasons for the termination of the new Dealership Agreement. The termination of the Dealership Agreement invoked the arbitration Clause and the same was referred for arbitration and the Award was came to be passed. Aggrieved over the Award dated 08.12.2021 passed by the learned Arbitrator, the present original petition was filed.

7. The main contention of the learned Senior counsel for challenge in the present original petition is only with regard to awarding of a sum of Rs.1,15,40,000/- as compensation towards the loss of investment and damages. Further, the arbitrator also awarded a sum of Rs.23,38,514/- for the illegal deduction on the part of the petitioner.



8. The learned Senior counsel appearing for the petitioner clearly submitted that he is not pressing with regard to the claim awarded by the arbitrator with regard to the illegal deduction for a sum of Rs.23,38,514/. However, he strongly opposed for granting of award towards the loss of investment and damages for an extent of Rs.1,15,40,000/-.

9. The learned Senior counsel would contend that the Arbitrator came to the conclusion that the termination was illegal. Further, he has taken into consideration the signing of the Dealership Agreement dated 30.11.2011 on 27.12.2013. However the learned Senior counsel would submit that agreement, entered on 30.11.2011, was acted upon and it is only for a period of 3 years which was completed on 29.11.2014. Beyond the said period, though there was no extension was granted, in terms of the new Dealership Agreement dated 30.11.2011, a notice was issued to the respondent in terms of Clause 13.1 of the new Dealership Agreement and 30 days time was granted. Thereafter, the said Dealership Agreement was terminated. However without taking into consideration of the provisions of Clause 13.1 of the new Dealership



10. Further, the learned Senior counsel submitted that with regard to the awarding of a sum of Rs.1,15,40,000/- for loss of investment is concerned, without any documentary evidence, the Arbitral Tribunal had awarded the said amount. The new Dealership Agreement was entered into in the year 2011. Though the documents, which were referred, as if the investment was made based on some of the unsigned ledger, are not admitted by the petitioner, based on the same, the Arbitral Tribunal came to the conclusion and awarded the said amount. These are all irrelevant and hence, the said award is not proper and the same is liable to be set aside on the ground of patent illegality, perversity as the same is against the public policy of India.



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11. Per Contra, Mr.Ajit Joy, learned counsel appearing for the respondent would submit that after the due consideration of the materials placed, the Arbitral Tribunal had come to the conclusion and directed the petitioner to pay a compensation of Rs.1,15,40,000/- towards the loss of profit and damages and also a sum of Rs.23,38,514/- towards illegal deduction. The learned counsel for the respondent would submit that since the learned Senior counsel submitted that they are not pressing on the award passed by the Tribunal with the regard to the amount awarded towards the illegal deduction for a sum of Rs.23,38,514/-, he would restrict his submission with regard to the arguments made against the award with regard to the pronouncement of the illegal termination of the aforesaid agreement by the Tribunal and the award for loss of profit and damages to an extent of a sum of Rs.1,15,40,000/-. As far as the finding of the Tribunal with regard to the illegal termination is concerned, he would submit that the Tribunal has considered the various aspects, particularly Clause 13.2 of the new Dealership Agreement and thereafter, it has come to a well considered finding and the same needs no



interference. In terms of Clause 13.2 of the new Dealership Agreement, the obligations have not been complied with and that is the reason for declaration of termination of the Dealership Agreement.

12. With regard to the awarding of the loss of profit and the damages, the learned counsel for the respondent would submit that the Tribunal has come to the conclusion based on the document, which was filed and marked as Ex.C3, whereby it is clearly proved that the respondent invested the sum of Rs.1,07,69,996/-. That apart, a perusal of Ex.C11 series, which are relating to the period 2011-2013, would shows that the respondent also invested a sum of Rs.17,46,940/-. Apart from the above, the Tribunal has taken into consideration the loan borrowed from SBI for a sum of Rs.9.88 Crores along with the interest Rs.11,22,29,690/- and from the Axis Bank a sum of Rs.2,39,00,000/- and from Standard Chartered Bank, a sum of Rs.2,00,00,000/-, which were put together and totally calculated as the investment to a sum of Rs.15,61,29,690/-. Since the termination was illegal, the tribunal has only taken 10% of the loss of profit and damages. Therefore, he would



contend that there is no illegalities or perversity as contended by the learned Senior counsel appearing for the petitioner. Further, he contended that the award is sustainable and no ground has been made out under Section 34 of the Act to set aside the same. The learned counsel for the respondent has referred some case laws and the same would be discussed hereafter to the extent which are relevant to for the present case.

