GALAKHA ENTERPRISES LTD v ECP AFRICA FUND IV A LLC & ANOR

2023 SCJ 294

SC/COM//WRT/00915/2021

IN THE SUPREME COURT OF MAURITIUS
(BEFORE THE JUDGE IN CHAMBERS)
(COMMERCIAL DIVISION)

In the matter of:-

GALAKHA ENTERPRISES LTD

APPLICANT

v

1. ECP AFRICA FUND IV A LLC

2. ECP MANAGER IV LP

RESPONDENTS

RULING

On 30 December 2021, an application for an interim order was lodged and at the material time, the applicant was unaware if its shares in the respondent no.1 had been sold or not. It was later confirmed by the respondent no.1 in its second affidavit that the shares and unpaid capital commitment of the applicant in the respondent no.1 were sold in April 2021. The applicant sought an interim order in the nature of an injunction based on two scenarios, that is, in the event that (i) the respondent no.1 had not sold the applicant's interest in respondent no.1, and (ii) that the applicant's interest in respondent no.1 had been sold.

On 31 December 2021, I declined to grant an interim order but instead ordered that a summons be issued upon the respondents for them to show cause why an interlocutory order in the form of injunction cannot be issued at the applicant's own risk and perils regarding prayers sought in the event that the applicant's interest in respondent no.1 had been sold, namely at items 5.1.2 - 5.1.4 of the amended praecipe -

> *"5.1.2 compelling Respondents to disclose to Applicant the name and address of the purchaser of Applicant's Shares*

in Respondent No.1, and the consideration paid by the purchaser in this respect;

5.1.3 restraining and prohibiting Respondents from using or distributing the proceeds received from the sale of Applicant's Interest in Respondent No.1 in any manner whatsoever;

5.1.4 restraining and prohibiting Respondents from disposing or dealing with or diminishing the value of the net assets of Respondent No.1 in an amount of USD 16,468,196, which is the fair value of Applicant's Shares as valued by Respondent No.1 itself…….;"

One Mr Nokour, a Tchad citizen agreed to subscribe for class A shares in the respondent no.1 in the amount of USD 20 million with a capital commitment pursuant to a Subscription Agreement dated 16 April 2017. Mr Nokour paid for the notice of capital call #13 on 17 September 2018 in the amount of USD 9,915,665. In or about September 2018, the said Mr Nokour assigned all his rights and obligations under the Subscription Agreement to the applicant. The applicant paid the notice of capital call #14 on 10 May 2019 in the amount of USD 477,924. From April 2017 to May 2019, the applicant paid for two capital calls in the total amount of USD 10,393,589 as averred by the applicant at paragraph 10 of its first affidavit. The applicant was unable to raise the fund for notices of capital call #16 and #17 on 30 October and 15 November 2019 respectively. Further notices of capital call #18, #19 and #20, were made in March, July and December 2020 respectively by the respondent no.1 and for which the applicant could not raise funds.

The respondent no.2 is the manager of the respondent no.1. On 8 February 2021, the respondent no.1 informed the applicant and all non-defaulting shareholders that it had received an offer for the purchase of the applicant's said shares and unpaid capital commitment. On 12 April 2021, there was a notice of capital call #21 made to the applicant notwithstanding the fact the applicant had been informed that it was a defaulting shareholder and the shares and unpaid capital commitment of the latter were being sold. On 21 June 2021, the respondent no.1 sent a draft release letter wherein the applicant was to release the respondents from all claims that it could receive out of the sale proceeds of the applicant's shares and unpaid capital commitment which the applicant refused to sign.

The respondent no.1 put in two affidavits dated 28 January 2022 of which one was as regards preliminary objections raised and one affidavit dated 17 June 2022, whereas the applicant

put in one affidavit dated 27 December 2021 in support of its application and two affidavits dated 4 April and 26 September 2022 respectively.

