2024:DHC:1043

$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON –21.12.2023
PRONOUNCED ON – 29.01.2024

\+ ARB.P. 1166/2022, I.As. 16744-46/2022, I.A. 610/2023

ARUNIMA AUTOMOBILES THROUGH ITS PARTNERS SUDHAKAR SINHA AND PRAVEER SINHA ..... Petitioner

Through: Dr. Amit George, Mr.Shubham Mishra, Mr. Rishav Ranjan, Mr. Rayadurgam Bharat, Mr. Shashwat Kabi, Mr. Vaibhav Shahi, Ms. Vineeta Singh, Mr. Nikhil Kumar, Ms.Prashita Mishra, Mr. Divyansh Rai, Advs.

Versus

MARUTI UDYOG LIMITED NOW MARUTI SUZUKI INDIAN LIMITED ..... Respondent

Through: Mr.T.K.Ganju, Sr. Adv. with Mr.Aquib Ali, Mr. Anish Lakhan Pal, Ms. A. KHaliq, Ms. Vanshika Rana, Mr. Shahnawaz, Advs.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J:

1. The present petition has been filed under Section 11 of the Arbitration

and Conciliation Act, 1996 (the "A&C Act") seeking appointment of an independent sole arbitrator to adjudicate the disputes interse arising between the parties pertaining to the MASS agreement (Maruti Authorised Service Station agreement) dated 01.04.2004.

2. Briefly stated the facts of the case are that in the year 2003, the respondent issued an invitation to apply for Maruti Authorised Service Station at Anpara, District Sonbhadra, U.P, which was advertised to the general public by the respondent. The petitioner applied to the invitation and finally issued a letter of intent dated 21.11.2003 in favour of "Jai Mata Di Construction Engineers and Builders"s, which was a proprietorship firm managed by the partners of the petitioner's firm. Pursuant to which was petitioner was offered with Maruti authorised service station subject to fulfilling certain conditions which included huge investment in the form of land, building, plant, machinery, deposits and several other accounts. The petitioner submitted that after all the terms and conditions contained in the letter of intent dated 21.11.2003 were fulfilled and after the creation of the partnership firm namely Arunima Automobiles, the respondent issued a letter of appointment dated 31.03.2004 in favour of Arunima Automobiles. On 01.04.2004, the parties signed and executed an agreement titled 'MASS Agreement' containing all the terms and conditions. It was for a period of three years and further renewal for any such period on mutual consent. However,the respondent vide communication dated 15.09.2005 alleging violation of clauses 5.9 and 5.18 of the agreement dated 01.04.2004 cancelled the agreement even without serving one month notice which was required under the provision of Clause 11 of the Mass Agreement. For ready

reference clauses 5.9 and 5.18 are reproduced as under:

> 5.9. The MASS shall abide by such administrative and other instructions/procedures as may be prescribed by the company from time to time.
>
> 5.18. The MASS will not charge for spare parts higher than the authorized retail price approved by the company from time to time. The MASS can add only recoverable taxes to the price. The MASS is; however, free to charge for spare parts at a price lower than the authorized retail price approved by the company. MASS understands that profiteering or charging for spare parts at price higher than authorized retail price will entail termination of the agreement. The MASS will not indulge in any unfair practice, which may be forbidden by law or is against the public policy or law of the country."

3. Consequently, the petitioner protested the said coercive step taken by the respondent vide communication dated 08.10.2005. However, the respondent did not relent despite a communication dated 08.08.2006 whereby the petitioner refuted all the allegations level against him to re-consider the MASS agreement.
4. The petitioner thereafter with an objective to explore different business options created a private limited company namely Arunima Automobiles Private Limited making themselves a director of the companies.All the directors were the stakeholders of the partnership firm also and they all tried to manage the future affairs of the firm in the name of Arunima Automobiles Private

Limited. The petitioner stated that the existing partnership was not dissolved and the formation of the company was duly informed to the respondent vide letter dated 06.09.2006 and thereafter all the communication between the parties was in the name of Arunima Automobiles Private Limited.

