



Arb.O.P.(Com.Div.) Nos.100 & 475 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	02.08.2024
Delivered on	30.10.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) Nos.100 & 475 of 2023

Hundai Motor India Limited,
rep. by its Authorised Signatory, Mr.M.Sagadevan ... Petitioner in
Arb.O.P.No.100 of 2023
and Respondent in
Arb.O.P.No.475 of 2023

Versus

Talwar Mobilies Private Limited,
rep. by its Authorized Signatory ... Respondent in
Arb.O.P.No.100 of 2023
and Petitioner in
Arb.O.P.No.475 of 2023

Prayer in Arb.O.P.No.100 of 2023:

Arbitration Original Petition filed under Section 34 (2A) of the Arbitration and Conciliation Act, 1996 praying to set aside the impugned Award dated 19.08.2022 amended pursuant to order dated 14.10.2022, passed by the learned Arbitral Tribunal.



Arb.O.P.(Com.Div.) Nos.100 & 475 of 2023

Prayer in Arb.O.P.No.475 of 2023:

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Arbitration Original Petition filed under Section 34 (2A) of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 19.08.2022 duly corrected by subsequent proceedings dated 14.10.2022 and remand the matter to the Arbitral Tribunal for fresh consideration.

For Petitioner in
Arb.O.P.No.100 of 2023
and Respondent in
Arb.O.P.No.475 of 2023 ... Mr.Thriyambak J.Kannan

Respondent in
Arb.O.P.No.100 of 2023
and Petitioner in
Arb.O.P.No.475 of 2023 ... Mr.S.Thanka Sivan

COMMON ORDER

These Arbitration Original Petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 'the Act') by both parties, praying challenging the Award, dated 19.08.2022 as duly amended pursuant to the order dated 14.10.2022, passed by the learned Arbitrator.



2. The petitioner in Arb.O.P.No.475 of 2023, M/s.Talwar Mobilies Private Limited, is the claimant (hereinafter referred to as 'the petitioner') and the petitioner in Arb.O.P.No.100 of 2023 is the respondent (hereinafter referred to as 'the Respondent') before the arbitral Tribunal.

3. Facts in brief, giving rise to the filing of the present Original Petitions, are as follows:

3.1 The petitioner is a Car dealer of the respondent since 1999. By way of Agreement dated 20.05.1999 which was replaced by subsequent Agreement dated 10.04.2016 for the territorial area of Secunderabad and Hyderabad. As per dealership Agreement, the petitioner has to establish a permanent showroom and service station facility at their own cost and the respondent would render their co-operation. The first Agreement dated 20.05.1999 was assigned dealership Code S5201, which was extended by letters renewal from time to time and stood extended till the date of 30.07.2021. According to the petitioner, they established show room and three service centers in Secunderabad at the total cost of Rs.14.50 Crores. Based on excellent performance of the petitioner, the respondent offered yet



another dealership with Code No.S5227 for Hyderabad area and entered into an Agreement dated 13.01.2016 which was consequently extended till 12.01.2022. According to the petitioner, pursuant to this Agreement, they established two Showrooms and two Service centers at the total cost of Rs.13 Crores. Likewise, yet another dealership for sales and service vide dealership Code No.S5234 was accorded to the petitioner, but no agreement was entered and the petitioner established one showroom and one service center at Hyderabad at the total cost of Rs.8 Crores. The petitioner also deposited Rs.60 lakhs as security deposit towards dealership operations.

3.2 According to the petitioner, by virtue of the above said three dealerships, the petitioner has been handling the sales and service of the vehicles manufactured by the respondent, viz., Santro, Getz, Accent, Elantra, etc. and thereby, fulfilling all obligations as a Dealer.

3.3 While so, from the end of 2018 onwards, there was a drastic reduction in the sale of Cars in India, this according to the petitioner, due to various factors, including introduction of new model cars by other



competitors in the market, features available in other brand of cars, fluctuation in the global economy, recession and cost of new models, brand value, resale value of cars, etc. There was further downward trend in the sale of cars due to Covid-19 pandemic and consequent lockdown. However, during the period 2017 to 2019, the respondent dumped a greater number of cars to achieve 100% target of sale, due to which, the petitioner had to pay huge amounts to the respondent. In spite of all these, the petitioner worked hard to promote the respondent's brand and took all earnest efforts to achieve 100% customer satisfaction. But on the other hand, since January, 2019, the respondent started insisting upon the petitioner for infusion of more funds in the business. Due to the bad economic scenario, the petitioner could not comply with the demand made by the respondent. The respondent, without considering the financial status of the petitioner, issued show cause notice dated 24.06.2020 to the petitioner for termination of all three dealerships on the ground of poor performance in sales, funds indiscipline and working capital shortfall, manpower shortage and shortage of test driver cars, etc.



