GFIN CORPORATES SERVICES LTD & ORS v BHARGAVA A.

2019 SCJ 332

Record No. 115081

THE SUPREME COURT OF MAURITIUS

In the matter of:-

1. **GFIN Corporates Services Ltd**
2. **Gujadhur Tej Kumar**
3. **Gujadhur Santosh Kumar**
4. **Madison Equity Investments Ltd**

Applicants

v

Bhargava Anurag

Respondent

In the presence of:-

The Financial Services Commission

Co-respondent

JUDGMENT

The respondent brought an action by way of a Plaint with Summons before the Commercial Division of the Supreme Court praying for a judgment –

1. Ordering the applicants nos. 1,2 and 3 jointly and *in solido* to pay to him the sum of USD 175,000 as damages for prejudice suffered as a result of their wrongful acts and omissions as officers of applicant no. 4 ("The company");

2. Declaring that applicants no. 1, 2 and 3 have acted in breach of their duties and obligations under the law as officers of the company.

The applicants have from the outset challenged the jurisdiction of the Court to hear the case on the ground that the issues raised before the Court can only be determined by arbitration. It is the contention of the applicants that the entire subject matter of the Plaint with Summons is arbitrable under one or more of the arbitration clauses found in the constitution of the company and/or the two other agreements to which the respondent is a party as a shareholder of the company.

The Parties

Applicant no. 4, ("Madison"), is a private company incorporated in Mauritius. It holds a Global Business Licence Category 1 and it has shares in various equity funds.

Applicant no. 1 ("GFin") is the Management Company and Company Secretary of the company. It is also the Management Company of IEP Management 1 Limited, the Investment Manager of the funds in which the company has invested.

Applicants nos. 2 and 3 are directors of GFin who were appointed on the Board of the company (Madison).

Respondent ("Bhargava") is a class D shareholder of the company.

Co-Respondent, the Financial Services Commission ("FSC"), is the statutory regulator of financial services and global business activities in Mauritius.

The Court Action

The respondent has averred, in his Plaint with Summons before the Commercial Court, that in 2015 the company, Madison, wilfully and wrongfully made distributions to only some but not all members of the class D shareholders to which he belongs ("the impugned transfers"). Respondent has also averred that GFin and its Directors, i.e applicants nos. 1, 2 and 3, colluded to disguise these impugned transfers in the audited accounts of the company for the financial year ending 2015. Furthermore, GFin has wilfuly and wrongfully misrepresented that the impugned transfers were advances made to some shareholders at their express requests and that the Board of Directors of GFin were lawfully authorised to accede to such requests for advances. GFin and the directors have also wrongly interfered with the respondent's contractual rights, under the IEP Restructuring Agreement, to have access and obtain copies of the company records relating to distributions by Madison (the company).

It is consequently the contention of the respondent in his plaint that the acts, doings and/or omissions of GFin and the Directors, as officers of the company, constitute "*faute"* as a result of which he has suffered prejudice. According to the respondent's plaint, the "*faute*" on which his action is based, consists of the following:

a. GFin and the Directors have taken part in a conspiracy to transfer money for the benefit of some, but not all the members of the class of shareholders to which the respondent belongs, i.e Class D shareholders, in relation to the D Shares held by the transferees and this in breach of sections 61 and 63(2) of the Companies Act;
b. GFin and the Directors have colluded to conceal and/or justify the wilful breach by Madison and the Investment Manager of their contractual obligations under the IEP Restructuring Agreement and the Amendment And Restated Shareholders Agreement;
c. GFin and the Directors have wilfully misrepresented to the US tax authorities that respondent had benefited from distributions by Madison in financial year 2015;
d. GFin and the Directors have failed and/or neglected to discharge their statutory duties as Officers of Madison honestly and in good faith; and
e. GFin and the Directors have wilfully attempted to mislead the respondent and the FSC as regards the true nature of the impugned transfers.

