

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

+ *Reserved on: 20th May, 2019*
Pronounced on: 9th July, 2019

+ **ARB.P. 163/2019**

LIBRA AUTOMOTIVES PRIVATE LIMITED Petitioner

Through: Mr. Vinam Gupta and Mr. Arjit
Oswal, Advs.

versus

BMW INDIA PRIVATE LIMITED & ANR. Respondents

Through: Mr. Dayan Krishnan, Sr. Adv. With
Mr. Diwakar Maheshwari, Mr. Karun
Mehta and Mr. Yugam Taneja, Advs.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. The present Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been filed seeking appointment of a sole Arbitrator for adjudicating the disputes alleged to have arisen under the Agreements executed between the Petitioner and Respondent Nos. 1 and 2.

Brief Background

2. The Petitioner is a company incorporated under the Companies Act, 1956 and has been engaged in the business of purchasing and selling BMW automobiles and associated products ("BMW Group products") under various agreements with the Respondents.

3. Respondent No.1, BMW India Private Limited ("BMW India"), is engaged in the business of manufacturing, assembling, wholesaling cars to various dealers on principal to principal basis and authorizing them to sell BMW Group Products to end customers.

4. Respondent No. 2, BMW India Financial Services Private Limited is licensed as a Non-Banking Financial Corporation under the Reserve Bank of India Act, 1934. It provides financing services to the dealers appointed by Respondent No.1, for the purposes of establishing and running its dealership business.

5. The relevant facts are that Petitioner was appointed as a dealer of the BMW Group Products in terms of various agreements executed between the Petitioner and the Respondent Nos. 1 and 2, including the Principal dealership agreement dated 1st January 2018 executed between the Petitioner and Respondent No. 1 ("Dealership Agreement"). In addition to the Dealership Agreement, Petitioner has also executed the following ancillary agreements with Respondent No. 1:

(i) Novation dated 12th April 2016, to the Letter of Intent dated 21st December 2015 ("Novated LoI");

(ii) Interim Dealer Agreement dated 19th May 2016 ("Interim Dealer Agreement") extended on 13th January 2017 till 31st March 2017.

(iii) Deferred Payment Facility Agreement dated 21st June 2016 ("DPA");
and

(iv) Hypothecation Deed dated 20th June 2016.

6. Apart from above mentioned agreements executed with Respondent No. 1, Petitioner has also entered into financing agreements with Respondent No. 2 for the purposes of carrying out its exclusive business of dealership in BMW Group Products. The details of such agreements are:

- (i) Floorplan Financing Agreement dated 21st June 2016 ("Floor Agreement");
- (ii) Spare Parts Financing Agreement dated 11th July 2016 ("Spare Agreement"); and
- (iii) Hypothecation Deeds dated 21st June 2016 and 11th July 2016 ("Hypothecation Deeds").

These agreements executed between the Parties are collectively referred to as "the Agreements".

7. In accordance with the terms of the Agreements, Petitioner furnished a bank guarantee dated 21st June 2016 worth INR 7 Crores ("Bank Guarantee"), jointly in favour of Respondent Nos. 1 and 2. This was later extended vide letters dated 14th June 2017 and 21st June 2018 and subsequently the Bank Guarantee was encashed on 2nd November 2018.

8. The limited prayer in the present petition is for appointment of a Sole Arbitrator for adjudication of the disputes that have arisen between the Petitioner and the Respondents in relation with the Agreements. Petitioner contends that the Respondents have acted in a totally unfair and whimsical

manner in the performance of the Agreements and have committed breaches having failed to adhere to the terms of the Agreements. The demands raised by Respondents are unreasonable and unsubstantiated. The Petitioner has invoked the arbitration clause under the Agreements, vide letter dated 24th January 2019 and 28th January 2019 and has requested the Respondents to either agree to appointment of a common Arbitrator to decide all the disputes in a tripartite arbitration or approach the Delhi International Arbitration Centre for appointment of a sole Arbitrator. Despite the receipt of the notice, the Respondents have failed to convey their consent/objection for the appointment of the Arbitrator, thereby constraining the Petitioner to approach this Court by way of present petition.

