GUJADHUR G & ORS v GUJADHUR & ANOR

2005 SCJ 187
2005 MR 57

Record No. 84596

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

1. **Ghaneshwar Gujadhur**
2. **Lajpati Gujadhur**
3. **Rajkumar Gujadhur**
4. **Sheoshankar Gujadhur**
5. **Dimeshwar Gujadhur**

Appellants

v.

1. **Gunness Gujadhur**
2. **Sewpeearee Singh**

Respondents

AND

In the presence of:-

1. **Luxmi and Gunesh Ltd.**
2. **The Registrar of Companies**

Co-respondents

JUDGMENT

This is an appeal challenging the decision of the learned Judge in Chambers ordering the appellants (then respondents) (a) from pledging and or otherwise creating encumbrances over the shares of co-respondent no.1 allotted in their names which they held as nominees of the respondents (then applicants); (b) to restitute and transfer those shares to the respondents; (c) to sign and deliver to the respondents the deeds witnessing the restitution of those shares; (d) to deliver to the respondents all certificates in relation to those shares, failing which, to issue a written indemnity to that effect and (e) to cause their names to be struck off the register of co-respondent no. 1.

There are 26 grounds of appeal which we need not reproduce as they may be conveniently grouped, as argued before us, under the following headings: (a) the unfairness in deciding a case of deprivation of property solely on affidavit evidence without hearing the parties under cross-examination; (b) the jurisdiction of the '*juge de referé*' to decide the matter on its merits; (c) the validity of the *contre-lettres* as to (i) whether they had not been spent or had lapsed, (ii) whether they were not time-barred; (d) the urgency in the matter and finally (e) the jurisdiction of the Judge in Chambers to consider matters relating to the rights of the shareholders of a company, more specifically as regards ordering the rectification of the share register.

We had, at the start of the hearing of this appeal, following objections raised by learned counsel for the respondents and co-respondent no. 1, prevented learned

counsel for the appellants to proceed on the ground styled '*preliminary point*' in their skeleton argument as to matters which the applicants purported to raise and which did not form part of any of the grounds of appeal already filed. We have repeatedly stated that the filing of the skeleton arguments must neither be used as a pretext for raising additional grounds of appeal out of time nor as a disguise to submit on matters which were not specified in any of the grounds of appeal or canvassed before the Judge in Chambers.

It is appropriate at this stage, in order to understand the dispute which arose between the parties, to set out briefly the undisputed facts. The first three appellants are the children of late Sir Radhamohun Gujadhur, the brother of respondent no. 1, and the last two appellants, the children of appellant no. 1 and 2 respectively. Respondent no. 2 is the religiously married wife of respondent no. 1. Co-respondent no. 1 is a family company with limited liability and the registered shareholders consist of the five appellants, the three children of late Sir Radhamohun Gujadhur, the succession of Sir Radhamohun Gujadhur and respondent no. 1. The latter is the minority shareholder.

It is common ground that the chairman of co-respondent no. 1 is respondent no.1. In the words of the appellants, they had "*always worked and kept themselves at the disposal of the respondents at all times and were in fact at their beck and call and this for over thirty years*". It was also not denied that on March 9, 1982, each of appellants no. 1, 2, 3 and the other three sons of late Sir Radhamohun Gujadhur had acknowledged in writing that "*all the shares registered in their names in the company in truth and in fact belong to respondent no. 1*" and they also undertook, upon the request of respondent no. 1, to transfer to the latter or such other person as respondent no. 1 might designate, the shares held by them. In the year 1984 and in May 1988, August 1988 and September 1988, new shares were issued and distributed to the appellants. According to a document dated September 14, 1988, and drawn up by appellant no. 2, an attorney al law, and signed by all the other appellants personally or on their behalf, they had admitted that all the shares which they held in co-respondent no. 1 belonged to the respondents and that they undertook to "*do anything with such shares according to your wishes and instructions*".

The application before the learned Judge in Chambers was for an interim order in the nature of an injunction prohibiting the appellants from *pledging and or otherwise creating encumbrances over the shares of co-respondent no. 1 allotted in their names which they held as nominees of the respondents*, coupled with an application for a mandatory injunction in respect of those shares.

It was the contention of the appellants that respondent no.1 was never the sole beneficial owner of co-respondent no. 1 and that, although they did sign the "*contre-lettres*" of March 9, 1982 and September 14, 1988, the shares in co-respondent no. 1 belonged to them as they had been registered in their respective names in the share register of co-respondent no. 1.