The applicants contended from the outset before the Commercial Court that the respondent's action was governed by an arbitration agreement and should therefore, pursuant to section 5(1) of the International Arbitration Act ("The Act"), be transferred to the Adjudicating Court for determination for the following reasons:

(1) The constitution of the company contains an arbitration clause within the purview of the International Arbitration Act. The subject matter of the respondent's Plaint with Summons amounts to disputes, controversies or claims arising out of the constitution of the company.

(2) The disputes involving the parties would also arise out of the "IER Restructuring Agreement" ("Restructuring Agreement) or out of the "Amended and Restated Shareholder's Agreement" ("Shareholders Agreement"), both of which contain arbitration clauses which bind the respondent.

The Findings of the Referring Court

The Commercial Court ("Referring Court") after hearing the parties made the following findings:

1. Its task under the Act is only to ascertain whether the procedural requirements for a referral claim under section 5(1) of the Act have been satisfied. If such is the case, the Referring Court has to automatically transfer the action to the designated Judges of the Supreme Court ("The Adjudicating Court") provided the claim for referral is made at the very outset before there are any pleadings on the substance of the case;
2. The referral claim of the applicants (then defendants and co-defendant no. 1) complies with section 5(1) of the Act as well as Rule 13(1) of the Supreme Court [International Arbitration Claims] Rules 2013 ("The Rules");
3. The case must, pursuant to Rule 13(2) of the Rules, be referred for determination to the designated Judges of the Supreme Court in accordance with section 5 of the Act.

The Referring Court accordingly stayed its proceedings pending the determination of the present Court i.e the Adjudicating Court.

Arbitration Agreements

It is not in dispute that there is an arbitration clause in the constitution of the company (Madison) as well as in the two other agreements which are the Shareholders Agreement and the Restructuring Agreement.

The constitution of Madison contains an arbitration clause which provides that "*Any dispute, controversy or claim arising out of this constitution or the breach, termination or invalidity thereof shall be settled by the international arbitration under the International Arbitration Act*" [Clause 18]. The constitution also provides that the Arbitration shall be conducted pursuant to the Arbitration Rules of LCIA – Mauritius International Arbitration Centre (LCIA-MIAC Rules), and that the juridical seat of arbitration shall be Mauritius.

Furthermore, the IEP Restructuring Agreement, signed by both the respondent and Madison, provides in its Clause 22, that "*in the event of any dispute or controversy arising out of or relating to this Agreement or any Ancillary Agreement",* the dispute *"shall be settled*

by arbitration in London or any other place agreeable by the parties involved in such dispute", unless it is amicably settled.

The respondent also signed the 'Amended and Restated Shareholders Agreement' in respect of Madison which contains a similar Arbitration Clause [Clause 16.4] for dispute resolution. It provides that '*any dispute or controversy arising out of or relating to this Agreement*' shall in the absence of any amicable settlement "*be settled by Arbitration in London or any other place agreeable by the parties involved in such dispute*". (**emphasis added)**

Grounds of objection

The respondent is resisting the application that the Adjudicating Court should refer the matter to arbitration pursuant to section 5(2) of the Act on the following grounds:

1. The respondent is in a position to satisfy the Adjudicating Court, on a *prima facie* basis, that there is a very strong probability that the arbitration agreements relied upon by the applicants may be null and void, inoperative or incapable of being performed.
2. The Referring Court was never presented at any time with a section 5 claim which was compliant with the Rules.
3. There has not been a proper referral by the Referring Court to the Adjudicating Court pursuant to Rule 13(3) of the Rules.

We shall first deal with the second and third grounds which question compliance with section 5(1) of the Act and Rules 13(1), (2) and (3) of the Rules.

It is submitted, in support of ground 2, that applicants nos. 1, 2 and 3 cannot be considered to have made a claim compliant with section 5(1) of the Act. There was no proper 'section 5 claim' before the Referring Court in the absence of a contention that the applicants are parties to an arbitration agreement and that the action before the Referring Court is the subject of an arbitration agreement.

