

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

A.P. 547 of 2008

Madan Kumar Saha

Vs.

Indian Oil Corporation Limited

For the Petitioner : Mr. Dhruba Ghosh, Sr. Adv.
Mr. Javed K. Sanwarwala, Adv.
Mr. Pradeep Kumar, Adv.
Mr. S. Dasgupta, Adv.
Ms. Madhurima Halder, Adv.

For the Respondent : Mr. Amit Kumar Nag, Adv.
Mr. Swarajit Dey, Adv.

Last Heard on : 25.03.2021.

Delivered on : 07.04.2021.

Moushumi Bhattacharya, J.

1. This is an application under Section 34 of The Arbitration and Conciliation Act, 1996 for setting aside of an Award dated 10th July, 2008

passed by a learned Sole Arbitrator before whom the respondent before this court was the claimant in the arbitration proceedings.

2. The respondent/Indian Oil Corporation Limited (IOCL) filed its Statement of Claim in the arbitration for damages incurred pursuant to termination of the dealership of the petitioner. The dispute between the parties arose out of a Memorandum of Agreement dated 2nd April, 1976 in connection with a dealership of a retail outlet at Howrah on the basis of which the petitioner undertook to run a petrol pump in the name of M/s Kalpana Service Station. The parties entered into a formal contract on 17th June, 1977. The contention of the petitioner is that the respondent intended at all material times that the dealers would induct a financial working partner, if required and the petitioner accordingly inducted one Mr. Saidur Rahman Khan for rendering necessary financial assistance. Mr. Khan subsequently withdrew himself from the affairs of the petrol pump and the petitioner requested the respondent to induct Mr. Khan as a financial partner as per the respondent's Circular of 28th July, 1983. The petitioner's case is that the respondent assured the petitioner that the petitioner would be allowed to run the business with the help of a financial partner on the basis of which the petitioner executed a general Power of Attorney in favour of Mr. Khan. The petitioner's case is that the petitioner continued to run the petrol pump as its sole owner and did not part with the rights of the service station in favour of any third party. According to the petitioner, despite being aware of the arrangement between the petitioner and Mr. Khan, the respondent initiated a Vigilance Inquiry in 1993 followed by a Show-Cause

Notice issued on 17th July, 1997 on the petitioner for conducting operations of the petrol pump contrary to the terms of the contract. The petitioner filed an application in the arbitration for examining one Mr. G. C. Roy, an Attorney of the respondent in relation to the Vigilance Report. The case of the petitioner is that although Mr. G. C. Roy admitted to the existence of the Vigilance Report, the said report was not produced by the respondent in the arbitration.

3. The primary contention of Mr. Dhruva Ghosh, learned Senior Counsel appearing for the petitioner, is that the Arbitrator based his findings on the Vigilance Report which was not produced by IOCL and that if produced, the Vigilance Report would show that IOCL/respondent had full knowledge of the manner in which the petrol pump was being run since 1991. Counsel submits that the Award is liable to be set aside as being contrary to public policy and is perverse. Counsel submits that since the respondent was in possession of the Vigilance Report and deliberately chose not to disclose the same, the Arbitrator should have drawn adverse inference against the respondent. It is further submitted that the Award is based on conjecture and surmise by reason of the finding of the Arbitrator being premised on the word "*perhaps*". Counsel also assails the Award as being devoid of reasons. Counsel submits that it was the respondent's specific case in the Statement of Claim that the petitioner had committed breach of the agreement by entering into partnership with Mr. Khan without obtaining the respondent's approval and that the petitioner had also transferred his shares in the business to Mr. Khan. Counsel submits that the draft Deed of Partnership

between the petitioner and Mr. Khan dated 1st November, 1990 has nothing to do with the dealership and further that the respondent was aware of the arrangement between the petitioner and Mr. Khan since 1991.

4. Mr. Swarajit Dey, learned counsel appearing for the respondent seeks to sustain the impugned Award by contending that the petitioner admittedly failed to obtain prior written approval from IOCL before entering into the Partnership Deed with Saidur Rahman Khan which was in breach of the terms of the contract. Counsel submits that the respondent/IOCL did not have knowledge of the induction of Mr. Khan, which would be evident from the fact that the petitioner had not sent any notice of the same to the respondent and further that there is no document on record to show that the respondent had knowledge of the fact of induction of Mr. Khan prior to 20th March, 1997. Counsel submits that the respondent received the concerned letter only in March 1997 and immediately took steps for issuing the Show-Cause Notice on 17th July, 1997. Counsel accordingly submits that there was no waiver on the part of IOCL since the petitioner has not proved the fact that the respondent had knowledge of the induction of Mr. Khan. Counsel additionally submits that no adverse inference should have been drawn against the respondent for not producing the Vigilance Report since there was no notice to produce the Vigilance Report and consequently no direction on the respondent in relation thereto. Counsel submits that the Award should not be interfered with on the factual aspect and further that since the contract was determinable in nature, the Arbitrator could not have passed any order for specific performance of the contract.