Findings and Analysis

9. The present petition is wholly misconceived and untenable in law for the reasons discussed hereinafter.

10. The relationship between the Petitioner and Respondents is not in dispute. It is also not in controversy that disputes and differences have arisen between the parties, inasmuch as Respondent Nos. 1 and 2 have filed Petitions under Section 9 of the Act being a) O.M.P. (I) (COMM) No. 25 of 2019 and b) OMP (I) (COMM) No. 9 of 2019. Both the Parties hold each other responsible for breach of the Agreement and have monetary claims. There is thus no denying of the fact that the parties have to now take recourse to the dispute resolution mechanism for adjudication of their claims and counter claims arising out of or in relation to the Agreements in question. Therefore, the question before the Court is whether the prayer in

the present petition can be allowed in the facts and circumstances of the present case.

11. The factual narrative clearly discloses that there are two separate and distinct set of agreements between the parties. The Petitioner had entered into a Dealership Agreement dated 1st January 2018 only with Respondent No. 1 and in that regard, several other Agreements were executed, as enumerated in para 5 above. For the purpose of financing, Petitioner executed separate and distinct agreements enumerated in para 6 above. The principal financing agreements dated 21st June 2016 and other inter related agreements are executed between the Petitioner and Respondent No. 2 only and Respondent No. 1 is not a party thereto.

12. Significantly, the arbitration clauses in “the agreements” are separate and distinct, and this becomes evident from the following tabulation:-

Agreement	Arbitration Clause
Dealership Agreement (Executed between Petitioner and Respondent No. 1)	<p><i>"13.5.2 Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, effect and interpretation thereof or termination, shall be referred to and <u>finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC")</u> in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.</i></p> <p><i>13.5.2 In deviation to the SIAC Rules, the number of arbitrators shall be three. Each Party shall</i></p>

	<p><i>appoint one arbitrator. The two arbitrators nominated by the parties to the arbitration shall nominate the chairman of the arbitral tribunal. The Emergency Arbitrator Provisions shall not apply. Any compulsory production of documents by a Party shall be limited to the documents on which that Party specifically relies in its submissions. No discovery shall be conducted between the Parties.</i></p> <p><i>13.5.3 All arbitral proceedings I sessions shall be conducted in Delhi. The language of the arbitration proceedings shall be English."</i></p>
<p>Interim Dealer Agreement (Executed between Petitioner and Respondent No. 1)</p>	<p><i>"13.4 Law, jurisdiction and dispute resolution</i> <i>13.4.2 All disputes, difference, disagreements, controversies or claims arising out of or in connection with this Agreement shall be settled amicably through consultation between the Parties. If the Parties fail to reach an amicable settlement within 15 days or a written request for such consultation being served by either Party on the other, all such disputes and differences arising out of or in relation to this Agreement including the validity, effect and interpretation thereof, <u>shall be resolved by Arbitration by three Arbitrators, one each to be appointed by the Parties and the third Arbitrator to be appointed by the two Arbitrators so appointed, or in the absence of agreement between them within 15 days, by the President of the Indian Arbitration Council, Delhi.</u></i></p> <p><i>13.4.3 Arbitration proceedings shall be in English and will be conducted in accordance with the Indian Arbitration and Conciliation act 1996 and the rules made thereunder and/or any amendments thereof (the "Rules").</i></p> <p><i>13.4.4 The <u>arbitration shall be conducted in New Delhi only and the language of the arbitration shall be English.</u></i></p> <p><i>13.4. 6 In connection with the arbitration, the</i></p>