3.4 According to the petitioner, the show cause notice is motivated and vexatious since their overall performance upto 2019 was good and even the respondent recommended a loan facility to be provided by the SBI. In reply to the show cause notice, dated 24.06.2020, the petitioner vide letter dated 01.07.2020, requested to extend time till 31.08.2020 to infuse the funds as required by the respondent. However, without giving any opportunity of personal hearing, the respondent has terminated the agreement and immediately, on 21.08.2020, caused an advertisement in Deccan Chronicle, calling for new dealership for the area allotted to the petitioner. The petitioner, vide notice dated 24.08.2020 intimating to refer the dispute for arbitration. However, as there was no response from the respondent, which prompted the petitioner to approach this Court by filing Section 9 application, seeking to direct the respondent to maintain *status quo* and this Court granted *status quo* which was extended from time to time till 21.12.2020. Thereafter, this Court appointed the Sole Arbitrator and directed both parties to resolve the dispute by way of arbitration.



WEB COPY 3.5 The petitioner, made a claim petition before the learned Arbitrator, seeking to declare the termination notices dated 13.08.2020 as illegal and for Rs.91,60,02,814/- under various heads.

4. Resisting the claim petition filed by the petitioner, the respondent filed statement of defence, wherein, it is stated that the Dealership is not an exclusive one and it is open to the respondent to appoint any number of dealers as per Clause 1 of the Dealership Agreement. Clause 13 of the Agreement empowers the respondent to terminate the agreement by giving 30 days notice. According to the respondent, the petitioner earned huge profits from the sales of the respondent's vehicles, but later diverted its interest and concentrated much in dealership of other automobiles and thereby, lost its efficiency and productivity while dealing with the respondent's vehicles. The shortage of funds also affected sales of respondent's vehicles from the lucrative market of Hyderabad. Despite best support by the respondent, the petitioner failed to rectify the shortcomings and improve their dealership business, which affected the respondent's brand



image and sales of cars in the said locality. It is stated that in respect of Jubilee Hills dealership, there was a degrowth of -15.2% in 2019 and -72.3% in 2020 and further, there was shortage of test drive cars and sale consultants and in respect of Erragadda dealership, there was degrowth of -16.8% for the year 2019 which further reduced to 89.3% and in respect of S.P.Road dealership, there was a degrowth of – 17% in 2019 and further 98% in 2020. This poor performance was due to the shortage of working capital, low stock availability, financial indiscipline and lack of infusion of funds by the petitioner. Therefore, the respondent issued notice of termination dated 13.08.2020 in terms of commercial contract agreed to between the parties. The respondent denied the investments made by the petitioner for the dealership business and the expenses incurred for advertisements and employment claims of the petitioner. The overall performance of the petitioner was far below the other dealers and not achieved the target as required. Though the sales during pandemic was low, but after pandemic, the sales had rebound, but the petitioner had failed to infuse the funds and unable to arrange necessary funds for the dealership purpose, which prompted the respondent to issue notices of termination of



dealerships, which is fair and legal. The respondent denied each and every claim made by the petitioner before the learned Arbitrator.

5. The respondent also made a counter claim for a sum of Rs.1,10,02,198/- against the petitioner.

6. The learned Arbitrator, on consideration of claim and counter claim made by the respective parties and oral and documentary evidence adduced by the parties in respect of their claims, passed Award dated 19.08.2022, rejecting as many as ten claims while partially allowing three claims made by the petitioner and also partially allowed the counter claim made by the respondent.

7. The details of the claims made by the petitioner and the findings made thereof by the learned Arbitrator, are detailed as under:



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Claims made by the petitioner	Description of the claim	Amount in Rs.	Allowed/Rejected by the learned Arbitrator
1.	Deposit with Hyundai: S-5201; S-5227; S-5234. Interest @ 18% p.a. from Oct 2020 to July 2021	Rs.60,00,000/-	Allowed together with 9% p.a. interest from the date of Award



