(2016) 04 DEL CK 0124

In the Delhi High Court

Case No : O.M.P. (COMM) No. 99 of 2016

Shivan Auto Center APPELLANT

Vs

Indian Oil Corporation Ltd. RESPONDENT

Date of Decision : 25-04-2016

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2016) 4 ArbiLR 314 : (2017) 1 RAJ 401

Hon'ble Judges : Mr. V. Kameswar Rao, J.

Bench : Single Bench

Advocate : Mr. Sudhir Nandrajog, Senior Advocate with Mr. Sanjay Bansal, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Mr. V. Kameswar Rao, J.(Oral)—IA No. 4976/2016

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (COMM) 99/2016

The challenge in this petition is to the award dated 29th March, 2016 passed by Mr. B.C. Joshi, learned Arbitrator whereby the learned Arbitrator has dismissed the claim of the claimants.

2. Some of the facts of the present petition are that on 4th June, 1991, Mr. Sanjay Kumar Singh was issued a letter of intent (LOI) by the respondents Indian Oil Corporation of setting up a petrol pump/retail outlet for selling petroleum products supplied by the respondents. On 15th April, 1994, a General Power of Attorney was executed by Mr. Sanjay Kumar Singh in favour of one Mr. Praveen Singh.

3. It is the case of the petitioner that Mr. Praveen Singh was working as a

Manager in the petrol pump for the purposes of dealing with various Government authorities for construction of showroom and for promotion of business on behalf of Mr. Sanjay Kumar Singh.

4. On 19th January, 1995, a dealership agreement was executed between Mr. Sanjay Kumar Singh as the proprietor of the petitioner and the respondents. It is the case of the petitioner that Mr. Sanjay Kumar Singh had cancelled the General Power of Attorney dated 15th April, 1994 executed in favour Praveen Singh on 1st November, 2011 and was running the dealership without violating any of the conditions of the dealership agreement dated 19th January, 1995. The revocation was duly communicated to the Sub-Registrar-II, Asaf Ali Road, New Delhi on 5th November, 2011.

5. On 27th March, 2012, after written and expressed approval of the respondents, Mr. Sanjay Kumar Singh entered into a partnership agreement with Mr. Satish Singh for running the business of sale of MS, HSD Lubes, Greases etc. supplied to the firm, under license, from Indian Oil Corp. As per the constitution of the partnership deed dated 27th March, 2012, Mr. Sanjay Kumar Singh holds 51% share and the second partner Mr. Satish Singh holds 49% share.

6. On 22nd April, 2013, petitioner and the respondents executed a new dealership agreement which resulted in cancellation of the earlier agreement dated 19th January, 1995 executed between Mr. Sanjay Kumar Singh and the respondents. The partnership firm carry on the business under the name and style of ''Shivan Auto Center'' and both the partners personally managing and running the business in absolute conformity with the provisions of the aforesaid dealership agreement.

7. On 4th September, 2014, the petitioner firm received an impugned show cause notice dated 4th September, 2014 from the respondents under clause 35, 46(i) and (iii) of the dealership agreement dated 19th January, 1995 and clause 28 (a) and 35 of the dealership agreement dated 22nd April, 2013 asking him to explain the execution of the alleged General Power of Attorney dated 15th April, 1994 by Mr. Sanjay Kumar Singh in favour of Mr. Praveen Singh causing breach of the agreement. A reply dated 15th October, 2014 to the said show cause notice was given by the petitioner having denied all the allegations made in the notice and emphasising the fact that the show cause notice was vague, based on the wrong facts, assumptions and presumptions and liable to be withdrawn.

8. On 19th December, 2014, petitioner filed an OMP No. 1627/2014 under Section 9 of the Arbitration and Conciliation Act, 1996 before this Court for interim protection and the court passed the order dated 19th December, 2014 directing the respondents that in the event of the respondents deciding to take extreme step to terminate the dealership, the respondents will give effect thereto after one week from the date of the order. It was further clarified that in the event the order of cancellation is issued during the ensuing court holidays, the same be not given effect for 3 days after the re-opening of the court.

9. On 14th January, 2015, respondents issued termination letter which was to become effective from 21st January, 2015. As in the meantime, petitioner had invoked the arbitration clause, petitioner thereto filed an Arbitration Petition no. 40/2015 before this Court on 21st January, 2015. The court directed the respondents to communicate to the petitioner its decision on the appointment of the sole Arbitrator in terms of the agreement between the parties on or before 31st January, 2015 and further directed that no coercive steps shall be taken by the respondents against the petitioner. On 22nd January, 2015, Mr. B.C. Joshi was appointed as the Arbitrator.