		<p><u>courts at Delhi will have exclusive jurisdiction</u> of enforcement of the Award, and/or applications for interim reliefs. However, BMW may, at its, option, file proceedings in any other court of competent jurisdiction. "</p>
Deferred Payment Facility Agreement (DPA)	between Petitioner and Respondent No. 1)	<p>"18. LAW AND JURISDICTION</p> <p>[. . .]</p> <p>18.2 All disputes, differences, disagreements, controversies or claims arising out of or in connection with this Deferred Payment facility Agreement shall be settled amicable through consultation between the Parties. If the Parties fail to reach an amicable settlement within 15 days of a written request for such consultation being served by either Party on the other, all such disputes and differences arising out of or in relation to this Deferred Payment Facility Agreement, including the validity, effect and interpretation thereof, <u>shall be resolved by Arbitration by three Arbitrators, one each to be appointed by the Parties and the third Arbitrator to be appointed by the two Arbitrators so appointed,</u> or in absence of agreement between them within 15 days, by the President of the Indian Arbitration Council, Delhi.</p> <p>18.3 <u>Arbitration proceedings shall be in English .. and will be conducted in accordance with the Indian Arbitration and Conciliation Act, 1996 and the rules made thereunder and/or any amendments therof (the "Rules").</u></p> <p>18.4 The arbitration shall be conducted in New Delhi only and the language of the arbitration shall be English. "</p>
Floorplan Agreement	between Petitioner and Respondent No. 2)	<p>"ARTICLE 23</p> <p>LIQUIDATED DAMAGES ON DEFAULTED AMOUNTS</p> <p>In case of default in Repayment on their respective due dates, the Dealer shall pay on the defaulted amounts, liquidated damages for the period of default. Liquidated damages shall be payable in the manner and on the due dates specified in Schedule 1.</p>

	"
<p>Spare Agreement (Executed between Petitioner and Respondent No. 2)</p>	<p>"ARTICLE 24 ARBITRATION Any dispute, controversy or claim arising out of or relating to this Financing Agreement or any related agreement or other documents or the validity, interpretation, breach or termination thereof ("Dispute"), including claims seeking redress or asserting rights under applicable law, <u>shall be resolved and finally settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as may be amended from time to time or its re-enactment (the "Arbitration Act")</u>. The Parties consent to a single, consolidated arbitration of all Disputes that may at the time exist. The arbitral tribunal shall be composed of one arbitrator to be appointed by the BMW Financial Services. The arbitration proceedings shall be conducted in the English language and any documents not in English submitted by any party shall be accompanied by an English translation. <u>The arbitration shall be conducted in Delhi/New Delhi. The arbitral tribunal shall determine in dispute in accordance the law of India, without giving effect to any conflict of law rules or other rules that might render such law inapplicable or unavailable, and shall apply this Agreement according to its terms.</u> The Parties agree to be bound by any award or other resulting from any arbitration conducted hereunder. The arbitral tribunal shall award the prevailing party, as determined by such arbitral tribunal, all its costs and fees. For the purpose of this Agreement, the expression 'costs and fees ' shall mean and include all reasonable pre-award expenses of the arbitration including the arbitrator's fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs and lawyers' fees, The Parties hereto agree to be bound by any award or order including the arbitral tribunal in the manner laid out hereinabove. "</p>

