**JITSING S & ANOR v CONSORTIUM D'ETUDES ET DE REALISATIONS IMMOBILIERES LTEE & ORS**

**2021 SCJ 228**

**Record No. 114624**

**THE SUPREME COURT OF MAURITIUS**

**In the matter of:**

1. **Sooresh Jitsing**
2. **Antoinette Theresa Jitsing**

**Appellants**

**v**

1. **Consortium d'Etudes et de Réalisations Immobilières Ltée**
2. **Calodyne Belle Vue Ltée (also known as RES Calodyne Belle Vue Ltée)**
3. **Etudes Conceptions et Promotion Immobilières Ltée**

**Respondents**

**JUDGMENT**

This is an appeal against the order of the learned Judge in Chambers who decided that an arbitral award of 6 October 2015, in favour of respondent no.1 be made executory against appellants. The award is to direct appellants to pay to respondent no.1 –

(i) an amount of Rs.5,949,485 with interests at the rate of 8% per annum as from 16 November 2013 until final payment;

(ii) the reimbursements of the sums paid by it on behalf of appellants; and

(iii) an amount of Rs.1,741,441.73 representing 80% of the costs incurred for the arbitration.

An ex-parte application was made before the learned Judge in Chambers for the exequatur of the said arbitral award under Article 1026-8 of the Code de Procedure Civile. The arbitral award resulted from arbitral proceedings which started before the MCCI Arbitration and Mediation Centre. It is a dispute between the parties regarding the existence of a shareholders'

agreement between appellants and respondent no.2. A decision was sought whether appellants were bound by –

(i) the constitution of respondent no. 2; and

(ii) liable for monies or expenses incurred by respondent no.1 for respondent no.2.

The learned Judge in Chambers did not grant the order for exequatur (ex-parte) but instead issued a summons calling upon appellants, then respondents to show cause why the award should not be made executory.

From the perusal of the court records when the application was made for the arbitral award to be made executory, respondent no.2 put up an appearance and supported the said application. After an exchange of affidavits between the parties and submissions made by learned counsel for each respective party, the learned Judge in Chambers granted an order of exequatur.

Three grounds of appeal have been raised to challenge the decision of the learned Judge in Chambers which read as follows –

> **"GROUND 1**
>
> The Honourable Learned Judge sitting in Chambers failed to give due consideration to the principles to be applied in such cases by failing to carry out *"un examen sommaire, vérifiant seulement si l'ordre public a été violé de façon flagrante par les parties dans la convention ou par les arbitres dans la sentence"* which is mandatory without going into the merits of the case.
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> **GROUND 2**
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> The Honourable Learned Judge sitting in Chambers erred in law and principle when he said:
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> *"….and reconsidering the objections already dealt with by the arbitrator would be outside my jurisdiction as was held in* ***Allied Builders Ltd v Aluminium Industries Ltd*** *[2002 SCJ 5]* and ***EDCC Co. Ltd v Road Development Authority*** *[2015 SCJ 231]."*
>
> It is submitted that this legal proposition enunciated above by the Honourable Learned Judge sitting in Chambers is wholly flawed inasmuch as the Honourable Learned Judge in Chambers enjoy total independence as enshrined in our Constitution and exercises its powers and jurisdictions *"without fear or favour,*

*affection or ill will"* by virtue of its judicial oath. It is submitted that the legal duty of the Honourable Judge in Chambers is to carry out *'un examen sommaire'* of the matter before him instead of submitting himself in the hands and shoes of the Arbitrator by relying on issues already determined by her.

**GROUND 3**

The Honourable Learned Judge sitting in Chambers erred in law and principle when he failed to carry out the summary assessment (*examen sommaire*) laid down in a line of cases, particularly the case of ***Gujadhur v Gujadhur [1967] MR 19***, where those factors does exist in the present matter lengthily expressed in Appellants' submissions (then Respondents) given that this issue is a question of fact."

We have considered the submissions of all learned counsel. They have all mainly relied on their skeleton arguments and the authorities cited.

