

IN THE SUPREME COURT OF SEYCHELLES

**Civil Side: MA 21/2017
(arising in CS11/2016)**

[2017] SCSC 470

BAJRANG BUILDERS (PTY) LTD

Applicant versus

v/s

HARINI & COMPANY (PTY) LTD
Respondent

Heard: 17th day of May 2017
Counsel: Mr. A. Derjacques for applicant
Mr. S. Rouillon for respondent

Delivered: 9th day of June 2017

RULING ON MOTION

Govinden J

[1] This is a Ruling on a Motion filed by the Applicant dated the 17th day of January 2017, seeking for Orders of stay of proceedings, dismissal of the Plaint in the main suit namely CS 11/2016 (hereinafter referred to as the “main suit”) and dismissal of the Interlocutory Injunction dated 8th day of April 2016.

- [2] Attached in support of the Application is the Affidavit of one Mr. Bhupesh Danji Hirani dated 22nd day of January 2017 wherein it is averred in a gist that the civil action in the main suit is based entirely on a written contract dated 16th day of February 2011 and is registered (hereinafter referred to as the “Agreement”). That the Agreement is a binding agreement in conformity with section 2 of the Agreement and has the force of law. That the Agreement mandates arbitration with respect to any breach of agreement as per section 21. That Laws of Seychelles apply in accordance with section 24.10 and that the latter section is an ouster clause which mandates arbitration in a legal dispute ‘inter partes’ and that finally, the Applicant is willing to do all that is necessary to ensure, deliver and respect arbitration and shall co-operate and participate in arbitration, and fully respect any Arbitration Order. As a result, the Applicant moves for stay of proceedings in the main suit, dismissal of the main suit and that of the interlocutory injunction dated the 8th day of April 2016.
- [3] Further in support, Learned Counsel Mr. Anthony Derjacques has attached thereto copies of the Judgements in the matters of (**Le Roux (2012) SLR 175 dated 31st day of May 2012, (Cs. No. 25/2013)**) and (**Raymond Cambou versus Eden Island Company (Seychelles) Limited dated 28th day of July 2014**)*wherein the Learned Judges Renaud and De Silva (as they then were), respectively, suggested that in line with the provisions of Articles 111 (1) and 113 (1) of the Commercial Code that the Court may declare that it has jurisdiction at the request of either party, if in the opinion of the court the arbitration agreement ‘is not valid or has terminated’. Further, in both cases, it was ruled, that the word “shall” used and/or “shall be” irrespective of the initiating words “subject to any specific provision to the contrary in this Agreement” (when it appears in an Arbitration agreement), renders it mandatory and it leaves no doubt that that*

provision of such an agreement is mandatory for 'its wording according to their Lordships is sufficiently wide and it can apply to a dispute as to the validity and enforceability of the agreement'.

- [4] The Respondent on its part, objects to the Application by way of written submissions of Learned Counsel Mr. S. Rouillon dated 15th day of March 2017 of which the contents have been duly noted for the purpose of this Ruling and of which in a gist provides that the Application is belated, incompetent and misconceived in that the terms of the contract between the parties allow the parties to move from arbitration to other parts of the contract in certain circumstances and that in any event, “the pleadings having been closed for some time and even been subject of a full discussion and Ruling on the interim injunction. Furthermore the Defendant is simply asking for damages as provided for in the contract for breach. Therefore it is late now to make such an application. The Respondent thus moves for the dismissal of the Application on the grounds of lack of substance for referral to Arbitration a priori by express agreement of the parties which ousts the Arbitration clause by operation of law and facts or any grounds put forward by the Respondent for returning to the premises illegally according to the Order of the Planning Authority and carrying activities therein.”
- [5] A brief history of the main suit giving rise to this Application arises out of a Plaint dated 18th day of February 2016 wherein the Plaintiff seeks for the following reliefs:
- (a) rescission of the building lease agreement dated 24th day of September 2010; and
 - (b) ordering the Defendant to:-

- (i) immediately stop operating the workshop inside the leased premises or any activities whatsoever and to vacate the premises forthwith;
- (ii) remove all the temporary sheds, containers and workers accommodation and personal belongings;
- (iii) remove all construction materials, debris and machinery immediately;
- (iv) to allow an independent architect to be appointed to finalize the cost of the building and include the defaults cost in his final report; and
- (v) cover any rents paid by the plaintiffs to third parties namely Fish Leather & Co since January 2012 at S.R. 37,500/- per month for carrying out its own business activities;
- (vii) pay the Plaintiff the sum of S.R. 200,000/- special damages and cost of the action.

