



A.No.4551 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.12.2024

Pronounced on : 31.01.2025

CORAM

THE HONOURABLE MR JUSTICE P.B. BALAJI

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Vivek Automobiles Private Limited,
Kanipath, Kathmandu,
Nepal and
also having its branch office at
No.11, Allenby Road, Kolkata – 700 020.

Applicant(s)

Vs

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

Respondent(s)

For Applicant(s): Mr.A.R.Ramanathan
for Mr.S.Karunamoorthy

For Respondent(s): Mr.P.S.Raman
Senior Counsel
& Mr.N.Vijay Narayan
Senior Counsel
for Mr.Arun C.Mohan



ORDER

WEB COPY The application under Section 27 of the Arbitration and Conciliation Act, 1996 to issue summons or otherwise call upon one Mr.Kesav Tayal S/o. Late Hari Niwas Agarwal to be present before the Arbitral Tribunal to examine him on the points mentioned in the affidavit in support of the said application.

2.I have heard Mr.A.R.Ramanathan, learned counsel for Mr.S.Karunamoorthy, learned counsel for the applicant and Mr.P.S.Raman, learned Senior Counsel and Mr.Vijay Narayan, learned Senior Counsel for Mr.Arun C.Mohan, learned counsel for the respondent.

3.The applicant, as claimant, has entered into a Dealership Agreement with the respondent for selling two-wheelers manufactured by the respondent in Nepal. The said Dealership Agreement contains an arbitration clause and in view of the disputes arising between the parties, the arbitration proceedings were initiated. A former Judge of this Court was appointed as the Sole Arbitrator. The applicant, as claimant herein, seeks to



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revive the terminated Dealership Agreement or in the alternative seeks damages.

4. In fact, an application was made before pending the arbitration proceedings, before the learned Arbitrator and the learned Arbitrator by order dated 09.08.2023, held that the applicant has made out a case for summoning Mr. Kesav Tayal and recommended the claimant to approach this Court for securing appropriate summons for his appearance before the Arbitral Tribunal.

5. When the said application was taken up by this Court, noticing two Judgments, namely *Ennore Port Limited Vs. Hindustan Construction Company Limited* reported in 2006 SCC Online Mad 870 and *Indusind Bank Limited Vs. MLR Auto Limited* passed in A.Nos.1662 and 3486 of 2023 dated 31.08.2023, rendering contradictory findings, the matter was directed to be placed before the Hon'ble Chief Justice for reference to a Larger Bench.

6. The Hon'ble Chief Justice directed the matter to be placed before the Division Bench of this Court for answering the following questions.



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1. Whether a witness has to be summoned and be directed to be present before the Arbitral Tribunal or whether the Court has to record evidence according to its Rules on taking evidence by ordering that the evidence be provided directly to the Arbitral Tribunal; and

2. Whether the Court has no discretion under Section 27(3) of the Arbitration and Conciliation Act, 1996 as ordered in Indusind Bank Limited Vs. MLR Auto Limited in A.Nos.1662 and 3486 of 2023 or whether the Court has discretion under Section 27(3) of the Arbitration and Conciliation Act, 1996 as ordered in M/s.Ennore Port Limited Vs. Hindustan Construction Company Limited reported in 2006 SCC On line Mad 870.

7. The Hon'ble Division Bench, after hearing the parties, clarified that there is actually no dichotomy in the above two decisions and even in *Indusind Bank Limited's case*, this Court had only held that interference under Section 27(1) of the Act will not apply as long as there is no glaring error, meaning that this Court is not completely denuded of discretion and it is not merely performing a ministerial act and/or making an administrative order. In short, the Division Bench held that exercising powers under



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Section 27(3) of the Act, this Court is not required to endorse the view of the Arbitral Tribunal and on the other hand, is entitled to exercise discretion to either permit or refuse the request.

8.While disposing of the reference, the Division Bench has made it clear that the Division Bench had not entered into the reign of merits and the learned Single Judge hearing the matter would have to decide the application on its own merits and in accordance with law and in the light of the answer to the reference by the Division Bench.

9.In view of the Division Bench clearly holding that this Court has discretion to even refuse the recommendation of the Arbitral Tribunal to issue summons to the third party, to be summoned and depose before the learned Arbitrator, I am now left with the discretionary part and see whether the recommendation of the Arbitral Tribunal is just, necessary and proper and whether the recommendation of the Arbitral Tribunal has to be endorsed or disallowed.

10.The learned counsel for the applicant Mr.A.R.Ramanathan, would invite my attention to the agreement dated 09.02.2016, which was



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subsequently reviewed on several occasions. He would also draw my attention to the termination of the agreement dated 07.03.2022. In and by the said agreement, the applicant was appointed as a exclusive dealer for the entire length and breadth of Nepal.

