BARNWELL ENTERPRISES LTD & ORS v ECP AFRICA FII INVESTMENTS LLC

2013 SCJ 327

RECORD NO:987/2013 (WI 4690)

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **Barnwell Enterprises Ltd (as successor-in-title to Shivaan Enterprises Ltd)**
2. **Rishi Ltd**
3. **Alok Ltd**
4. **GNR Reddy**

Applicants

v

ECP Africa FII Investments LLC

Respondent

In the presence of:

Spencon International Ltd

Co-Respondent

JUDGMENT

The present matter came before this Court on 8th July 2013 for the respondent and co-respondent to show cause why the interim order dated 28th June 2013 preventing the respondent from enforcing or exercising any rights or purported rights under or derived from the Share Pledge Agreement dated 30th June 2011, subscribed by the applicants as pledgors, and/or the Notice of Enforcement dated 14th June 2013 should not be made interlocutory, enlarged, discharged or otherwise dealt with, pending the final determination of the arbitration proceedings before the London Court of International Arbitration (LCIA). The co-respondent has left default.

With regard to matters governed by the International Arbitration Act 2008 (the Act), this Court will intervene only in accordance with the provisions of the Act. Pursuant to section 6 of the Act a party to an arbitration agreement may, either before or during arbitral proceedings, request from the Supreme Court an interim measure of protection in support of arbitration. The Supreme Court will determine such a request in accordance with section 23, having regard to the specific features of international arbitration [section 23 (1) (b)]. Therefore, unless the parties agree otherwise, the Supreme Court will exercise its power to issue an interim measure to the extent that section 23 permits, that is, in accordance with subsections (2A) to (6). By virtue of subsection (2A) the Supreme Court, in accordance with the power given to it under section 23(1)(a), will issue an interim measure in relation to arbitration proceedings in such a manner as "*to support, and not to disrupt*" existing or contemplated arbitration proceedings.

Where there is urgency, section 23(3) of the Act permits this Court, on an *ex parte* application of a party or proposed party to the arbitral proceedings, to make such order as it thinks necessary. Pursuant to section 23(4), where there is no urgency, the Court will only act where the applicant, a party to the arbitral proceedings, has given notice to the other parties and to the arbitral tribunal, and with the permission of the arbitral tribunal or the written agreement of the other parties. In the instant case, the applicants have based their application on the ground of urgency. This Court will act only as provided by section 23(5), that is, only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.

It is averred by the applicants that the Share Pledge Agreement is a means of securing the enforcement of the rights purportedly given under the Put Option Agreement, under which the respondent was given the right to compel the applicants to purchase all the shares to be held by the respondent pursuant to Convertible Note Purchase Agreements

entered into between the respondent and the co-respondent. It is further averred that as such the Share Pledge Agreement is inextricably linked with the Put Option Agreement which is the subject matter of arbitration actually before the LCIA. The urgency, according to the applicants, stems from the fact that the respondent was attempting to enforce its rights under the Share Pledge Agreement by serving a Notice of Enforcement on 14 June 2013 giving the applicants 14 days' notice that it would enforce the Share Pledge Agreement (Exhibit 2). The applicants aver that the respondent could not do so to the extent that it had admitted before the arbitral tribunal that it cannot exercise any right under or in relation to the Put Option Agreement pending the arbitration proceedings. The applicants further aver that allowing the respondent to enforce the Share Pledge Agreement will defeat the raison d'être of the arbitral proceedings, apart from the irreparable harm that will be caused to them.

Indeed if an applicant for an interim measure shows that the other party to the arbitration is going against an undertaking it has given before the arbitral tribunal, this may show sufficient risk and urgency for this Court to act to protect the integrity of arbitration proceedings. In this case, however, one of the grounds raised by the respondent to move for the discharge of the order is that the arbitral tribunal has already rejected an application for Interim and Conservatory Measures made by the applicants to prevent the respondent from exercising its rights under the Share Pledge Agreement. The applicants, on their part, contend that the respondent's stand before the arbitral tribunal was that it is the Court in Mauritius and not the arbitral tribunal that has jurisdiction under the Share Pledge Agreement, and that is why they, the applicants, have requested the arbitral tribunal to state whether it has jurisdiction in respect of the Share Pledge Agreement. The arbitral tribunal has not yet ruled on that question as it proposes to do so within the framework of the procedure it has established to give each party full opportunity to be heard, and in accordance with the LCIA Rules.

