

(2019) 12 DEL CK 0184

In the Delhi High Court

Case No : Arbitration Petition No. 224 Of 2019

Maruti Suzuki India Limited

APPELLANT

Vs

Moto Drive Private Limited & Ors

RESPONDENT

Date of Decision : 13-12-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7, 7(1), 7(3), 7(4), 7(4)(b), 7(5), 11(6), 11(6A), 12

Citation : (2019) 12 DEL CK 0184

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : T.K. Ganju, Aquib Ali, Yash Pratap Singh, Anupam Seth

Final Decision : Allowed

Judgement

Jyoti Singh, J

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act'). Notices have been duly served on the respondents. An affidavit of service was filed stating that the respondents have been duly served.

2. On the last date of hearing, respondent was proceeded ex-parte as none had appeared despite the matter being called twice.

3. Learned senior counsel for the petitioner submits that the respondents had approached the petitioner for authorized dealership of the petitioner company in December, 2015. Several meetings were held between the parties to work out the modalities for entering into an agreement. After all the formalities prior to signing of the Agreement were complete, the officials of the petitioner conducted an interview on 25.12.2015 and respondent No. 1 was approved as an authorized dealer subject to remitting a security deposit of Rs. 30 lakhs. The said deposit was made on 23.12.2015. Respondents had applied for appointment as a dealer at Pune and the petitioner in reply to the said application sent a letter dated 20.2.2016 informing the respondents of its approval subject to certain

conditions set out in the said letter. The agreement was duly sent to the respondent in February, 2016 for signatures and attestation. The same was however, never returned but the respondent acted on the Dealership Agreement. On the in principal agreement between the parties the petitioner even dispatched vehicles and spare parts to respondent No. 1 and the latter was also dealing with the general public as the authorized dealer of the petitioner. In fact, between 04.04.2016 to 09.05.2017 the petitioner sold and dispatched 1204 vehicles in terms of the agreement along with spare parts. The respondents also availed a concession on sale tax at the time of invoicing the vehicle and made payment on reduced amounts on the assurance that necessary Sales Tax, Declaration C-form will be submitted to the petitioner.

4. Learned senior counsel submits that contrary to the commitments made, the respondents failed in furnishing the necessary C-forms which is a statutory requirement, though they have availed a total concession of Rs. 2,32,26,492/-. Learned senior counsel further submits that several meetings took place between the parties to resolve this issue but the respondents did not fulfil their obligations and hence the petitioner terminated the agreement with effect from 25.01.2018. Thereafter, a legal notice dated 16.10.2018 was sent by the petitioner but there was no reply.

5. Learned senior counsel for the petitioner thus submits that a Dealership Agreement was entered into between the parties, although he fairly admits that Agreement was not signed by the parties. He, however, relies on Section 7 (4) (b) of the Act, to argue that even if the Arbitration Agreement is not signed between the parties but there are letters or telex or any other correspondence exchanged between the parties, which reflects such an Agreement then it is considered to be an agreement in writing and is an Arbitration Agreement. He submits that there is an Arbitration Clause in the said agreement which reads as under:-

"If any difference or dispute, except a dispute pertaining to termination, shall arise between the parties hereto as to the construction or true intent and meaning of any of the terms and conditions herein contained or as to any payment to be made in pursuance hereof or as to any other matter arising out of or connected with or incidental to these presents or as to the rights, duties and obligation of either party such difference or dispute whenever and so often as the same shall arise, shall be referred to arbitration to be conducted at New Delhi in accordance with the Indian Arbitration and Conciliation Act, 1996 and the rules framed there under for the time being in force and the award in pursuance thereof shall be binding on the parties".

6. Learned senior counsel for the petitioner has drawn the attention of this Court to a letter dated 20.02.2016 whereby the parties had agreed to enter into a Dealership Agreement. Relevant para of the letter reads as under:-

1. Security Deposit of RS. 30 Lacs (Rupees Thirty Lacs) has been submitted to

MSIL.