The two preliminary objections which the respondent no.1 raised in the affidavit dated 28 January 2022 are as follows –

(i) The Honourable Judge in Chambers of the Commercial Division of the Supreme Court of Mauritius does not have jurisdiction to consider the present application in view of the arbitration clause set out in an Amended and Restated Shareholders Agreement dated 30 June 2018; and

(ii) The present application is misconceived and cannot succeed as it has been lodged in contravention of section 169(4) of the Companies Act.

It was submitted by counsel for the applicant that since the respondent no.1 replied to the affidavits put in by the applicant coupled with the preliminary objections raised, the respondent no.1 has submitted itself to the jurisdiction of the Judge in Chambers. I have considered the submissions of both counsel as regards this issue and the authorities referred thereto. The first affidavit put in by the respondent was as regards the preliminary objections and it was clearly averred by the respondent no.1 at paragraph 3 of its first affidavit that –

"*In making and filing this affidavit, the Respondent No.1 does not submit or intend to submit to the substantive jurisdiction of the Mauritian Courts. This affidavit is filed for the sole purpose of setting out the factual background to the Respondent No.1's objection to the effect that the dispute underlying the Applicant's application for injunction is the subject of an arbitration agreement, with the result that the jurisdiction of the Honourable Judge in Chambers is ousted by operation of the IAA*."

I am therefore of the view that the respondent did not subject itself to the jurisdiction of the Judge in Chambers and that preliminary objections had been raised at the outset.

Both learned counsel for the applicant and the respondent no.1 offered written and oral submissions as regards the preliminary objections which I have duly considered. As for the respondent no.2, it joined the respondent no.1 as regards the preliminary objections raised.

The case of the respondents is that on the basis of an arbitration clause as found in the Amended and Restated Shareholders Agreement, the jurisdiction of the Judge in Chambers is ousted. Any application for an interim measure like the present one, can only be made to a designated Judge as provided in the International Arbitration Act. For that matter, since I am not a designated Judge, I am therefore not entitled to entertain this application.

According to counsel for the respondent no.1, insofar that the sale of the shares and unpaid capital commitment of the applicant in the respondent no.1 led to the present application, this means that the transactions were being conducted pursuant to the Shareholders Agreement and the Amended and Restated Shareholders Agreement. In fact, clause 17.10 of the Amended and Restated Shareholders Agreement provides for disputes to be resolved by arbitration –

"All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules") by one arbitrator appointed in accordance with the said Rules. The language of the arbitration shall be English. The place of arbitration shall be New York, New York."

Counsel for the respondent no.1 added that should the applicant have qualms regarding the validity, scope and application of the arbitration clause, this would have to be determined by the arbitral tribunal and not by the Court. The respondent no.1 therefore submits that the issue which needs to be determined is whether the applicant is bound by the arbitration clause found in the Amended and Restated Shareholders Agreement. For the respondent, the applicant is duly bound by this clause on the basis of the Subscription Agreement which Mr Nokour agreed to and signed, and following which he assigned his rights and obligations to the applicant as regards the Subscription Agreement and Shareholders Agreement and Amended and Restated Shareholders Agreement.

Counsel for the applicant submitted that the applicant cannot be bound by the arbitration clause found in the Amended and Restated Shareholders Agreement as at the time that the Amended and Restated Shareholders Agreement came into effect on 30 June 2018, the applicant, Galakha Enterprises Ltd was not yet a shareholder of respondent no.1. As such, it could not have been recorded to hold class A shares in respondent no.1 in the amount of USD 20 million as can be read in the Amended and Restated Shareholders Agreement *(page 170 of the brief).*

In fact, it was by letter dated 1 September 2018 that Mr Nokour requested both respondent nos.1 and 2 that *"the Subscription Agreement and all rights and obligations thereunder be transferred to my wholly-owned investment vehicle Galakha Enterprises Ltd……".* Therefore, the applicant cannot be bound by the arbitration clause found in the Amended and Restated Shareholders Agreement of 30 June 2018.