Learned Counsel for the respondent argued that applicants nos. 1,2 and 3 are not parties to any arbitration agreement and there is not the slightest indication that any of the arbitration agreements has been validly transferred to them. There is also no indication that

these applicants may have become parties to the agreement and are entitled to take advantage of any arbitration agreement by reason of the application of some legal principles, whether agency, alter ego, estoppel and/or third-party beneficiary; or that the respondent, had at any point in time formed a common intention with applicants nos. 1, 2 and 3 that applicants nos. 1, 2 and 3 would be bound by the arbitration agreements and would therefore be entitled to take advantage of any of these arbitration agreements.

There is a further submission in support of ground 3 that there has not been a proper referral to this Court in accordance with section 5(1) of the Act and the Rules. Counsel argued that according to the Rules, there is no automatic transfer of the action by the learned Judge of the Referring Court, as she can only inform the Chief Justice of her decision to stay as laid down under Rule 13(2). It is only then that the section 5 claim is transferred to the Adjudicating Court in accordance with Rule 13(3) of the Rules. There would therefore be no proper referral to the Adjudicating Court where the Chief Justice has not been informed of the decision to stay by the Referring Court.

The respondent also contends that applicant no. 4 is a third party in the Court action and could not therefore make a Section 5 claim.

An application for stay of court proceedings in favour of arbitration is governed by section 5(1) of the Act which reads as follows:

> "*5(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*".

Rule 13(1) and (2) of the Rules provide the following in that connection:

> "*13(1) Where a party to an action before a referring Court contends that the action is the subject of an arbitration agreement, it shall make an application ("a Section 5 claim") to that effect to that Court, supported by written evidence in the form of one or more affidavits or witness statements, together with any supporting documents.*
>
> *(2) Where the application complies with paragraph (1) and section 5(1) of the Act, the referring Court shall immediately stay its proceedings and notify the Chief Justice who shall promptly constitute the adjudicating Court*."

Following the lodging of the respondent's case before the Commercial Court, Attorney for the applicants (then defendants), by way of a letter dated 28 April 2017, informed the Court that the defendants have put an appearance in the case for the sole and limited purpose of informing the Court that they dispute the competence and jurisdiction of the Court. There was an explicit contention that the whole of the respondent's action is the subject of an arbitration agreement with a request that the action should be transferred for adjudication by the Supreme Court pursuant to section 5(1) of the Act and Rules 13(1) and (2) of the Supreme Court (International Arbitration Claims) Rules 2013. The letter sets out, with detailed references to the relevant documents, that the entire subject matter of the Plaint with Summons (a) is arbitrable under one or more of the arbitration clauses found in the constitution, the IEP Restructuring Agreement or the Amended and Reinstated Shareholders Agreement; and (b) should be referred to arbitration. It is supported by an "*objection to Jurisdiction Affidavit*" drawn up and solemnly affirmed on 28 April 2017 in conformity with Rule 6 of the Rules.

It is abundantly clear that the section 5 claim made by the applicants before the Referring Court substantially complies with the relevant requirements, as laid down under section 5 of the Act and the applicable provisions of Rule 13(1) of the Rules.

Firstly, there is a clear and precise contention that the whole of the respondent's action is the subject of an arbitration agreement which requires that the disputes between the parties should be referred to arbitration.

Secondly, there is a request for the transfer of the action to the Supreme Court which complies with the further condition as to the proper timing of the making of such a request, since it was made by the applicants when they submitted "*their first statement on the substance of the dispute*".

The following extract from the judgment of the Referring Court indicates that the learned Judge was alive to all these issues and adopted the correct approach in dealing with the objections raised by the respondent:

> "*When a party contends that an action before the court is the subject of an arbitration agreement, the task of the referring court is only to ascertain that the procedural requirements for a section 5 claim have been satisfied. If such is the case, the court has to automatically transfer the action to the Supreme Court, provided that the claim is made at the very outset before any pleadings on the substance of the case"*

We see no reason to interfere with the finding of the learned Judge that the applicants had complied with section 5(1) of the Act as well as Rule 13(1) of the Rules and that it was not incumbent upon the Referring Court to decide upon or determine the challenge as regards the applicability or validity of the arbitration agreements. It was indeed outside the purview and jurisdiction of the Referring Court to delve into or adjudicate upon the merits of any objection relating to the applicability or existence of an arbitration agreement.