2. For DMS roll out, training & Link integration at showrooms and workshops, a Demand Draft of Rs 1,14,500 (Rupees One Lakh Fourteen Thousand and Five Hundred Only) in favor of 'Hewlett Packard Enterprise India Pvt Ltd.' payable at Bangalore, along with duly signed and stamped purchase order and undertaking should reach the undersigned by 27th February 2016. A one time cost of Rs.75,000 plus tax for each setup shall be charged from the dealership towards hardware installation & infrastructure.

3. Duly Signed Action Plan, as enclosed should be submitted by 27th February 2016.

4. The approved Showroom, bodyshop and service workshop with 5 Bays only will be located at Gat no:- 1337/1, Wagholi, Pune Nagar Road, Pune. The copy of lease deed of the proposed showroom setup has already been submitted to MSIL. The undertaking from the property owners on the extension of the existing lease deed with the new company proposed for MSIL business should be submitted by 27th February 2016.

5. The approved True Value setup will be located at showroom no: 5, Mayfair towers, Wakedawadi, Pune. The copy of lease deed of the proposed True Value showroom setup has already been submitted to MSIL. The undertaking from the property owners on the extension of the existing lease deed with the new company proposed for MSIL business should be submitted by 27th February 2016.

7. Learned senior counsel for the petitioner has also drawn the attention of this Court to Minutes of Meeting dated 09.10.2017. The meeting was held jointly between the parties and the minutes clearly refer to the Dealership Agreement. Relevant para are reads as under:-

"Option 3: MSIL may take decision based on terms and conditions of Dealer agreement."

8. Minutes of Meeting dated 8.11.2017 have also been placed on record. This meeting was held between the official of the petitioner and Shri Ashish Mittal, the Director of the respondent as well as its two other shareholders. The minutes indicate that the respondent had admitted that some obligations under the contract were not fulfilled on account of some internal family issues and it had proposed that the respondent be allowed to continue the dealership operations. In fact, there is a reference to the Dealership Agreement in several other parts of the Minutes. Relevant part is extracted hereinunder:-

"Mr. Ashish Mittal accepted that all the above points mentioned were not fulfilled as per commitment given in past. Also there are internal family issue going on due to which Dealership operations were hampered. Mr. Ashish Mittal committed that in next 15 days he will infuse Rs. 5.00 Cr to clear all statutory compliance and also part of Financer over-dues.

However considering past failure in fulfilling commitment and in view of above situation MSIL will be initiating necessary action as per Dealership agreement.

Mrs Mittal and Ms Kavita Mittal proposed that they be allowed to continue dealership operations and buy Mr. Ashish Mittal shares subject to Mr. Ashish Mittal clearing all the liability part on Dealership as on date. MSIL clarified that they may submit a proposal to MSIL regarding the change in shareholding pattern. However, considering that the proposal involves the exit of the main applicant, the process of due diligence regarding financial and operational capability of the proposed shareholders will have to be carried out by MSIL as in done for a new party."

9. Petitioner had also sent an Invocation Notice dated 26.12.2018 in terms of Clause 7.2.1 of the agreement which is the arbitration clause to which there has been no response. Learned senior counsel for the petitioner submits that notice has been duly served on the respondents.

10. I have the learned senior counsel for the petitioner.

11. Section 7 of the Act reads as under:-

7 Arbitration agreement. -

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

12. Section 7 (1) defines an Arbitration Agreement. As per Section 7 (3) the Arbitration Agreement has to be in writing. Section 7(4) provides that an Agreement is in writing, either (a) if it is signed by the parties or (b) it is contained in any exchange of letters or any correspondence etc. between the

parties. Thus, even if the agreement is not signed by any or both the parties, but is in writing, it may still be an Arbitration Agreement if it is contained in any correspondence exchange between the parties.