It was also submitted by counsel for the applicant that the dispute arising between the parties is not pursuant to the Shareholders Agreement and the Amended and Restated Shareholders Agreement. Counsel further added that the reliance on the Amended and Restated Shareholders Agreement by the respondents to dispose of the shares of the applicant was unlawful as the latter was not a party to the said Amended and Restated Shareholders Agreement. According to counsel for the applicant, the dispute is in fact as regards the decision of the respondents forfeiting the shares of the applicant which had been fully paid. There is no such provision regarding forfeiture of shares in the Subscription Agreement. For the applicant, the dispute is regarding the infringement of the rights of a shareholder under the constitution of the company and under the Companies Act.

I fail to agree with the proposition of learned counsel for the applicant when it was clearly borne out in the Subscription Agreement that, inter alia*, "The Subscriber agrees that its obligation to contribute its Capital Commitment to the Fund shall be unconditional, complete and binding from the date that this Subscription Agreement is accepted by the Fund"* and that the subscriber *"agrees to comply with and be bound by the terms of each of the Subscription Agreement and the Shareholders Agreement".* In addition, the purchase commitment of the capital clearly spells out that the subscriber *"irrevocably applies to subscribe for Class A Shares with a Capital Commitment."* As such the present dispute arising between the parties is as per the Subscription Agreement, Shareholders Agreement and the amended one.

Having found that the dispute arising between the parties is pursuant to the Amended and Restated Shareholders Agreement, I have now to decide whether the applicant is bound by the arbitration clause in the Amended and Restated Shareholders Agreement and as such, whether my jurisdiction as Judge in Chambers is ousted.

In fact, when Mr Nokour subscribed to the shares of the respondent no.1 in a Subscription Agreement, **Annex 2** of the applicant's affidavit (*pages 27-78 of the brief*), he signed the said

subscription agreement. The relevant extracts in the said Subscription Agreement are as follows, inter alia –

(a) This application to subscribe for class A shares (the "Class A Shares") pursuant to the terms set forth in the shareholders agreement of ECP Africa Fund IV A LLC (the "Fund") in the most recent form agreed with the Subscriber and dated as of ---------- (as may be amended from time to time in accordance with the terms thereof, the "Shareholders Agreement") (*pages 27-28 of the brief*);

(b) Under the heading "**2**. **Purchase Commitment**

The Subscriber hereby (a) irrevocably applies to subscribe for Class A Shares with a Capital Commitment in an amount equal to the amount accepted by the Fund on the signature pages to this Subscription Agreement and (b) agrees to contribute such Capital Commitment in cash to the Fund in accordance with and subject to the terms of the Shareholders Agreement and the Subscriber's Letter Agreement (if any) by wire transfer of immediately……. The Subscriber agrees that its obligation to contribute its Capital Commitment to the Fund shall be unconditional, complete and binding from the date that this Subscription Agreement is accepted by the Fund." (*page 57 of the brief*);

(c) Under the heading "**10**. **Power of Attorney**

Subject only to the acceptance of this Subscription Agreement by the Fund, the Subscriber hereby (a) joins in and agrees to be bound by the Shareholders Agreement as a party thereto, and (b) makes, constitutes and appoints the Manager, acting through any of its authorized partners and officers and with power of substitution, as the Subscriber's true and lawful agent and attorney, with full power and authority in the Subscriber's name, place and stead, to execute the Shareholders Agreement and any amendments thereto that are validly made in accordance with the terms of the Shareholders Agreement….." (*page 73 of the brief);*

(d) Under the heading "**14. Miscellaneous**

…….(b) This Subscription Agreement (together with the Subscriber Information Form) and the Shareholders Agreement and Letter Agreement (if any) constitute the entire agreement between the parties hereto with respect to the subject matter hereof……." (*pages 74-75 of the brief*);

(e) Under the heading "**18. <u>Dispute Resolution</u>**

All disputes arising out of or in connection with this Subscription Agreement shall be settled in accordance with the dispute resolution provisions of the Shareholders Agreement" (*page 76 of the brief);*

