
(2010) 02 BOM CK 0057

In the Bombay High Court

Case No : Appeal From Order No. 300 of 2009 in Notice of Motion No. of 2008 in Suit No. 791 of 2008

Indian Oil Corporation Ltd.

APPELLANT

Vs

Vora Auto Service Centre Private Ltd. and Another

RESPONDENT

Date of Decision : 08-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 1
Specific Relief Act, 1963 — Section 14

Citation : (2010) 2 BomCR 549

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Gaurav Joshi and Naushad Engineer, instructed by and R.M.G., Law Associates, for the Appellant; V.A. Thorat instructed by and R.A. Thorat, for Res. Nos. 1 and 2, for the Respondent

Judgement

Roshan Dalvi, J.—The Appellant (original Defendant) has challenged the order of the Bombay City Civil Court dated 2.2.2009, granting injunction against the Appellant restraining it from interfering with the operation of the Petrol Pump and from the conduct of the business of the Respondents (original Plaintiffs) or their nominees in the Petrol Pump or in any manner interfering with their use, occupation and possession of the suit premises being the Petrol Pump described in the Plaint of the Respondents. predecessor-in-title.

2. The parties entered into a lease on 3.8.1999, under which the land admeasuring 3872 sq. meters in Survey No. 25, village Shirsad, District Thane, came to be leased by the predecessor-in-title of the Plaintiffs to the predecessor-in-title of the Defendant. Under Clause 1(a) of the lease, the Defendant, who was the lessee, had the right to install, erect and maintain the demised premises. Under Clause 11(b) of the lease, the demised premises was to be used for any lawful purpose which the lessee desired and specially as a depot for the storage and sale of petroleum products as well as a service station. Under that clause, the Defendant had the right to construct and erect any buildings, pumping

plants, accessories, etc. The Defendant, therefore, had freedom of access for its workmen, servants, agents, customers, etc. The lease work was for a term of 28 years commencing from 1st July 1999.

3. The Defendant wrote a letter to the Plaintiffs on 5th August 1999, 2 days after the execution of the lease setting out the lease which was entered into between the parties and in furtherance thereof, offered that in the event the Defendant decided not to operate the outlet as was then agreed to be operated as a Company Owned Company Operated (COCO), contract but decided to operate it through the dealer, the Company would first make an offer to the Defendant as the landlord, provided all the terms and conditions of the Company prevailing at the time were fulfilled by the Plaintiffs. That offer was personally made to the landlord and could not be assigned or transferred to any person.

4. The parties entered into a written maintenance and handling contract on 4.6.2007. Under that contract, the Defendant, as the lessee of the plot of land as well as the structures thereon, was stated to have installed its apparatus and equipments mentioned in the second Schedule to that agreement. The Defendant appointed the Plaintiffs as its contractors.

5. Clause 7 of the contract gave the right to the Plaintiffs to enter upon the premises for the sole purpose of operating the retail outfit for the sale of the products and render services enumerated in the agreement. The Plaintiffs were to have no right, title or interest whether as owners, lessees, tenants or otherwise in the premises nor in the outfit and were not to be entitled to claim right of lease, tenancy or any other interest in the premises or outfit. The Plaintiffs were not to be deemed to be in exclusive possession of the premises.

6. Under Clause 43 of the contract, on the termination of the licence and permission granted by the Defendant to the Plaintiffs to sell the products and operate the outfit, the Plaintiffs, as the contractors, were to immediately remove the goods, properties and effects belonging to the Plaintiffs from the premises and hand over vacant and peaceful possession of the premises to the Defendant who would be entitled to enter upon the premises without hindrance.

7. Under Clause 44 of the Agreement, upon termination, the possession of the contractors would automatically revert to and become vested in the Defendant-Company.

8. Such agreements have been entered into from time to time by the parties for a period of one year. They last of such contracts has terminated by efflux of time.