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Claims made by the petitioner	Description of the claim	Amount in Rs.	Allowed/Rejected by the learned Arbitrator
2.	Investment on dealership addition, net of depreciation	Rs.20,51,43,859/-	Rejected
3.	Investment in marketing expenses for promotion of brands advertisement expenses collected from the claimant by Hyundai	Rs.7,52,46,732/-	Rejected
4.	Loss incurred due to distress sale of Demo cars	Rs.1,07,36,388/-	Rejected
5.	Loss due to distress sale of stock of cars due to termination	Rs.76,52,789/-	Rejected
6.	Employees due post termination salaries, compensation and statutory dues	Rs.9,22,40,877/-	Partially allowed a sum of Rs.2,30,60,220/-
7.	Loss of projected profit based on the four years average	Rs.22,77,10,051/-	Partially allowed a sum of Rs.1,26,04,250/- together with 9% interest from the date of award
8.	Post termination infrastructure rent	Rs.5,31,92,323/-	Rejected



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Claims made by the petitioner	Description of the claim	Amount in Rs.	Allowed/Rejected by the learned Arbitrator
9.	Post termination infrastructures maintenance cost	Rs.70,00,000/-	Rejected
10.	Loss of liquidating spares	Rs.1,30,53,804/-	Rejected
11.	Litigation expenses	Rs.1,50,00,000/-	Rejected
12.	Loss of Goodwill and mental agony	Rs.20,00,00,000/-	Rejected

8. The details of the counter claims made by the respondent and the findings made thereof by the learned Arbitrator, are detailed as under:

Counter Claim made by the respondent	Description of the claim	Amount in Rs.	Allowed/Rejected by the learned Arbitrator
1.	IDFSC Claim	Rs.99,72,658/-	Rejected
2.	Advertisement Agency dues	Rs.10,29,540/-	Partially allowed (50%)

9. Challenging the said award, both the petitioner and the respondent have come forward with the present Original Petitions and would urge this



Court to allow their respective claims rejected by the learned Arbitrator.

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10. Mr.S.Thanka Sivan, learned counsel appearing for the petitioner would contend that the learned Arbitrator has not dealt with the issues raised in the dispute in proper perspective and rejected genuine claims made by the petitioner despite having held that the termination of the petitioner's dealerships is unjust and unfair. He would point out that once the termination of dealerships was held as unjust, the consequential loss suffered by the petitioner due to such illegal termination, ought to have been compensated by the respondent, but learned Arbitrator has erroneously apportioned the liability as 50% on each of the party, which is unreasonable and unjust.

11. The learned counsel would also contend that 3rd dealership was granted by way of Letter of Intent dated 23.11.2016 and it has been renewed once in every three years and 1st term was expired on 22.11.2020 and 2nd term was expired on 22.11.2022 and as such, the learned Arbitrator ought to have taken the remaining number of days as 790 days for the purpose of



granting loss of profit, however, the learned Arbitrator has taken only 90 days instead of 790 days and awarded meagre amount instead of Rs.2,22,25,860/-. He would also contend that the learned Arbitrator has completely rejected the claim No.2 made by the petitioner towards loss of investment to the tune of Rs.20,51,43,857/- in setting up showrooms and service stations and periodical refurbishment. Though the petitioner furnished Ex.R26 series of Income Tax returns and Auditor's report in support of his claim and further, the respondent has not specifically denied the such investment, however, the learned Arbitrator has not considered the but taken a different stand stating that the petitioner ought to have furnished further proof regarding such investment on infrastructures. He pointed out that it is a basic requirement to establish showroom and service centre for maintaining the dealership and certainly, there should require a huge investment. Therefore, he would submit that since the learned Arbitrator has rejected the claim outright, the same requires reconsideration.

12. The learned counsel would also contend that there were nearly 724 permanent employees and consequent to the termination of dealerships,



the petitioner has paid statutory liabilities and the learned Arbitrator, having categorically held that the termination is illegal, ought to have fastened the entire liability on the respondent, but unfortunately, allowed only 50% of the claim amount of Rs.9,22,40,787/- out of which, further slashed to 25% (on the basis of 50:50 liability), i.e. Rs.2,30,60,220/-, which is unfair and illegal. He would submit that the payment of statutory liability towards employees compensation post termination, which has been proved by way of documentary evidence (Ex.C27 bank statement) since payment has been made through Bank. He also pointed out that apart from this, the learned Arbitrator, without appreciating other genuine claims made by the petitioner, has rejected the same, viz., post termination infrastructure rent, maintenance, investment in marketing expenses for promotion of brands advertisement expenses collected from the petitioner by the respondent, loss incurred due to distress sale of demo cars in stock after the date of termination, loss on liquidating accessories, loss in liquidating spares, loss of goodwill, etc. The learned counsel would also contend that the learned Arbitrator has erroneously awarded counter claim of Rs.5,14,770/- towards advertisement charges.