10. It is the case of the petitioner that the petition being OMP No. 131/2013 filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 was allowed by this Court observing that a fresh dealership agreement having been entered, the action of the respondents under the earlier agreement prima facie appears to be doubtful and the court directed that the interim order passed on 20th January, 2015 will continue till arbitrator modifies it in an application filed by either party under Section 17 of the Act.

11. On 9th April, 2015, in an Appeal filed by the respondents against the order dated 20th January, 2015, the Division Bench in its order dated 9th April, 2015 observed that the arbitration proceedings may go on, but the observations made by the learned Single Judge shall not be taken into account.

12. In the claim petition, the petitioner had sought the following reliefs:

(a) Quash the show cause notice dated 4th September, 2014, reference No. Ref. No. DDO/R/2014-2015/65/Shivan issued by the respondents.

(b) Quash the non-effective termination letter Ref. No. DDO/R/2014-2015/132/ Shivan dated 14th January, 2015 issued by the respondents.

(c) Cost and expenses quantified at Rs. 50,000/-.

13. The case of the claimant before the learned Arbitrator was that the alleged breach of contract happened on 15th April, 1994 while, the first agreement was signed on 19th January, 1995 and second agreement on re-constitution was signed in 2013. As per the agreement dated 19th January, 1995, a four day notice should have been given by the respondent for rectification in case of breach. The action intended to be taken has not been stated in the show cause notice and the clause of the dealership agreement providing for intended action was not quoted.

14. The respondents in their reply opposed the reliefs on the ground that the petitioner was issued letter of intent with a condition that he shall not induct any partner or change the constitution of the firm. The claimant has violated the terms and conditions contained in the LOI and dealership agreements by handing over the control and running of the petrol pump to a third party, so the respondent is entitled to terminate the contract.

15. It is the case of the respondents that on 19th January, 1995, when the agreement was entered they were not aware of the breach of condition of the letter of intent. The General Power of Attorney was not disclosed by Mr. Sanjay Kumar Singh even when he had applied for re-constitution of the firm in January, 2012. It was Kalyan Puri Police Station, Delhi which informed that the General Power of Attorney was submitted before the Additional Sessions Judge by accused Mr. Praveen Singh while seeking anticipatory bail claiming that he was legally running the petrol pump M/s. Shivan Auto Centre. They had sought comments of the petitioner vide its letter dated 3rd July, 2014 on this aspect, however, the petitioner did not explain as to why General Power of Attorney was entered into.

16. Based on the pleadings, learned Arbitrator has framed the following issues:

"1. Whether the claimant has committed any breach of dealership agreement executed with the respondent dated 22.04.2013?

2. Whether the claimant has committed any breach of LOI dated 4.6.1991 or dealership agreement dated 19.01.1995?

3. Whether the show cause notice dated 4.9.2014 is legally valid?

4. Whether the termination dated 14.01.2015 is legally valid?

5. Whether the claimant is entitled to the reliefs Claimed?"

17. From the witnesses produced by the petitioner as noted by the learned Arbitrator, the following is revealed:

1. Mr. Sanjay Kumar Singh filed his evidence by way of affidavit dated 11.07.2015.

2. He admitted having executed GPA in favour of Mr. Praveen Singh, Manager of his petrol pump on 15.04.1994 to represent him before various Govt Agencies, for obtaining permissions and arrange clearances for the retail outlet.

3. He also stated that the GPA was cancelled on 1.11.2011.

4. He asserted that he personally managed the affairs of petrol pump and did not hand over the control of dealership to any third party.

5. During cross examination by the counsel of the respondent, C-1 admitted having registered the GPA at Asaf Ali Road and that he had not informed the respondent about the same.

6. Mr. Satish Kumar Singh S/o Mr. Surender Kumar Singh (C-2) submitted his evidence by affidavit dated 11.09.2015 cross examined by the counsel of the respondent.

7. C-2 submitted that he was employed in M/s Shivan Auto Centre since December 2005 and that he had not seen anyone else, except Sanjay Kumar

Singh or Mr. Satish Singh managing and running the business of the petrol pump.

