

(2022) 03 DEL CK 0163

In the Delhi High Court

Case No : Arbitration Petition No. 783 Of 2021

Hero Moto Corp Ltd.

APPELLANT

Vs

Upper India Trading Co. (Delhi) Pvt Ltd & Ors.

RESPONDENT

Date of Decision : 25-03-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11(6), 12(2)

Citation : (2022) 03 DEL CK 0163

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Sangeeta Sondhi, Ruchi Gour Narula, Gorang Goyal, Jaswinder Singh

Final Decision : Disposed Of

Judgement

Mukta Gupta, J

1. By this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, the Act), petitioner seeks appointment of a Sole Arbitrator in terms of Clause 23.16 of the Dealership Agreement dated 15th February 2018.

2. According to the petitioner, the petitioner is a manufacturer of two-wheelers/spares and entered into a dealership arrangement with respondent No. 1 which sells two wheelers on retail basis and services the same, vide agreement dated 17th February 2003. The said authorized dealership agreement was renewed on 15th February 2018. The respondent Nos. 2 and 3 being the Directors of respondent No. 1 stood as guarantors to the dealership arrangement vide the Guarantee Deeds dated 31st December 2005. The respondents defaulted in payments for goods purchased by the respondent No. 1 and despite initiation of negotiations and discussions to amicably resort the disputes, the disputes could not be resolved and despite assurances, including expressly assuring repayments inter alia vide their letters dated 29th May 2019, 13th March 2020 and email dated 17th July 2020 and the balance confirmation letter dated 1st October 2020, the respondents failed to make the payments. Further, to the petitioner's

knowledge, some of the properties of the respondents were sold/attached as dues of other parties were not satisfied by the respondents. The petitioner thus invoked arbitration as per the agreement vide its notice dated 12th October 2020 to which the respondents replied vide letter dated 17th November 2020.

3. In the reply dated 17th November 2020, the plea taken by the respondents was that the notice invoking arbitration was contrary to the arbitration clause, premature and in contravention of Clause 23.16(a) of the agreement as the petitioner sought arbitration without resorting to the process of negotiation/consultation. It was also stated that the amount of Rs.3.24 Crores claimed from the respondents was totally imaginary and denied. It was claimed that though the respondents purchased vehicles from the petitioner but often, there were delays in the supplies resulting in financial losses to the respondents and the respondents were in the process of making an assessment of the losses occasioned due to the acts and omissions and will quantify the same and shall send a separate notice to the petitioner in this regard. However, till date, no notice has been sent by the respondents to the petitioner.

4. The three grounds urged for dismissal of the petition before this Court by learned counsel for the respondent were; (1) the respondent Nos. 2 and 3 are not signatories to the dealership agreement dated 15th February 2018; (2) no liability on the respondent Nos. 2 and 3 can be enforced in terms of the deed of Guarantee dated 31st December 2005 as the same was time barred; and (3) the notice invoking arbitration dated 12th October 2020 was premature, therefore, no cause of action arises against the respondents.

5. Learned counsel for the respondents further states that in case, this Court holds that an Arbitrator is required to be appointed in terms of the Arbitration Agreement between the parties, then, he has instructions to state that instead of three member arbitration panel, a Sole Arbitrator be appointed as prayed for by the petitioner.

6. Admittedly, the agreement dated 17th February 2003 was entered into with the petitioner by the respondent No. 1 as the dealer through its authorized representative and the respondent Nos. 2 and 3 are the Directors of the respondent No. 1. Article XXVI of the Agreement dated 17th February 2003 reads as under:-

“ARTICLE – XXVI (Arbitration)

All disputes, controversies or differences arising out of or in relation to or in connection with this Agreement or any breach hereof, including interpretation hereof, shall be referred for arbitration to the PHD Chamber of Commerce & Industry whose decision shall be final and binding upon the parties hereto”.

7. Pursuant to the dealership agreement dated 17th February, 2003, the respondent Nos. 2 and 3 executed the deeds of Guarantee on 31st December 2005 which are not disputed by learned counsel for the respondent Nos. 2 and

3. It is also not disputed that the agreement dated 17th February 2003 was renewed and lastly, the authorized dealership agreement was executed on 15th February 2018. Clause 23.16 of the dealership agreement dated 15th February, 2018 which is now sought to be enforced by the petitioner reads as under:-

"23.16 Arbitration and Dispute Resolution

a) Any dispute or difference between the Parties arising out of or in connection with this Agreement, including any question regarding its interpretation, existence, performance, validity, or termination, either during the term of the Agreement or at anytime thereafter, will be settled between the Parties through friendly consultations and negotiations.

b) If no settlement can be reached through friendly consultations and negotiations as discussed in Article 23.16(a) of this Agreement within thirty (30) days of one Party delivering a notice of the dispute or difference to the other Party, then such dispute will be finally settled by arbitration in accordance with the provisions of this Article 23.16.

