

(2013) 07 DEL CK 0218
In the Delhi High Court
Case No : O.M.P. 1194 of 2012

Harish Kumar and Others

APPELLANT

Vs

Seb International Sas and Others

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2013) 7 AD 268

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : Parag Tripathi, Mr. Atul Sharma, Mr. Milanka Choudhary and Mr. Yash Srivastava, for the Appellant; A.M. Singhvi and Mr. Rajiv Nayyar, Sr. Advocates and Ms. Ruchira Gupta, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Bhasin, J.—Petitioner no. 1 Harish Kumar claims to have been successfully running the business of developing and manufacturing electrical appliances and selling them with the brand name "Maharaja Whiteline" for over three decades. For carrying on that business he had formed a private limited Company by the name of "Maharaja Whiteline Industries Pvt. Ltd." (to be referred hereinafter as "the Indian Company") in which the entire shareholding was owned by him and his family members. However, in November, 2011 he and other shareholders decided to sell 55% of their fully paid up equity shares (2,819,300 shares out of 5,126,000 shares) in the Indian Company to respondent no. 1, which is a French Company (hereinafter to be referred as "the French Company"). After negotiations and finalisation of the deal various agreements were executed on 28th November, 2011 between the Indian Company and the French Company and the existing shareholders of the Indian Company for sale of their shares in favour of the French Company. Those documents included one Shareholders Agreement and one Share Purchase Agreement. It was also decided at that time to make petitioner no. 1 as the first Managing Director of the re-constituted

Indian Company after the said deal. The other members of the Board of Directors were four nominees of the French Company, respondent nos. 2-5 herein and petitioner no. 1's wife (petitioner no. 2) and his daughter (petitioner no. 3). Restated Articles of Association of the Indian Company after the deal with the French Company were also brought into existence. An Employment Agreement was also executed between petitioner no. 1 and the reconstituted Indian Company whereby he was employed as the Managing Director and the annual compensation payable to him was fixed at one million rupees. The name of this joint venture Company which came into existence on 28th November, 2011, however, remained unchanged and now reference to it shall be made as "the re-constituted Indian Company". Petitioner no. 1's grievance is that despite the fact that his family still holds 45 % shares in the Indian Company and it was the intention of the parties concerned at the time of sale of 55 % shares to the French Company and execution of Employment Agreement as well as Share Holders Agreement that he shall remain the Managing Director for a period of five years and in any case he could not be removed for a period of two years at least, he had been illegally and in most arbitrary manner and unceremoniously removed as the Managing Director of the re-constituted Indian Company within a year from his taking over as the Managing Director by the Board of Directors in its meeting held on 21st December, 2012 which was chaired by himself as the Chairman and attended by his wife and daughter and respondent nos. 2-4 herein in the capacity of Directors nominated by the French Company. It is also his grievance that in an illegal way his Group was virtually reduced to a non entity, as far as the management of the affairs of the reconstituted Indian Company is concerned, even though it was never the intention behind the deal with the French Company that this situation would also arise.

2. Since the Employment Agreement between the petitioner no. 1 and the re-constituted Indian Company, whereunder petitioner no. 1 was appointed as the Managing Director of the re-constituted Indian Company, had an arbitration clause also this petition u/s 9 of the Arbitration and Conciliation Act, 1996 was filed by him against the French Company and its four nominee Directors on the Board of the re-constituted Indian Company in which he claimed that he had been illegally removed by the Board of Directors of the re-constituted Indian Company as its Managing Director and claimed the following reliefs:

(i) Restrain by an ex-parte ad-interim order, the Respondents No. 1 to 5 from interfering with the management of the Petitioner No. 4 Company without following the due process of law; and

(ii) Stay the effect and operation of letters dated November 22, 2012 (written by Respondents No. 2-5), and December 13, 2012 (written by the Respondent No. 2) as being illegal and without any sanction of law; and

(iii) Stay the operation of all acts unilaterally taken by the Respondents No. 2-5 at the board meeting held on November 21, 2012 as being illegal and without any sanction of law; and

(iv) Restrain, by an ex-parte ad-interim order, the Respondents from circulating the forged Minutes of Meeting held on November 21, 2012 or extracts thereof to any bank, customer, dealer, associate, supplier, distributor etc; and

(v) Declare that the bankers of the Petitioner No. 4 Company shall not record/act upon any purported resolution unless the same is certified by the Board of the Petitioner No. 4 as per law; and