5. Ssubsequently, the petitioner made various representations to the respondent regarding the sudden cancellation of the agreement and left with no option, the petitioner sent a legal notice dated 08.02.2007 as per clause 13 of the MASS agreement seeking appointment of an arbitrator, followed by the petitioner filing Arb. P 99/2007 wherein vide judgement dated 02.07.2007. Justice K. Ramamoorthy (Rtd.) was appointed as an arbitrator to adjudicate upon the existing dispute between the parties.
6. Learned counsel for the **petitioner** submits that the Petitioner had incorporated the company, Arunima Automobiles Pvt. Ltd. on 19.07.2006 and the purpose behind the setting up of the company was to carry on future business in the name of the company and for that the petitioner had entered into an Agreement dated21.06.2006. Learned counsel for the petitioner also submits that it is an admitted position that no formal deed of dissolution nor an intimation of dissolution was filed with the Registrar of firms and therefore, the petitioner continued in legal existence as an entity under the Indian Partnership Act,1932
7. Learned Counsel for the petitioner submitted that pursuant to the same Arunima Automobiles Private Limited being a claimant filed a statement of claim on 15.11.2007.However, the learned tribunal

rejected all the claims vide award dated 19.03.2022 stating that the dispute is non-arbitral and claims are not maintainable.

8. Learned Counsel for the petitioner submitted that the learned arbitrator *inter alia* held that the claims as non-maintainable and non-arbitrable as the claimant i.e. Arunima Automobiles Private Limited had no locus to claim any amount from the respondent as the dispute arising by virtue of MASS agreement dated 01.04.2004 was between Arunima Automobiles Partnership firm and the respondent. The petitioner stated that the reason for such a conclusion was that the agreement was non-assignable/non-transferrable and hence Arunima Automobiles Private Limited has no claim against the respondent.
9. Learned counsel for the petitioner also submits that the petition was filed before this court under Section 11 by Arunima Automobiles Private Limited and all the claims were made through Arunima Automobiles Private Limited. Learned Counsel for the petitioner has further submitted that at the time of termination of the MASS agreement, the petitioner was a partnership firm and there was no change in the constitution of the entity and therefore rejection of all claims of the petitioner by the learned arbitrator on the ground that the MASS agreement was non-assignable/non-transferrable is incorrect as the MASS agreement had not been assigned/transferred in favour of any third party.
10. Learned counsel for the petitioner further submitted that after the award the partnership firm i.e. the petitioner being the correct entity issued a letter dated 14.05.2022 calling upon the respondent

to appoint an arbitrator in terms of clause 13 of the MASS agreement. However, the respondent vide their reply dated 08.06.2022 denied the same.

11. It has been also submitted that all the claims of the petitioner are within the limitation as in the year 2007 the petitioner had approached this court for seeking the appointment of an arbitrator. The arbitrator was appointed on 02.07.2007.The statement of claim was filed on 15.11.2007 and after 15 years on 19.03.2022, an award was passed whereby all the claims were rejected. It has been submitted that the time of 15 years would not be relevant for the purpose of limitation as the dispute was under adjudication before the learned arbitration tribunal.

12. It has been submitted that the initiation of limitation has to be counted from the date of the second and recent refusal of appointment of an arbitrator by the respondent dated 08.06.2022 and thus the present petition is within the period of limitation. The petitioner has referred to Section 43 of the Arbitration and Conciliation Act and Section 14 of the Limitation Act.

13. Learned counsel for the petitioner also submits that the earlier invocation of the arbitration clause by the petitioner was done in good faith and if at all the time of 15 years has to be considered then the limitation on the present petition can be excluded as per Section 14 of the Limitation Act, 1963. Learned counsel for the petitioner also submits that in the award dated 19.03.2022, the learned arbitrator has inter alia held that the agreement dated

01.04.2004 was not executed between the parties to the dispute and therefore the dispute was non-arbitrable.