Section 5(1) of the Act and Rule 13(2) plainly prescribe that once an application complies with Rule 13(1) and section 5(1) of the Act, the Referring Court is bound to *"immediately stay its proceedings and notify the Chief Justice who shall promptly constitute the adjudicating Court*".

The learned Judge has therefore complied with section 5(1) of the Act which further enjoins the Court in mandatory terms to "*automatically transfer the action to the Supreme Court"* once the conditions for such a referral are met, as was the situation in the present case. The reference in Rule 13(2), for notifying the Chief Justice, does nothing more than specify the administrative process for transferring the action to the Supreme Court as laid down in the Act. The learned Judge amply satisfied this requirement as laid down in section 5(1) of the Act when she ordered that the action be transferred to the Supreme Court. There has been no departure from the process prescribed under section 5 of the Act since it cannot be questioned that the present Court has been set up by the appointment of 3 designated Judges by the Chief Justice in compliance with section 42 of the Act, following a referral of the section 5 claim by the Referring Court.

For all the above reasons we consider that the objections raised under grounds 2 and 3 are untenable and devoid of any merits.

This takes us to the first ground invoked by the respondent which raises in the first place the question whether the respondent is able to show, on a *prima facie* basis, that there is a very strong probability that the arbitration agreements invoked by the applicants may be null and void, inoperative or incapable of being performed.

Following a referral under Section 5(1) of the Act, it is incumbent upon the adjudicating Court set up under Section 42 of the Act, to determine whether the parties should be referred to arbitration. By virtue of section 5(2) of the Act the Adjudicating Court

must "*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".*

Prima Facie basis

The Adjudicating Court, in its initial assessment under section 5(2) of the Act, has to decide whether there exists a "*very strong probability*" that the arbitration agreement is null, void, inoperative or incapable of being performed. The Court does so on a *prima facie* basis as is made explicit in the following excerpts from paragraphs 40 and 41 of the **Text and Travaux Préparatoires** to the Act **(The Mauritian International Arbitration Act 2008 - Text and Materials Updated 2016 Edition)**:

> "*40(c) The Supreme Court (constituted as specified in Section 42 of the Act) shall then refer the parties to arbitration unless the party who refuses to have the matter referred to arbitration shows on a prima facie basis that "there is a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed" ("the nullity issue").*
>
> *(d) Only if a party is able to meet that very high threshold on a prima facie basis will the Supreme Court itself proceed to a full determination of the nullity issue.*
>
> *41. This mechanism is meant to ensure that the parties will be referred to arbitration save in the most exceptional circumstances*."

The Adjudicating Court carries out a summary *prima facie* assessment in the course of which the Court examines the evidence, including the affidavits and/or witness statements placed before it, in order to decide whether the objecting party has been able to show that there is a very strong probability that the arbitration agreement is null and void or inoperative or incapable of being performed. The Adjudicating Court does not engage for that purpose into a full trial, or even a mini trial on the merits. The Court is only saddled with the responsibility to determine, by making an assessment on a *prima facie* basis, whether the party contesting the validity or applicability of the arbitration agreement has been able to show that there is a very strong probability that it is invalid or inoperative. The Court is not called upon at that juncture to embark into any conclusive decision *quoad* the validity of the arbitration clause or agreement and does not make any final finding as to whether the arbitration clause is valid or not.

The Court may, under the Act, proceed to make a conclusive finding on the validity or existence of the arbitration agreement only where (i) the Court is satisfied, following its initial assessment under section 5(2) of the Act, that there is a very strong probability that the arbitration agreement is invalid or inoperative; (ii) the Court has to review the jurisdictional ruling of an arbitral tribunal in respect of the existence or validity of an arbitration agreement pursuant to section 20(7) of the Act; (iii) there is an application, pursuant to section 39 of the Act, for setting aside an arbitral award on the ground that the arbitration agreement is not valid.