(vi) Restrain the Respondents from taking any actions which may be contrary to the Articles of Association of the Petitioner No. 4 as well as the terms of the SHA; and

(vii) Direct the Respondents No. 1-5 to furnish to this Hon'ble Court copy of the video recording of the proceedings of the Board Meeting dated November 22, 2012;

3. This petition has been opposed by the respondents on various grounds including the one that this petition was not maintainable as the employment agreement having arbitration clause, whereby the petitioner no. 1 was appointed as the Managing Director of the reconstituted Company was between the petitioner no. 1 and the reconstituted Indian Company but that Company has not been made a respondent and respondents no. 2 to 5 were not parties to that agreement. On merits, this petition has been opposed, inter-alia, on the ground that the petitioner no. 1 was removed as Managing Director of the re-constituted Indian Company for good cause and that was permissible even in the employment agreement without any time period within which that could be done. In fact, he could be removed as Managing Director without any compensation or notice if he was to be removed with cause. In the reply, the respondents have given various grounds which had compelled the Board of Directors of the reconstituted Indian Company to remove petitioner no. 1 as its Managing Director.

4. During the course of hearing, learned senior counsel from both the sides had cited judicial precedents in support of their respective submissions. Mr. Parag Tripathi, learned senior counsel for the petitioners had submitted that even if it was a case of termination of contract of service, as is the stand of the respondents though according to the petitioners case it was not so and, in fact, the employment agreement between the petitioner no. 1 and the reconstituted Indian Company was not a stand alone agreement and the same had to be read with the shareholders agreement as well as restated Articles of Association and if read together it could be clearly said that the petitioner no. 1 could not be removed as the Managing Director at least for a period of two years from 28-11-11. Mr. Tripathi also reiterated the averments made in the petition. On the other hand, Dr. A.M. Singhvi and Mr. Rajiv Nayyar, learned senior counsel appearing for the respondents had submitted that petitioner no. 1 could be removed as the Managing Director at any time for cause and so he was removed for cause. Whether there was a good cause for the re-constituted Indian

Company to remove petitioner no. 1 as its Managing Director or not he cannot claim a declaration/injunction to the effect that he continues to be the Managing Director and cannot be removed as the Managing Director before two years since as a Managing Director he was simply an employee of the Company and the contract of employment cannot be enforced by him through Court to continue as the Managing Director. It was further argued that even if he considered his removal as illegal his remedy was to claim compensation/damages before appropriate forum but certainly not the relief of a direction that he be continued as the Managing Director.

5. The case of the petitioner no. 1 is that he had been removed as the Managing Director of the re-constituted Indian Company by its Board of Directors in its meeting held on 21st December, 2012 and which decision was conveyed to him vide letter dated 22nd December, 2012. The relevant averments as to how the petitioner no. 1 came to be removed illegally as the Managing Director of the re-constituted Indian Company by its Board of Directors made in this Section 9 petition are re-produced below:

7(21) After the Board had discussed items No. 1-4 on the Agenda, item 5 was taken up for discussion. At this stage, at the request of the Petitioner No. 1 as Chairman & Managing Director of the Company, the Chief Financial Officer of the Petitioner No. 4 placed before the Board the Balance Sheet, P & L, Cash Flow, etc. as of September 30, 2012. At this moment, the Respondent No. 2-Mr. Frederic Verwaerde and other nominee directors representing the Respondent No. 1 abruptly and without prior notice brought up that the Petitioner No. 1 immediately resign as the Managing Director of the Petitioner No. 4. The Petitioner No. 1 refuted such illegal and improper demand and conveyed his refusal to accept such a proposal inasmuch as it was unreasonable, arbitrary, forceful, illegal and in contravention of the Indian Law besides in violation of the terms and spirit of the various agreements entered into with Respondent No. 1. On such refusal, the Defendants No. 2-5 started to shout in an unruly and derogatory manner and surrounded the Petitioner No. 1 from all sides. Such actions made the Petitioner No. 1 very scared as he was threatened by the Respondents No. 2-5 of dire consequences including forceful termination of the Petitioner No. 1 as the Managing Director of the Company, defamation of his stature and reputation as an industrialist in the appliances industry and complete erosion of his shareholder value resulting in grave loss, both financial and reputational. At this stage, the Board Meeting was abruptly suspended and the Respondents No. 2-Mr. Frederic Verwaerde forced the Petitioner No. 1 to go outside the board room with him on the pretext of holding discussions.