13. Heard the learned Senior counsel appearing for the petitioner as well as the learned counsel appearing for the respondent and perused the materials available on record.

14. The main issue that evolved from the submissions of the respective counsel, in the present original petition, is with regard to the termination of the new Dealership Agreement and awarding of a sum of Rs.1,15,40,000/- towards the loss of profit and damages.



**(I) TERMINATION OF NEW DEALERSHIP AGREEMENT
DATED 30.11.2011:**

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15. The award was passed in favour of the claimant by awarding loss of profit and damages and also awarding the compensation for illegal deduction. However, in the present case, the learned counsel for the petitioner would submit that he only challenged with regard to the awarding of loss of profit and damages as awarded by the Tribunal and he is not pressing with regard to the awarding of compensation for illegal deduction.

16. The Tribunal has arrived at a conclusion that the termination of the new Dealership Agreement by virtue of letter dated 17.08.2015 is bad in law and held as follows:

“The Learned Counsel for claimant contended that the valid Dealership Agreement which was signed by both parties is Ex.C1 dated 20.05.1999. Though Ex.C2 dated 30.11.2011 came into existence, in which the claimant had signed belatedly, not on the date of execution and the said claimant signed Dealership Agreement is also not produced by the respondent. Therefore, as per Ex.C1 Dealership Agreement, though the period of 3 years was expired, the dealership between the claimant and the respondent continued for more



than 15 years since the huge investment was made by the claimant in the business. In the said circumstances, the respondent had issued Ex.R2 Show Cause Notice dated 14.07.2015, after receiving reply from the claimant dated 20.07.2015 (Pg.329-Vol-11 of claimant's document) and not accepting the reply, the respondent had issued letter dated 17.08.2015 terminating the dealership of the claimant. It is bad in law."

17. A perusal of the above shows that the first Dealership Agreement dated 20.05.1999 as well as the second Dealership Agreement dated 30.11.2011 were marked as Ex.C1 and Ex.C2. Since Dealership Agreement dated 30.11.2011, which was signed by the claimant, was not produced, the Arbitral Tribunal had taken Ex.C1 Dealership Agreement dated 20.05.1999 into consideration and arrived at the conclusion that the termination is bad in law. When the entire claim was filed by the claimant based on the new Dealership Agreement dated 30.11.2011 and the said Dealership Agreement was also filed by the claimant and marked as Ex.C2, this Court is unable to accept the ignoring of Ex.C2/new Dealership Agreement and considering of the Ex.C1/old Dealership Agreement. It is nobodies case that the termination



was occurred based on the Ex.C1 but the same was occurred based on the Ex.C2. The claim was also filed by the claimant based on the Ex.C2 alone. When such being the case, this Court is of the view that the Arbitrator had exceeded his jurisdiction and the declared the termination as bad in law.

18. Even if the Ex.C1 was taken into consideration, a similar Clause 13 is also available in Ex.C1 and the same reads as follows:

“13. TERMINATION OF AGREEMENT

Both HMI and DEALER are entitled to terminate this agreement by giving 30 days notice. No reasons whatsoever need be stated by the party giving notice of termination and it is sufficient if the notice conveys the intention of the party to terminate this agreement.”

19. The Clause 13 of the standard provisions of the new Dealership Agreement dated 30.11.2011, which is marked as Ex.C2, states as follows:

“13.TERMINATION OF AGREEMENT



13.1 Both HMI and DEALER are entitled to terminate this agreement by giving 30 days notice. No reasons whatsoever need be stated by the party giving notice of termination and it is sufficient if the notice conveys the intention of the party to terminate this agreement.

13.2 Without prejudice to HMI's rights under Clause 13.1 above, HMI is entitled to terminate this Agreement after serving seven (7) days' notice in writing to the DEALER in the event of the DEALER's failure to duly comply with sub-Clauses 4.3 to 4.10 herein above."