(f) Under the heading "**SIGNATURE PAGE**

The Subscriber's Application is accepted, subject to the provisions of the Subscription Agreement and the Shareholders Agreement, on the date set forth below"(*page 78 of the brief)*;

(g) Under the heading "**SIGNATURE PAGE**

By signing below, the Subscriber (1) confirms that the information contained in the Subscriber Information Form and the Subscription Agreement is accurate and complete, (2) agrees to comply with and be bound by the terms of each of the Subscription Agreement and the Shareholders Agreement and (3) requests that the records of the Fund reflect the Subscriber's admission as a holder of Class A Shares issued by the Fund." (*page 79 of the brief*)

When the Amended and Restated Shareholders Agreement came into operation, that is, on 30 June 2018, one must not lose sight that there was a Shareholders Agreement which already existed and to which Mr Nokour subscribed, inter alia, on the terms and conditions as set out above in the Subscription Agreement. The fact that the applicant had been doing transactions with the respondent no.1, as averred by the applicant itself, from April 2017 until May 2019, it can be said that the applicant acquiesced to the terms and conditions of the Shareholders Agreement as well as the Amended and Restated Shareholders Agreement.

Furthermore, the notice of capital call of 10 May 2019, post the Amended and Restated Shareholders Agreement of July 2018, was paid by the applicant. It is further noted that the applicant also averred at paragraph 30 of its first affidavit that all the notices made reference to an Initial Shareholders' Agreement dated 14 December 2017 or an Amended and Restated Shareholders Agreement. I am therefore satisfied that it is in order for the applicant to be recorded as holder of class A shares in the respondent no.1 as ex facie the affidavit of the applicant, Mr Nokour and the applicant started to pay for the notice for call from April 2017 until May 2019, that is, prior to and post the Amended and Restated Shareholders Agreement as averred in paragraph 10 of the applicant's affidavit.

True it is that Mr Nokour formally requested the respondent no.1 to assign his rights and obligations in his shares to the applicant as per letter dated 1 September 2018. However, the fact remains that on the applicant's own averments and its own acts and doings, it cannot be said that it had not ascribed, subscribed and acquiesced to the terms and conditions of the Shareholders Agreement which had since then been amended as the Amended and Restated Shareholders Agreement. In stepping into the shoes of Mr Nokour, the applicant had taken all the rights and obligations as per the Subscription Agreement and the Shareholders Agreement and the Amended and Restated Shareholders Agreement. The applicant cannot now choose to not be bound by the terms and conditions of those documents.

As such, I find that the applicant is bound by the arbitration clause found in the Amended and Restated Shareholders Agreement and cannot say that it was not a party to same. Besides, clause 5 of the Amended and Restated Shareholders Agreement clearly sets out a chapter on "*DEFAULTING SHAREHOLDERS"* and ex facie the affidavit of the applicant, the dispute which has arisen reveals and indicates that the applicant is being construed as a defaulting shareholder by the respondent no.1. Since there is a dispute between the parties as to whether the applicant is a defaulting shareholder or not, any dispute arising must be resolved by arbitration and not by the Court as per clause 17.10 of the Amended and Restated Shareholders Agreement. I therefore conclude that the applicant is bound by the arbitration clause in the Amended and Restated Shareholders Agreement.

During the course of their submission, both counsel addressed me on the application of-

(i) section 5 of the International Arbitration Act; and

(ii) whether the requirements of section 5(2) of the International Arbitration Act have been satisfied.

Section 5 of the International Arbitration Act provides as follows –

*"**5. Substantive claim before Court***

(1) Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when

submitting his first statement on the substance of the dispute.

(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.

(3) Where the Supreme Court finds that the agreement is null and void, inoperative or incapable of being performed, it shall transfer the matter back to the Court which made the transfer.

(4) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and one or more awards may be made, while the issue is pending before any Court."