13. The Supreme Court in the case of M.R. Engineers and Contractors Private Limited Vs. Som Datt Builders Limited (2009) 7 SCC 696 has held as under:-

21. After referring to the view of Sir John Megaw in Aughton Ltd. v. M.F. Kent Services Ltd. [(1991) 57 BLR 1] that specific words were necessary to incorporate an arbitration clause and that the reference in a sub-contract to another contract's terms and conditions would not suffice to incorporate the arbitration clause into the sub-contract, followed in Barrett & Son (Brickwork) Ltd. v. Henry Boot Management Ltd., Trygg Hansa Insurance Co. Ltd. v. Equitas Ltd. and AIG Europe (UK) Ltd. v. Ethniki and Sea Trade Maritime Corpn. v. Hellenic Mutual War Risks Assn. (Bermuda) Ltd. No. 2, Russell concludes:

"The current position therefore seems to be that if the arbitration agreement is incorporated from a standard form a general reference to those terms is sufficient, but at least in the case of reference to a non-standard form contract in the context of construction and reinsurance contracts and bills of lading a specific reference to the arbitration agreement is necessary."

"24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration

agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties."

14. In *Inox Wind Limited vs. Thermocables Limited* (2018) 2 SCC 519, the Supreme Court has while examining the existence of an arbitration agreement, held that the arbitration clause in an earlier contract cannot be incorporated by a general reference. The Court has in para 18 reiterated the position of law in *M.R. Engineers and Contractors Private Limited* (supra) and observed that the Court was in agreement with the judgment in *M.R. Engineers and Contractors Private Limited* (supra). Para 18 is reproduced as under:-

18. We are of the opinion that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. In *M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.]*, (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. In view of the development of law after the judgment in *M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.]*, (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from *Russell on Arbitration*, 24th Edn. (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in *M.R. Engineers* case [*M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.]*, (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] . We are in agreement with the judgment in *M.R. Engineers* case [*M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.]*, (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the

arbitration clause.

15. I have examined the various documents referred to by the petitioner. It is clear that a Dealership Agreement was entered into between the parties, although the same was not signed. The Minutes of Meetings refer to above as well as the correspondence exchanged between the parties contemporaneously clearly indicate that on several occasions this Dealership Agreement was referred to and relied upon and more importantly acted upon. In fact, in one of the meetings, the respondents had also admitted to their failure to abide by the commitments in term of the Dealership Agreement owing to certain internal family issues. Thus, the said agreement is an Arbitration Agreement by virtue of the provisions of Section 7 (4) (b) of the Act as held by the Supreme Court in M.R. Engineers and Contractors Private Limited (supra) and Inox Wind Limited (Supra).

16. The Dealership Agreement contains an arbitration clause as extracted above. Thus, in my view there is an existing and valid Arbitration Agreement between the parties and the present petition is maintainable. The respondents have been duly served but have chosen not to contest the matter. In the absence of any rebuttal, the pleadings and the documents relied upon by the learned senior counsel are unrebutted.

17. While deciding the petition under Section 11(6) of the Act, the Court is only required to examine the existence of a valid Arbitration Agreement, in terms of Section 11 (6A) of the Act. Supreme Court in a recent decision in the case of Mayavti Trading Pvt.Ltd. Vs. Pradyut Deb Burman 2019 SCC OnLine SC 1164 has held as under:-

"10) This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (Supra) - see paras 48 & 59.

11) We, therefore, overrule the judgment in United India Insurance Company Limited (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above."

Thus in my view the present petition deserves to be allowed.

18. Thus, in my view the present petition deserves to be allowed.

19. Mr. Ravi Kant Chadha, Senior Advocate is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

20. The address and mobile number of the learned Arbitrator is as under:

Mr. Ravi Kant Chadha, Senior Advocate
Chamber No. 161, Lawyer's Chamber,
Delhi High Court, New Delhi-110503
Mobile: 9811024601, 9711176545

21. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

22. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

23. Petition is allowed in the aforesaid terms.