5. The primary ground of challenge for setting aside the impugned Award is that the Award is perverse. The ground of perversity is based on the fact that the learned Arbitrator based his findings on a document that had not been brought on record by the respondent/ IOCL, namely the Vigilance Inquiry Report. The other ground of challenge is that the Award is based on surmise and conjecture since the Arbitrator has prefaced his finding on the termination of the dealership by the respondent/IOCL with the word "*perhaps*".

6. The above grounds of challenge have to be tested against the findings of the Arbitrator. The first ground, namely, that the Award is perverse is based on the presumption that (a) the entire Award is based on the Vigilance Report and (b) that the Vigilance Report was the only essential document which decided the issue of termination of the petitioner's dealership by the respondent.

7. The dispute arose between the petitioner (respondent in the Arbitration) and the respondent, IOCL (claimant before the arbitrator) from cancellation of a dealership of a Service Station- M/s Kalpana Service Station- by the respondent on the apparent breach of the terms and conditions of the Agreement by the petitioner. The respondent awarded the dealership of the Pump to the petitioner with effect from 02.04.1976. In November, 1991 the petitioner sought permission from IOCL to induct Saidur Rahman Khan as a financial partner to which by a letter of January,

1992, IOCL instructed the petitioner not to reconstitute the business without first obtaining IOCL's approval. A Partnership Deed was entered into between the petitioner and Mr. Khan on 1st November, 1990, which according to IOCL was in breach of the petitioner's obligation not to enter into any arrangement with regard to the Service Station. IOCL issued a show-cause on the petitioner on 17th July, 1997 and the Dealership Agreement was terminated on 28th March, 2000. The petitioner was directed to hand over vacant possession of the retail outlet together with the assets and properties of IOCL. IOCL claimed possession of the retail outlet and damages of Rs. 5,000/- per day from 01.04.2000 until delivery of possession together with other expenses of Rs. 3,00,000/-. According to the petitioner, IOCL had full knowledge and had given approval to the induction of Mr. Khan as a financial partner. The petitioner also claims that since Mr. Khan made further investments in the business, a General Power of Attorney was executed by the petitioner in the name of Mr. Khan which however was not given effect to. It is also contended that the Partnership Deed dated 01.11.1990 executed between the petitioner and Mr. Khan was based on the assurances given by the officers of IOCL, but which was also finally not given effect to. The petitioner claims that these facts were stated by the petitioner in the Vigilance Inquiry conducted by the Vigilance Officer of IOCL.

8. The impugned Award contains detailed references to the facts, which culminated in the reference of the disputes to Arbitration. The "*Conclusions*" of the Arbitrator followed the recordings of the factual position between the

parties. After taking into account the relevant facts the Arbitrator concluded that IOCL did not have knowledge of the induction of Mr. Khan. The reason given for this finding is that there was no document on record to prove the involvement of IOCL in the induction of Mr. Khan. The Arbitrator has also come to the finding that Mr. Khan was inducted in the affairs of the dealership prior to permission being sought from IOCL which was in clear breach of the terms of the Dealership Agreement executed between the petitioner and IOCL. It is also noted that although the petitioner was given time in February, 1998 to rectify the breaches committed by it, the petitioner approached the National Commission for the SCs and STs after which the dealership was terminated on 28th March, 2000. The Arbitrator found that the claim of IOCL was not defeated by delay since IOCL had given the petitioner time to rectify the breach.

9. The question which therefore falls for consideration is whether the Arbitrator has wholly based his decision to answer the abovementioned two issues framed by the Arbitrator in favour of the respondent IOCL on the Vigilance Inquiry Report.

10. For ease of reference the reasons in the judgment are divided under two headings.

(i) That the Vigilance Report was the only essential document which decided the issue of termination of the petitioner's dealership by the respondent.

The first two issues were concerned with whether IOCL was entitled to cancel the dealership, whether it was aware of the actions taken by the petitioner and whether the claim of IOCL could be defeated on the ground of delay. This question was decided with reference to the first two issues framed by the learned Arbitrator. From a perusal of the reasons given by the Arbitrator in arriving at the conclusion that IOCL was entitled to cancel the dealership and was not aware of the induction of Mr. Khan makes it clear that the Arbitrator did not base his findings solely on the Vigilance Inquiry Report. It is also important to note that the case of the petitioner before this Court is that there has been waiver on the part of IOCL with regard to induction of Mr. Khan in the dealership business. Counsel has sought to deal with the issue of breach of the Agreement regarding the alleged waiver on the part of IOCL namely that IOCL was all along aware of the involvement of Mr. Khan in the business but chose to issue the show-cause notice and terminate the Agreement despite such knowledge. It should be stated in this context that the argument of waiver presumes that IOCL was aware or had knowledge of the induction of Mr. Khan. The Arbitrator has recorded a clear finding that there was no document on record to show that IOCL was involved in any assurance which may have prompted the petitioner to execute the documents in favour of a third party. The fact that IOCL came to learn of the induction on 20th March, 1997 has not been dislodged by any factual evidence relied upon by the petitioner. Since the conclusions of the Arbitrator is based on other factual findings, namely the correspondence between the parties and the significance of the dates on which documents were executed by the petitioner, it cannot be said that the Vigilance Inquiry

was the only reason for the Arbitrator to justify the termination of the Dealership Agreement. The argument of the petitioner before this Court on this contention is hence rejected.