All the three grounds of appeal relate to whether the learned Judge in Chambers was right in allowing the arbitral award to be made executory. The grounds relate to the role of a Judge, his jurisdiction and his "*examen sommaire*". We propose therefore to deal with all the 3 grounds of appeal together.

We find it apt to repeat what is the jurisdiction of the judge of exequatur, as it was described in the case of **Gujadhur v Gujadhur [1967 MR 19]** –

*" …. the judge has no power to enquire whether the decision arrived at by the arbitrator is good or bad, but that he is empowered to examine the award and to see if it does not suffer from some fundamental defect."*

The jurisdiction of the judge of exequatur was also clearly spelt out in the case of **Allied Builders Ltd v Aluminium Industries Ltd [2002 SCJ 5]** –

"Reference may here be made to **Encyclopédie Dalloz Répertoire Procédure Civile, verbo Arbitrage (en droit interne) note 364 - *Pouvoirs du juge de l'exequatur***

*"N'ayant pouvoir que pour rendre exécutoire une sentence arbitrale, le juge de l'exequatur peut refuser l'exequatur à l'acte qui n'aurait pas le caractère contentieux, qui ne constituerait pas une sentence arbitrale, ou dont l'inexistence serait flagrante (V. Cass. civ. 17 juin 1971, Rev. arb. 1971. 10; CA Paris, 4 juill. 1968, ibid, 1968. 105). Il a été decidé que l'exequatur pourrait être refusé à une sentence rendue par des arbitres incompétents, à raison de l'existence d'une clause d'attribution de compétence au tribunal de commerce (Ord. Seine, 8 mai 1967, Rev. arb. 1967.77). Cette décision appelle cependant les plus expresses réserves, l'application de la compétence de l'arbitre étant exclusivement réservée*

*au tribunal statuant en vertu de l'article 1466. Il en va de même d'une décision selon laquelle l'exequatur pourrait être réfusé lorsque la sentence aurait méconnu les stipulations contenues dans les conventions des parties (Cass. Con. 30 juill. 1952, D. 1952. 724). En fait, le juge de l'exequatur procède seulement à un examen sommaire (CA Paris, 29 mai 1973, Rev. arb. 1973. 182), vérifiant seulement si l'ordre public a été violé de façon flagrante par les parties dans la convention ou par les arbitres dans la sentence (CA Paris, 4 juill. 1968, Rev. arb. 1968. 105; Cass. civ. 17 juin 1971, ibid. 1972. 10). Le juge de l'exequatur n'a donc pas à procéder à un examen du fond de la sentence, ni même à se faire juge de la pertinence des motifs (Cass. com. 13 nov. 1967, Rev. arb. 1967. 116). Il ne peut non plus accorder un exequatur partiel ou sous réserve, il ne peut que l'accorder ou le refuser (CA Paris. 26 juin 1981, JDI 1981. 843, note oppetit). Il ne peut donc ajouter à la décision qu'il rend exécutoire (Cass. 1re civ. 9 juin 1982, Bull civ. 1, no 215; 14 déc. 1983, D. 1984, IR 183). (**Emphasis is ours**)*."

This principle of law was then applied in the cases of **Mauritius Union Assurance Co. Ltd v GFA Insurance Co. Ltd [2011 SCJ 34] and EDCC Co. Ltd v Road Development Authority [2015 SCJ 231]**.

In the light of authorities mentioned above, the learned Judge in Chambers could only assess the evidence summarily and not dwell into the merits of the award. In fact, the objections raised by appellants in resisting the application for exequatur are that –

(i) they are not the shareholders of the respondent no.2;

(ii) they are not bound by the shareholders' agreement and constitution of respondent no.2 as they never agreed and signed to be party to same, they were instead bound by the shareholders' agreement and constitution of "RES Calodyne Belle Vue Ltée";

(iii) the arbitration clause is not valid;

(iv) there were no terms of reference; and

(v) there was unlawful extension of time for the arbitration proceedings have all been the subject matter of debates before the arbitrator.