Burden and Standard of Proof

The burden of proving that there is no valid or operative arbitration agreement lies on the party seeking to impugn the arbitration agreement. The test retained by the legislator has set up a high threshold by imposing the "*very strong probability*" standard: "*where doubt remains after a prima facie assessment, that doubt must be resolved in favour of referral to arbitration without a full trial (or mini-trial of unresolved issues)"* [Para 42 of **Travaux Préparatoires (*Supra)*]*.*

The mechanism prescribed under the Act and the applicable Rules therefore ensure that the parties should be referred to arbitration, once the Adjudicating Court has initially assessed on a *prima facie* basis, i.e without engaging into a full trial, that there is no very strong probability that the arbitration agreement is null and void or inoperative.

Respondent's submissions

Counsel for the respondent has submitted that there is a strong probability that the arbitration agreements, relied upon by the applicants, are null and void, inoperative or incapable of being performed for the following reasons:

(a) Applicants nos. 1,2 and 3 are not signatories to the agreements. Furthermore, these applicants are not entitled to take advantage of any of the arbitration agreements by reason of the application of any legal principle akin to agency, alter ego, estoppel and/or third party beneficiary.

(b) There was never any common intention between the respondent and applicants nos. 1,2 and 3 that they would be bound by the arbitration agreements such that they may be entitled to take advantage of these agreements.

(c) The dispute between applicants nos. 1,2 and 3 and the respondent, which was the subject matter of the action before the Referring Court, does not arise out of a defined legal relationship concerning a subject matter capable of settlement by arbitration. The action which was stayed by the Referring Court is not an action for damages for failure to comply with an obligation created by any of the 3 agreements, nor is it an action to enforce any obligation under these agreements. The cause of action before the Referring Court, both as regards the nature of the dispute and the remedies sought are grounded in tort and concern the rights of the respondent as a "consumer of financial services" and the failure of applicants nos. 1, 2 and 3 to comply with their statutory duties as a licencee of the co-respondent and as directors of such a licensee. As such it cannot be said that the action brought before the Referring Court is the subject of an arbitration agreement which should be referred to arbitration.

(d) Likewise, the arbitration agreement referred to in the motion of applicant no. 4 (co-defendant no. 1 in the Court action) would also not be applicable to the subject matter of the action in tort before the Referring Court.

(e) Applicant no. 4 is to all intent and purposes a third party to the action before the Referring Court.

It is not being contested by the respondent that he is bound by the arbitration clauses contained in the company's constitution as well as in the 2 other agreements.

In fact, as stated earlier in this judgment, the constitution of applicant no. 4 expressly stipulates in its Clause 18 that "*any dispute, controversy or claim arising out of this constitution or the breach termination or invalidity thereof shall be settled by international arbitration*". The Restructuring Agreement as well as the Shareholders Agreement also provide that '*any dispute arising out of or relating to the Agreement*' is to be settled by international arbitration by the parties involved in the dispute. It is however the contention of the respondent that none of the arbitration clauses or agreements are applicable to the action brought by him before the Referring Court for the reasons advanced by him.

It is therefore necessary to examine and ascertain, albeit on a *prima facie basis*, the precise nature of the respondent's Court action in order to determine whether there is a strong probability that it falls within the ambit of a binding arbitration agreement. An examination of the respondent's Plaint with Summons reveals the following essential features which form the backbone of his Court action against the 4 applicants. It is averred by the respondent in his plaint that:

1. Distributions of dividends have wrongfully been made to only some but not all members of the class D shareholders to which he belongs.