According to counsel for the applicant, since the respondent is submitting that this case falls within the premise of the International Arbitration Act pursuant to the arbitration clause as found in article 17.10 of the Amended and Restated Shareholders Agreement, the respondent had the duty to refer the matter to the Supreme Court under section 5 of the International Arbitration Act. Counsel for the respondent argued otherwise and submitted that since the present dispute is not a substantive claim before the Court but a matter before the Judge in Chambers and for which interim relief is being sought, section 5(1) of the International Arbitration Act does not find its relevance and application to the facts of the case.

Both counsel then submitted on section 5(2) of the International Arbitration Act which provides for requirements which need to be satisfied once there exists an arbitration clause. It is only if parties agree that there is an arbitration clause that the next issue to be determined, and which is agreed between counsel, is whether the applicant can show on a *prima facie* basis that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed under section 5(1) of the International Arbitration Act. They both referred to **Hewlett-Packard International Trade BV v Happy World Ltd [2017 SCJ 324]**, **Mall of Mont Choisy Limited v Pick 'N Pay Retailers (Proprietary) Limited & Ors [2015 SCJ 10]**

and **UBS AG v The Mauritius Commercial Bank Ltd** [2016 SCJ 43] where section 5(2) of the International Arbitration Act was considered.

Notwithstanding the fact that both counsel addressed me on section 5(2) of the International Arbitration Act, I find that it does not apply to the facts of the present case. As of note, learned counsel for the respondents rightly observed that section 5(1) of the International Arbitration Act would not be applicable for interim measures sought but only as regards to substantive claims made before the Court, and since interim measures are being sought, section 5(1) of the International Arbitration Act is not relevant and applicable.

However, counsel for the respondent submitted on section 5(2) of the International Arbitration Act as, according to her, this would be applicable for a case before the Judge in Chambers. I fail to agree with the proposition of learned counsel for the respondents that section 5(2) of the International Arbitration Act is applicable to remedies sought before the Judge in Chambers as this would only be applicable to substantive claims brought before the Court.

Remedies sought here from the Judge in Chambers are interim measures pending a main case. Since only interim measures are being sought, I do not find that section 5 of the International Arbitration Act would be applicable for the present case as interim measures cannot tantamount to them being a substantive claim before the Court. Besides, the International Arbitration Act provides for a part on "Compatibility of Interim Measures". I therefore find that I do not need to determine if the requirements of section 5(2) of the International Arbitration Act have been satisfied or not based on the nature of the application before me which is one for interim measures sought from a Judge in Chambers.

Counsel for the respondent submitted that since the remedies sought from the Judge in Chambers are interim measures and that the subject matter of the dispute is subject to an arbitration clause, by virtue of sections 2A, 23 and 42(1A) of the International Arbitration Act together with Rule 14 of the Supreme Court (International Arbitration Claims) Rules and insofar I am not a "*Designated Judge"* as provided in the said Act, I am therefore not entitled to entertain the present application and grant interim measures under section 23 of the International Arbitration Act. Section 23(1) of the International Arbitration Act provides –

"**23. Powers of Supreme Court to issue interim measures**

(1) (a) The Supreme Court shall have the same power to issue an interim measure in relation to arbitration proceedings as it has in relation to proceedings in Court, whether the juridical seat of the arbitration is in Mauritius or not, and whether that power is usually exercised by a Judge in Chambers or otherwise."

On the basis that there is an arbitration clause as per the Amended and Restated Shareholders Agreement which I find the applicant to be bound and considering that under section 23 of the International Arbitration Act, the Supreme Court has powers to issue interim orders, I find that the interim measures presently sought follow from the respondent no.1 selling the shares and unpaid capital commitment of the applicant pursuant to the Amended and Restated Shareholders Agreement.