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13. With these contentions, the learned counsel for the petitioner would urge this Court to set aside the award and remand the matter to the learned Arbitrator for re-consideration of the claims made by the petitioner. In this regard, he relied upon a decision of the Hon'ble Supreme Court reported in 2021 (9) SCC 1 (*NHAI versus M.Hakeem and others*), wherein, it has been held that if the Court sets aside the award, matter has to be remanded for deciding the dispute afresh. Paragraphs 41 and 42 are relevant, which are extracted as under:

“41. As has been pointed out by us hereinabove, *McDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]* has been followed by this Court in *Kinnari Mullick [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106]* . Also, in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd. [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657]* , a recent judgment of this Court also followed *McDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]* stating that there is no power to modify an arbitral award under Section 34 as follows : (*Dakshin Haryana Bijli Vitran Nigam case [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657]* , SCC p. 676, para 44)

“44. In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section



34 of the Arbitration Act, the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to modify an arbitral award.”

42. It can therefore be said that this question has now been settled finally by at least 3 decisions [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , [*Kinnari Mullick v. Ghanshyam Das Damani*, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [*Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in *Redfern and Hunter on International Arbitration*, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the “limited remedy” under Section 34 is coterminous with the “limited right”, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.”

14. The learned counsel would submit that once the termination of



dealership is found illegal, the petitioner is entitled to reasonable compensation and he would rely upon a decision of this Court reported in 2023 (1) LW237 DB (*S&S Foundation Pvt.Ltd. Versus S.Gnanasekaran and others*), wherein, it has been held as under:

“20. Thus, it is a clear case of breach of MoU dated 09.05.2013 and Supplemental MoU dated 27.06.2014, for which, no evidence is necessary. Consequently, as rightly held by the learned Arbitrator, the party complaining of breach is entitled to receive just and reasonable compensation, hence, awarding of 15 % of compensation on the total fund invested by the appellant company, in our considered view, is just and proper, therefore, the impugned order passed by the learned Single Judge reversing the award passed by the learned Arbitrator is liable to go.”

15. Mr.Thriyambak J.Kannan, learned counsel appearing for the respondent would contend that the impugned arbitral award cannot be sustained and liable to be set aside since it has been passed in contravention of the terms of the arbitral agreement and established principles of law and suffers from patent illegality. He would point out that the learned Arbitrator has steeped up beyond the scope of the arbitral agreement since Clause 13.1



of the arbitral agreement provides that the agreement can be terminated by either party by giving 30 days notice without assigning any reasons for such termination, however, the learned Arbitrator proceeded to conclude that the reasons provided by the respondent in its termination notice dated 13.08.2020 are not tenable and further held that the termination was non-justiciable and thereby, the learned Arbitrator has re-written the arbitral agreement and made Clause 13.1 otiose and redundant.

16. He would contend that though the learned Arbitrator observed that the termination notice with respect to the 1st agreement is not illegal as the contract provided for termination without reason, however, he held that it betrayed lack of justness and fairness. This finding of the learned Arbitrator is patently illegal and incorrect interpretation of the terms of the contract. Further, although the learned Arbitrator recognizes that the dealership agreement is determinable and relationship between the parties is principal-to-principal, however, he overlooks the right of the respondent to terminate the dealership agreements. The conclusion arrived at by the learned Arbitrator that the respondent has no right to terminate the contract without



cause, falls foul of the public policy of contractual law in India and thereby the impugned award is liable to be set aside, as being in conflict with the public policy of India.

17. He would further submit that the learned Arbitrator ought to have taken into consideration that private contracts can be terminated by the parties without assigning any cause, with a reasonable period of notice in accordance with the agreement. In the present case, he pointed out that the very nature of the dealership agreements is a private transaction between the petitioner and the respondent, while so, the learned Arbitrator has contrarily observed that the dealership agreements form part of the public law domain. He would submit that there is no principle of law that supposes that a private party has to pass the rigorous inquisition of fair play, lack of arbitrariness and such an action of a private party has to be founded on good and sound reasons despite a specific covenant in the agreement that the contract can be determined by simply giving notice without assigning any reason. He pointed out that that the learned Arbitrator despite having held that the termination clause in the agreement is valid, however passed the



impugned award without any basis and the learned Arbitrator ought not to have gone into reasons behind the notice of termination issued by the respondent.

18. He would further contend that the learned Arbitrator fastened the liability at 50:50 per centage on both the parties, without any basis or reasonableness. He would submit that Section 28(2) empowers the parties the freedom to authorise the Arbitrator to act as *amiable compositeur* and decide *ex aequo et bono*, that only if the parties, by express terms or agreement, have authorised the Arbitrator to do, then only, he can apply the equity clause and he cannot decide on the basis of his notions of equity and fairness and fasten the liability on both the parties when the parties have not authorised him to do so.

