PROPERTY PARTNERSHIP HOLDINGS (MTIUS) LTD v TOSTEE J. Y.

2020 SCJ 65

Record No. 1305

THE SUPREME COURT OF MAURITIUS

[Court of Civil Appeal]

In the matter of:-

Property Partnership Holdings (Mtius) Ltd

Appellant

v/s

Jacques Yves Tostee

Respondent

JUDGMENT

This is an appeal from a judgment of the Commercial Division of the Supreme Court, sitting as the Bankruptcy Division, ordering that (1) the appellant company (then respondent) be wound up, and that the Official Receiver be appointed as provisional liquidator; and (2) such winding up be completed and the company dissolved by 31 October 2015, unless the sum of GBP 1,046,000 was paid to the respondent (then petitioner) by 30 April 2015.

The appellant has appealed against the judgment of the learned Judge on eight grounds. On the date of hearing of the appeal, learned counsel for the appellant has taken all eight grounds together as according to counsel the grounds are related to the plea in *limine litis* raised by the appellant before the Bankruptcy Division.

Before adverting to the grounds of appeal, it is apposite to refer to the sequence of events before the Bankruptcy Division:

1) In a plea dated 13 May 2009, the appellant raised a plea in *limine litis* which read as follows: *"All the agreements referred to by the petitioner in the petition contain an arbitration clause which provides that all disputes between the parties shall be determined by way of arbitration consequently and in*

accordance with Article 1016 of the Code de Procédure Civile, the court ought to decline to exercise its jurisdiction and set aside this petition".

2) On 22 October 2009, the case was scheduled for argument on the plea *in limine* and upon the unexplained absence of Mr. S. Hawoldar, learned Counsel for the respondent (now appellant), Mr M. Ahnee, learned Counsel for the petitioner (now respondent) moved that the matter be fixed for merits peremptorily on 16 February 2010 as the argument was previously postponed due to the absence of Mr S. Hawoldar. The Court acceded to the motion of Mr M. Ahnee.

3) On 16 February 2010, the case came for merits and Mr. S. Hawoldar stated that since he had raised a plea *in limine,* the Court should adjudicate on that issue first. Mr Ahnee objected to the stand of Mr Hawoldar and insisted that the case be heard on the merits. The learned Judge ruled that the plea *in limine* be taken on the merits when enough evidence would have been adduced to thrash out the issue. The Court then proceeded to hear the case on the merits and the petitioner gave evidence in chief. The case was fixed for continuation on 21 July 2010.

4) On 21 July 2010, when the case was fixed for the petitioner to be cross-examined, Mr Hawoldar informed the Court that the appellant had entered a plaint with summons and that the case, which involved the same parties and the same dispute, was still at pleadings stage. He suggested that both cases be consolidated. He also stated that if the learned Judge was not minded to consolidate the two cases he would reiterate his motion that the plea *in limine* be taken since there was some evidence on record to adjudicate on that point. Mr Ahnee objected to both motions and after hearing the submissions of both Counsel, the learned Judge did not allow the consolidation of the two cases and further ruled that there was insufficient evidence at that stage to determine the plea *in limine*. The Court then continued to hear the case on the merits.

Although Counsel for the appellant did not refer specifically to each of the grounds of appeal, we propose to do so to ensure that we remain within the ambit of this appeal.

Ground 1 avers that the learned Judge failed to address the *plea in limine* of the appellant which was grounded on section 5 (1) of the International Arbitration Act.

This ground must be rejected straightaway as it is obviously based on an erroneous assumption: the plea *in limine* of the appellant was not grounded on the above-mentioned enactment but invoked **Article 1016 of the Code de Procedure Civile** in support of its contention that in view of an arbitration clause contained in the relevant agreements, the Court ought to decline jurisdiction.

We shall next consider **Ground 5** since it also invokes the International Arbitration Act. This ground is to effect that the learned Judge erred in not referring the matter to the Honourable Chief Justice under the International Arbitration Act for the constitution of the adjudicating Court. This ground is clearly misconceived. We need only point out here that the **International Arbitration Act 2008**, which came into operation on 1 January 2009, was not applicable to the transactions referred to in the petition dated 10 December 2008.

Ground 2 contains the contention that the learned Judge acted without jurisdiction by not limiting himself to an examination of the "*clause compromissoire*" and by hearing evidence to find whether there was a real dispute. We are unable to agree with this contention. We agree with the submission of Counsel for the respondent that where an arbitration clause is invoked in a winding up petition, the Bankruptcy Division need not decline jurisdiction and refer the case for arbitration if it finds that there is no *bona fide* dispute.

Accordingly, it was in order for the Judge to hear evidence to determine whether there was a real dispute.