11.Challenging the said termination, the applicant has made a claim before the Arbitral Tribunal.

12.Before the Arbitral Tribunal, one Mr.Kanak Jammur was examined as C.W.1 and Mr.Tarun Kumar Jain was examined as C.W.2 on the side of the claimants. On the side of the respondent, Mr.Abishek Shukla, the authorized representative of he respondent Company was examined as R.W.1.

13.During the course of cross-examination of R.W.1, placing reliance on his deposition, the applicant sought to examine the said Kesav Tayal, the Zonal Manager of the respondent Company in Nepal, who was handling the Nepal market and managing the business of the respondent in Nepal at the time of the parties entering into Dealership Agreement and also



thereafter throughout the entire course of transactions between the claimant and the respondent.

14. According to the applicant the said Kesav Tayal had knowledge of the circumstances including the representations allegedly made by the respondent to the claimant, in the course of the business transactions. R.W.1 had mentioned in his deposition that the said Kesav Tayal had left the employment of the respondent Company and according to the claimant, the evidence of said Kesav Tayal was relevant for adjudication of the disputes between the parties.

15. The said application was resisted by the respondent on the ground that the request was only a fishing expedition and there is absolutely no rhyme or reason to examine the said Kesav Tayal who cannot lead any oral evidence contrary to admitted documentary evidence already on record. According to the respondent, the application was not bonafide and liable to be dismissed.

16. The learned Arbitrator, in and by an order dated 09.08.2023, found that the case has been made out by the applicant for examination of



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said Kesav Tayal and recommended the claimant to approach this Court for securing the appearance of the said Kesav Tayal for the purposes of giving evidence. It is this order dated 09.08.2023, which is sought to be given effect to by the applicant. The application is however strongly resisted by the respondents .

17.The learned counsel for the applicant would submit that the Arbitrator has clearly found that the evidence of said Kesav Tayal would be material in all aspects as the dealings between the applicant and the respondents were wholly within his knowledge even according to R.W.1, and therefore no disadvantage would be caused to the respondent, if the witness is summoned and examined as a Tribunal's witness and the respondent is assured of cross-examination. In short, the learned Arbitrator held that no prejudice would be caused to the respondent by examining its former employee, Kesav Tayal.

18.The learned counsel for the applicant would also contend that the necessity to examine the said Kesav Tayal has arisen only because of the answers provided by R.W.1 in cross-examination and rightly, the Arbitral



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Tribunal has recommended the claimant to seek permission of this Court to summon the said Kesav Tayal. He would further submit that when the said employee is only being examined as Tribunal's witness, the respondent cannot have any grievance whatsoever. He would therefore pray for the application being ordered, accepting recommendation of the learned Arbitrator.

19.The Bombay High Court in *Dilip Vs. Errol Moraes* reported in (2022) 4 AIR Bom R 771, the Bombay High Court held that the legislative scheme of Section 27 is clear that the Court has not been attributed any adjudicatory function and is exercising jurisdiction under Section 27 the Court and would only to require to consider as to whether the requirement of Subsection (1) is satisfied, namely whether an Arbitral Tribunal or a party with the approval of the Arbitral Tribunal applies to the court for assistance and taking evidence and once such requirement is satisfied, the Court has to exercise its jurisdiction under Section 27 as Subsection (1) itself provides.

20.In *Delta Distilleries Limited Vs. United Spirits Limited and Another* reported in (2014) SCC 113, the Hon'ble Supreme Court, advertent



to Section 27, held that 'person' appearing under Section 27(ii)(c) is wide enough to cover not merely witnesses but also parties to the proceeding and for the purposes of making an award on the merits of the claim before it, if the Arbitral Tribunal feels that any evidence become necessary then the Tribunal ought to have power to get the evidence and it is for this purpose alone that the enabling Section has been provided.

21.Per contra, the learned Senior Counsel, Mr.P.S.Raman, would contend that the applicant had forged a document as if the applicant is the exclusive dealer of the respondent, contrary to the contract specifically mentioning that the applicant has been appointed only as a non-exclusive dealer. Further, according to the learned Senior Counsel, it was only the applicant who mis-declared the capacity of the respondent's bullet for achieving more sales. The learned Senior Counsel would further submit that when the Managing Director of the applicant who is a signatory to the document and witness to the entire transactions was never examined and only the head of operations, one Kanak Jammur and the Senior Accountant Tarun Kumar Jain, were examined on the side of the claimant, it was totally unnecessary to summon Kesav Tayal, who was only a Zonal Manager.