(ii) The Award is based on conjecture and surmise.

The part of the Award which has been assailed by the petitioner on the above ground is reproduced below:-

“It also appears that perhaps, the dealership was terminated after a Vigilance Enquiry finding of dealership being operated as ‘benami’. There is nothing in law or contract between the parties that takes away the right of the Corporation in exercising a right vested in it, because it chooses to allow some time or a second chance to the party in breach to rectify its faults. Therefore, the claim of the Claimant is not defeated by delays. This issue is accordingly decided in favour of the Claimant and against the Respondent”.

According to the petitioner, the Vigilance Inquiry Report was not brought on record or proved by IOCL in the Arbitration proceedings despite the petitioner contending that the Vigilance Report would show that IOCL had full knowledge of the manner in which the Petrol Pump had been run since 1991. The petitioner’s case is that since the Vigilance Report was not part of the record, the Arbitrator based his Award on an absence of evidence rendering the Award perverse. The petitioner has also argued that the Arbitrator should have drawn adverse inference against the respondent for not discussing the Vigilance Report. The aforesaid contentions of the petitioner have to be decided on whether the Vigilance Report was the only document on which the Arbitrator held that the termination of the

Agreement was valid. This Court has already negated such contention in the earlier part of this judgment.

The other issue which however remains to be decided is whether the Award shows that the petitioner had sought for production of the Vigilance Report by way of an application or otherwise. This Court has carefully considered the Award from which it is evident that there is no recording in the Award which would show that the petitioner made an application for production of the Vigilance Report or that IOCL refused to produce the said Report despite such request/application. This Court is of the view that adverse inference against the respondent/IOCL based on non-production of the Vigilance Report would only arise if IOCL refused to produce the same despite an application made by the requesting party or in defiance of a direction of the Arbitrator. Question No. 85 of the cross-examination relied on by the petitioner does not show that IOCL refused to produce the Inquiry Report. In fact, the answer of the respondent's witness is that despite, Vigilance Report being a confidential document, IOCL may produce it upon a direction of the Arbitrator. Hence, from a conjoint reading of the Award as well as the evidence relied on by the petitioner, it cannot be stated that the Arbitrator should have drawn an adverse inference on IOCL for non-production of the Vigilance Report.

Use of the word "*perhaps*" in the context of the sentence further indicates that the Vigilance Inquiry Report may have been an additional reason for IOCL to terminate the Agreement (underlined for emphasis).

Hence the ground taken by the petitioner of the Award being based on surmise and conjecture is not acceptable and is rejected.

11. The cases relied on by the petitioner on the law of perversity namely *Associate Builders vs Delhi Development Authority; (2015) 3 SCC 49* proceeds on the fact that the Arbitrator either ignored vital evidence or came to a finding without any evidence. Since it has already been held that the Vigilance Report did not form the only basis of the Arbitrator's finding on the validity of the termination, this decision cannot be of any assistance to the petitioner. *Ajay Kumar D. Amin vs Air France; (2016) 12 SCC 566*, *Union of India vs Sugauli Sugarworks (P) Ltd.; (1976) 3 SCC 32* and *Sathyanarayana Brothers (P) Ltd. vs Tamilnadu Water Supply and Drainage Board; (2004) 5 SCC 314* are decisions in which the courts should have drawn adverse inference on a vital piece of evidence and found that an Award would be vitiated if relevant documents are ignored. In *Ajay Kumar D. Amin* and *Sugauli Sugarworks* important documents were suppressed by the parties and witnesses were not examined for proving vital facts which is unlike the present case where no application was made on IOCL to produce the Vigilance Report. In *Ajay Kumar D. Amin*, the Supreme Court held that failure of a party to produce a document which should have been produced despite a direction for such coupled with failure to explain such non-production raises a presumption that the contents were unfavourable to the party. An adverse inference should hence be drawn against the said party. There is also nothing on record in the present case to show that despite an

application made for production of the Report or an order of the learned Arbitrator to that effect, IOCL refused to disclose the same.

12. On the other hand in *Associate Builders vs Delhi Development Authority* the Supreme Court has cautioned that a Section 34 Court does not sit in Appeal over an Award for reassessing the evidence. *Dyna Technologies Pvt. Ltd. vs Crompton Greaves Ltd; (2019) SCC Online SC 1656* is on the same vein where the Supreme Court held that an Award should not be interfered with merely because an alternative view on facts or interpretation of the contract is possible and further that a Court should defer to the view taken by the Arbitrator unless the reasoning is found to be perverse. Since this Court is of the view that the Award contains sufficient and clear reasons for coming to the conclusions and that a definite and intelligible link exists between the factual findings and the conclusions, the Award must be sustained. This Court does not find any reason to interfere with the Award under the grounds available under Section 34 of the 1996 Act and much less on the grounds taken in the present application for setting aside of the impugned Award.

13. In view of the above A.P No. 547 of 2008 is dismissed without any order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)