2. He caused American lawyers to request all the “concerned parties, including Madison and the Investment Manager, to take remedial actions” [para. 16].
3. In a formal correspondence, applicant no. 3 in his capacity as a director of applicant no. 4 represented to the FSC (co-respondent) that the respondent had been paid his pro-rata share of amounts due to him [para. 17].
4. On 18 March 2016 applicants nos. 1,2 and 3 “procured that Madison (applicant no. 4) transfer the sum of USD 506,317 to the respondent” representing 27.92% of the MPI Distribution authorised by directors of Madison [para. 18].
5. On 29 June 2016 applicant no. 1, as company secretary of Madison and applicants nos. 2 and 3 as directors “procured that Madison files its Audited Accounts for the financial year ending 2015 without disclosing any MPI Distribution” [para. 20].
6. Respondent obtained information and evidence that at least 2 MPI distributions were made in May and October 2015 to some and not all members of the Class D Shares [para. 21].
7. Madison has not made any distribution payment to him in relation to his class D shares in respect of year ending 2015. [para. 22].
8. Applicants nos. 1,2 and 3 colluded to disguise the MPI distributions made to some and not all members of the Class D shares in the Audited Accounts for year ending 2015 [para. 23].
9. Applicants nos. 1, 2 and 3 caused applicant no. 4 to issue a letter dated 8 November 2016, in answer to respondent and his American lawyer, that Madison made no formal distributions in 2015; that the payments queried by the respondent were made either to non MPI shareholders (i.e those holding a different class of shares) or persons who are not shareholders of the company under applicant no. 4’s shareholder agreement; [para. 26].
10. Respondent was not allowed access by applicants nos. 1,2 and 3 to the records and books of accounts of applicant no. 4 [para. 32, 33 and 34].
11. It should have been apparent to the co-respondent (FSC) that applicants nos. 1,2 and 3 (i) have taken part in a conspiracy to transfer money for the benefit of some, but not all members of class D Shareholders; (ii) have colluded to conceal and/or justify the willful breach by Madison and the Investment Manager of their contractual obligations under the IEP Restructuring Agreement and the Amended And Restated Shareholders Agreement; (iii) had wilfully attempted to mislead the US Tax Authorities and the FSC with regard to the distributions and transfers

made by Madison; (iv) had failed to discharge their duties as officers/directors of Madison.

It is strikingly apparent from the above averments of the respondent that his Court action against all the 4 applicants raises issues, disputes and claims relating to or arising out of the company constitution and/or the Restructuring and Shareholders arbitration agreements.

The respondent's complaints, whether in tort or in contract, are directed against the applicants' alleged wrongful conduct in making distributions to only some and not all members of the Class D shareholders; they relate to the applicants' wrongful misrepresentation with regard to the "*impugned transfers",* their wrongful interference with the respondent's right to have access to information; their misleading information to U.S tax authorities and to the F.S.C; the failure by the applicants nos. 1,2 and 3 to discharge their duties towards a shareholder as officers and directors of the company; collusion by applicants nos. 1,2 and 3 to conceal and justify the various breaches by applicant no. 4 and the Investment Manager of their contractual obligations under the Restructuring Agreement and the Shareholders Agreement.

It is eminently evident from an examination of the Plaint with Summons and the evidence before us that it is highly probable that practically all the issues raised by the respondent whether in tort or in contract could arise out of either the constitution of the company and/or the Shareholders' Agreement or Restructuring Agreement. It is sufficient to refer for that purpose to only a few of the extracts from these agreements bearing in mind that respondent is a Class D Shareholder in the company (applicant No. 4), of which the applicant no. 1 is the Managing Company, and applicants nos. 2 and 3 are directors of applicant no. 1, which is also the Investment Manager of the funds in which the company Madison has invested.

Clause 5.4.4(b) of the Constitution provides the following in respect of Class D shares of the company, applicant no. 4:

"*5.4.4 Class D Shares*

(a) Voting rights
A Class D Share shall confer on its holder the rights to attend meetings but shall not confer its holder the right to vote on any matter except as expressly conferred by the Shareholders Agreement or this Constitution or as required under Mauritius Law.

(b) Distribution
Each Class D Share shall confer on its holder the right to distributions in accordance with the Shareholders Agreement."