20. A perusal of the above Clauses make it clear that Clause 13.1 of Ex.C2 and the Clause 13 of Ex.C1 are one and the same. Therefore, there is no need for any reason to be provided for the termination and it will be sufficient to give 30 days notice. In the present case, admittedly the 30 days notice has been issued and there is no violation as per the aforesaid Clauses of both the agreements. The said Clause of Ex.C2 has not been taken into consideration by the Tribunal. The Tribunal had merely referred the Ex.C1, but had not considered the relevant Clause in the said Ex.C1 and concluded that the termination is bad in law. Therefore, the said finding of the Tribunal is perverse and the Tribunal



had committed patent illegality and the award is liable to be set aside, to the extent declaring the termination is bad in law is concerned.

(II) AWARDING OF LOSS OF PROFIT AND DAMAGES:

21. With regard to the awarding of loss of profit and damages by the Tribunal, the relevant portion of the award is extracted hereunder:

“VI. Issue No.6:

6. Whether the claimant is entitled for a sum of Rs. 15,61,29,690/- as loss of investment from the respondent?

1. The claimant contends that after appointment of dealership, as per the LOI in the year 1998 and subsequent execution of Ex.C1 dated 20.05.1999 and Ex C2 dated 30.11.2021 Dealership Agreements for the territory of Trivandrum and Kollam, the claimant has established showrooms at the following places Sasthamangalam, Near Ulloor Bridge, Enchakkal, PTP Nagar, Doctor's colony, Ulloor, Juma Masjid at Thattamala, Umayanallur, Kollam, H&C Compound Mundaickal, Kollam and another sales and service showroom opposite to Prince auditorium Karunagapalli and Alamcode by spending a total sum of Rs.876 Lakhs. Further contented that towards the promotional expenses and inventory funding and running capital, the claimant has invested in the dealership business in total amount of Rs.15,61,29,690/- including the above said establishment expenses at sales and service showrooms



mentioned above. According to the claimant, the above contention is evidenced by the documents filed on the side of the claimant marked as Ex. C3 ledger extract and balance sheets produced as Ex C19 and Ex.C34 and also the photographs of the said building structures and elevation of the above said sales and service centres established produced as Ex.C5. The Learned Counsel for claimant also contended that the during the cross examination of RW1 under Q.Nos.103 to 108 he has not stated anything against the above investment made by the claimant in the said dealership business. According to the claimant, these investments and operational costs were met with personal money and bank loans and the total loan availed by the claimant is Rs 9.88 Crores from SBI that is now with interest Rs. 11,22 29,690-2,39,00,000 from Axis bank and Rs.2,00,00,000 from Standard Chartered bank- Rs.15,61,29,690/- According to the claimant, due to the closure of business, the accounts have become non-performing and the various properties of the claimant have been attached and the total loss as per bank action is Rs.15,61,29,690/- The claimant has claimed this amount from the respondent on account of loss of investment and operational costs as evidenced in Ex C3 ledger. Whereas the Learned Counsel for respondent has contended that the claimant was benefited out of their investment by running the dealership for more than 16 years and the buildings and showrooms mentioned has to be treated as assets of the



claimant and therefore the claim under the head logs of investment by the claimant is liable to be dismissed.

2. Relying on Sec 73 of the Indian Contract Act, the Learned Counsel for claimant has referred the decision made in State of Kerala Vs Bhaskaran HC Kerala, AIR 1985 Ker 49 in which it is held as follows, also reiterated this principle of award of damages to the party of suffers due to the legal break in contract in this decision the principle of the English case Hadley V Baxandale has been quoted as follows "Where two parties have made contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally..."

He also relied on E.Venketakrishna Vs IOC 2007 (7) SCC 764 the Honble Supreme Court held "all that the arbitrator could do, if he found that the termination of the distributorship was unlawful, was to award damages, as any civil court would have done in a suit".

This Tribunal has already decided that the termination of the dealership of the claimant by the respondent is unlawful and bad in law and without any valid reason and therefore entitled for loss and damages under Sec 73 of the Indian Contract Act.