We are satisfied that the learned Judge in Chambers was right and that he carried out "*un examen sommaire*" as can be seen from what he stated in the following extract:

*"a close reading of the award which is at Annex 4, shows that the very same objections were raised before the Arbitrator and the latter has lengthily dealt with these objections and made her ruling;*

*.....going into the merits of the case would be tantamount to sit on appeal against the decision of the arbitrator. At this stage, the respondent (*now appellant) *cannot rehash before me (*Judge in Chambers*), the arguments submitted before the arbitrator, on which she has already ruled."*

We also agree with the learned Judge in Chambers that he only has the function of looking at the evidence summarily and ensuring that there had been no flagrant breach of "*l'ordre public*" either by the parties or by the arbitrator.

On the basis of **Gujadhur v Gujadhur [1967 MR 19]**, we agree with the learned Judge in Chambers that the conditions which need to be satisfied for an arbitral award to be made executory are as follows –.

*"According to this last decision, which is generally accepted, the judge may satisfy himself (1) that the arbitrator was properly appointed and that his decision is, in fact, an award; (2) that the award is duly signed; (3) that it is not against public order; (4) that the arbitration agreement (compromis) was valid and regular; (5) that the arbitrator acted within the ambit of the arbitration agreement and made his award within the prescribed delay; (6) that he discharged the obligation imposed upon him by law; and (7) that he did not order anything which was contrary to law. (See Dalloz, Nouveau Code de Procédure Civile, art. 1021, notes 103 to 118)."*

In the present case, the conditions referred in the above quoted paragraph, that is, namely (1), (2), (4), (5), (6) are all linked to whether appellants were the shareholders of respondent no.2. If in the affirmative, they are bound by the constitution of respondent no.2 for arbitral proceedings to take place in case of dispute. We are satisfied that the learned Judge in Chambers looked at the award summarily and found that those conditions have been satisfied as the arbitrator considered all the issues relevant to her satisfying those conditions for her to be competent as an arbitrator. As of note, the "competence" of the arbitrator is within the realm of the arbitrator and we find it relevant to quote from**:**

**"V° Arbitrage - Fasc. 20 : ARBITRAGE. – Arbitrage en droit interne. Acteurs. Instance Sentence. *JurisClasseur Encyclopédie des Huissiers de Justice V° Arbitrage* Fasc. 20 : ARBITRAGE. – Arbitrage en droit interne. – Acteurs. Instance. Sentence.** Date du fascicule : 1er Janvier 2019 par **Éric Loquin** - Professeur à l'université de Bourgogne - Doyen honoraire de la faculté de droit de Dijon - Directeur honoraire du Centre de recherches sur le droit des marchés et des investissements internationaux (CREDIMI, UMR CNRS/ UB).

**9. – Appréciation prima facie par l'institution d'arbitrage de sa désignation –** De nombreuses institutions d'arbitrage se réservent, dans leur règlement, le pouvoir

d'apprécier *prima facie* si les parties ont convenu de porter leur litige devant elle. Généralement, la partie qui conteste la réalité de la convention d'organisation d'arbitrage tente de saisir le président du tribunal compétent, pour contester la décision de l'institution d'arbitrage d'organiser la procédure, au motif qu'il existe une difficulté de constitution du tribunal arbitral.Dans cette situation, il est admis que seul le tribunal arbitral est compétent pour statuer sur la validité de sa compétence, sous réserve du recours en annulation de la sentence diligenté par le demandeur, si le tribunal admet sa compétence *(TGI Paris, 13 juill. 1989 : Rev. arb. 1989, p. 97, P. Bellet)*.Inversement, il est possible que l'institution d'arbitrage à laquelle s'adresse l'une des parties refuse d'organiser l'arbitrage en invoquant l'absence de convention ayant pour objet sa désignation. Le juge de droit commun est alors compétent pour juger d'une action en exécution du contrat conclu entre les parties et l'institution d'arbitrage (*TGI Paris, 8 oct. 1986 : Rev. arb. 1987, p. 367)*."