The other three children of late Sir Radhamohun Gujadhur, who were not parties to the present proceedings, had sworn an affidavit confirming the contention of respondent no. 1 that all the shares which they held in co-respondent no.1 belonged to respondent no. 1 as per the *contre-lettres*. Similarly, the accountant of co-respondent

no.1 had sworn an affidavit stating that a substantial amount of money belonging to co-respondent no.1 had been credited to the account of respondent no.1. while the amount credited to the accounts of the appellants upon the instructions of respondent no. 1, was less important, although respondent no. 1 actually held fewer shares registered in his name in that company.

The learned Judge in Chambers had no hesitation in coming to the conclusion, from the various documents put before him and in the light of the numerous affidavits filed, that (a) the shares held by the appellants and the other three sons of late Sir Radhamohun Gujadhur were in their capacity as nominees of the respondents; (b) the *contre-lettres* did not become obsolete (*caduques*) as a result of the amendment to the constitution of co-respondent no.1; (c) the *contre-lettres* were not time-barred and (d) consequently, the respondents had shown that they held a clear legal title to those shares. Having found that there was urgency as well in the matter and that the appellants had not put up a bona fide and serious defence, he converted the interim order into an interlocutory one and further granted a mandatory order, as prayed for, making it clear that the orders made were provisional "pending the determination of any main case which any party may wish to lodge".

We shall now turn to the appeal proper. We fail to follow the submission of learned counsel for the appellants on the question of deprivation of property without giving the parties an opportunity of being cross-examined. All the parties had the opportunity of putting before the learned Judge in Chambers their contentions through numerous affidavit evidence and annexes. This had always been the procedure before the Judge in Chambers as provided for by the Rules of the Supreme Court. The issue before the Judge in Chambers was the run-of-the-mill case which was quite straight forward and presented no difficulty, namely whether (i) the contention of the respondents that the shares which the appellants held in co-defendant no. 1 belonged to them and (ii) the intervention of the Judge in Chambers was required in view of urgency.

In the light of the *contre-lettres*, the validity of which the learned Judge found to be unassailable, coupled with the other uncontested facts, namely the upper hand which respondent no. 1 had in the management of co-respondent no. 1, despite not being the majority shareholder, he concluded that the legal right in those shares had been overwhelmingly established in favour of both respondents. In other words, the learned Judge found that the respondents had shown that they had established a prima facie serious case as to the ownership of those shares. We are of the view that the complaint is unfounded as every opportunity was given to the appellants to challenge the respondents' contention.

The jurisdiction of the Judge in Chambers as a *juge de référé* is beyond dispute (vide **Gujadhur v Reunion [1960 MR 208], Ragavoodoo v Appaya [1985 MR 18]**) in "*matters requiring celerity so as to implement or protect a clear legal right to the exercise of which there is no serious or bona fide defence*". As rightly pointed out by learned counsel for the respondents and co-respondent no.1, an order of the Judge in Chambers in his capacity as a *juge de référé* is never final. We shall quote *Dalloz Répertoire Pratique verbo Référé* at notes 137 et seq. referred to by learned counsel for the respondents and co-respondent no.1:-

"*note 137:* *L'ordonnance de référé, ne pouvant faire préjudice au principal et ne statuant qu'au provisoire, ne saurait jamais avoir l'autorité de la chose jugée...et, par suite, ne saurait être invoquée, comme ayant autorité, devant le juge du principal..*

note 141: *L'ordonnance de référé n'ayant pas l'autorité de la chose jugée, celui qui l'a obtenue ne peut l'exécuter qu'à ses riques et périls...*

note 143: *Les ordonnances de référé présentent, quant aux mesures qu'elles préscrivent, et quoique le fond du litige y soit nécessairement réservé, tous les caractères d'une décision définitive, avec un droit actuel de commandement et d'exécution, que le seul recours aux juges du fond ne pourrait pas arrêter...*".

In the light of the above authorities, we reject the contention of the appellants that the interlocutory and mandatory orders made by the Judge in Chambers are final.

We shall now deal with the issue of the validity of the *contre-lettres,* first considering whether the *contre-lettres* had been superseded by (a) the alleged distribution of dividends; (b) the alleged distribution of lands and (c) the amendment to the statute of co-respondent no.1 which allegedly gave them a right of veto, as submitted by learned counsel for the appellants.