19. In this regard, the learned counsel would rely upon a decision rendered by the Hon'ble Supreme Court reported in (2019) 15 SCC 131 (***Ssangyong Engg.& Construction Co.Ltd versus NHAI***), wherein, the Hon'ble Supreme Court has observed as under in para 40 and 41:



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“40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

“41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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 characterised as perverse.”



WEB COPY 20. He also relied upon a Division Bench of the Delhi High Court reported in 2016 SCC OnLine Del 1648 (***Prakash Atlanta versus National Highways Authority of India***), wherein, in para 18 and 19, it has been held as under:

“18. The 50:50 solution find by the learned Arbitrators is on the reasoning that the tender made known to Prakash that there was a reinforcing element in the works and there was some hiatus between clause 703(A) and item No.5.41(a) of the Technical Specifications. Putting the blame on Prakash for not having got the matter resolved i.e. the conflict resolved, the learned Arbitrators held that it could not be overlooked that NHAI was equally responsible for this because it was the author of the tender documents. Therefore, both parties had to share the blame 50 : 50.

“19. The learned Single Judge has held that this was a '*Panchayati Solution*'. The learned single Judge is absolutely correct. As per the Arbitration and Conciliation Act, 1996, the mandate of an Arbitral Tribunal is to decide a dispute in terms of a written agreement. If the language of the written agreement is clear, the Arbitral Tribunal has to give effect to the language. If the language is unclear, giving reasons to justify what was held to be unclear, the Arbitral Tribunal would have the mandate to give a meaning to the clause in question. Sub-



Section (2) of Section 28 of the Arbitration and Conciliation Act, 1996 reads as under:

“28.(2) The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorised it to do so”.

21. He would also refer to another decision of the Delhi High Court reported in (2017(2) Arb.LR 64 (Delhi) (***Ramakishan Singh versus Rocks Buildon Pvt.Ltd.***), wherein, in para 28, it has been held as under:

“28. Under Section 28(3) of the Act, the learned Arbitrator was bound to render an Award consistent with the clauses of the contract. Under Section 28(2), the Arbitrator shall decide *ex aequo et bono* only if the parties have expressly authorised it to do so. Further, under Section 28(3) of the Act, there was an obligation on the learned Arbitrator to take into account "the terms of the contract and trade usages applicable to the transaction." In *M.S.T.C. Limited v. Jain Traders* (2011) 4 Comp LJ 387 (Del), it was observed in paras 18 and 19 as under:

"18. This distinction has been completely ignored by the learned Arbitrator and he has, on the basis of equitable considerations and his notions of fairness, superimposed the concept of proportionate refund in Clause 5.3, even though the same is specifically excluded from Clause 5.3.

19. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide on the basis of his notions of equity and fairness,



particularly in such a manner that it goes contrary to the specific contractual terms. Section 28(2) of the Act provides that "The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so". (emphasis supplied). The phrase "ex aequo et bono"

means "according to equity and conscience" (see Black's Law Dictionary 6th edition). In relation to the expression "Amiable compositeurs" the Black's Law Dictionary refers to "Amicable compounders" and states that "amicable compounders are arbitrators authorized to abate something of the strictness of the law in favour of natural equity". The parties in this case have not agreed that the Arbitrator may decide as an amiable compositeur or on the basis of "justice and fairness". Therefore, the learned Arbitrator could not have disregarded the plain and grammatical meaning of Clauses 5.3 and 5.4 of the General Conditions of Contract to give way to his own sense of equity, fairness or justice. ...”

22. As regards awarding interest on refund of Sincerity Deposit at 9% p.a. by the learned Arbitrator, the learned counsel would submit that as per the the Dealership Agreements, the respondent agrees to pay interest on the Sincerity Deposit paid by the dealer (petitioner) as per State Bank of India's



prevailing one year time deposit rate from the date of credit of Sincerity Deposit to its account to the financial year ending. However, the learned Arbitrator awarded 9% interest, which is not only a mere digression from the terms of the Dealership Agreements but also a contravention of the provisions of Section 31(7)(a) of the Act and the well settled law which stipulates that rates of interest agreed upon by the parties.