c) The arbitration proceedings will be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 ("Arbitration Act").

d) The dispute or difference will be referred to a panel of three (3) arbitrators, one arbitrator to be appointed by each Party and the third arbitrator to be appointed by the two arbitrators appointed by the Parties. In the event that either Party fails to appoint its arbitrator within fifteen (15) days from one Party submitting a request for appointment of such arbitrators to the other Party or the two arbitrators appointed by the Parties fail appoint the third arbitrator within fifteen (15) days from the date of appointment of the second arbitrator, the single arbitrator or the third arbitrator will be appointed in accordance with the provisions of the Arbitration Act.

e) The arbitration proceedings will be held at New Delhi and the language to be used in the arbitral proceedings will be English.

f) The prevailing Party in the arbitration proceedings will be awarded reasonable attorney's fees, if any, and all other costs and expenses in relation to the arbitration proceedings unless the arbitrators for good cause determine otherwise".

8. It may be noted that the authorized dealership agreement dated 15th February 2018 does not provide for reference of disputes through arbitration to the PHD Chamber of Commerce & Industry as provided under the agreement dated 17th February, 2003 but firstly by settlement through friendly consultations and negotiations and if no settlement is arrived at in terms of Article 23.16(a) of the Agreement within thirty days of one party delivering a notice of the disputes or differences to the other party, then the disputes are to be resolved by arbitration in accordance with the provisions of Article 23.16.

9. Article 23.16 of the Agreement dated 15th February 2018 as noted above, provides for a panel of three arbitrators, one arbitrator to be appointed by each party and the third arbitrator to be appointed by the two arbitrators and in case, either party fails to appoint its arbitrator within fifteen days from one party submitting a request for appointment of such arbitrators to the other party or the two arbitrators appointed by the parties fail to appoint the third arbitrator within fifteen days of the date of appointment of the second arbitrator, the single arbitrator or the third arbitrator will be appointed in accordance with the provisions of the Arbitration Act. The seat of arbitration is provided at New Delhi and thus, a valid arbitration agreement exists between the parties and hence, this Court has jurisdiction to entertain the present petition.

10. As regards the contention of the learned counsel for the respondents that no negotiations have been made, the petitioner has placed on record emails asking the respondents to clear the entire outstanding amounts and that the petitioner's representative is trying to speak to the respondents, however, no response is being received. A perusal of the emails exchanged between the parties would reveal that repeatedly, the petitioner raised the issue of balance payment. Though there is no admission of the liability by the respondent, however, the communications and discussions between the parties have not fructified leading to petitioner issuing notice invoking arbitration. Hence, it cannot be said that the notice invoking arbitration dated 12th October 2020 is premature and the petition is liable to be dismissed on this count.

11. The Three Judge Bench of the Hon'ble Supreme Court in a reference to the Larger Bench reported as 2021(2) SCC 1 *Vidya Drolia & Ors. vs. Durga Trading Corporation & Ors.* held that the ambit of Court's jurisdiction at the reference stage was restricted to prima facie finding that there exists an arbitration agreement that is not null and void, inoperative or incapable being performed. The key rationale for holding that the Courts' review of the arbitration agreement should be limited to a prima facie standard is the principle of competence-competence.

12. The second plea taken by the learned counsel for the respondents is that the respondent Nos. 2 and 3 were not signatories to the arbitration agreement. As noted above, the first dealership agreement was entered into between the petitioner and the respondent No. 1 on 17th February 2003 which was lastly renewed vide the dealership agreement dated 15th February 2018. Pursuant to the dealership agreement dated 17th February 2003, the respondent Nos. 2 and 3 executed their respective deeds of Guarantee dated 31st December 2005 for which the claim of the petitioner is that the same subsists as on today which is denied by the learned counsel for the respondents. Whether the deeds of Guarantee subsist or not, making the respondent Nos. 2 and 3 personally liable or not, is an issue which has to be gone into by the Arbitrator and cannot be decided in the present petition. The period of limitation and subsistence of the deeds of guarantee in this case would be a mixed question of fact and law to be

decided by the learned Arbitrator.

13. In view of the discussion above, this Court finds that the petitioner has made out a case for appointment of a Sole Arbitrator in terms of Clause 23.16 of the Authorized Dealership Agreement dated 15th February 2018.

14. Consequently, Justice S.P.Garg, a former Judge of this Court is requested to arbitrate the disputes arising between the parties.

15. The learned Arbitrator would be entitled to charge fees as per the Schedule IV of the Act or as agreed by the learned Arbitrator pursuant to the consent of the learned counsels for the parties.

16. The learned Arbitrator will furnish the requisite disclosure under Section 12(2) of the Act within one week of entering the reference.

17. The right of the respondents to file counter-claims and objections before the learned Arbitrator in accordance with law is reserved.

18. Petition is disposed of.

19. Order be uploaded on the website of this Court.