Intershore Consult v Govinden

(2013) SLR 469

Karunakaran J

6 November 2013 CS 127/2010

Counsel L Pool for the petitioner

S Aglae for the respondent

KARUNAKARAN J

[1] This is a petition for judicial review. The petitioner in this matter seeks a writ of certiorari to quash the decision of the respondent - Senior Magistrate Her Worship Mrs Samia Govinden - dated 25March 2010, exercising the supervisory jurisdiction of this Court over subordinate courts, tribunals, and adjudicating authority conferred by art 125(1)(c) of the Constitution.

[2] At all material times, the petitioner was and is an offshore company operating in Seychelles. It is licensed by the Seychelles International Business Authority to carry on business as a Corporate Service Provider. By virtue of its business operations, the petitioner holds confidential information pertaining to its clients. One among the clients is a company by the name “Liaison Marketing Company Limited” (LMCL) which is also registered in Seychelles as an International Business Company.

[3] Be that as it may, on 27February 2009, the Attorney-General made an ex parteapplication (hereinafter called the application) to the respondent, by way of a motion supported by an affidavit in terms of

s 10(2)(b) of the Mutual Assistance in Criminal Matters Act (the Act) seeking an order for disclosure of certain information and documents from the petitioner pertaining to its client LMCL. The disclosure was sought in relation to a criminal investigation conducted by the Bureau of Combating Organised Crime of Money Laundering and the Crime of Establishment and Support of a Criminal Enterprise and Terrorist Group. The application was made by the Republic of Seychelles through the Attorney-General (the Central Authority under the Act) following a request made by the General Public Prosecution Service of the Slovak Republic, the agency responsible for prosecuting criminal cases in that country. In passing, I should mention here that this agency was simply seeking the assistance of the legal and judicial authorities in the Republic of Seychelles for the purpose of investigating cross-border crimes under the Act.

[4] Consequent upon the said application, in Case No 149/09, the respondent on 9 April 2009, issued a summons to the petitioner to appear through its director or other representative before the Magistrate Court "A" to produce certain documents/give evidence pertaining to certain information held by the petitioner in respect of LMCL. The summons inter alia, reads as follows:

> You are hereby summoned to appear before this Court "A" on 30 April 2009 at 8:30am in the forenoon to produce the following certified documents of the Company (see attached) including any changes in the details specified (a) (b) and (c) (attached) which were registered during the existence of the Company and so on until the matter be concluded.

[5] The disclosure sought were certified documents in the possession information regarding the Company LMCL as to: (a) Persons

registered as owners/directors of the Company, (b) registered/permit scope of the business (objects) of the Company and (c) Persons authorized to act (perform legal acts) on behalf of the Company including any changes in the details specified in (a), (b) and (c) above which were registered during the existence of the Company.

[6] The Company was represented in the Magistrates' Court by counsel Mr Boullé and subsequently by counsel Ms Pool. They objected to the application on the following grounds:

i) that the application was unlawfully headed ex parte;

ii) the heading of an application as being ex parte does not give party the right to be heard ex parte;

iii) the Court erroneously heard the application ex parte in violation of the fundamental principle that in all cases the Court must hear both parties unless there is a provision of law, which empowers the Court to hear a matter ex parte. That the application and summons are procedurally and substantively flawed as it has provided no opportunity for the parties who will be affected by the Court order sought and against whom the evidence will be used to be heard, in violation of the principles of natural justice and the provision of s 9 (4) of the Mutual Assistance in Criminal Matters Act, which implies that notice of proceeding should be served on all parties to allow them to be represented or be present at the hearing; and

iv) on the fact that it is not judicially sound and it is beyond the competence of the Court to act on any matter before

> it without evidence, of the application. It is to be noted that a submission as is the case with this application which is not even supported by affidavit evidence.

[7] Based on the said grounds, the petitioner's counsel moved the respondent Court to dismiss the application and recall/cancel the summons issued in terms of the application.