23. He would submit that while deciding the claim made by the petitioner under the head of 'loss of profit', the learned Arbitrator had taken the average profit earned during the period April 2015 to March, 2019 by relying on the petitioner's financial statements, but actually, the petitioner has not filed their financial statements for the year 2019-2020 and 2020-2021 and more over the petitioner suffered huge loss in the dealership business during the said period. Further, the learned Arbitrator arrived at the loss of profits by taking into account the profits of all three dealerships and the entire balance period of three dealerships instead of arriving at a split wise profit for each dealership, which is erroneous and liable to be set aside.



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24. The learned counsel would submit that despite there was no sufficient evidence on record, the learned Arbitrator has awarded 25% of the amount claimed by the petitioner towards employees compensation and it amounts to patent illegality, on which ground, the award is liable to be set aside. According to the learned counsel for the respondent, the learned Arbitrator dealt with the matter beyond the scope of the dealership agreements in interpreting that the respondent is liable to pay the employees compensation though the respondent is not the employer and the relationship between the respondent and petitioner is principal-principal nature as provided in the dealership agreements. Therefore, he would contend that the conclusion arrived on this aspect suffers from impropriety and perversity. In this regard, he relied upon a decision of the Hon'ble Supreme Court reported in (2019) 20 SCC 1 (***Dyna Technologies (P) Ltd. versus Crompton Greavers Ltd.***), wherein, it has been held as under:

“From the facts, we can only state that from a perusal of the award, in the facts and circumstances of the case, it has been rendered without reasons. However, the muddled and confused form of the award has invited the High Court to state



that the arbitrator has merely restated the contentions of both parties. From a perusal of the award, the inadequate reasoning and basing the award on the approval of the respondent herein cannot be stated to be appropriate considering the complexity of the issue involved herein, and accordingly the award is unintelligible and cannot be sustained.”

25. The learned counsel would point out that in fact, even after termination of dealerships, the petitioner continued to operate the dealership from September, 2020 to September 2021 and earned profits. Further, as regards the counter claim, the learned counsel would submit that the learned Arbitrator has not dealt with the claim made by the respondent under IDFSC (Inter Dealer Free Service Coupons, which were issued by the petitioner for their customers and these coupons could be used at any of the petitioner's dealership for services at free of cost. He pointed out that on termination of the dealerships of the petitioner, the other dealers who provide such services would collect the charges from the respondent and as such, towards IDGSC, the petitioner is liable to pay a sum of Rs.99,72,658/-, but the learned Arbitrator has rejected the claim on technical ground that the respondent has failed to give proper explanation as to how the vehicles manufactured in the



year 2008 of 2009, could still have been sold after August 2019 or how such vehicles could have run less than 20,000 kms so as to avail IDFSC by the car owners and that after there was no availability of petitioner's service centres after cancellation of the dealerships to honour the free coupons. But the learned counsel would point out that even after cancellation of dealerships of the petitioner, the customers can utilise the free coupons from any of the dealers of the respondent. Further, as regards the counter claim towards Advertisement agencies, the learned counsel would submit that though the learned Arbitrator accepted this claim, however, awarded only 50% of the claim amount based on 50:50 per centage of liability, which cannot be sustained and the same is liable to be set aside.

26. With the above contentions, the learned counsel sought for setting aside the comprehensive award in its entirety passed by the learned Arbitrator.



WEB COPY 27. Heard the learned counsel appearing for both parties and perused the entire materials available on record.

28. Claim No.1:

28.1 The Claim No.1 is pertaining to the “Deposit of a sum of Rs.60,00,000/- made by the claimant with Hyundai”. While deciding this claim, the Tribunal has held that the said amount of a sum of Rs.60,00,000/- has to be returned to the claimant along with the interest at the rate of 9% per annum. This claim was not pressed before this Court by both the parties.

29. Claim No.2 & 3:

29.1 The Claim No.2 is pertaining to “investment on dealership addition, net of depreciation” and the Claim No.3 is pertaining to “investment in marketing expenses for promotion of brands advertisement expenses collected from the claimant by Hyundai”. These claims were rejected by the learned Arbitrator.



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29.2 The learned Arbitrator had arrived at a conclusion that the termination was not justifiable and rejected the contentions raised by the respondent on the grounds of poor performance in sales, funds indiscipline and working capital shortfall, manpower shortage and shortage of test driver cars, etc. In this regard, the Tribunal had recorded its detailed findings at paragraph Nos.3.6 to 3.9 of the award and accordingly, awarded the compensation for unexpired period of dealership to the claimant by treating that the termination to have been effected without any adequate cause. Subsequently, the 2nd claim was rejected citing the reason that the compensation for unexpired period of dealership was already awarded to the claimant.