<p>Hypothecation Deed dated 20.06.2016 (Executed between Petitioner and Respondent No.1 and 2)</p>	<p>"44. All disputes, differences, disagreements, controversies or claims arising out of or in connection with this Deed shall be settled amicable through consultation between the Parties. If the Parties fail to reach an amicable settlement within 15 days of a written request for such consultation being served by either Party on the other, all such disputes and differences arising out of or in relation to this Deed, including the validity, effect and interpretation thereof, <u>shall be resolved by Arbitration by three Arbitrators, one each to be appointed by the Parties and the third Arbitrator to be appointed by the two Arbitrators so appointed, or in absence of agreement between them within 15 days, by the President of the Indian Arbitration Council, Delhi.</u></p> <p>45. Arbitration proceedings shall be in English and will be conducted in accordance with the Indian Arbitration and Conciliation Act, 1996 and the rules made thereunder and/or any amendments thereof (the "Rules").</p> <p>[.. .]</p> <p>48. In connection with the arbitration, <u>the Courts at Delhi will have exclusive jurisdiction</u> for enforcement of the Award, and/or application for interim reliefs.[...]"</p>
<p>Hypothecation Deed dated 11.07.2016 (Executed between Petitioner and Respondent No.1 and 2)</p>	<p>42. In the event of any dispute or differences arising under this Deed including any dispute as to any amount outstanding, the real meaning or purport hereof ("Dispute") such Dispute shall be finally resolved by arbitration. <u>Such arbitration shall be conducted in accordance with the provisions of the (Indian) Arbitration and Conciliation Act 1996 or any amendment or reenactment thereof by a single arbitrator to be appointed by the Lender. The venue of arbitration shall be at New Delhi and the arbitration shall be conducted in English Language. "</u></p>
<p>Hypothecation Deed dated 21.06.2016 (Executed between</p>	<p>"45. In the event of any dispute or differences arising under this Deed including any dispute as to any amount outstanding, the real meaning or purport hereof ("Dispute") <u>such Dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in</u></p>

Petitioner and Respondent No. 1 and 2)	<u>accordance with the provisions of the (Indian) Arbitration and Conciliation Act 1996 or any amendment or reenactment thereof by a single arbitrator to be appointed by the Lender. The venue of arbitration shall be at as decided by the Lender and the arbitration shall be conducted in English Language. "</u>
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13. The Petitioner contends that the clauses appearing in all the Agreements are different and thus relegating the parties to different Tribunals for adjudication of the same dispute would create an anomalous situation. In this view of the matter, the Petitioner in its notice dated 23rd January 2019, while invoking the arbitration clauses requested the Respondent to agree to a common Arbitrator for deciding all the disputes in a tripartite arbitration or approach the Delhi International Arbitration Centre under the aegis of this Court.

14. Learned counsel for the Petitioner has also argued that there is a nexus between the Agreements. The cars and other BMW products were supplied to the Petitioner under the interim Dealership Agreement dated 19th May 2016 and then under the permanent Dealership Agreement dated 1st January 2018. Such products were financed by both the Respondents under the financing agreements. To show the nexus, learned Counsel also referred to various Clauses of the Agreements indicating that there is a cross reference in the Floor Plan Financing Agreement (FFA) to the Deferred Payment Agreement (DPA). It is further argued that there are interconnecting and overlapping disputes in relation to the various agreements with the Respondents who are group companies and therefore there is a need for a

composite tripartite Arbitration. The disputes between the parties are overlapping and have a common nexus and it would be highly impractical for the Petitioner to raise its grievance or adduce separate evidence before different Tribunals which are mutually exclusive of each other. Further, conducting multiple arbitrations would not be feasible, practical or cost effective and is likely to cause multiplicity of proceedings. In a nutshell, the Petitioner urges that it is imperative that the Petitioner is allowed to raise its grievance before a common Arbitral Tribunal in a composite arbitration.

15. Learned counsel also referred to the different Arbitration Clauses appearing in the Agreements between the parties, tabulated above and argued that conducting separate arbitrations against the two Respondents for the interconnected issues could possibly lead to conflicting awards. This would cause difficulty for the Petitioner to lead evidence on its stand of conspiracy between the Respondents and it would be constrained to pursue the two cases separately. In support of his submissions, Petitioner relied upon the judgment of the Supreme Court in *P.R. Shah, Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594*.