3. However, on taking proper scrutinization of the accounts as per Ex.C34 and Ex.C19 attached balance sheets



for the year 2015, though the claimant claims Rs. 15,61,29,690/- as loss of investment, which includes the interest due to the Bank and also considering the assets of the claimant which were mortgaged to the Bank are also available with the claimant, this Tribunal is of the view that the entire amount of Rs. 15,61,29,690/- cannot be said to be loss of assets and to be granted as damages. As per the claimant's case investment made in the business by way of establishing sales and service showroom in different places in running the business is Rs.876 Lakhs and subsequently the amount introduced at various times as working capital as mentioned in the rejoinder of the claimant to the statement of defence in para 5 is Rs.638 Lakhs. Therefore, the total investment as per the claimant's contention is Rs.876 + 638 Lakhs which amounts to Rs. 1514 Lakhs.

4. Considering the facts and circumstances, this Tribunal is of the view that 10% of the said investment amount can be calculated as loss and damages. Therefore, if the above said total investment of Rs. 15,14,00,000/- if calculated, 10% of the said amount will come to Rs 1,51,40,000/-. As such considering the totality of the circumstances pleaded and established, this Tribunal has no hesitation to conclude that the claimant is entitled for a sum of Rs. 1,51,40,000/- as compensation for damages on account of loss on investment on asset and the above issue no.6 is accordingly answered partly in favour of the claimant."



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22. A perusal of the above portion of the award makes it clear that the loss of profit and damages calculated by the Arbitral Tribunal is 10% of the total amount borrowed by the respondent from various Bank. Over a period of time, the respondent borrowed for setting up the dealership showroom at various locations both in Kollam and Trivandrum. The respondent spent the money and also availed working capital facility to buy cars and pay advance for the cars, which is going to be received from the petitioner. This amount was considered by the Tribunal as investment. No doubt, the respondent is liable to make an investment in the showroom. It is their obligation to set-up the showroom in accordance with the guidelines issued by the petitioner. In the agreement, nowhere it has been stated that the expenses with regard to the setting up of the showroom will be refunded and the same was agreed by the petitioner and the respondent. The respondent was provided commission while selling cars and for this business only the Dealership Agreement was entered on the condition that the showroom should be set-up at the cost of the respondent and under any



circumstances, the petitioner will not compensate the same.

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23. In the present case, there is no documentary evidence with the regard to the split-up of the amount spent towards the construction. A perusal of Ex.C3 and Ex.C11 makes it clear that the respondent spent about Rs.1,07,69,996/- towards Ex.C3 and Rs.17,46,940/- towards Ex.C11. Except these two exhibits, no other documentary evidences have been produced. Even this amount was also not totally with regard to the construction of the showroom, but with regard to the various day-to-day expenses also. This cannot be considered as an investment and the returns cannot be expected from the petitioner, in which case the respondent has to account with regard to the profit earned out of dealership but the same has not disclosed by the respondent. Whatsoever this investment is relating to the year prior to Ex.C2 agreement. Subsequent to the Ex.C2 agreement, a sum of Rs.17,46,940/- was only spent for day-to-day expenses, which cannot be construed as an investment. Further, the respondent borrowed about a sum of Rs.15,61,29,690/- as stated above and this amount is not only for



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construction of showroom. Even if the respondent is constructing showroom, it is their obligation to construct the same and the major portion of the amount was also utilised for the purpose of making advances for the cars, which has to be received from the petitioner. In other words, the said amount was utilised for the working capital facility. The working capital facility is not an investment in the company. For these investments, already respondent was benefited by virtue of commission by selling each and every car. Out of the said amount only, he is supposed to compensate all the expenses including the working capital facility.

24. Further in the present case, the Dealership Agreement was not cancelled within the three years term as provided in the Ex.C2 agreement. Ex.C1 Agreement was entered in the year 1999 and thereafter, Ex.C2 agreement was entered for a term of 3 years, which was expired on 29.11.2014 itself. This agreement came to be terminated only on 17.08.2016, even after the expiry of 3 year period. Therefore, at no stretch of imagination, the respondent can claim any loss of profit for



the said termination of dealership.