29.3 When the learned Arbitrator has justified the aspect of awarding the compensation for loss of profit for the unexpired period of dealership, the compensation on the investment of dealership should also have been awarded, because the “compensation for loss of profit for the unexpired period of dealership” is entirely different from the “compensation for investment on dealership addition”.



WEB COPY 29.4 As far as the 3rd claim is concerned, the marketing expenses, claimed under this head, are spent for the period of block of 3 years. Once if those expenses are spent for the said block of period, certainly the claimants are entitled for compensation under this head, that too, after the unjustifiable termination of dealership.

29.5 When the learned Arbitrator has arrived at a conclusion that the termination was not justifiable, certainly, the claimants are entitled for separate compensation under the heads, viz., “the investment on dealership” and “marketing expenses” for every “one time” investment, which was made by the claimant for the block of 3 years. Even though all the documentary materials are available, the above aspect was not considered by the learned Arbitrator. In such case, this Court is of the view that the findings of the learned Arbitrator are required to be re-considered. Therefore, the rejection of these claims is hereby set aside.

30.Claim Nos.4 & 5:



30.1 The Claim No.4 is pertaining to the “Loss incurred due to distress sale of Demo cars” and Claim No.5 is pertaining to the “Loss due to distress sale of stock of cars due to termination”. These claims were rejected by the learned Arbitrator.

30.2 If the Tribunal has arrived at a conclusion that the termination is within the scope of agreement and justifiable, any loss incurred due to distress sale of demo cars has to be borne by the claimant. On the other hand, when the Tribunal has arrived at a conclusion that the termination was not justifiable and rejected the 4 grounds raised by the respondent, the claimant is required to be compensated appropriately for the “loss incurred due to the distress sale of demo cars” and also for the “loss incurred due to distress sale of stock of cars due to termination” based on the materials available before the learned Arbitrator.

30.3 In this case, the loss of profit was awarded based on the estimated net profit arrived at by the learned Arbitrator. Normally, if the learned Arbitrator took into consideration of the gross profit after adjusting



the advertisement expenses, interest on investment, marketing expenses, salary dues and other maintenance costs, etc., then the question of awarding compensation under the aforesaid heads would not arise. However, in this case, the learned Arbitrator had ascertain the net profit, based on which, the loss of profit was awarded. When such being the case, when a claim was made on the aspect of expenses referred above, viz., advertisement expenses, interest on investment, marketing expenses, salary dues and other maintenance costs, etc., the same has to be considered and compensated appropriately by the Tribunal.

30.4 In this case, there is no dispute on the aspect of availability of details and other material documents for the purpose arriving at the loss incurred under the claim Nos.4 and 5. In spite of the availability of such material evidences, the above aspects were not properly considered by the learned Arbitrator. In such case, this Court is of the view that the award passed in Claim Nos.4 and 5 are liable to be set aside. Accordingly, the rejection of Claim Nos.4 and 5 is hereby set aside.



31. Claim No.6:

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31.1 The claim No.6 is pertaining to the “Employees' dues post termination salaries, compensation and statutory dues”. This claim was partially awarded by the Tribunal.

31.2 In this claim, the learned Arbitrator has accepted 50% of the total claim of Rs.9,22,40,877/-, which would come around a sum of Rs.4,61,20,438.50, however, awarded only a sum of Rs.2,30,60,220/- (25% of the admitted amount) as compensation to and in favour of the claimant. In this regard, the Tribunal had failed to provide any reasons for attributing 50% of the admitted amount to the claimant and 50% to the respondent/Hyundai.

31.3 When the learned Arbitrator has arrived at a categorical finding that the termination is not justifiable, certainly attributing 50% of admitted compensation under this head is also not justifiable and the same is against the basic notion of justice, which really shocks the conscience of this Court.



Therefore, the compensation, which was awarded only to the extent of 2,30,60,220/-, is not sufficient and the Tribunal should have awarded the entire 50% of the claim amount to and in favour of the claimant. In such case, the award passed by the learned Arbitrator is not proper since the learned Arbitrator has committed the patent illegality while deciding this claim. Therefore, the award passed in Claim No.6 is liable to be set aside. Accordingly, the award passed to the extent of Claim No.6 is hereby set aside.

32. Claim No.7:

32.1 The Claim No.7 is pertaining to the “Loss of projected profit based on the four years average”. This claim was partially awarded by the Tribunal.