[8] On the other side, State Counsel Ms Aglae supported the application before the respondent. In answer to the objection of the petitioner, Mrs Aglae submitted that as per the Court of Appeal judgment dated 11 December 2009 in CA No 6 of 2009, the absence of rules was not an impediment and did not invalidate the application. Hence, she contended that the application was valid in law. The petitioner-company was served with a copy of the application and was given the opportunity to be heard, the matter was not heard in the absence of the petitioner. An answer to the application was filed by the petitioner on 23 January 2010; and lastly that an affidavit had been attached to the application.

[9] The respondent, having heard both sides, overruled the objections of the petitioner to the application and held that the application was properly filed, supported by an affidavit and so valid in law. Hence, the respondent issued the summons ordering the petitioner or its representative "to appear before Court "A" on 30April 2009 at 8:30 am in the forenoon and produce the certified documents hereinbefore mentioned".

[10] On 30 April 2009, the representative of the petitioner attended the Court. However, at the instance of a request made by the Central Authority, the case was adjourned till 1 June 2009. On the second adjourned date the Court again adjourned the case by

telephonic message to 24 September 2009, which date was later confirmed by a notice sent by the Assistant Registrar to the petitioner. On 22 July 2009 the Assistant Registrar sent a notice to confirm the above-mentioned date of 24 September 2009.

[11] As from 24September 2009 the case proceeded and the parties filed the following pleadings and submission before the Magistrate:

i) The petitioner filed an answer to the application dated 27 January 2010.

ii) The applicant (Central Authority) a Reply to answer to application dated 5 February 2010.

iii) Submission of counsel for petitioner dated 13 February 2010.

[12] On 25March 2010 the respondent delivered a ruling in favour of the Central Authority, which overruled the objections of the petitioner to the application; granted the application and issued a summons ordering the petitioner to produce the required documents mentioned hereinbefore.

[13] The petitioner, being dissatisfied with the said ruling (decision) of the respondent - has now come before this Court for a “Judicial Review” seeking a writ of certiorari to quash the said decision of the respondent. According to the petitioner, the said decision is void in essence, on the following grounds.

[14] Irrationality: the decision is irrational as the respondent in her decision has relied and acted upon an affidavit of State Counsel instead of the Attorney-General, who is the designated Central

Authority under the Act. Besides, the records of the case before the respondent have been distorted, misinterpreted and partly ignored which renders the decision fatally flawed. The decision is irrational since the respondent as a whole has failed in providing a fair process of adjudication and has not addressed the major issues raised in the answer and the submission of the petitioner. Consequently, the answer and submission remains alive for determination and in terms of which the finding in favour of the applicant (Central Authority) is without proper juridical foundation.

[15] Illegality/Unlawfulness/Breach of the Rules of Natural justice: The said decision is further misconceived and procedurally flawed as the respondent has not complied with the *audi alteram partem* rule. The respondent has evoked local practice and procedures adopted in local case law to justify an ex parte application is a totally flawed process of adjudication on such a fundamental principle as "right to be heard", is guaranteed by the Constitution. In support of its contention that "Practice cannot supersede the mandatory provisions of a statute, the petitioner relied upon the authority in *Chetty v Tong* Civil Appeal 11/93.

[16] Ultra Vires: The respondent has no power to turn an ex parte application into an inter partes proceedings as it is tantamount to substituting itself for the applicant in terms of which the Court was in error to serve an ex parte application in a criminal matter instead of dismissing the application if the Court felt that it could not hear the matter ex parte.

[17] I meticulously perused the records of the proceedings before the respondent (Senior Magistrate) in this matter. I gave careful thought to the arguments advanced by both counsel touching on points of law as well as facts.

[18] For the sake of convenience, I will first proceed to examine the issue of irrationality raised in ground No 1 allegedly emanating from the affidavit of the State Counsel, which the respondent relied and acted upon to base her decision in this matter.