14. Learned counsel for the petitioner also submits that the Company was incorporated by the same stakeholders of the Petitioner firm and all the management was being controlled and operated by the directors of the Company who are also the partners in the Petitioner. Hence, Section 14 of the Limitation Act, 1963 very much has application in as much as the arbitration proceedings conducted by the Company. It has been also submitted that unregistered partnership firms can invoke an arbitration clause and is not barred under section 69 of the Partnership Act, reliance has been placed upon ***Umesh Goel v. Himanchal Pradesh Cooperative Group Housing Society Ltd.*** 2016 11 SCC313.

15. Lastly, learned counsel for the petitioner submits that thus, had it been the Arunima Automobiles i.e. the partnership firm which was a party to the dispute then the dispute must have been adjudicated on merits. It has been submitted that the dispute has yet not been adjudicated on merits and therefore keeping in the spirit of the law the matter is required to be referred to the arbitration.

16. Learned counsel for the **respondent** has vehemently opposed all the contention raised by the petitioner and has submitted that the present petition is not maintainable in view of the express provision under Section 69 of the Indian Partnership Act as neither the petitioner has claimed to be duly registered with the Registrar of Firms nor registration certification has been filed along with the present petition. It has further been submitted that no document

has been placed on record to show that the petitioner firm is still in existence and carrying out business in its name.

17. Learned counsel for the respondent also stated that there is no document on record to show that other partners have taken a unanimous decision to initiate the present proceedings. It has been submitted that as per Section 19 of the Indian Partnership Act, an express authority of all the partners is required for initiating an arbitration proceedings. It has been submitted that no such material has been placed on record.

18. Learned counsel for the respondent submitted the present petition is badly barred by limitation and is liable to be dismissed out rightly. It has been submitted that reliance on Section 14 is misconceived as the first requirement of Section 14 of the Limitation Act is that the same party has been prosecuting with due diligence another civil proceeding in good faith and such proceedings were/are not maintainable due to defect of the jurisdiction or other causes of like nature. The respondent submitted that none of the conditions as required under Section 14 are fulfilled.

19. Learned counsel for the Respondent also submits that the plea of the limitation is covered by the Hon'ble Apex court in ***Bharat Sanchar Nigam Ltd and Anrvs Nortel India Pvt. Ltd*** (2021) 5 SCC 738 wherein it was held that in a case where the claims are ex facie time-barred by over 5 and a half years, the samewas rejected being time-barred. Similarly, in the present case, the application under Section 11 has been filed after a period of 15 years as it has

been filed in the year 2022 in reference to the dispute raised in the year 2006.

20. Learned counsel for the respondent also submitted that M/S Arunima Automobiles Pvt Ltd. have not challenged the impugned award dated19.03.2022 under section 34 of the A&C Act, nor have they filed civil suit but instead they have filed a petition under section 11 of the Act seeking appointment of an arbitrator with respect to the same MASS Agreement dated01.04.2004 which was executed between the Respondent and M/S Arunima Automobiles. Learned counsel further submits that the aforesaid firm has been dissolved and does not exist and therefore all the assets and the liabilities, including benefits under all subsisting contracts of the erstwhile partnership firm was taken over by the newly formed private limited company i.e. M/S Arunima Automobiles Pvt Ltd.
21. Learned counsel for the respondent further submitted that Arunima Automobiles Pvt. Ltd. has invoked the arbitration clause which is a separate entity registered under the provisions of the Companies Act, 1956. It has been further submitted that it cannot be said that the same had been carried out in due diligence and good faith. It has been submitted that even the witnesses before the arbitral tribunal took a contrary stand regarding the dissolution of the partnership firm.
22. Learned counsel for the respondent has further submitted that Arunima Automobiles as a partnership firm is not in existence and has been converted into a private limited company as per the evidence recorded before the learned arbitration tribunal and

reproduced by the learned arbitrator tribunal in para 22.2 of the award. It has been also submitted that the learned arbitral tribunal has rightly rejected the claim on the ground that since the partnership firm has been converted into a private company, it is in violation of the contract which stipulated that the contract was not assignable. It has been stated that therefore the partnership firm cannot be allowed to again initiate the arbitration proceedings.