There are additional provisions under Clause 13 of the constitution relating to dividends and distributions in respect of applicant no. 4 and which further specify that distributions to shareholders shall be effected in accordance with the Shareholders Agreement:

"*13.5 Subject to the solvency test, the Board may at such time as it thinks fit, authorise and declare as dividend such amount as it may determine.*

13.6 Subject to the rights of persons, if any, entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect of which the dividend is paid, but no amount paid or credited as paid on a share in advance of calls shall be treated for the purposes of this Clause 13 as paid on the share.

13.7 All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid, but where any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.

13.12 Distributions to shareholders shall be effected in accordance with the Shareholders Agreement by way of dividends or redemption of shares."

Article V of the Shareholders Agreement makes detailed provisions not only as regards distributions in general of all distributable proceeds received by Madison but also with regard to the distributions in respect of Fund investments including "Tax distributions".

The dispute with regard to the misleading information being communicated to the US Tax authorities resulting in adverse tax consequences upon the respondent may also arise under Clause 9.4(b) of the Shareholders Agreement which provides as follows:

"*The Company shall furnish to each Shareholder such information regarding the amount of such Shareholder's share in the Company's taxable income or loss for such year, in sufficient detail to enable such Shareholder to prepare its United States federal, state and other tax returns. The Company shall endeavor to effect such delivery within 90 days after the end of each Fiscal Year."*

The respondent's contentions with regard to his right of access to information, records and books of applicant no. 4 (Madison) may also relate to Clause 9.1 of the Shareholders Agreement which reads as follows:

> "9.1 <u>*Books of Account.*</u> *Appropriate records and books of account of the Company shall be kept by the Company at the registered office of the Company in Mauritius (with copies thereof at such other place or places as the Class C Shareholder shall determine), and each Shareholder and Class C Shareholder and their respective representatives shall have access to the records and books of account and the right to receive copies thereof."*

It is amply evident, from an examination of the contentions and claims which constitute the subject matter of the respondent's Plaint with Summons, that all the issues raised by him, whether in tort or in contract, may well fall within the ambit of arbitrable disputes arising out of, or relating to, the constitution of the company and/or one of the arbitration clauses contained in the Shareholders Agreement.

The respondent has therefore been unable to establish on a *prima facie* basis that there is a very strong probability that his allegations and contentions, as set out in the Plaint with Summons, do not fall within the purview of the arbitration agreements and are not arbitrable disputes. Quite apart from the fact that both the respondent and applicant no. 4 are parties to the arbitration agreements, the disputes raised in the Plaint with Summons concern the payment of dividends, distributions and management of applicant no. 4, and involve all the applicants. It is in their respective capacity as company secretary and directors of applicant no. 4 that the applicants nos. 1, 2 and 3 have been brought in as parties to the Court action. It can hardly be contended therefore that the resolution of these disputes do not involve all the applicants in view of the fact that applicants nos. 1,2 and 3 are not signatories to the agreements or that Madison (applicant no. 4) is a third party to the Court action.

For the given reasons, we have no difficulty in holding that the respondent has failed to establish, on a *prima facie* basis, pursuant to section 5(2) of the Act, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed for any of the reasons advanced by him.

We accordingly refer the parties to arbitration in accordance with section 5(2) of the Act.

The respondent shall pay the costs of the case.

A. Caunhye
Ag. Chief Justice

N. Devat
Judge

N.F. Oh San-Bellepeau
Judge

29 November 2019

Judgment delivered by Hon. A. Caunhye, Ag. Chief Justice

For Applicants	:	**Mr A. Robert, SA**
For Applicants Nos. 1,2,3	:	**Mr I. Rajahbalee, SC, together with,**
		Ms M. Meetarban, of Counsel
For Applicant No. 4		**Mr M. Namdarkhan, of Counsel**
For Respondent	:	**Miss Attorney K. Mardemootoo**
		Mr H. Duval, SC, together with Ms L. Churitter
For Co-respondent	:	**Mr G. Ramdewar, SA**
		Mr G. Bhanji-Soni, of Counsel