In the light of the above, by virtue of Article 1023 of the Code de Procédure Civile, the arbitrator rightly decided about her competence. In looking at the award summarily and which the learned Judge in Chambers did, he was right to find that the conditions for making the award executory were correct. In fact, the arbitrator was properly appointed and her decision is in fact, (1) an award; (2) that the award was duly signed; (3) that the arbitration agreement (*compromis*) was valid and regular; (4) that the arbitrator acted within the ambit of the arbitration agreement and made her award within the prescribed delay (by seeking for a relevant extension from the MCCI) and (5) that she discharged the obligation imposed upon her by law.

We also agree with the learned Judge in Chambers that he could not reconsider the objections which were raised before the arbitrator as grounds of objection against making the arbitral award executory. What was required to be satisfied is that the award did not have any fundamental defects, it was not against public order and that the arbitrator did not order anything which was contrary to law.

As regards to conditions (3) and (7) referred to in the above extract quoted from the case of **Gujadhur [supra]** whether the award is against public order and made contrary to the law. We agree with the learned Judge in Chambers that the award does not have such defects.

Finally we find it relevant to refer briefly to the facts of this case and the allegations of forgery. The appellants signed a Shareholders' Agreement in respect of the to-be incorporated company in a reserved name of "RES Calodyne Belle Vue Ltée". A constitution for the

company together with the Consent and Certificate Forms of Directors as well as a Consent Form of shareholders were also signed by the appellants.

The Registrar of Companies however did not allow the company to be incorporated as "RES Calodyne Belle Vue Ltée" but did allow incorporation under "Calodyne Belle Vue Ltée". The appellants were not informed of this and contended that they had never signed the relevant documents for respondent no.2.

Therefore, the main dispute between the parties is that appellants never signed the shareholders' agreement and are not bound by the constitution of respondent no.2 but that they were only shareholders of "RES Calodyne Belle Vue Ltée" so that they are not liable for the claims made by respondent no.1 against respondent no.2. These issues have been considered by the arbitrator. Although it was made a live issue that the appellants did not sign the shareholders' agreement and thus not bound by the constitution of respondent no.2, the arbitrator was nevertheless satisfied that the name of the company being "Calodyne Belle Vue Ltée" and not "**RES** Calodyne Belle Vue Ltée" was not a material consideration for the parties. The arbitrator also found that by their conduct, appellants have subscribed to the shareholders' agreement and constitution of respondent no.2. Since 23rd January 2013 they were made aware that the company had been incorporated under the name of "Calodyne Belle Vue Ltée" following a decision of the Registrar of Companies for not accepting the word "RES" in the company name. Evidence on record shows that they remained as shareholders of "Calodyne Belle Vue Ltée" and continued to communicate with the latter up to August 2013.

In the present case, making the award becoming executory, is not against "*l'ordre public*". Article 1024 of the Code de Procedure Civile must be interpreted in context. An allegation of forgery will not necessarily cause the arbitration proceedings to be stayed. The following extract is of note: **Fasc. 1024 : ARBITRAGE. – Conventions d'arbitrage. – Conditions de fond. Litige arbitrable, *JurisClasseur Procédure civile***, **Fasc. 1024 : ARBITRAGE. – Conventions d'arbitrage. – Conditions de fond. Litige arbitrable**, **Date du fascicule : 11 Mai 2016- Éric Loquin - Professeur à l'université de Bourgogne - Ancien doyen de la faculté de droit de Dijon, at paragraph 52,** we quote:

> "**52. – Compétence de l'arbitre pour juger des litiges civils liés à l'infraction –** L'interdiction de compromettre en matière pénale doit être entendue de manière stricte. Elle n'empêche pas, selon la jurisprudence, que l'auteur de