23. It has been submitted that the learned arbitral tribunal has even otherwise rejected the claim of the petitioner on merits also. The averments made in the rejoinder on the merits of the case have also been denied by the respondent.Hence, the present petition is liable to be dismissed.

FINDINGS AND ANALYSIS

24. The facts which are not disputed are that initially the agreement was executed between a partnership firm Arunima Automobiles and the respondent.

25. It is necessary to refer to clauses 3.1 of the agreement which provides as under:

> "3. ASSIGNMENT PROHIBITED
>
> 3.1. The MASS shall not assign or sub-contract or licence/ sub-licence this agreement or any part thereof or any rights, claims, interest or obligation there under without the prior written consent of the Company."
>
> 5.18. The MASS will not charge for spare parts higher than the authorized retail price approved by the company from time to time. The MASS can add only recoverable taxes to the price. The MASS is; however, free to charge for spare parts at a price lower than the authorized retail price approved by the company. MASS

understands that profiteering or charging for spare parts at price higher than authorized retail price will entail termination of the agreement. The MASS will not indulge in any unfair practice, which may be forbidden by law or is against the public policy or law of the country."

11. TERMINATION OF AGREEMENT

11.1 This agreement shall remain and continue in force and govern all transaction between the parties hereto until cancelled or terminated in the manner hereinafter expressed. Notwithstanding the provision of any clause hereof, either party may be giving the other 10 days notice in writing terminate this agreement without assigning any cause.

11.2 The agreement may be terminated if there is violation of any terms and condition of this agreement on one month's notice, if within the said one month and breach complained of is not set right or remedied. "

12. JURISDICTION

This agreement shall be construed as having been executed in the city of DELHI and it is agreed that the rights and liabilities of the parties hereto their executers, administrators, successors and assignees in case of dispute arise shall be referred the Courts of DELHI and shall be construed according to the law for the time being in force in the City of Delhi.

26. Similarly, clause 11 provides termination of the agreement. The contract was terminated by the respondent vide notice dated 15.09.2005. It is not disputed that subsequently the firm was converted into Arunima Automobiles Pvt. Ltd. and the earlier petition under Section 11 was filed by Arunima Automobiles Pvt. Ltd. against the respondent. The claim was also prosecuted by the Private Limited Company i.e. Arunima Automobiles Pvt. Ltd. The

learned arbitrator vide the award dated 19.03.2022 has *inter alia* held as under:

> *26. In the instant case, the Ld. Senior Counsel for the respondent relied upon Clause 3.1 of the MASS agreement and said the Contract was not assignable and therefore the claimant who is an assignee is not competent to maintain the claim petition. Clause 3.1 reads as under:*
>
> *"3.1. The MASS shall not assign or subcontract or licence/sublicense this agreement or any part thereof or any rights, claims, interest or obligation there under without the prior written consent of the company. "*
>
> *27. Deepak Dhingra, Ld. Counsel for the claimant submitted that the respondent did not raise any objection of this type before the High Court when it decided Section 11 application and the present Arbitral Tribunal was constituted and therefore it is estopped from raising this question before the Tribunal. Incidentally, he also refer to the application filed by the respondent on 12.01.2016. This very point was vehemently argued before the Supreme Court in the Constitutional Bench. The Supreme Court repelled the contention holding:*
>
> *"14(2) It is next contended for the appellants that evenifcl.14 should be held to be inoperative by reason of the fact that the dispute is one relating to the validity of the contract, the respondents are stopped from now challenging the award on that ground, because they appeared before the arbitrators and took part in the proceedings before them. The decision in Ex parte Wyld,(1860) 30 U Bcy 10, is relied on in support of this contention. In that case, a dispute between an assignee in bankruptcy and a creditor, Mr. Wyld,was referred to arbitration on the basis of an agreement in writing between them. An award having been pronounced against Mr. Wyld, he disputed its validity on the*