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22.The learned Senior Counsel vehemently contend that the said Kesav Tayal was admittedly no longer in the services of the respondent Company and merely because R.W.1 had stated that Kesav Tayal was his superior and was managing the whole business and involved in all big discussions, it would not warrant or necessitate the said Kesav Tayal being examined, especially when he was thrown out of employment for wrongful acts. The learned Senior Counsel would therefore contend that even if the said Kesav Tayal was to be examined, it is highly unlikely that he would depose the truth and may only seize the opportunity to take revenge on the respondent.

23.The learned Senior Counsel would also submit that the Order XVI of the CPC will apply to the arbitration proceedings and even if the said Kesav Tayal who is examined as Tribunal's witness, he will not fall within the definition of a third party. He would further contend that the settled legal principle which has held field for over 118 years starting from the decision of the Privy Council in *Chunni Lal Vs. Kishori Lal* reported in (1908) L.R. 36 I.A. 9, cannot be lightly ignored. The learned Senior Counsel



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would also invite my attention to the decision of this Court in *Quintessential Designs India Private Limited Vs. Puma Sports India Private Limited* reported in (2019) 5 CTC 320, where this Court held that when a witness is not a party to the lis directly, but it is indirectly associated with some of the parties and it may be a case where the witness summoned is ex-employee of one of the parties to the lis and the relationship might have also gone sour, then such a witness cannot be summoned to lead evidence. This Court further held that the witness cannot be examined even as a Court witness. The learned Senior Counsel would also draw my attention to the fact that the Division Bench of this Court in *Quintessential Designs India Private Limited Others Vs. Puma Sports India Private Limited and Others* reported in 2019 6 CTC 593 had confirmed the said order of the learned Single Judge. He further placed reliance on the decision of the Privy Council in *Chunni Lal Vs. Kishori Lal* reported in (1908) L.R. 36 I.A. 9, where the Privy Council has held that objection to the practice of allowing a litigant to cross his opponent and summoning an adversary as a witness to lead evidence against the opponent in the litigation was a weak and faulty kind of advocacy.



24. In *Kaliaperumal Vs. Pankajavalli and Others* reported in 1999 1

L.W.-660, the learned Judge of this Court held that when a plaintiff wants the opposite party to be examined as their witness, such practice ought to be deprecated, placing reliance on the decision of the High Court of Mysore in *Nallan Gowda Vs. Gavisiddan Gowda* reported in 1958 SCC Online Kar 122, where it was held that practice of calling the opposite party as a witness should not be countenanced as it is not in the interest of justice. Reliance is also made by the learned Single Judge to judgment of the Kerala High Court in *Mohamed Kunju Vs. Sha* reported in 1969 KLT 170, where it was held that a practice of a party causing his component to be summoned as a witness has to be disapproved. The Kerala High Court further held that as a matter of right, a party cannot have the opposite party examined as a witness. Reliance is also placed on the decision of the Delhi High Court in *ONGC Limited Vs. Vijay Mahajan* reported in 2016 SCC Online Del 6371, where an application was taken out under Order XVI Rule 1 of CPC and where the Delhi High Court held that the Courts have frowned upon the parties summoning the opposite party or its officers for the purpose of recording of evidence and the only object appears to be to harass and embarrass the officers of the petitioner.



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25.Mr.Vijay Narayan, learned Senior Counsel for the respondent would invite my attention to clause 2.2 and clause 16 of the agreement between the parties. According to the learned Senior Counsel, the learned Arbitrator has disregarded the specific terms of the said contract and deliberately recommended a disgruntled and dismissed employee to be examined which would only misdirect the proceedings. Similar to the submission of the learned Senior Counsel Mr.P.S.Raman, Mr.Vijay Narayan would also pray for exercise of discretion of this Court to reject the recommendation of the Arbitral Tribunal by dismissing the application filed before this Court.

26.I have carefully considered the submissions advanced by the learned counsel for the petitioner and the Senior Counsel for the respondent.

27.Admittedly, the applicant/claimant has entered into a Distributor Agreement with the respondent for sale of respondent's Royal Enfield motorcycles in the territory of Nepal. Clause 2.2 stipulates that respondent



appoints the applicant as a non exclusive distributor for the purpose of sale and non exclusive distributor for ancillary products, within the territory of Nepal for supplying, marketing, reselling, distribution and servicing the same the distributor has accepted such appointment. Now contrary to the specific covenant in the agreement, the applicant wants to attempt to lead oral evidence, that too through a former employee of the respondent, contrary to clause 2.2. Clause 3.1 of the said agreement clearly stipulates “the parties hereby expressly agree that under no circumstances shall the non extension of this agreement be deemed as equivalent to unjust termination nor constitute any basis for any type of compensation”. Clause 16.1 of the agreement which runs as follows:

“16.1 Entire Agreement:

This Agreement, including Annexures, contains the entire agreement of the parties hereto with respect to the transactions envisaged herein, superseding all negotiations, prior discussions, preliminary agreements, and memoranda made prior to the date hereof. Each Party hereby waives any and all claims such Party has or may have against the other Party arising out of or in connection with any prior agreements between the Parties.”



