LAPORTE M. v. ANTOLINOS M. R.

2018 SCJ 410

Record No. SC/COM/PWS/00423/2018

IN THE SUPREME COURT OF MAURITIUS
(COMMERCIAL DIVISION)

In the matter of:

Marc Laporte

Plaintiff

v.

Michel Robert Antolinos

Defendant

In the presence of:

Ashvin Krishna Dwarka

Co-Defendant

Judgment

It is averred in the plaint that the plaintiff and the defendant entered into an agreement entitled a "*Promesse de cession d'actions*" dated 13 November 2016 (hereinafter referred to as "The Agreement") for the sale of the entire stated capital of Catania Project Finance Limited for and in consideration of a total sum of RUR 5,700,000- (Euros Five Million and Seven Hundred Thousand).

Pursuant to "The Agreement", the plaintiff paid to the defendant an *"indemnité d'immobilisation"* amounting to 10% of the sale price of the abovementioned shares, namely EUR 570,000- which was to be held in escrow by the co-defendant.

The agreement between the parties provided for the settlement of any dispute arising in connection with the contract, through arbitration.

Clause 16.2 of "The Agreement" provided for the appointment of the arbitrator as follows:

> *«Le premier arbitre désigné pour statuer sur les litiges, différends ou réclamations susvisés sera le Président alors en exercice de la Chambre des Notaires de l'Ile Maurice»*

It was further provided at clause 16.3 –

> *«A défaut de résolution par voie amiable ou arbitrale, les Parties conviennent qu'il est fait attribution de compétence exclusive aux*

> *tribunaux relevant du ressort de la Cour Suprême de l'Ile Maurice afin de régler tous les litiges (y compris les réclamations d'indemnisation ou de compensation et les demandes reconventionnelles) pouvant survenir au titre de la formation, de la validité, des effets, de l'interprétation ou de l'exécution du Contrat ou se rapportant au Contrat à quelque titre que ce soit.»* (Emphasis added)

It is agreed that a dispute has arisen which in accordance with the "*clause compromissoire"*, has to be referred to arbitration.

Pursuant to the above clause, the President of the "Chambre des Notaires de l'Ile Maurice", Mr. Rajendra Dassyne, was contacted so as to initiate arbitration proceedings to determine the dispute. It was agreed that each party would contribute half of the fees charged by Mr. Dassyne for the purposes of the arbitration. Subsequently several drafts of a potential arbitration agreement were exchanged between the legal representatives of the parties but no agreement was reached. As such no arbitration agreement was finalised, signed and executed between the parties.

The defendant has however proceeded to pay his half share of Mr. Dassyne's fees, a fact of which the plaintiff claims, he was informed at a later stage.

The plaintiff is now objecting to the dispute being resolved through arbitration by Mr. R. Dassyne or any other arbitrator inasmuch as he claims that he has lost faith in the arbitration process.

It is the contention of the plaintiff that the defendant has proceeded to effect payment to Mr. Dassyne when the parties have not even yet agreed upon the terms of the arbitration agreement let alone signed any agreement. Further the plaintiff contends that without prejudice communication between the legal representatives of the parties, were unilaterally disclosed to Mr. R. Dassyne by the legal representatives of the defendant, without prior authorisation from the plaintiff.

According to the plaintiff the unauthorised, "unwarranted and unscrupulous course of conduct" on the part of the defendant and/or his agent and/or his *préposé*, has rendered it impossible for the plaintiff to agree to the appointment of Mr. R. Dassyne as arbitrator for the

purpose of resolving the dispute arising between the parties; the dispute cannot be resolved by way of arbitration in the terms provided under clause 16.2 of the Agreement.

The plaintiff contends that consequently clause 16.3 of "the Agreement", becomes operative and it is now for the court to hear and determine the dispute.

The plaintiff has accordingly lodged the present case before this court and has averred *inter alia* that the defendant's wrongful acts and omissions amount to a breach of contract, as a result of which, the *résolution* of the "*Promesse de cession d'actions"* dated 13 November 2016, has become unavoidable and necessary.

The plaintiff is accordingly praying for a judgment –

> *(a) declaring the résolution of the Promesse de cession d'actions dated 13 November 2016 and*
>
> *(b) ordering Mr. Ashvin Krishna Dwarka to restitute the cheque of EUR 570,000. With costs."*

At this stage before the exchange of pleadings, both the defendant and the co-defendant have raised the following preliminary objections and moved that the plaint with summons be dismissed:

> *"Whilst reserving their rights to file a Plea on the merits if need be, the defendant and co-defendant plead the following:-*
>
> *The Supreme Court has no jurisdiction to entertain the plaint with summons in view of the clause compromissoire embodied in the "Promesse de cession d'actions" dated 13 November 2016, which provides that any dispute between the parties should be referred to arbitration.*

Counsel for the defendant has pointed out that the plaintiff's only qualm concerning the arbitration process is in relation to the fact that he was not informed about the defendant paying his share of the arbitrators' fees immediately but that rather, he learnt about it at a later stage. This according to the defendant, is not a valid reason for arbitration proceedings to be ousted and for clause 16.3 to become operative.