9. The Defendant is a wholly-owned Central Government Undertaking. The Government of India had issued certain circulars/notifications from time to time with regard to the appointment of dealers of all Companies for running and maintaining petrol pumps and outlets. Under one such Policy dated 14.11.2002, preference was given to those dealers who offered their land on lease to the Oil Companies for being appointed dealers. The Plaintiffs. contract with the

Defendant was subsisting prior to the Circular dated 14.11.2002. The Plaintiffs. contract is a maintenance and handling contract. The Plaintiffs are not dealers *stricto sensu*. The Plaintiffs claim preferential treatment for being appointed dealers on the ground that a dealer agreement is essentially the same as maintenance and handling contract or COCO contract and on the premise that the Defendant represented to the Plaintiffs that they would be given preferential treatment for such appointment as dealers under their letter dated 5.8.1999. The Plaintiffs claim that a similar circular was in force at the time they entered into a contract with the Defendant, but that is not shown.

10. The Government of India issued another Circular on 21.12.2006 where such preference was removed. Upon the premise that the Defendant would be estopped from contending that such preference could be removed on the principle of promissory estoppel and legitimate expectation, the Plaintiffs filed a Writ Petition being Writ Petition No. 6503 of 2007, which came to be dismissed as the Court refused to interfere with the Government policy.

11. The Plaintiffs filed a Suit in which the impugned order came to be passed for enforcing their contractual rights under the aforesaid lease and the agreement. The Plaintiffs further claim that in a further letter of the Defendant dated 7.11.2007, even after the second circular, showing the changed Government policy was issued the Defendant informed the Plaintiffs that its dealership was approved for inclusion in the priority network of the Defendant. The Plaintiffs were called upon to maintain the required standard as well as minimum volume growth and would be entitled to certain incentives and credit if the Plaintiffs were interested to avail of the same. The Defendant claims, as it is apparent from a plain reading of the letter, that the letter shows only the trade incentives offered and has nothing to do with the policy decision of the Government, under which the Defendant is covered and bound.

12. The right of the Plaintiffs to have the policy decision quashed has been finally decided. The right of the Plaintiffs under their contract with the Defendant, entered into before both the aforesaid policy decisions alone requires to be seen. Even accepting the case of the Plaintiffs that there is no difference between the dealer agreement or any other agreement by whatever name called, the Plaintiffs are, at best, dealers. Though the Petrol Pump has been installed by the Defendant on the land of the Plaintiffs, at present, the Defendant has the title to the land as a lessee. The lease is subsisting. The parties are bound by the respective covenants in the lease as lessor and lessee.

13. The separate dealership/COCO/Maintenance Handling Agreement which has expired by efflux of time determines the right of the Plaintiffs as dealers and not as lessors. Upon the land of the Defendant, whether it is leased to the Defendant by the Plaintiffs themselves or by any other owner, the Plaintiffs, as the dealers, have no right, title and interest in any capacity. The Plaintiffs specifically have no juridical possession aside from the specific agreement contained in Clause 7. Upon the termination of the agreement, the Plaintiffs are required to remove all

the goods, properties and effects and the Defendant is entitled to enter upon the premises.

14. It is settled law that possession of a dealer is not juridical possession. In the case of *Prithvi Jayprakash Chhajed v. Indian Oil Corporation Ltd. and Anr.* Appeal From Order No. 449 of 2007 in Thane Special Civil Suit No. 230 of 2006, this Court observed that a contractor performing the jobs under the contract for and on behalf of the owner, cannot be said to be in possession much less settled possession of the premises. It may be mentioned that he is a mere occupant as such dealer or contractor, a concept rather different from the concept of juridical possession in jurisprudence.

15. Mr. Thorat argued that the parties are bound by and must perform their reciprocal promises since they have acted upon the lease, admittedly executed between the parties. These reciprocal promises, he contended, are contained in the letter dated 5.8.1999, which must be read as a consideration for the contract of lease itself. He, therefore, contended that since the lease between the parties was subsisting, the Plaintiffs must be offered a dealership contract preferentially irrespective of the policy. I do not read into the letter dated 5.8.2009, any extension of the lease deed for making any offer in the nature of right of pre-emption. The reciprocal promises shown, contained in the letter, relate only to the circumstance when the COCO contract is changed into a dealership contract and a dealer has to be appointed by the Defendant in place of the contractor. The Defendant has not sought to appoint a dealer in place of a contractor and that is not even the case of the Plaintiffs. In fact, it has been argued that both the contracts are much the same, no matter the nomenclature. In any event, the contract between the two private parties would be governed by the law, as may be enacted in future and consequently, also the policies of the Government. The contract may even become frustrated by virtue of such policies or may become impossible for performance.