As to the issue raised under item (a), the learned Judge in Chambers found that there was nothing sinister in the light of the explanation of respondent no. 1 concerning the distribution of dividends to the appellants by co-respondent no. 1. He considered the letter dated May 7, 1999, written by respondent no. 1 to all the shareholders of Radhamohun Gujadhur Limited and to the heirs to the succession of late Sir Radhamohun Gujadhur, to which was annexed a list of assets and liabilities, calling for suggestion as to the manner in which those assets should be partitioned. The relevant part of the letter reads as follows:-

'*As far as the company Luxmi and Ganesh Ltd is concerned, I circulate a copy of a letter signed by all of you whereby it is acknowledged that the shares although registered in your respective names belong in truth and in fact to me and my wife. I do not propose to proceed to any distribution of the shares owned by that company*'.

No affidavit in rebuttal was made by the appellants as to the assertion of respondent no. 1 that the shares belonged in truth to him and his wife with the result that the learned Judge in Chambers found that, in the light of that letter, the question of *caducité or prescription* could not arise.

In respect of the issue raised under item (b), the learned Judge in Chambers found that, despite the distribution of lands by respondent no. 1 to some of the appellants, there was a reservation that both respondents would during their lifetime be entitled to the usufruct over those lands which was an indication that the respondents had still control over the properties, the more so as there was evidence that the authorisation given to one of the appellants to build had been revoked afterwards.

It must also be borne in mind that the amendment to the constitution of the company in January 2003 followed a feud between the six nephews of respondent no. 1, resulting in a split into two groups. All the cheques of co-respondent no. 1 were previously signed jointly by the secretary, namely appellant no. 2 and one of the directors upon the instructions of respondent no.1. Following the dispute, respondent no.1 decided that his signature was mandatory together with a signatory from each of the two groups. This was accepted by the two groups, as can be gathered from the notarial deed. It was apparently this right which the appellants claimed to constitute a veto.

We fail to see in what manner it can be said that the *contre-lettres* had thereby become obsolete, since as rightly found by the learned Judge in Chambers, respondent no.1 was still the person holding the reins of the company and even before the amendment to the constitution of the company, appellant no. 2 was one of the signatories and could have refused to sign the cheque, thus exercising a sort of veto which apparently never occurred before the dispute. So much for the issue raised under item (c) above.

As regards the issue of prescription raised concerning the *contre-lettres*, having regard to article 2271 of the Civil Code which provides that '*le délai de prescription court du jour où le droit d'action a pris naissance'*, we take the view that the learned Judge in Chambers did not err, after a thorough analysis of the undisputed facts before him, in concluding that time started to run as from the date respondent no. 1 had notified the appellants that he was exercising his right to the shares held by them as his nominees.

Moreover, having regard to the wording of the *contre-lettres*, which clearly reveals a contract of agency (*mandat*), the contract can only be terminated as provided for by article 2003 of the Civil Code and consequently it stands to reason that any question of limitation of action to bar any cause of action can only run after the notice of termination of the contract of agency.

With regard to the ground of appeal relating to the issue of urgency, it was submitted by learned counsel for the appellants that there was no urgency and that the matters taken into consideration as listed by the learned Judge in Chambers in his judgment, were not indicative of urgency. He further contended that urgency should not be confused with celerity and he referred in this regard to *Dalloz Répertoire Pratique verbo Référé* at notes 4 to 8, 17, 39, 40 to 44, 53, 65 and 66. He further added that had there been urgency due to the advanced age of the respondents, it was open to the latter to seize the competent court by way of motion as provided for by rule 2(2)(b) of the Rules of the Supreme Court.

It was submitted by learned counsel for the respondents and co-defendant no. 1 that it was not open to the appellate court to review the matters taken into account by the Judge in Chambers in his appreciation of urgency unless they were unreasonable and that, in any event, in the case in hand, the factors taken into account, namely the advanced age of the respondents and, more specially, their ailing health, as admitted by the appellants, coupled with the refusal to sign the cheque for the medical expenses of respondent no. 2, amply demonstrated in the circumstances that there was urgency.

Reference was also made in this respect to the *Gazette du Palais* of 1955 and the article therein entitled "*L'urgence en matière de référé*".