Ground 2 accordingly fails.

Ground 3 is to the effect that the learned Judge erred in rejecting a motion made by the appellant's Counsel that the petition and a "counter claim" entered by the appellant be heard together. In fact, Counsel for the appellant has made it clear that he was really referring to a plaint with summons which had been entered by his client following the petition lodged against the latter. The learned Judge was perfectly entitled, in our view, to refuse Counsel's motion as there was no compelling reason for a consolidation of the winding up petition and the other case entered by way of plaint with summons, all the more since, as

pointed out by the learned Judge, it was important to ensure that the hearing of the winding up petition was not unduly delayed.

Ground 4 avers, in effect, that the learned Judge erred in not making a preliminary finding on the plea *in limine* and in proceeding directly to a pronouncement on its merits. Counsel for the appellant submitted that in so doing, the learned Judge actually failed to address the point raised in the plea *in limine.*

We are unable to agree with the contention contained in the above ground and the submission made by Counsel. At the outset of his judgment, the learned Judge made it clear that he was alive to the issue arising from the plea *in limine*, namely whether there was a *bona fide* dispute warranting the referral of the matter to an arbitrator under the arbitration clause.

The learned Judge then referred to section 216 (4) (d) of the **Companies Act 1984** which provides, as one of the circumstances in which a petition for winding up may be presented, a company's inability to pay its debts. And he went on to say that there was overlapping evidence which would impact both on the issue under the *plea in limine* (whether the debt was being disputed on any serious and *bona ground(s)* warranting a referral to arbitration under the arbitration clause) and the issue on the merits (whether the company was unable to pay its debt).

The conclusion reached by the learned Judge is to be found in the following passage from his judgment:

> *"For all the above reasons, I have come to the conclusion that the petitioner has established all that it had to do to be entitled to its prayer for a winding up order against the respondent, whereas the latter has utterly failed to show that it is disputing the debt subject matter of the action 'in good faith and on substantial grounds'. The respondent has failed to rebut the presumption that it is unable to pay the debt which was amply established and even admitted to be due and demandable, and after a demand had been duly made. As seen further above, it has also not succeeded to show that there was a real or serious dispute which would bring into operation clause 11 of the share purchase*

> *agreement and necessitate a reference of 'any dispute' to arbitration, and thus oust the jurisdiction of this Court, the state jurisdiction."*

It is clear from the above passage, that the learned Judge had heard evidence which at once allowed him to rule on the issue in the plea *in limine* and that in the plea on the merits.

In the circumstances, he could not be taken to task for having, as he did, decided on both issues and proceeded to a pronouncement on the merits rather than limiting himself to a preliminary finding on the *plea in limine.*

For these reasons, ground 4 also fails.

Ground 6 contains argumentation as to the procedure which the learned Judge should, in the appellant's contention, have followed. However it does not aver what the learned Judge allegedly did which was, in the appellant's contention, wrong. Accordingly, it cannot be considered as a proper ground of appeal and we are not prepared to entertain it as such.

Ground 7 is to the effect that the learned Judge erred in carrying out a full trial rather than limiting himself to a *prima facie* assessment of the issue whether the parties "validly agreed" to arbitration. We consider this ground to be totally misconceived. As indicated above when considering Ground 4, the issue under the *plea in limine* was whether there was a *bona fide* dispute warranting the referral of the matter to an arbitrator under the arbitration cause; and the issue on the merits was whether the appellant was unable to pay its debt. The question whether the parties "validly agreed" to arbitration was therefore not in issue before the learned Judge. Furthermore, having regard to the fact that the evidence in relation to the issues before him overlapped, the learned Judge cannot be taken to task for having heard all the evidence relevant to the issues and accordingly held a full trial.

Ground 8 reads as follows:

> "*The learned Judge was completely wrong in his approach from the very beginning and this is patently obvious from the proceedings before*

the Court and the approach taken in its form and tenor in the final judgment."

We find this ground, as formulated, to be too vague to amount to a proper ground of appeal and deserve our consideration.

All the grounds of appeal having failed, the appeal is dismissed with costs. For the dates "30 April 2015" and "31 October 2015" mentioned in the last paragraph of the judgment dated 6 February 2015, we substitute, respectively, the dates "30 April 2020" and "31 October 2020".

E. Balancy
Chief Justice

G. Jugessur - Manna
Judge

03 March 2020

Judgment delivered by Hon. G. Jugessur - Manna, Judge

For the Appellant	**: Mr D. Luchmun, Attorney-at-Law**
	: Mr S. Hawoldar, of Counsel
For the Respondent	**: Mr F. Hardy, Attorney-at-Law**
	: Mr M. Ahnee, of Counsel