16. The fact that Petitioner was appointed as a Dealer of Respondent No. 1 and that there was a finance arrangement between the Petitioner and Respondent No. 1 and also with Respondent No. 2, for carrying out the business of dealership, no doubt discloses that the agreements were interlinked and interconnected. Thus, the disputes arising under the Agreements could possibly include the interconnected contractual violations, claims relating to encashment of the Bank Guarantee and the termination of

the Dealership Agreement. However, just because there is an element of overlapping disputes between the parties on account of the fact that the agreements are interconnected, cannot be the sole ground for the Court to direct the parties to go for a composite arbitration. In the present scenario this is impermissible. The commercial transaction between the parties have two limbs, a) Dealership Arrangement b) Financing Arrangement, and pertinently for this reason, the Agreements between the parties contain separate and distinct arbitration clauses. The Dealership Agreement dated 1st January 2018, which is the umbrella agreement for the dealership relationship between the parties provides for arbitration administered by the Singapore International Arbitration Centre (SIAC). The said dealership agreement, contract was entered into between Petitioner and Respondent No. 1. In contrast, there is no arbitration agreement under the Floor Plan Financing Agreement, which is the principal agreement for the financing scheme between the parties. The said agreement was entered into between Petitioner and Respondent No. 2.

17. Furthermore, in the Dealership Agreement, Respondent No. 2 is not a party and likewise Respondent No. 1 is not a party to the Financing Agreements. The Arbitration Clauses are only contained in Hypothecation Deeds and Spare part financing agreements. These clauses also provide for a different mechanism for the constitution of the Arbitral Tribunal; The Hypothecation Deed dated 20th June 2016, provides for the Arbitral Tribunal consisting of three Arbitrators. Under the Hypothecation Deed dated 11th July 2016, the parties have agreed for a sole Arbitrator. The same is the situation under the Hypothecation Deed dated 21st June 2016.

18. In this view of the matter, directing the parties to go for a composite arbitration under a sole Arbitrator would amount to rewriting the terms of the dealership agreement agreed between the parties. It can also not be ignored that the invocation of the arbitration agreement is also misconceived. The invocation notice is unspecific and not as per procedure prescribed under the arbitration agreement. Petitioner has not proceeded as per the agreed procedure under any of the Arbitration Agreements. The Petitioner has rather called upon the Respondents to agree to an arbitration mechanism contrary to the agreed procedure prescribed under the Agreement. The invocation is thus contrary to the contract and wholly misconceived.

19. The judgment relied upon by the Petitioner in *P. R Shah* (supra) is also not applicable to the facts of the present case. In the said judgment, the Court had noted that the provision for arbitration as provided in the two arbitration agreements were different. Under one agreement, the dispute arose between the member and a non-member and under the other agreement, dispute was between two members. The Appellant therein, contended that there could not be a common Arbitration with regard to a claim or dispute by a member against another member and a non-member, as under the relevant byelaws, the arbitration mechanism was separate and distinct. However, the Court taking note of the fact that the relevant byelaws of the Bombay Stock Exchange permitted a single arbitration in respect of a members and non-members, upheld the appointment of a composite Arbitral Tribunal.

20. This becomes evident from the following paragraphs of the said judgment:-

“16. The appellant contends that as the provisions for arbitration are different in regard to a dispute between a member and a non-member and in regard to a dispute between two members, there cannot be a common arbitration in regard to a claim or dispute by a member against another member and a non-member. It is pointed out that in regard to the arbitration in the case of a non-member, the reference is to three arbitrators, each party appointing one arbitrator and the Executive Director of the Exchange appointing the third arbitrator, one of the three arbitrators being a non-member (vide Bye-law 249). On the other hand, in the case of a dispute between a member with another member, the matter is referred to the Arbitration Committee of the Exchange and the said Committee will appoint a three-member tribunal, known as the lower Bench (vide Bye-law 285); and in regard to such arbitration between a member and another member, an appeal is available from the lower Bench of the Arbitration Committee to the Arbitration Committee constituted by the governing Board. In the case of a dispute between a member and a non-member, no such institutional appeal is available. The appellant contends that the valuable right of appeal was denied by holding a joint arbitration against the appellant and the second respondent.