32.2 In this claim, the Tribunal has awarded a sum of Rs.1,26,04,250/- out of the total claim amount of a sum of Rs.22,77,10,051/-. At paragraph No.10.1.5 of the award, the learned Arbitrator had worked out the assessment of the profit and loss account of



the claimant. The profit, per day, was arrived at a sum of Rs.28,134/- and the number of days from the date of termination of 1st and 2nd dealership was taken by the Tribunal as 321 days and 485 days respectively.

32.3 As far as the 3rd dealership is concerned, the date of granting of 3rd dealership was on 23.11.2016. The 1st term of three years was expired on 23.11.2019 and thereafter, the 2nd term of 3 year was expired on 23.11.2022. When such being the case, the date of expiry of license should have been taken as 23.11.2022, in which case, the total number of days would be 835 days in term three. However, without any basis, the Tribunal has taken the date of expiry of license as 13.12.2020 instead of 23.11.2022 and awarded compensation for only 90 days instead of 835 days.

32.3 Therefore, this Court is of the view that in non-application of mind, the Tribunal has committed patent illegality while deciding this claim and the decision arrived at by the learned Arbitrator is required to be re-considered. Hence, the said decision is liable to be set aside. Accordingly,



the award passed in this claim is hereby set aside.

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33. Claim Nos.8 to 13:

33.1 The Claim No.8 is pertaining to the “Post termination infrastructure rent”, the Claim No.9 is pertaining to the “Post termination infrastructures maintenance cost”, the Claim No.10 is pertaining to the “Loss of liquidating accessories”, the Claim No.11 is pertaining to the “Loss of liquidating spares”, the Claim No.12 is pertaining to the “Litigation expenses” and the Claim No.13 is pertaining to the “Loss of Goodwill and Mental Agony”. All these claims were rejected by the Tribunal.

33.2 As discussed above, when the learned Arbitrator rejected respondents' contention with regard to the aforesaid grounds viz., poor performance in sales, funds indiscipline and working capital shortfall, manpower shortage and shortage of test driver cars, etc, and arrived at a conclusion that the termination was not justifiable, certainly the claimants are entitled for compensation atleast up to the end of 3 years.



33.3 Further, this Court is of the view that certain expenses would have incurred by the claimant under the pretext that the dealership would be extended. However, due to the unjustifiable termination of dealership, the said expenditures would become waste and hence, the claimants are entitled for compensation for the said expenses also. Therefore, when the Tribunal has arrived at a conclusion that the termination is unjustifiable, they should have considered the claims under the heads viz., “Post termination infrastructure rent”, “Post termination infrastructures maintenance cost”, “Loss of liquidating accessories”, “Loss of liquidating spares”, “Litigation expenses” and “Loss of Goodwill and Mental Agony” and awarded the compensation.

33.4 In view of the above, the rejection of these claims is against the basic notion of justice and these claims are required to be re-considered. Hence, the award passed by the Tribunal is liable to be set aside. Accordingly, the award passed in Claim Nos.8 to 13 are set aside.

34. Counter Claim Nos.1 and 2:



34.1 The Counter Claim Nos.1 and 2 are pertaining to “IDFSC Claim” and “Advertisement Agency dues”. The 1st counter claim was rejected and the 2nd counter claim was partially allowed by the Tribunal.

34.2 In this case, as stated above, the Tribunal had rejected the contentions of the respondent/Hyundai and arrived at a conclusion that the termination of dealership was not justifiable. In such case, this Court is of the view that the Tribunal has rightly rejected the 1st counter claim and partially allowed the 2nd counter claim.

34.3 Therefore, for all the reasons discussed above, this Court does not find any error in the decision arrived at by the Tribunal. Hence, the same stands confirmed.

35. Both the learned counsel had referred various judgments. The law laid down by the Hon'ble Apex Court is settled law. However, in view of the decision arrived at by this Court, the aforesaid judgments referred by both the learned counsel have not been considered by this Court.



Arb.O.P.(Com.Div.) Nos.100 & 475 of 2023

WEB COPY 36. In the result, the Arb.O.P.(Com.Div.)No.475 of 2023 is allowed and the Arb.O.P.(Com.Div.)No.100 of 2023 is dismissed. No cost. However, it is made clear that since the award is set aside by this Court, to the extent as narrated above, for the purpose of any future course of action proposed to be initiated (if any) by the respective parties, by virtue of Section 43(4) of the Arbitration and Conciliation Act, 1996, the period, i.e. from the date of commencement of arbitral proceedings till the date of this order, shall be excluded in computing the time prescribed by the Limitation Act, 1963.

30.10.2024

Speaking order : Yes
Index : Yes
Neutral Citation: Yes
suk/nsa



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KRISHNAN RAMASAMY, J.

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30.10.2024