We read from the article in the Gazette du Palais (supra) that "*l'urgence suppose des droits ou des intérêts légitimes à protéger, un dommage ou tout au moins un danger à éviter*".

And in the same vein, at note 5 of *Dalloz Répertoire Pratique verbo Référé*, we read:-

> "*il y a urgence chaque fois qu'il y a péril pressant, chaque fois qu'un retard entraînerait un préjudice irréparable. Il y a même urgence, suivant un arrêt, toutes les fois que le retard apporté à une solution provisoire, et ne préjudiciant en rien au fond, met en péril les intérêts d'une des parties*".

Similarly at note 6, which had been cited to us by learned counsel for the appellants himself, we read the following:

> *"L'urgence doit être distinguée de la célérité, qui n'autorise qu'à assigner à brief délai. L'urgence exige qu'il y ait péril en la moindre demeure, péril réel à attendre l'audience ordinaire du tribunal, même à bref délai.., et que les délais des autres jurisdictions, si abrégés soient-ils, aient pour conséquence d'occasionner une sorte de déni de justice".*

We have scrutinized the record and, in the light of the various authorities cited to us, we are of the view that, in the present circumstances of the case, it was not unreasonable for the learned Judge in Chambers, after having concluded that the respondents held a clear legal right to the shares *in lite*, that there was urgency in the matter, having regard to the very special circumstances of the case.

Moreover, the question of whether there was urgency or not is a matter of appreciation of the Judge in Chambers. In this respect, we shall refer to *Encyclopédie Dalloz, Répertoire de Procédure Civile et Commerciale , Verbo: Référé Civil* at note 21, cited by learned counsel for co-respondent no. 1 and quoted in **Ramlagun v Gangaram [1978 MR 206] -**

> "*La question de savoir s'il y a urgence est une question de fait souverainement appréciée par le juge de référé*."

Furthermore, the Appellate Court is loath to disturb the appreciation of fact of the Judge in Chambers as to whether there was urgency or not:-

> "*La loi a abandonné à l'appréciation discrétionnaire et souverain du juge de référé les cas divers d'urgence qui peuvent déterminer sa compétence, sans que sa decision sur ce point tombe sous le contrôle de la cour de cassation". [D.P.1882.1.241; note 15 of Encyclopédie Dalloz, Répertoire de Procédure Civile et Commerciale (supra)]*.

We shall now turn to the last point raised, namely that the Judge in Chambers had no jurisdiction to hear matters which were eminently within the sole jurisdiction of the Bankruptcy Court, as provided for by section 95 of the Companies Act 2001. It was

also urged before us that, since the shares *in lite* were registered in the name of the appellants in the share register of co-defendant no.1, the legal title to those shares was prima facie vested with the appellants, having regard to section 93 of the Companies Act 2001.

Learned counsel for the respondents was of the view that, notwithstanding the fact that the shares *in lite* were registered in the share register of co-respondent no. 1 in the name of the appellants, that prima facie evidence of legal title of the shares was rebuttable and the respondents had shown through the *contre-lettres* that they were the real owners of the shares.

We agree with the views of learned counsel for the respondents. Moreover, as rightly pointed out by learned counsel for the respondents, the dispute was not one between the respondents and co-respondent no. 1, so that the Judge in Chambers was not asked to rectify the share register.

Since the respondents had established at the end of the day before the learned Judge in Chambers that they had a prima facie serious and arguable case and that the balance of convenience, having regard to the urgency of the matter, tilted heavily in their favour, we see no cause to interfere with the decision of the learned Judge in Chambers.

In the light of our conclusions, we uphold the judgment of the learned Judge in Chambers and dismiss the appeal, with costs.

A.G. PILLAY
CHIEF JUSTICE

P. LAM SHANG LEEN
JUDGE

15 July 2005
Judgment delivered by Hon P Lam Shang Leen, Judge
For Appellants : Mr Attorney F Hardy – Mr R D'Unienville, QC together with Messrs. A Domingue & R Gujadhur, of Counsel

For Respondents : Mr Attorney A Robert (Jr) – Mr R Pursem, of Counsel together with Mr V Ramsamy, of Counsel

For Co respondent No.1: Mr Attorney G Ng Wong Hing – Mr T M Gujadhur, of Counsel

For Co respondent No.2: State Attorney – Mrs R Beekarry–Sunassee, State Counsel