ROBERT J J v GUNNESS S

2010 SCJ 146

SN. 373/09

IN THE SUPREME COURT OF MAURITIUS

In Chambers

In the matter of:

Jean Jacques Robert

APPLICANT

v/s

Seeshoopalsing Gunness

RESPONDENT

In the presence of:-

South Seas Development Co Ltd

CO-RESPONDENT/GARNISHEE

And in the matter of:-

Ex-Parte:-

Jean Jacques Robert

APPLICANT

…..

JUDGMENT

On the 26th of February 2009, I granted leave to the Applicant, at his own risks and perils, to attach in the hands of the Co-Respondent/Garnishee all sums of money or other property whatsoever due to or held by the latter for the account of the Respondent and especially 9,500 shares of Rs 10 each belonging or accruing or which may belong or accrue to the Respondent in the share capital of the Garnishee as well as any share of profits due or accruing to or which may be due or accrue to the Respondent in the Garnishee in order to secure the payment of the sum of Rs 5 million plus Rs 750,000 as VAT and costs valued by Applicant at Rs 100,000.

The present application is for the validation of the said attachment under section 71 of the Courts Act.

The Applicant has averred in his affidavit that his services as Attorney were retained on 10th October 2000 by the Co-Respondent, represented by its then Chairman the Respondent, to proceed with a statement of claim which had been lodged against the Government of Mauritius and which contained a claim for damages for the sum of Rs 149,400,000, subsequently amended to Rs 263,586,578.50. As per the agreement, the Co-Respondent undertook to give to the Applicant a commission of 5% on all sums recovered by him and to pay him his disbursements and fees after the termination of the case or in case of an amicable settlement, as soon as same would be concluded (vide Annex D1). As the case was dragging on for more than seven years without the Applicant having been paid any fee or disbursement, the Co-Respondent's Chairman, that is the Respondent, agreed on 13.3.08 to pay the Applicant the sum of Rs 5 million as part payment of his fees, which sum was to be paid by 31.3.08 (vide Annex D2). This payment of Rs 5 million was guaranteed jointly and in solido by the Respondent. Both the Respondent and the Co-Respondent failed to pay the agreed sum. As the Co-Respondent has no asset to satisfy the claim, whereas the Respondent holds 9,500 shares of Rs 10 each in the Garnishee, the present application is directed against the Respondent only.

The Respondent is objecting to the application. The Co-Respondent is abiding by the decision of the Court.

The objections raised by the Respondent are as follows:-

(1) The attachment proceedings are invalid as they were not properly served on the Respondent in his personal capacity in compliance with article 558 of the CCP which lays down the procedure to be followed. They have been served on the Co-Respondent only, of whom the Respondent is one of the directors.

(2) The document (Annex D2) purporting to establish the debt is invalid in as much as-

(a) This document purports to take the form of a simple sous-seing privé between the Applicant and the Co-Respondent. There is no reference to any

board resolution or other corporate authorisation on the part of the Co-Respondent for this payment to be made;

(b) Document D2 purports to have been signed by "The Client" but the name of the person representing the client or the capacity in which he is signing the document does not appear so that it is doubtful if this document may validly bind the Co-Respondent itself;

(c) On the face of document D2, there is no clear mention that the Respondent has accepted to guarantee the debt in his own personal name. The agreement is between the Applicant and the Co-Respondent and the Respondent has signed the document on behalf of the latter.

(d) For a personal guarantee to be enforceable against the Respondent he should have signed it in his own personal capacity. Document D2, on which the present attachment proceedings have been based, does not establish the existence of a debt between the Applicant and the Respondent.

(e) A third document signed on 15.10.2008 emanating from the Applicant makes no mention of the sum of Rs 5 m. It can therefore be concluded that this document supersedes Document D2.

(3) A debt must be "certaine", "liquide" and "exigible"- **Bhattoo v Goburdhun and Anor [1976 MR 301]; Jardin and anor v Cordouan [1884 MR 138]; Mamoojee v Cassim [1886 MR 111]; Marie Jeanne v Bahemia & Ors [1965 MR 182]; Ramphul v Siraz & The Mon Désert S.E and Anor [971 MR 242]; Dauguet v Brunner [1999 SCJ 334].** In the present case, as judgment is still pending on the issue of quantum, the amount of commission and fees cannot be determined and the part payment of Rs 5 m which the Applicant is claiming is in respect of a final amount which is yet unknown.