7(22) Outside the board room, the Petitioner No. 1 was once again cornered by the Respondent No. 1's representatives and for the next two hours was confined at one place. During these two hours, the Respondents No. 2-5 together with Mr. Philippe Sumeire and Mr. Mouterde Pierre (invitees to the meeting), shouted, threatened the Petitioner No. 1 again and again of grave consequences and

repeatedly tried to insult and intimidate him and threatened action by any means whatsoever to harm his personal stature and reputation and to erode his shareholder value in the Company. The Respondents No. 2-5 alongwith Mr. Philippe Sumeire and Mr. Mouterde Pierre criminally intimidated the Petitioner No. 1 and threatened the Petitioner No. 1, his wife and daughter to act in accordance with their illegal directions and demands.

7(23) After a harrowing nearly two hours of constantly being shouted upon, threatened, intimidated and coercion, the Petitioner No. 1 was escorted by the Group SEB Representatives back into the room where the Board Meeting was being held. The Board Meeting, which was suspended thereafter resumed. The Respondent No. 2-Mr. Frederic Verwaerde and other nominee directors representing the Respondent No. 1 thereafter sought to pass certain resolutions without the Petitioner No. 1's permission as the Chairman of the Board, and without proper decorum. As the Petitioners were under coercion, there was no question of them giving any free consent on any of the improperly placed items. Under extreme duress, resignation was sought from the Petitioner No. 1, to which he could not offer free consent as he was being intimidated and coerced by the Respondent No. 2-5 and the other invitees present at the Board Meeting. Thereafter, just as the Board Meeting had been resumed illegally, the meeting was concluded by the Respondent No. 2 without following decorum and without the permission of the Chairman. All proceedings which transpired at the Board Meeting were recorded in the video camera which had been placed inside the Board Room.

7(24) As the meeting was disrupted by the nominees and representatives of the Respondent No. 1, the Petitioner was under coercion and unable to provide free consent, no decisions or resolutions could be passed at the said board meeting which was conducted arbitrarily, improperly and the agenda of which was high-jacked, undue coercion put on board members and meeting abruptly concluded. The Petitioner No. 1 was so intimidated and fearful of the threats held out by the Respondents No. 2-5 together with Mr. Philippe Sumeire and Mr. Mouterde Pierre, acting on behalf of Respondent No. 1 that the Petitioner was constrained to lodge a criminal complaint in the matter on November 21, 2012 itself [Criminal complaint dated November 21, 2012 annexed as Annexure M to the List of Documents].

7(25) It is relevant to state that the removal of the Petitioner No. 1 as the Managing Director of the Petitioner No. 4 was not on the agenda of the Board Meeting. Further, the removal of the Petitioner No. 1 could not have been given effect to in an improperly convened board meeting as Clause 8.1 of the SHA prescribes that all key management personnel shall be appointed by the Board and guidelines for terms of appointment or removal shall also be decided by the Board:

8. Appointment of Key Management Personnel

8.1. The key management personnel including the Managing Director shall be appointed by the Board based on such terms and conditions and for such duration, as may be agreed by the Board. The Board shall lay down the guidelines for the method of selection, terms of engagement and appointment or removal of such key management personnel.

This above provision is also encompassed in Article 129 of the Articles of Association.

As the agenda did not have any item which dealt with removal of the Petitioner No. 1 as the Managing Director, no occasion arose for discussion on such an issue. This points to the fact that the purported removal of the Petitioner No. 1 could not have been given effect to in the Board Meeting held on November 21, 2012. Further, the Board Meeting was suspended during the discussion on the fifth agenda item and no discussion, in terms of the Articles of Association could take place on other items thereafter due to the illegal way in which the meeting was first suspended, then resumed. Thus, no opportunity arose for passing any resolution for removing the Petitioner No. 1 as the Managing Director. It is reiterated that the consent of the petitioner no. 1 to resign was sought under threat and coercion, to which the Petitioner No. 1 did not buckle.

7(26) To his shock, the Petitioner No. 1 received a letter from the Respondents No. 2-5 dated November 22, 2012 wherein the said Respondents falsely stated that during the Board Meeting held on November 21, 2012, the Petitioner No. 1 had voluntarily resigned as the Managing Director of the Petitioner No. 4 Company and that such resignation was unanimously accepted. As no resignation was ever offered by the Petitioner No. 1, the question of acceptance of the same by the Board does not even arise. Further, considering that three out of the seven members of the board comprise of the Petitioners No. 1-3 all three of which were criminally intimidated at the Board Meeting, it is inconceivable (presuming that the resignation was offered) that the resignation was accepted "unanimously". Although at this stage that the Petitioner No. 1 realised that the Respondents No. 1-5 had ill intentions against him, however, the efforts for a mutual compromise initiated by the Respondents let the Petitioner No. 1 to believe that the Respondent No. 1 were serious about settling the matter amicably.