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28.The above clause emphasizes that the said Distributor Agreement is the final and binding agreement between the parties and any claim by either party arising out of or in connection with any other prior agreement stood waived with the execution of the Distributor Agreement on 09.02.2016.

29.For two primary reasons, I am unable to accede to the recommendation of the Arbitral Tribunal. Firstly, it is settled law that no amount of oral evidence can be adduced contrary to documentary evidence. The applicant does not dispute the Distributor Agreement The Distributor Agreement clearly records the understanding between the parties that the Distributor Agreement was on a non exclusive basis, besides also confirming at clause 16.1 that this is a final and binding agreement and all other agreements, if any and the rights flowing there from stand waived by both the parties. Now, the applicant wants to issue summons to a former employee of the respondent to lead evidence on the point that the agreement between the applicant and the respondent was an exclusive Distributor Agreement for the territory of Nepal. No amount of oral evidence can be permitted to negate documentary evidence on record.



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30.As already indicated above, the applicant admits the Distributor Agreement and it is not the case of the applicant that the agreement was sham and nominal. Therefore, the applicant is bound by the Distributor Agreement dated 09.02.2016 and cannot be permitted to turn around contrary to the terms of the said Distributor Agreement and claim that the Distributor Agreement was on an exclusive basis as represented orally by the respondent's officials/employees. The Arbitral Tribunal unfortunately has not dealt with this aspect of the matter while recommending summons to be issued to the former employee of the respondent.

31.Even otherwise, admittedly, the employee, Kesav Tayal has been terminated from services of the respondent and his relationship between the respondent Company is neither cordial nor good. In such circumstances, he becomes an adversary witness who cannot be expected to speak in favour of the respondent Company, even if it is to be true evidence that is to be spoken. In fact, it is likely that the said employee may only grab the opportunity to vent his anger and ire against the respondent Company and accordingly depose against the respondent, unmindful of the truth.



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32. Even otherwise, when it is the case of the applicant that the Managing Director of the applicant Company had informed the Zonal Manager, Kesav Tayal about the representation of the respondent Company that the Distributor Agreement would be on an exclusives basis, the best person who ought to have been examined would have been the Managing Director of the applicant Company. However, the applicant has not chosen to examine its Managing Director and instead has examined other witnesses, C.W.1 and C.W.2. Therefore, the evidence of Kesav Tayal is certainly not the best evidence available to the applicant and in any event, the applicant having made it abundantly clear that he attempts to lead oral evidence contrary to the written document, the same is impermissible in law.

33. The Arbitral Tribunal has apparently recommended the examination of said Kesav Tayal only based on the deposition of R.W.1 that the said Kesav Tayal being Zonal Manager and he was present throughout the transaction period with the applicant. Unfortunately, such a request to lead oral evidence contrary to documentary evidence is



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impermissible under Section 91 and 92 of the Indian Evidence Act. The Arbitral Tribunal ought to have turned down the request of the applicant to issue summons to the Kesav Tayal instead of recommending the claimant to move this Court to seek appropriate directions.

34.Further, as rightly pointed out by the learned Senior Counsel, Mr.P.S.Raman, though the applicant claims that there is a novated evaded Distributor Agreement, such an agreement has never been produced either before the Arbitral Tribunal or before this Court at any point of time. Further, the Courts have clearly frowned upon an adversary party summoning a person associated with the other party to the lis, especially when the relationship had soured between the said employee and the Company. Even on this aspect, the law is well settled and as already discussed right from 1908 in *Chunni Lal Vs. Kishori Lal* reported in (1908) L.R. 36 I.A. 9, right up to 2019, in the decision of this Court in *Quintessential Designs India Private Limited Vs. Puma Sports India Private Limited* reported in (2019) 5 CTC 320, which was also confirmed by the Division Bench of this Court, the Courts have certainly held that examination of such witnesses who have conflict of interest with one of the



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parties to the lis cannot be permissible. The Arbitral Tribunal, in line with the above settled legal principles and law enunciated by the Courts, ought to have rejected the request of the applicant for examining the Zonal Manager, Kesav Tayal instead of recommending his examination.

35.In view of the above, I am unable to exercise discretion in favour of the applicant by accepting the recommendation of the Arbitral Tribunal to issue summons to the Zonal Manager, Kesav Tayal for the purposes of examining him before the Arbitral Tribunal.

36.In fine, A.No.4551 of 2023 is dismissed.

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P.B.BALAJI,J.

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