8. During cross examination C-2 informed that when he joined service, Mr. Praveen Singh was manager of Petrol Pump."

18. The findings of the ld. Arbitrator on the issues mentioned above are as under:

Issue No. 1

I agree with the respondent that by concealing the relevant information from the respondent, the claimant had already breached the provisions of the agreement dated 22.4.2013 before signing the agreement. The existence of GPA dated 15.4.1994 has been proved beyond reasonable doubt and has not been denied by claimant. The GPA was admittedly executed after issue of LOI which was in violation of the terms of LOI. Also the argument that the agreement dated 22.4.2013 was among different sets of people does not hold good as claimant and respondent were common in all three documents mentioned i.e. LOI dated 4.6.1991, Agreement dated 19.01.1995 and agreement dated 22.4.2013 and claimant is still a majority partner in the firm running M/s Shivan Auto Center.

Issue No. 2

It is evident that claimant breached the terms of LOI dated 4.6.1991 by executing GPA in favour of third party. The contents of GPA aim at giving complete control of petrol pump to the third party and not for day to day operations. As the respondent was not aware of any such GPA, the agreement dated 19.1.1995 was signed assuming the claimant to be sole proprietor of M/s Shivan Auto Centre which was untrue. Hence I agree with the respondent that both LOI dated 04.06.1991 and agreement dated 19.01.1995 were breached by the claimant.

Issue No. 3

The show cause notice was issued to the claimant who was holder of LOI at the time of signing of the GPA and subsequently was signatory to both the agreements. The notice was legally valid as its purpose was to give opportunity to the claimant to explain his position before the respondent. The claimant has relied on technical grounds to question the legality of Show Cause Notice and omission of a clause does not make the notice illegal.

Issue No. 4

I agree with the respondent that the claimant had concealed the existence of GPA from the respondent while the agreements were entered into. The breach of the conditions of LOI had taken place even before the parties entered into first agreement and the same has not been denied by claimant. The claimant has relied on the expiry of LOI and first agreement to contest the termination but has not been able to give any evidence that he had informed the respondent about the GPA. The condition regarding non-transfer of ownership and control was available in all three documents namely LOI dated 4.6.1991, first agreement dated 19.01.1995 and second agreement dated 22.04.2013. The claimant has breached the conditions and respondent is within its rights to take action as per terms of the agreement including termination of the dealership. A show cause notice was given to the claimant and also a personal hearing was given where the claimant had ample opportunity to present his case. The principle of natural justice was followed before termination, hence the same is legal.

19. In view of the findings in Issue nos. 1 to 4, learned Arbitrator rejected the claim of the petitioner.

20. It is submission of Mr. Sudhir Nandrajog, learned Sr. Counsel appearing on behalf of the petitioner that clause 56 of the agreement dated January 19, 1995 contemplates that if the Dealer shall commit a breach of any of the covenants and stipulations contained in the agreement and fail to remedy such breach within four days of the receipt of a written notice from the Corporation in that regard, then only termination can be effective. He states no such notice was given. He states that even otherwise, the respondents could not have invoked such a stipulation in the first agreement in 2014. So there is no occasion for the show cause notice to be given to the petitioner.

21. He would also state that it is not case of the respondents that the petitioner had misled the respondent while executing the second agreement. He also states that the General Power of Attorney on which the reliance has been placed by the respondents has been given by Mr. Sanjay Kumar Singh in favour of Mr. Praveen Singh appointing him the attorney to do such acts/deeds which are necessary for the maintenance of petrol pump, promotion of sales and running of the petrol pump and nothing more.

22. He states that by executing the General Power of Attorney in favour of Mr. Praveen Singh, he still continues to be the dealer of the petrol pump and the finding of the learned Arbitrator relying on the GPA is totally untenable and perverse in nature. He would draw my attention to clause 35 of the first agreement to contend that the same does not contemplate execution of the power of attorney in favour of 3rd person as a bar. He states, the same was prescribed in the new agreement of 2013. In other words, power of attorney could have been executed, more particularly in favour of an employee, under the first agreement.

23. He also draws my attention to Page 84 to state that clause 45 of the new agreement stipulates cancellation of the dealership only in the eventuality if the dealer has given any information or supply any document which found to be untrue or incorrect. He also attack the order of termination being assumptive without having evidence.

24. On the other hand Ms. Mala Narayan, Advocate supports the award of the learned Arbitrator. She would rely upon the judgement of the Division Bench of this Court in LPA 435/2012 in the case titled as Nirmala Kwatra v. Indian Oil Corporation Ltd. more specifically in Para 21.