Counsel argued that the arbitral clause is contained in the agreement of the parties. They have not only agreed for the settlement of their disputes through arbitration but have further agreed about the arbitrator to be appointed. Now that there is a difficulty over implementation of the clause, the matter should be referred to the Judge in Chambers as provided for under Article 1005 of the Code de Procedure Civile.

Counsel further submitted that by virtue of the provisions of our Code de Procedure Civile, resolution of issues arising in connection with an arbitral clause, falls within the jurisdiction of the Judge in Chambers and not the court.

Counsel referred to the various articles of the Code de Procedure Civile which give the Judge in Chambers jurisdiction to settle issues pertaining to an arbitration - Articles 1005 thus deals with appointment of an arbitrator, Article 1015, with extension of time for delivering the award, Article 1021 with "*récusation*" of the arbitrator and Article 1026-8 with "*exequatur"* of the "*sentence arbitrale"*.

Counsel went on to submit that the present issue which raises a dispute as to whether the arbitration can proceed before Mr. Dassyne, has to be resolved by the Judge in Chambers. Counsel argued that since this matter involves a separate process, it has to be resolved first by the Judge before there can be any subsequent court action. Counsel thus concluded that it is for the Judge in Chambers to decide whether clause 16.3 would be applicable in the present case and that this plaint should accordingly be set aside with costs.

In her address counsel for the plaintiff has stressed that the plaintiff is not imputing any improper conduct on the part of Mr. Dassyne. The plaintiff however has simply lost faith in the arbitration process. Counsel argued that given that the contract has specifically provided that if there is no resolution of the dispute by arbitration, the matter is to be determined through court process, this court accordingly has jurisdiction to hear the matter and it should proceed to determine the dispute.

A reading of clause 16.3 reveals that the clause makes reference to a *"résolution par voie amiable ou arbitrale".* It is clear therefore that what the above words convey is that the dispute must be resolved either amicably or through an arbitration process. There is absolutely no doubt that by the use of the word "*résolution*", clause 16.3 unequivocally indicates that any

dispute should be determined by arbitration. Such "*résolution*" through arbitration can only be achieved if the arbitral process is not merely initiated but only, until the dispute is finally determined.

In the present case the parties had clearly agreed to settle any dispute arising between them through arbitration and they have also provided for the mode of designation of the arbitrator who should be the "President of the Chambre des Notaires".

A dispute has now arisen in relation to the appointment of Mr. Dassyne as arbitrator. The plaintiff has referred in that connection, to the defendant's payment of his share of Mr. Dassyne's fees and has made allegations of improper and unauthorised communication between the defendant's legal advisers and Mr. Dassyne.

In view of the difficulty that has now arisen with regards to the implementation of the appointment of an arbitrator as contemplated by the *clause arbitrale*, Article 1005 of the Code de Procedure Civile reproduced below now becomes applicable –

> *«Si le litige né, la constitution du tribunal arbitral se heurte à une difficulté du fait de l'une des parties ou dans la mise en oeuvre des modalités de désignation, le Juge en Chambre désigne le ou les arbitres.*
>
> *Si la clause compromissoire est soit manifestement nulle, soit insuffisante pour permettre de constituer le tribunal arbitral, le Juge en Chambre constate et déclare n'y avoir lieu à désignation.*»
> (Emphasis added)

We are here in a situation where *"la constitution du tribunal arbitral se heurte à une difficulté du fait de l'une des parties»* and this is a matter which needs to be determined by the Judge in Chambers as provided for under Article 1005.

It is not open to a party to invoke any reason to withdraw from an arbitration which goes against the *clause compromissoire* agreed between the parties and embodied in the agreement duly signed by them.

Article 1005 of the Code de Procedure Civile expressly provides that where a difficulty arises as to the "*constitution du tribunal arbitral*", here such a difficulty has arisen in view of the plaintiff's unwillingness to proceed with the arbitration before Mr. Dassyne, the matter should therefore be referred to the Judge in Chambers.

Article 1005 of the Code de Procedure Civile provides that the only circumstances where the Judge in Chambers can declare that no arbitrator can be designated is where "*la clause compromissoire est soit manifestement nulle, soit insuffisante pour permettre de constituer le tribunal arbitral".*

Clause 16.3 which has been invoked by the plaintiff, is a residual provision which would find its application only if arbitration is not possible in conformity with the *clause compromissoire* and the above relevant provisions of the Code de Procedure Civile. In such a situation it provides an alternative avenue for redress to the parties and entitles them to have a right of recourse through court. However clause 16.3 will only become operative if the prescribed process for arbitration has failed.

In the present case, it cannot be said that there has been a failure *"de résolution par voie arbitrale"* since it cannot be said that there has been such failure, without the process prescribed by law for arbitration in conformity with the agreement of the parties having failed or that, the clause is declared to be "*manifestement nulle, soit insuffisante pour constituer le tribunal"* by the Judge in Chambers.

I accordingly uphold the preliminary objection and set aside the plaint. With costs.

R. Mungly-Gulbul
Judge

6 December 2018

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For Plaintiff: **Mrs. P. Balgobin-Bhoyrul, together with Mr. Y. Lutchmenarraidoo, both of Counsel Mr. Attorney S. Mardemootoo**

For Defendant and Co-Defendant: **Mr. M. Ajodah, of Counsel Mr. Attorney P. Chuttoo**