ground that the assignee had not obtained the leave of the Court for entering into the arbitration. In rejecting this contention, the Court observed that under the law the agreement was binding on Mr. Wyld even though the leave of the Court was not obtained and that therefore he was not entitled to take this objection based on the informality of the submission as he had himself acted on it. This decision is clearly of no assistance to the appellants because there was a valid and subsisting submission, on which the jurisdiction ofthe arbitrators to hear the dispute was complete, and that was not affected by the failure of the assignee to obtain the requisite leave, because that was a matter between him and the Court. But here if the agreement dated September 7,1955, is void then there was no submission which was alive on which the arbitrators could act and the proceedings before them would be wholly without jurisdiction. If there had been another arbitration agreement apart from and independent of CI.14 of the contract dated September 7, 1955, it might have been possible to sustain the proceedings before the arbitrators as referable to that agreement. But none such has been set up or proved in the present case. All that is alleged is that the respondents acquiesced in the proceedings. But what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement as defined in S.2(a) of the Arbitration Act and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. It may also be mentioned that the decision in (1860) 30U Bey 10 has been understood as an authority for the position that when one of the parties to the submission is under a disability that will not be aground on which the other party can dispute the award if he was aware of it. Vide Russel on Arbitration, 16th Edition, 320. We are therefore unable to

accept the contention of Mr. Sanyal, hat the respondents are estopped by their conduct from questioning the validity of theaward."

28. *In the light of this, the point raised by the Ld. Senior Counsel, Mr. T. K. Ganju has considerable force and Iaccept the same.*

29. *Ld. Sr. Counsel for the respondent further argued that the agreement provided for cancellation on two counts.*

First is that it can be on the happening of any certain specific events, and

Second it can be done without assigning any reason on giving notice.

30. *The Ld. Senior Counsel submitted that in any event the claimant cannot call in question, the contractual provision conferring right on the respondent to terminate the agreement without assigning any reasons and the claimant if at all would be entitled to only the compensation for the notice period.*

31. *The Ld. Senior Counsel relied upon the Judgment passed by the three-judge Bench of the Supreme Court of India in Indian Oil Corporation Vs. Amritsar Gas Service &ors., 1991 (1) SCC Pg.533*

31.1. It is not necessary to burden the Award with the facts the case.

31.2. The ratio covers the point raised by Ld. Senior Counsel for the respondent.

32. The Ld. Senior Counsel relied upon the Judgment passed by the Delhi High Court in IOCL Vs. Shriram Gas Service,1995 (57) DLT 279 following the Judgment of the Supreme Court in Indian Oil Corporation, 1991(1) SCC 533.

33. The Delhi High Court in Sainath Enterprises Vs.NDMC &Ors., 2015 (224) DLT 586 followed 1991(1)SCC 533.

34. The High Court took the view that the aggrieved party can claim only compensation only for the period of notice.

35. The Ld, Senior Counsel further referred to the Judgement of the Delhi High Court in Naresh Kumar Vs. Hiroshi Maniwa, 224 (2015) DLT 586 that is withreference to suit for damages on account of termination by an employee and therefore it is not necessary to consider this case.

36. The Ld. Sr. Counsel, further cited Sethi Construction Company Vs. Chairman & MD, NTPC & Anr., 2002 (65)DRJ 732. In that case Delhi High Court was dealing with an application under Section 8 and 11 of the1996, Act. Following the dictum in AIR 1962 SC 1810,the Delhi High Court held that there was no privity of contract between the applicant and respondent and dismissed the same.

37. In the light of the settled legal position, the claimant has no right to make any claims against the respondent as the disputes are not arbitrable and i hold that the claims of the claimant are not maintainable. Accordingly, points No.5 & 6 are decided against the claimant and in favour of the respondent.