25. Having heard the learned counsel for the parties, from the award it is clear that the execution of GPA has been proved without reasonable doubt. The GPA executed by Mr. Sanjay Kumar Singh in favour of the Mr. Praveen Singh reads as under:

"General Power of Attorney

This deed of General Power of Attorney is made at New Delhi on this 15th day of April, 1994 By Shri Sanjay Kumar Singh S/o, Shri Radhe Shyam Singh, R/o, Bunglow No. 3, South Avenue Lane, New Delhi - 110011, Permanent Address i.e., B-15, Lohia Nagar, Shopping Centre, Ghaziabad, U.P. (Hereinafter called the Executant)

In Favour of

Shri Praveen Singh, S/o, Shri Kripa Shanker Singh, R/o, Banglow No. 3, South Avenue Lane, New Delhi - 11 (Hereinafter called the Attorney)

Whereas the Executant has been appointed as a dealer of retail outlet of M/s. Indian Oil Corporation vide their letter of appointment NO. A/KD/DELHI dated 31.03.1994 for the retail outlet named Shivan Auto Centre at National Highway - 24, Mayur Vihar, Phase-II, New Delhi.

And Whereas the Executant is required to construct the showroom, maintain the Petrol Pump and do all the acts and deeds necessary for maintenance of Petrol Pump and promotion of sales of the petrol pump and for all these acts and other related job the executant desirous to appoint Shri Praveen Singh above name as his attorney.

Now this General Power of Attorney witnessesth as follows:

1. The said attorney is hereby authorise to sign all the correspondence on my behalf.

2. The said attorney is hereby authorise to enter into any agreement, create mortgage, pledge or hypothecate all or any part of the Petrol Pump.

3. The said attorney shall be entitled to file suit, appeal or petition etc. before the Civil Court, Revenue Courts, Criminal Courts, Labour Courts or tax courts as may be required from time to time.

4. The said attorney shall be entitled to execute any document on my behalf with the I.O.C. or any other company desirous of marketing from the showroom.

5. The said attorney shall also be entitled to collect the revenue, deposit same in the bank/banks, operate bank account by his own signatures and make all the payment etc. required to be made in the due course of business.

6. The said attorney shall also be entitled to raise monies by way of bank borrowings or private borrowings as the need be for the running and maintenance of the petrol pump.

7. The said attorney shall also be entitled to appoint any agent or agents on my behalf.

8. The said attorney shall also be entitled to collect all debts and other outstanding dues to the petrol pump and to appoint agent, pleader or attorney etc. for the said purpose.

9. The said attorney shall also be entitled to deliver possession of the said property to any other person and give him/her any power as may be required and felt necessary by the said attorney.

10. That the said attorney shall also be entitled to do all acts, things or execute any deed including partnership deed or documents or letter of retirement or other instruments or insurance etc. as may be necessary.

11. The said power of attorney is irrevocable."

26. It may be noted here that the General Power of Attorney does not reveal that Mr. Praveen Singh was working as a Manager of the petrol pump, in other words, he was an employee of the petitioner, as contended by Mr. Nandrajog.

27. Interestingly, the deed of cancellation of the General Power of Attorney dated 1st November, 2011 depicts that the earlier General Power of Attorney executed in favour of Mr. Praveen Singh was in respect of construction of showroom and maintaining the petrol pump and to do all acts/deeds necessary for maintenance of petrol pump and promotion of sales of the petrol pump, this depiction is incorrect as can be seen from the GPA itself.

28. It is clear from the GPA of 1994, the terms of appointment of Praveen Singh was very wide, giving complete control of the petrol pump.

29. It was stipulated that the power of attorney was irrevocable. Suffice to state that the power of attorney was an appointment of attorney in perpetuity. The submission of Mr. Sudhir Nandrajog, Sr. Adv. that Praveen Singh was only an employee and the GPA was only executed to look after the day to day functions of the petrol pump is not appealing. In fact, no appointment letter of Praveen Singh as Manager has been placed on record. The finding of the learned Arbitrator on issue No. 2 cannot be faulted.

30. In so far as the submission made by Mr. Sudhir Nandrajog, Sr. Advocate relying upon clause 56 of the agreement dated 19th January, 1995 is concerned, I would like to note here the agreement vide clause 35, stipulates as under:

"The dealer shall not sell, assign, mortgage, charger or part with or otherwise transfer his interest in the dealership or any right or interest or benefit conferred by this agreement or grant any license in connection with the said premises and/ or outfit or any part thereof to any person firm or company nor allow any other person, firm or company to use the premises or the outfit or any part thereof except to the extent necessary under the terms of Agreement and specifically permitted in writing by the Corporation".

31. If meaningfully read, it stipulates that the dealer shall not part with his interest in the dealership to any 3rd person.