Section 42(1A) of the International Arbitration Act provides-

"42. Constitution of Supreme Court and appeal

(1A) Applications to the Supreme Court for interim measures under sections 6(2) and 23 shall in the first instance be made to, heard by and determined by a Judge in Chambers who shall be a Designated Judge, but shall be returnable before a panel of 3 Designated Judges, composed of the Designated Judge who initially heard the matter and of such 2 other Designated Judges as the Chief Justice may determine."

Having regards to section 42(1A) of the International Arbitration Act, I find that interim measures sought can be said to be under section 23 of the International Arbitration Act so that the application should in the first instance be made to, heard and determined by a Judge in Chambers who shall be a Designated Judge but shall be returnable before a panel of 3 Designated Judges composed of the initial Designated Judge who heard the matter together with two other Designated Judges as the Chief Justice may determine. Taking into account that I am not a Designated Judge in accordance with the International Arbitration Act and considering that sections 2A, 23 and 42(1A) of the International Arbitration Act together with Rule 14 of the Supreme Court (International Arbitration Claims) Rules which are applicable to the facts of the case, I find that I cannot entertain the present application for interim measures for want of jurisdiction. I therefore uphold the first preliminary objection of the respondents.

It was also submitted on behalf of the applicant that Mr Nokour was not subject to the arbitration clause as, pursuant to section 8(2) of the International Arbitration Act, he did not certify by separate written agreement entered into after the dispute arose that he has read and understood the arbitration agreement and agreed to be bound by it as provided in section 8(1) of the International Arbitration Act. Counsel for the respondent disagreed that Mr Nokour entered into a consumer arbitration agreement and that section 8 of the International Arbitration Act would be applicable to the facts of the case. I have considered both submissions of learned counsel. The argument that at the time that Mr Nokour entered into a consumer arbitration agreement is not tenable as he signed the subscription agreement for the subscription of class A shares together with the capital commitment to be made. Clearly, Mr Nokour was not acting in a capacity of a consumer when I consider section 8(2) of the International Arbitration Act as to when a person enters into a contract as a consumer. I am therefore not convinced by this proposition of counsel for the applicant. Mr Nokour, in signing the Subscription Agreement, agreed to be bound by the Shareholders Agreement and to any amendments to be made to the said Shareholders Agreement on the wordings of the said Subscription Agreement as set out above.

The second preliminary objection is as regards whether this case has been lodged under the purview of section 169(4) of the Companies Act or not. For the respondent no.1, since there had been the sale of the shares and unpaid capital commitment of the applicant in the respondent no.1 and which was completed on 21 April 2021, by the operation of section 169(4) of the Companies Act, the applicant cannot seek an injunction for a conduct or course of conduct which had been completed as there had already been the sale of the shares and unpaid capital commitment.

As far as the applicant is concerned, the remedies sought before the Judge in Chambers is within the purview of section 73 of the Courts Act. When the application for interim relief was sought, it was clearly spelt out that the application for an injunction was being made pursuant to section 73 of the Courts Act and not under section 169 of the Companies Act.

I have considered the submissions of both learned counsel and as regards the second preliminary objection I overrule same as I am satisfied that the application made by the applicant was under section 73 of the Courts Act. However, having found that the protection which the applicant is seeking from the Judge in Chambers is pursuant to the Amended and Restated Shareholders Agreement which provides for an arbitration clause and by operation of sections

2A, 23 and 42(1A) of the International Arbitration Act together with Rule 14 of the Supreme Court (International Arbitration Claims) Rules, my jurisdiction as a Judge in Chambers, not being Designated Judge, is ousted.

In the light of upholding the first preliminary objection for reasons mentioned above, I set aside this application with costs.

M J Lau Yuk Poon
Judge

20 July, 2023

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FOR APPLICANT	**:**	**Ms R. Jaunbacus, Attorney-at-Law**
	:	**Mr M.R.C. Uteem, of Counsel**
FOR RESPONDENTS	**:**	**Mr T. Koenig, Senior Attorney**
	:	**Mrs M. Behary-Paray, of Counsel**
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