(4) Under article 1146 of the Civil Code, the Respondent should have been put 'en demeure' after the 31st March 2008 when the alleged debt became due but it has failed to do so. **Tankoe v Gustave Ovide [1868 MR 43].**

(5) There has been an improper claim of VAT as this has not been stipulated in the document.

(6) Bad Faith

The Applicant has not come before the Judge in Chambers with clean hands and has not acted in good faith because-

(a) he took action some 11 months after the sum was allegedly due and there has not been a simultaneous claim against the Co-Respondent;
(b) he is the director/company secretary of the Co-Respondent and has failed to disclose his relationship with the company;
(c) the notice was served on the directors of the company contrary to the practice of serving it on the company secretary, who happens to be the Applicant himself. He has selected on which directors to serve the notice and not to serve it on himself. He has concealed the glaring conflict of interests surrounding him in the present matter.

Respondent's Counsel submitted, on the basis of the above arguments, that the Respondent has raised serious objections against the application and that the jurisdiction of the Judge in Chambers is therefore ousted. Counsel cited the authority of **Delphis Bank v Jhureea Joseph Paul & Ors** [2002 SCJ 94] in support of her submission.

The Applicant's Counsel, on his part, submitted as follows-

1. The sum of Rs 5 m is to all intents and purposes "certaine, liquide and exigible" in as much as it rests on an agreement whereby the Respondent bound himself jointly and in solido with the Co-Respondent towards the Applicant to settle the said sum by 31st March 2009 at latest;
2. If the Respondent contends that the agreement was made merely to enable the Applicant to secure a housing loan from the bank, then the Respondent is

saying that the document is a mere simulation. The Respondent cannot go 'contre et outre le contenu aux actes' (vide Article 1341 of the Civil Code).

3. The Applicant is under no obligation to justify his choice of suing one party or the other. It is his legitimate right to sue either party or both as he wishes.

4. The objections are spurious, frivolous and vexatious.

The merits of the present application

I have duly considered the present application and the objections raised by the Respondent. Section 71 of the Courts Act sets out the matters that may be finally disposed of at Chambers by a judge's order, subject to the discretion of the judge in any particular case to refer them to the Court. The present application falls under s 71(1)(e). Section 71(2) provides that "*In applications under subsection (1) (c), (d), (e) or (f), no order shall be made by a judge in Chambers, where a party to the application objects*".

It is now well-settled that s 71(2) should not be interpreted to mean that an objection of whatever nature once raised will preclude the Judge in Chambers from even considering the nature of the objections. It is open to the Judge in Chambers to decide whether the objections are frivolous or not. The Judge in Chambers will not refer the matter to the Court where he is satisfied that the objections are frivolous and vexatious. He will do so only where a serious objection has been raised (vide **The Mauritius Commercial Bank Ltd v Sibartie and Ors [1980 MR 155]; MCB v Ramrachheya [2009 SCJ 97].**

In the present case, I shall deal first with the objection relating to the ground that the document purporting to establish the debt is not valid. I find that there is substance in this ground of objection, which has been validly and seriously raised. I say so for the following reasons:-

(i) The document D2 is an agreement between the Applicant (the Attorney) and the Co-Respondent (the Client) and it bears the signatures of the Attorney and the Client only.

(ii) The Respondent has not signed the agreement in his own personal capacity binding himself to pay the sum jointly and in solido along with the Co-Respondent.

(iii) The presence of the words "*This fee is guaranteed jointly and in solido by client's representative, Mr Seehoopalsing Gunness"* in paragraph 2 of the document cannot per se bind the Respondent in the absence of any formal undertaking by him.

As this objection on its own is one of substance, I find that my jurisdiction is ousted and I cannot probe any further into the merits of the application. The matter should be dealt with by the competent Court as provided by s 71 of the Courts Act.

In the circumstances the application is set aside with costs.

I certify as to Counsel.

D. Beesoondoyal
Judge

11 May 2010.

For Applicant : **Mr. M.A. Bocus, of Counsel**
: **Mr. Attorney P.D. Lallah**

For Respondents : **Mrs. U. Boolell, of Counsel**
: **Miss K. Mardemootoo, Attorney at Law**