[19] Needless to say, an affidavit is a declaration on oath, reduced to writing, affirmed or sworn to by a deponent, before some person who has authority in law to administer oaths and also attested by the latter. Indeed, an affidavit is nothing but a form of evidence on oath. However, the weight and the credibility of such evidence isquestionable or to say the least, whose veracity is untested as the averments made therein were not subjected to cross-examination. Therefore, in any judicial or quasi-judicial process, the decision-maker may rely and act upon any affidavit evidence adduced by a party, although the credibility and the weight that could be attached thereto, fall within the subjective assessment of the decision-maker in respect of each and every averment made in the affidavit. In the instant case, the respondent obviously had no reason to suspect the credibility of the deponent and the veracity of the averments made in the affidavit. Hence, the respondent's decision cannot be faulted for irrationality as she has rightly and lawfully relied and acted upon the affidavit evidence - like any other reasonable tribunal would do in the circumstances - to base her decision in this matter. Be that as it may, on the issue of swearing an affidavit by State Counsel on behalf of the Attorney-General, (Central Authority), it is pertinent to note that s 32 of the Act reads thus:

> (1) The Central Authority may, either generally or as otherwise provided by the instrument of delegation, delegate to a public officer all or any of its powers

under this Act, other than its power of delegation or its powers under s 7.

(2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Central Authority.

[20] It is thus evident the Act empowers the Attorney-General - the Central Authority - to delegate all the powers (including the power obviously, to swear an affidavit) conferred on him by the Act to State Counsel or any other public officer. Article 76 of our Constitution also states that the power of the Attorney-General may be exercised by the Attorney-General in person or subordinate officers acting with the general or special instructions of the Attorney-General. This delegated power as I see it, includes the power to carry out all functions incidental thereto such as swearing an affidavit etc to institute and conduct any proceeding under the Act.

[21] Hence, it goes without saying that it is neither irrational nor illegal nor improper for State Counsel - who is not only a public officer but also a subordinate officer of the Attorney-General - to exercise the delegated power conferred on him or her by the Attorney-General to institute and conduct any proceeding under the Act. The respondent therefore acted rationally in relying and acting upon the said affidavit of the State Counsel to base her decision in this matter and so I find.

[22] I will now move on to examine the merits of the case in the light of the record of the proceedings before the Magistrates' Court and the submission made by counsel on both sides. To my mind, four fundamental questions arise for determination in this case. They are:

Is the decision of the respondent irrational or unreasonable in summoning and ordering the petitioner to produce the documents in question, having regard to all the circumstances of the case?

Is the decision of the respondent illegal in summoning and ordering the petitioner to produce those documents required by the General Public Prosecution Service of the Slovak Republic?

Did the respondent act ultra vires in any manner in summoning and ordering petitioner to produce those documents? and

Was the respondent in breach of any of the principles of natural justice particularly, that of "Audi alteram partem?

[23] Before one proceeds to find answers to the above question it is important to know the objective of the Act, under which the respondent made the impugned order so that the interpretation given to the provisions therein and the judicial powers and functions exercised in pursuance of the Act accord with the objective. It is evident from the preamble of the Act that the main objective of the Act was to make provision for the purposes of implementing the Commonwealth Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth and to make provision with respect to mutual assistance in criminal matters between Seychelles and a foreign country other than a Commonwealth country. In fact, the pith and substance of the Act is that one Member State may request the other Member State for assistance in order to collect or secure or gather evidence in criminal matter. The State that receives a request for such assistance, is not adjudicating any criminal or civil

liability of any person rather it simply gathers or secures evidence in criminal matters in which a foreign country has an interest. It is also pertinent to note that s 10 (2)(b) of the Act reads thus:

> in the case of the production of documents or other things, a magistrate or judge may, subject to subsection (6), require the production of the document or other thing and, where the document or other thing is produced, the magistrate or judge shall send the document or copies of the document certified by the magistrate or judge to be true copies, or the other thing, to the Central Authority.

Section 10(6) therein reads thus:

> Subject to subsection (7), the Evidence Act, Evidence (Bankers) Act and the Criminal Procedure Code shall apply, so far as they are applicable, with respect to the compelling of persons to attend before a magistrate or judge and to give evidence, answering question and producing document or other thing for the purposes of this section.