16. Mr. Thorat drew my attention to a judgment of the Karnataka High Court in the case of *Indian Oil Corporation Ltd. v. Sri Y.T. Narendra Babu S/o Thammaiah and Anr.* Writ Appeal No. 3248/2009 (GM-RES) in which it has been held that despite the Government policy of 2007, lessor would be entitled to his rights to claim the dealership agreement because he parted with his land on lease by granting lease in favour of the Oil Company, based upon representations contained in the Policy dated 8.10.2002. That case is wholly different. That was a case which fell with the mischief of the doctrine of promissory estoppel and legitimate expectation because the lease was executed, based upon the policy of 2002. In this case, the lease has been executed in 1999, well before the Policy dated 8.10.2002 was framed. The Plaintiffs incidentally rely upon the policy, though their contract is not governed by it. Their contract is governed by its terms alone.

17. It is seen that in the present legal relationship of the parties, the Plaintiffs' right to ownership of the land has ceased by virtue of the lease which subsists.

The Plaintiffs' right, as contractors, has ceased by the termination of the Agreement of Maintenance and Handling by efflux of time. It may indeed be an inequitable position between the parties. However, the Plaintiffs, as businessmen, have sought to enter into the business contract and are bound by its terms and conditions. The Plaintiffs would continue to have the right of the lessor under the Lease Deed dated 3.8.1999, which would expire in 2037. The Plaintiffs have no right in the contract which has come to an end by efflux of time.

18. The Plaintiffs have in effect sought to enforce that contract. The contract for maintenance and handling is in its nature determinable. It is not specifically enforceable upon it being determined u/s 14(c) of the Specific Relief Act. The Plaintiffs, therefore, cannot obtain rights by way of the mandatory perpetual injunctions and declaration that they have sought which is in the nature of a relief of specific performance.

19. The Plaintiffs have no subsisting right, the contract itself having been determined. The Plaintiffs are not in possession, they being the mere contractors. The Plaintiffs, therefore, have made out no prima facie case to be granted the relief of prohibitory injunctions applied for. The learned Judge has granted reliefs specifically on a premise that the Plaintiffs are in possession and have sought to protect the Plaintiffs' possession. It is there that the learned Judge has made a fundamental error.

20. No Court can grant relief to a party who, by virtue of his own agreement, is not shown to be in possession of the premises after the contract is determined. Contractual rights and obligations can be agitated and must be determined strictly based upon the contract between the parties. This is more so in case of written contracts executed by parties in business and trade or in respect of their immovable properties when they are expected to know the purport of the agreements they enter into.

21. Granting relief of protecting the possession of the Plaintiffs, who are not in juridical possession at all and mere occupants as contractor under a contract which has come to an end upon the termination of the contract by efflux of time, would mean and constitute that the Court supplants a contract between the parties by a contract made by itself, which is contrary to the rights and obligations agreed to by the parties.

22. The three circumstances in which a temporary injunction can be granted by the Court are set out in Order XXXIX Rule 1 of the Code of Civil Procedure, which run thus:

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b)...

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause

injury to the plaintiff in relation to any property in dispute in the suit.

Considering Clause (a) above, the property which belongs to the Defendant as the lessee and on which the right of the Plaintiffs has been terminated as the contractors, cannot be stated to be in danger of being wasted or damaged by the Defendant who has the absolute right, title and interest to deal with the property as the lessee.

Considering Clause (b) above, the dispossession threatened by a party proceeds on a premise that the party being threatened with dispossession is in juridical possession of the premises. It is only then that party would show a prima facie case under a legal right to claim protection. When a party is not in juridical possession on the date of the Suit, he cannot be taken to have made out any prima facie case for protection of the possession claimed by him. He may, at best, be in an unauthorised occupation of the premises which under his own contract he would be bound and liable to vacate as in this case. A party, in such position, is not entitled to obtain the relief of an equitable order by way of a temporary injunction upon the alleged threat of dispossession.

23. Consequently, the impugned order is seen to be wholly incorrect. It is, therefore, set aside. The Appeal from Order is allowed accordingly.

24. There shall be no order as to costs.

25. In view of the disposal of the Appeal from Order, Civil Application No. 589 of 2009 taken out in this A.O. does not survive and it is disposed of accordingly.

The interim relief granted under the impugned order shall continue for 4 weeks.