The letter dated November 22, 2012 contained false and frivolous allegations and was completely contradictory since it falsely alleged on one hand that the Petitioner No. 1's services as the Managing Director had been terminated and on the other hand that the Petitioner No. 1 had agreed to resign as the Managing Director. A bare perusal of the said "termination letter" shows that there was neither a resignation, nor was a termination recorded in any proceedings of the Board as the letter refers to both.

It is manifest that an oblique reference has been made in the letter dated November 22, 2012 to certain provisions of the Managing Director's Employment

Agreement. The same is completely vague, imprecise, devoid of any details of basis. The reference has been made for the sake of making a reference and none of the provisions of the Employment Agreement have been or could have been invoked as there is no previous reference or background for the same.

7(27) Pertinent to mention, Clause 8.1 (reproduced above) mandates that appointment of key management personnel, including appointment of the Managing Director shall be done by the Board. Further, guidelines for selection, terms of engagement etc have to be laid by the Board on which basis the appointment can be done. As the Board Meeting held on November 21, 2012 ended abruptly, no resolution for appointment of Defendant No. 2-Mr. Fredrim Verwaerde as the Managing Director was even proposed, leave alone passed. Further, in the absence of any guidelines by the Board for selection, terms of engagement etc of key management personnel, the appointment of Defendant No. 2-Mr. Fredric Verwaerde as the Managing Director cannot be given effect to. Thus, the appointment of Defendant No. 2 as the Managing Director is illegal and cannot be given effect to as such appointment could only have been made in a properly conducted Board Meeting and after laying down of terms of selection, engagement etc., neither of which took place. Similarly, the Respondents No. 2-5 are forcefully trying to impose Mr. Sunil Wadhwa as the CEO (another key management personnel) on the Petitioner No. 4 even without the Board discussing or passing resolution for such appointment, which appointment is also illegal. Further, since no resignation/termination of the Petitioner No. 1 has taken place in law, the Petitioner No. 1 continues as the Managing Director and Chairman of the Petitioner No. 4 and the Respondents No. 1-5 must not be permitted to interfere in his functioning in such capacity. As the Petitioner No. 1 continues to be the Managing Director, no question arises of appointment of a new Managing Director in his place [Letter dated November 22, 2012 annexed as Annexure N to the List of Documents] which in any case is against the terms of the SHA.

6. After having given my thoughtful consideration to the rival submissions I have come to the conclusion that I need not go into the question as to whether the petitioner no. 1 was only an employee of the re-constituted Indian Company after he had been made the Managing Director or he could claim as a matter of right his continuation as the Managing Director for a period of five years or at least for a period of two years from 28-11-11 in view of the fact that this petition is liable to be rejected only on the ground that the Board of Directors of the re-constituted Indian Company had decided to remove him as its Managing Director but that Company has not been arrayed as a respondent. Respondents were not parties to the Employment Agreement which had an arbitration clause and under which the petitioner claims to be entitled to remain as Managing Director for five years. Therefore, this petition u/s 9 of the Arbitration and Conciliation Act, 1996 could not be maintained against the respondents. Respondent nos. 2 to 5 were simply the nominee Directors of the French Company on the Board of the re-constituted Indian Company and in that capacity they can be said to be only the

agents of the re-constituted Indian Company. They cannot be said to have played any role in their personal capacities in the removal of the petitioner no. 1 as the Managing Director.

7. The petitioner no. 1, however, in a very clever manner has made the re-constituted Indian Company as petitioner no. 4 which, in my view, is not permissible in law. His grievance is against his removal as the Managing Director of the said Company through its Board of Directors and, therefore, he could not have impleaded the said Company as a co-petitioner claiming himself to be duly authorized to file this petition on its behalf also. In no case he could get authorization from the Board to represent the Company as his Group is in minority in the Board of Directors. This petition is, therefore, dismissed as being not maintainable. However, it is clarified that if at all petitioner no. 1 invokes the arbitration clause against the re-constituted Indian Company the arbitral tribunal shall deal with the matter independently and in accordance with law totally uninfluenced by the dismissal of the present petition since this Court has not gone into the merits of the grievances raised in this petition.