[24] Firstly, I would like to restate herein what I have stated before in *Cousine Island Company v Herminie* CS 248/2000. Whatever the nature of the issue factual or legal that may arise for determination following the arguments advanced by counsel, the fact remains that this Court is not sitting on appeal to examine the facts and merits of the decision in question. Indeed, the system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the case under appeal. However, when subjecting some administrative

decision or act or order to judicial review, the Court is concerned only with the legality, rationality (reasonableness) and propriety of the decision in question vide the landmark dictum of Lord Diplock in *Council of Civil Service Unions* (supra). On an appeal the question is "right or wrong"? Whereas on a judicial review the question is "lawful or unlawful"? or "reasonable or unreasonable"? Or "rational or irrational"? Or procedurally "proper or improper"?

[25] On the issue of legality, I note, the entity of law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the Court may without much ado determine the issue of legality of any administrative decision, which indeed, includes the issue whether the decision-maker had acted in accordance with law, by applying the litmus test, based on an objectiveassessment of the facts involved in the case. On the contrary, the entity of fairness or reasonableness cannot be defined, ascertained and brought within the parameters of law; there is no litmus test to apply, for it requires a subjective assessment of the entire facts and circumstances of the case under consideration and such assessment ought to be made applying the yardstick of human reasoning and rationale.

[26] I will now, turn to the first issue as to the alleged irrationality or unreasonableness of the decision in question. What is the test the Court should apply in determining the rationality or reasonableness of the impugned decision in matters of judicial review?

[27] In order to determine the issue as to reasonableness of a decision one has to invariably go into its merits, as formulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.Where judicial review is sought on the ground of unreasonableness, the Court is required to make value judgments

about the quality of the decision under review. The merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing; it is one outside the limit of reason (Michael Molan, *Administrative Law*, (3rded, 2001). Applying this test, as I see it, the Court has to examine whether the decision in question is unreasonable or not.

[28] At the same time, one should be cautious in that:

> Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.
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> Per Lord Fraser *Amin v Entry Clearance Officer Bombay* [1983] 2 All ER 864 at 868.

[29] In determining the issue of reasonableness of the decision in the present case, the Court has to make a subjective assessment of the entire facts and circumstances of the case and consider whether the decision of the respondent is reasonable or not. In considering reasonableness, the duty of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing including the objective of the Act. That he must do in what I venture to call a broad common sense way as a man of the world, and come to his conclusion giving such weight, as he thinks right to the various

factors in the situation. Some factors may have little or no weight; others may be decisive but it is quite wrong for him to exclude from his consideration matters which he ought to take into account per Lord Green in *Cumming v Danson* [1942] 2 All ER 653 at 656**.**

[30] In my considered view, the respondent in this matter has rightly considered the affidavit evidence on record, all relevant facts and the entire circumstances of the case including the objective of the Act in arriving at her decision. Obviously, the petitioner's contention to the contrary, stating that she has acted irrationally/unreasonably and without evidence is not well-founded. I find that the decision of the respondent is rational; she has relied and acted upon the affidavit of State Counsel. In my view, the respondent as a whole has provided a fair process of adjudication and has addressed the major issues raised in the answer and the submission of the petitioner. Hence, the petitioner's contention that the respondent acted without proper juridical foundation and evidence did not appeal to me in the least.

[31] In any event, on the face of the affidavit evidence adduced by the Central Authority, it is indeed reasonable for any adjudicating tribunal to arrive at the decision, which the respondentdid, in this matter. In view of all the above, I hold that the decision of the respondent in summoning and ordering the petitioner to produce the documents required by theGeneral Public Prosecution Service of the Slovak Republic is not irrational or illegal. As I see it, the respondent did not act ultra vires in any manner repugnant to any provisions of the Act in summoning and ordering petitioner to produce those documents. Moreover, I find that the respondent was not in breach of any of the rules of natural justice particularly, that of *audi alteram partem.*

[32] For the reasons stated hereinbefore, I hold that the decision of the respondent dated 25 March 2010 in this matter is neither irrational nor illegal nor ultra vires. I therefore, decline to grant the writ of certiorari and dismiss the petition accordingly. I make no orders as to costs.