32. From the perusal of the GPA, it is apparent that Mr. Sanjay Kumar Singh having created interest in favour of Mr. Praveen Singh, had violated clause 35 of the agreement. Perusal of clause 35 would also make it clear that the same is a mandatory stipulation, which if violated could not be remedied and the submission of Mr. Nandrajog relying on clause 56, that four days notice is essential to remedy the breach is not appealing.

33. I note, the Division Bench in Paras 20 and 21 of Nirmal Kwatra (Supra) held as under:

"20. Keeping in mind the aforesaid well settled principles of interpretation of an agreement, now we would like to deal with the termination order and the specific clauses which are in dispute between the parties. It is the admitted case of the appellant that she was granted retail outlet under ''A'' site as per the dealership agreement. Neither she denied the surprise inspection conducted on 1st December, 2007 nor the inspection report prepared at that point of time. The appellant has also not disputed the execution of the General Power of Attorney, Partnership Deed and the Will - all dated 10th February, 2001. The only defence that has been put up by the appellant is that those documents were prepared to submit to the respondent Corporation for transfer of the ownership of the retail outlet on account of her old age and financial problems and also on account of the fact that her son and daughter were not interested in continuing the said business. According to her, the said documents were dissolved on 5th March, 2001, even though purported to be executed on 1st February, 2001, i.e. in about one month''s time. Even according to the appellant, the said documents were not notarized or registered, but the factum of execution of the same were never disputed. Apart from that, the documents found in the premises itself substantiate that on the basis of the said documents, Mittals (Ajay Mittal and Gaurav Mittal) were operating all the transactions of the petrol pump retail outlet and were also present at the time of inspection and even signing the inspection reports. To examine whether the said documents were in operation or not, the respondent Corporation directed the appellant to submit income-tax returns, balance sheets of the dealership firm and the account statements. It is apparent from the material placed before us that the appellant is using two different PAN numbers for filing of income-tax returns. The financial statements which were placed before the respondent Corporation also reveal that the petrol pump retail outlet was operated by 100% financial assistance given by the outsiders/third parties and the said account transactions relate to the said Mittals. One of the documents, i.e., Partnership Deed also shows that 98% share had been transferred to the Mittals. The above documents clearly establish that the said petrol pump retail outlet, even though allotted to the appellant, is virtually run and controlled by the benamis and, hence, we cannot appreciate the interpretation placed by the appellant that they are entitled for a notice under clause 56(a) which is remedial in nature. By any stretch of imagination the violation of clause 45 and running of business by a third party for the last several years is contrary to the policy of the Corporation. Though the respondent had provided all the facilities and granted dealership to the appellant who is a widow, yet a third party is enjoying the profits and benefits to an extent of 98% and such an act is an irreversible act.

21. We may also notice that clause 56 clearly provided that notwithstanding anything to the contrary contained herein, the Corporation shall be at liberty to terminate the agreement forthwith upon or at any time after the happening of any of the events stated therein - one being if the dealer commits a breach of any of the covenants and stipulations contained in the agreement and fails to remedy such breach within four days of the receipt of a written notice from the Corporation in that regard. Thus, the clause has to be understood in such a way that it promotes the intention of the parties while incorporating that clause. It appears to us that the intention of the parties is to give an opportunity to the dealer in cases of breaches which are remedial in nature."

(emphasis supplied).

34. It is not denied by the petitioner that respondents have come to know about the GPA from the police station of Kalyan Puri. In other words, the stand of the respondents that they were not aware of the GPA is appealable. In the absence of any information of such GPA having been executed the respondents could not take action at the relevant point of time.

35. Being unaware they executed the second agreement and allowed the petitioner to change the status of the dealership from a proprietorship concern to a partnership concern. On coming to know of the execution of the GPA and the fact that Mr. Sanjay Kumar Singh had created 3rd Party interest in the dealership is a factor which forced the respondents to issue a show cause notice by observing that the action of the Mr. Sanjay Kumar Singh was in breach of the terms and conditions of the dealership agreement.

36. The plea of the respondents that the show cause notice was given on non-existence ground is also unsustainable, rather such a plea is very technical in nature.

37. On overall consideration of the facts pleaded and the conclusion arrived at by the learned Arbitrator, more specifically keeping in view the observations made by the Division Bench in Para 21 of the judgment in Nirmala Kwatra (supra) and also noting the terms of power of attorney given in favour of Mr. Praveen Singh, this Court is of the view that it is not a case where the award requires interference in exercise of power under Section 34 of the Arbitration and Conciliation Act, 1996.

38. In view of above, I find no merit in the instant petition, same is accordingly dismissed.

39. IA No. 4975/2016

40. Dismissed as infructuous.