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25. More importantly, the respondent had enjoyed the dealership for a period of 15 years and earned money out of selling the car. The respondent made a claim before Arbitrator as if the dealership was cancelled before the completion of the term. If the dealership was cancelled before the expiry of the term, the same may be a reason for awarding a compensation for the loss of profit for the reminding period. In the present case, as per the Ex.C2 agreement, the 3 year term of the contract was expired as early as on 29.11.2014 itself. Thereafter, only due to the non performance, the Dealership Agreement dated 30.11.2011 was came to be terminated. On many occasions, the warning letters were sent and the Show Cause Notice was also issued as narrated above. It is not necessary to provide the reason for termination of the said agreement as per Clause 13.1 of the Ex.C2.

26. Therefore as far as the awarding of the loss of profit by the



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Tribunal for the respondent is concerned, this Court is not in a position to accept the same for the reasons assigned above and also for a simple reason that the arbitrator referred those amount as borrowing from the banks by the respondent and the said borrowing is only meant for his working capital facility and the said working capital facility is not an investment to benefit the petitioner. Apart from making investment and setting up the showroom, it is for the respondent to invest and buy cars. It is only the obligation on the part of the respondent and at no stretch of imagination one can construed that the investment was made for the benefit of the petitioner. The said investment was made only to benefit the respondent themselves. Therefore, without understanding the type of investment made by the respondent, i.e., whether it is for the benefit of the petitioner or for the benefit of the respondent, the Arbitral Tribunal considered it as a investment for the benefit of petitioner and committed patent illegality in awarding loss of profit.

27. On the other hand, since the amount spent for the benefit of the respondent, the question of payment of loss of profit does not arise,



as the present termination was made in terms of Clause 13.1 of Ex.C2 and the said termination is well within the scope of the Ex.C2. Hence, without considering all these facts, the arbitrator had passed an award as if the respondent is entitled for the loss of profit and thereby committed a patent illegality for the reasons assigned above.

28. The following are the few instances, where the Arbitrator may award loss of profit in the event of illegal termination of the agreement/contract and the claimant proved the actual loss of profit.

(i) If the agreement was terminated before the completion of tenure illegally, the loss can be calculated for the remaining period based on the previous performance;

(ii) If there is any delay in the execution of the work due to the reason of any of the parties, for the said delay, loss of profit as well as the interest in the form of compensation may be ordered;

(iii) If there is any delay in making the payment, the loss of profit can be ordered to the extent of profit



that would have earned by the person from the said investment if the said amount received in time and invested the same somewhere;

29. In the present case the alleged investment said to have made during the course of the existence of the Ex.C2 agreement alone has been produced and how the actual loss was incurred, subsequent to the termination of the agreement dated 30.11.2011 has not been established by the respondent. The unsigned Ex.C3 and C11 are not the document to establish the loss that the claims said to have incurred due to termination of the agreement. Hence, without establishing the said aspects both the oral and documentary evidence, the Tribunal ought not to have awarded the loss of profit and damages and thereby, the Arbitral Tribunal had committed the patent illegality.

30. It is worthwhile to refer the decision of the Hon'ble Supreme Court reported in “(2015) 3 SCC 49 (*Associate Builders versus Delhi Development Authority*)”, wherein, it has been held as under in para 31



and 36:

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“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”*

31. In ***“Ssangyong Engineering and Construction Company Limited versus National Highways Authority of India (NHAI)”*** reported in (2019) 15 SCC 131, it has been held as under in para 36 and 39, 41 and 42:

“36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section



34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

“39. 28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

“41.What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.



42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Section 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.”

From the above decisions, it is clear that in the event of any award passed based on no evidence, it would clearly amount to a patent illegality appearing on the face of the award and the same would consider as a ground for setting aside the award in terms of Section 34(2-A) of the Act.

32. In view of the above, the present award is liable to be set aside on the aspects of patent illegality and perversity, as far as the findings of the Arbitral Tribunal with the regard to the declaration of termination as illegal and awarding of loss of profit and damages in favour of the respondent alone. However, with regard to the award based on the illegal deduction for a sum of Rs.28,34,514/- is concerned, the same is sustainable as the petitioner has not pressed this aspect before this Court.



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33. Accordingly, this Arbitration Original Petition is partly allowed and the award dated 08.12.2021 is set aside with regard to the findings of the Arbitral Tribunal about the declaration of termination of the dealership agreement dated 08.12.2021 as illegal and awarding the loss of profit and damages in favour of the respondent alone.

14.03.2023

Speaking/Non-speaking order

Index : Yes / No

Neutral Citation : Yes / No

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