l'infraction et la victime ne recourent à l'arbitrage pour le règlement des intérêts civils *(Cass. crim., 23 janv. 1947 : Gaz. Pal. 1947, 1, p. 76. – CA Paris, 9 déc. 1955 : Rev. arb. 1955, p. 101)*. L'arbitre peut par exemple statuer sur la responsabilité civile de l'auteur de l'infraction, à condition de respecter l'article 4, alinéa 2, du Code de procédure pénale, dans sa version du 5 mars 2007 : *"Il est sursis au jugement de cette action tant qu'il n'a pas été prononcé définitivement sur l'action publique lorsque celle-ci a été mise en mouvement"*.S'agissant des autres actions, avant la loi du 5 mars 2007, l'arbitre devait respecter la règle selon laquelle *"le criminel tient le civil en l'état"*. Placé dans la même situation que le juge civil, il lui appartenait "**de juger si l'instance pénale est de nature à influer sur le jugement du litige dont il est saisi**" *(CA Paris, 30 mars 1995 : Rev. arb. 1996, p. 131, obs. Pellerin. – CA Paris, 16 juin 1994 : Rev. arb. 1996, p. 135, note Pellerin. – V. E. Loquin, Les conséquences de la règle "le criminel tient le civil en l'état sur l'arbitrage" : RTD com. 1997, p. 231)*. La solution est différente depuis la promulgation de cette loi qui a supprimé l'obligation de surseoir à statuer. Le nouvel article 4, alinéa 3, du Code de procédure pénale énonce que :

La mise en mouvement de l'action publique n'impose pas la suspension du jugement des autres actions exercées devant la juridiction civile, de quelque nature qu'elles soient, même si la décision à intervenir au pénal est susceptible d'exercer, directement ou indirectement, une influence sur la solution du procès civil.

Même si le texte ne fait aucune allusion à la juridiction arbitrale, les solutions applicables "au juge civil" sont ici transposables. Il en résulte que le sursis ne s'imposera au tribunal arbitral que s'il est saisi d'une action tendant à la réparation du dommage causé par l'infraction, que ce sursis soit sollicité par une partie, (*TGI Paris, 23 févr. 1996 : Rev. arb. 2000, p. 471, note J.-B. Racine*), que celle-ci démontre l'influence que la décision pénale est susceptible d'avoir sur l'issue du litige (*CA Paris, 13 févr. 2003 : Rev. arb. 2004, p. 311, note J.-B. Racine)*. Conformément à l'article 1472 du Code de procédure civile, cette décision suspendra le cours de l'instance." (**Emphasis is ours**)

Further, concerning international arbitration dispute in France, it is of interest to note the following in the case of **Société Omenex M.X, Cour de cassation, Chambre civile 1, 25 Octobre 2005 - n° 02-13.252**

**"Si en matière d'arbitrage international la règle" le criminel tient le civil en l'état" ne s'impose pas aux arbitres**, l'article 4 du Code de procédure pénale est applicable, même en matière internationale, au recours en annulation d'une sentence arbitrale si la procédure pénale se déroule en France. **La demande de sursis à statuer ne peut être accueillie que si les faits dénoncés comme constituant l'infraction ont une incidence directe sur la cause d'annulation de la sentence et si la décision pénale à intervenir est susceptible d'influer sur la décision civile**.

> En application du principe de validité de la convention d'arbitrage et de son autonomie en matière internationale, la nullité non plus que l'inexistence du contrat qui la contient ne l'affectent." (**Emphasis is ours**)

We are therefore of the view that notwithstanding that a case of forgery has been reported to the police, the outcome of the police case will not have any influence or have any impact on the decision reached by the arbitrator as it was made a live issue before the arbitral proceedings that appellants did not sign the shareholders' agreement and constitution of respondent no.2 and this was adjudicated upon.

For all the reasons mentioned above, all the three grounds of appeal are set aside with costs.

**R Teelock**
**Judge**

**M J Lau Yuk Poon**
**Judge**

**08 July 2021**

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**Judgment delivered by Hon. M. J. Lau Yuk Poon, Judge**

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|---|---|
| **For Appellants:** | **Mr M. Dulloo, of Counsel**<br>**Mr K. Bokhoree, Attorney at Law** |
| **For Respondent No.1:** | **Mr M. Sauzier, Senior Counsel**<br>**Ms C. Bellouard, of Counsel**<br>**Ms N. Ahmed, of Counsel**<br>**Mr E. Sauzier, of Counsel**<br>**Mr Thierry-Koenig, Senior Attorney** |
| **Respondent No.2:** | **Left default** |
| **For Respondent No.3** | **Ms V. Mayer, of Counsel**<br>**Ms N.R. Wan Wing Kai, Attorney at Law** |