18. In this case, the first respondent had a claim for Rs 36,98,354.73 jointly against the second respondent and the appellant. According to the first respondent, it entered into the transaction with the second respondent on the instructions of the appellant and on the understanding that the appellant will also be liable and in fact, the appellant accepting its liability, had also paid Rs 13 lakhs as part-payment. It is not disputed that the appellant and the second respondent were closely held family companies managed by the same person (Ms Kanan C. Sheth). According to the appellant the share holdings in the appellant was Kanan C. Seth: 1,05,000 shares, Chetan M. Sheth: 45,000 shares and Jasumati P. Shah: 1,50,000 shares and the

shareholdings in the second respondent Company was Kanan C. Sheth: 100 shares and Chetan M. Sheth: 100 shares.

19. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. **In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration.**

20. In this case though the arbitration in respect of a non-member is under Bye-law 248 and arbitration in respect of the members is under Bye-law 282, as the Exchange has permitted a single arbitration against both, there could be no impediment for a single arbitration. It is this principle that has been applied by the learned Single Judge, and affirmed by the Division Bench. As the first respondent had a single claim against the second respondent and the appellant and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it is not possible to accept the contention of the appellant that there could not be a common arbitration against the appellant and the second respondent.”

21. Thus, the aforementioned judgment is distinguished and not applicable to the

facts of the present case.

22. The Court while exercising its power under Section 11 of the Act, cannot recast the terms of the Contract and direct the parties to go for a composite arbitration contrary to the procedure prescribed under the arbitration clause provided in distinct arbitration agreements. The overlapping of the issues does not mean that the arbitration proceedings under the two respective contracts cannot commence and continue independently. Fundamental feature of an arbitration agreement is that there is an understanding between the parties to adopt alternate mechanism for the adjudication of the future disputes that arise between them. The law does not prescribe any standard form of arbitration agreement and the parties are free to agree upon a procedure and designate the private forum where the parties would like to go in case the disputes and differences arise between them. Thus, there is to be consensus ad-idem between the parties regarding the choice of the forum. The Supreme Court in certain judgments, has held that in certain exceptional circumstances the Court has a power to make an appointment of the Arbitrator, notwithstanding the choice of the specified forum agreed between the parties. However, at the first instance, the effort of the Court would be to ensure that the parties adhere to the choice of the Arbitrator or to the mechanism for constituting the Arbitral Tribunal as envisaged by the Arbitration Agreement. It is also noteworthy that, the Supreme Court in *Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.*, (2009) 8 SCC 520, *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523, *Northern Eastern Railway v. Triple Engineering*, (2014) 9 SCC 288 and *Union of India v. BESCO*, AIR 2017 SC 1628, has expressed the

opinion that where an application under Section 11(6) of the Act is filed, the procedure for appointment of an arbitrator prescribed in the agreement, be given effect to and the Court ought not to appoint an independent arbitrator without resorting to the inbuilt mechanism as agreed between the parties. Parties were conscious of the terms of the agreement and they willingly and consciously agreed for the arbitral procedure envisaged under the agreement without any reservation. Petitioner is now suggesting that the agreed choice of forum should be ignored and that part of the Agreements should be severed and further Respondent should tow it's line and agree to the Arbitral Tribunal contrary to what has been provided in the Contracts. This cannot be permitted and thus the relief claimed in the present petition for appointment of a common arbitrator cannot be granted. There is no merit in the present petition and the same is dismissed. No order as to costs.

It is however clarified that the dismissal of the present petition does not preclude the Petitioner or the Respondents from exercise their remedy under the relevant provisions of the agreement for invoking the arbitration clause and seeking the appointment of the Arbitral Tribunal in accordance with the mechanism provided under the Agreements.

SANJEEV NARULA, J.

July 09, 2019/ss