38. In view of the above, I will not be justified in going into Points No.1 to 4.

39. In fine, the Award is passed:

A. Rejecting the Claims of the claimant.

B. Rejecting the counter claims of the respondent.

C. Directing the parties to bear their respective costs.

The award is prepared in quadruplicate. Each award is engrossed on RS.l00/- non-judicial stamp paper.

27. The bare perusal of the aforesaid findings made by the learned arbitrator makes it clear that the learned arbitrator has gone into all the

material questions and has passed the detailed award dated 19.03.2022. It is also necessary to refer to the formation agreement to convert a partnership firm into a private limited company dated 21.06.2006. Clause 11 of the said agreement reads as under:

> "11. After the business of the said partnership is assigned to the company as aforesaid, the said partnership will be treated as dissolved and no party will pe liable to pay any amount to the other in respect of such partnership. It is, however agreed that if any of the creditors does not accept the company as debtor for the amount, due to him on any account, the amount due to such creditor or creditors will be payable and paid by the parties hereto in proportion of their respective shares in the partnership and the valuation of the said business will be increased to that extent. The consent of the creditors to the transfer of the liability of the partnership to the company will be obtained before the transfer of the business to the company. A formal Deed of Dissolution will be executed by the parties and intimation of dissolution will be filed with the Registrar of Firms and advertised as required by law."

28. Thus, even as per the documents of the petitioner itself the partnership firm M/S Arunima Automobiles has already been dissolved and did not remain in existence after the Arunima Automobiles Private Limited was formed. This plea was earlier also taken by Arunima Automobiles Private Limited when the Arbitration Petition No. 99/2007 was filed under Section 11 and the matter was referred to the learned arbitrator. It is also advantageous to mention that even in the claim petition filed before the learned arbitrator, Arunima Automobiles Private Limited had taken a plea that it is a successor in interest of the partnership firm and

the partnership firm had been converted into a private limited company in the year 2006. It is also pertinent to mention here that in a reply to the application filed under Section 32 (2-C) of the Arbitration and Conciliation Act, 1996, Arunima Automobiles Private Limited specifically stated as under:

> "….it is denied that that partnership firm is still in existence and was never converted into a Private Limited Company. It is also denied that Arunima Automobiles, the partnership firm is a different legal identity. It is reiterated that Arunima Automobiles was a Partnership firm as on 31.03.2004 and the partnership firm was converted to private limited company only in the year 2006, after the termination of contract of MASS. The intimation of this constitutional change therefore does not arise. It is also denied that the Claimant Company is alien to the said agreement of MASS. It is duly submitted that the partnership firm Arunima Automobiles was dissolved and a new Company under the name and title of Arunima Automobiles Private Limited was incorporated under the provisions of Companies Act, which took over the business of the partnership firm. The partnership firm was accordingly converted into a Private Limited Company."

29. It is also relevant to mention that no objection under Section 34 has been filed by the petitioner challenging the interim award.

30. I consider that there is no substance in the contentions being taken by the petitioner. The partnership firm was earlier converted into a private limited company and the conversion itself is in violation of the terms of the MASS agreement dated 1st April 2004 and even thereafter, Arunima Automobiles Private Limited company filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 and followed

the same for 15 years before the learned arbitrator and the present petition has been filed only after the learned arbitrator rejected all the claims of the petitioner. The present petition has been filed in the name of the partnership firm and it is pertinent to mention that if the partnership firm had already been dissolved and ceased to exist then it is beyond comprehension that how the present petition has been filed. Apparently, the present petition is nothing but an abuse of the process of the court and a sheer attempt to prosecute the ex-facia deadwood or the time-barred claim.

31. I do not find any merit in the contention of the petitioner, hence the petition along with all the pending applications is dismissed.

DINESH KUMAR SHARMA, J

JANUARY 29, 2024
rb/ak