It is evident from Exhibit 5 – Order No 4 of the arbitral tribunal dated 7 June 2013 – that the arbitral tribunal was seized by the applicants in order to obtain Interim and Conservatory Measures. The applicants sought an order to prevent the respondent "*from enforcing any of its rights under [the] Put Option Agreement and by necessary consequence under the Share Pledge Agreement signed on the 30 June 2011 in order to give effect to the Put Option Agreement under articles 25.1(b) and (c) of the LCIA rules pending the determination of this arbitration by the Arbitral Tribunal*"- (Emphasis added). Further, the applicants emphasized before the arbitral tribunal that their application, which was the second one for Interim and Conservatory Measures, was to "*prevent and restrain*" the respondent from enforcing its rights under the Share Pledge Agreement, as well. In fact, the affidavit of the applicants and its exhibits and annexes show that the arbitral tribunal has rejected the interim measure sought by the applicants in that second application.

To put matters in perspective, the affidavit evidence shows that according to the respondent's submissions before the arbitral tribunal, the Share Pledge Agreement is to provide the respondent with security, that is, that under the Share Pledge Agreement the respondent "*holds executed share transfer certificates and in principle might exercise its security thereunder before a final arbitral award"*. Therefore, when rejecting the applicants' second application, the tribunal was aware of the stand of the respondent and of the likelihood that it might endeavour to enforce its rights under the Share Pledge Agreement. It also transpires from the respective submissions of the parties before the arbitral tribunal that while the applicants were submitting themselves to the jurisdiction of the arbitral tribunal for Interim and Conservatory Measures to prevent and restrict the respondent from exercising its rights under the Share Pledge Agreement, the respondent was asserting that the arbitral tribunal had no jurisdiction inasmuch as the Share Pledge Agreement contained no arbitration clause as clause 17 of that agreement provides that "*the civil courts of Mauritius*

shall have full jurisdiction over any difference or dispute arising or which may arise out of [the] contents of this document or any part thereof".

It is evident therefore that the arbitral tribunal is fully seized of the issues that arise in the present application, and it must be emphasised that this Court can act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively. We are not here faced with a situation where the arbitral tribunal has not been constituted or for some reason or other is not able to act effectively, or does not have the power of a Judge or Court to issue a certain specific order.

We have considered the submissions of learned Counsel on each side. Without going into all the grounds raised by the respondent, we take the view that there is substance in the second ground on which the respondent relies to ask that the Interim Order granted in this case on 28 June 2013 be discharged, namely that by the applicants' own actions the arbitral tribunal is already seized with the issues arising in the present application. However, we consider that there is also a new event consisting of the Notice of Enforcement served by the respondent on the applicants on 14 June 2013, which the applicants have not brought before the arbitral tribunal to ask for the interim measure which they are asking before us.

In all the circumstances, this Court considers that having regard in particular to the provisions of section 23(5) of the Act which entitles it to act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively, the interim measure granted should be maintained only until such time as necessary, in view of the new event of the service of the Enforcement Notice, to allow the applicants, if they wish to do so, to go before the arbitral tribunal itself to seek the interim measure they have requested before this Court.

It is, accordingly, ordered that the interim order be maintained until 02 August 2013 after which date it will automatically lapse.

As far as costs are concerned, given the facts and circumstances of this case, we are exercising our discretion under rule 19 of the Supreme Court (International Arbitration Claims) Rules 2013 that no costs are payable by any party to the other.

S. Peeroo
Judge

S. Bhaukaurally
Judge

N. Devat
Judge

26 July 2013

Judgment delivered by Hon. S. Peeroo, Judge

For Applicants : Mr Attorney F. Hardy
Mr N. Proag, of Counsel

For Respondent : Mr Attorney A. Robert
Mr D. Basset, SC