[6] Having instituted the above main suit, the Plaintiff then filed a Motion ex-parte in MA 44 of 2016 seeking an interlocutory injunction to prevent the Defendant from carrying on with the continued illegal occupation and activities in the Plaintiff's premises until the matters mentioned in the Plaint are fully and finally decided by this Honourable Court and such an Order was granted after an 'inter partes' hearing dated 8th day of April 2016.

[7] The gist of the Application before this Court is that of referral to arbitration by this Court of the main suit by virtue of Article 21 of the Agreement for subleasing and building of commercial building between

the parties dated 24th day of September 2010 (hereinafter referred to as “the Agreement”).

[8] Article 21 of the Agreement provides as follows:

Article 21 Arbitration:-

21.1 Subject to any specific provision to the contrary in this Agreement, in the event of any dispute of any nature whatsoever arising between the Parties on any matter provided for in, or arising out of, this Agreement, then that dispute shall be submitted to and decided by arbitration in accordance with the provisions below:.....”

Sub-articles (a) to (b) of the Agreement set out the procedure to submit to Arbitration.

[9] Now, the law applicable in same and similar Applications are clearly set out in the cases of (**Wartsila NSD Finland OY and United Concrete Products Civil Appeal No. 16 of 2003**) wherein other relevant local case law were discussed *inter alia*, (**Emerald Cove Ltd v Intour S.R.I. (Civil Appeal No. 9 of 2000)**) and (**Beitsma v Dingjam No. 1 (1974) SLR P 292**) , (**Pillay v Pillay (No. 25 1971-1973, SLR 307)**) and (**No. 50 1978**), **SLR of the 5th December 1978**), in the context of interpretation of arbitration clauses forming part of an agreement and conditions for ousting Jurisdiction of the Court.

[10] In the matter of (**Emerald Cove Ltd v Intour S.r.i. (Civil Appeal No. 9 of 2000)**), the Court of Appeal observed that:-

“It is evident that now where an arbitration clause is valid in terms of article 113-1, it is capable of ousting the jurisdiction of the Court. However, the validity of the arbitration is determined by the proper law of contract... Notwithstanding the wide important of article 113-1 a Seychelles Court should not decline jurisdiction and so shut its doors to

a litigant unless it is sure that the agreement to arbitrate is valid and subsisting. This he must do by evidence that satisfies the Court to that effect.

*It is also because the Seychelles Court will not deny a litigant the protection of the law that it will insist that a party who ask it to decline jurisdiction in matter on the ground that there is a valid arbitration agreement must show readiness to submit to arbitration. It must be emphasised that where there is an arbitration agreement, notwithstanding the validity of the agreement is determined by the proper law of the contract which may be foreign law, whether the Seychelles Court will decline jurisdiction or not and the procedure for requesting the Court to decline jurisdiction is governed by Seychelles law. That procedure was stated in *Beitsma v Dingjam*".*

- [11] In **(Beitsma v Dingjam)** (supra), it was held that the Supreme Court of Seychelles in exercising its jurisdiction has by virtue of Section 4 of the Courts Act, the same powers, privileges, authority and jurisdiction of the High Court of Justice in England. Accordingly, when a party has been served and caused appearance before the jurisdiction of the Court, the question was not whether the court had power to exercise jurisdiction but whether it had power to decline to exercise such jurisdiction or to order a stay of the proceedings. It is added that ‘as a matter of procedure, the party who asks the court for an order to stay proceedings must file an Affidavit so as to satisfy the Court not only that he is, but also that he was at the commencement of the proceedings ready and willing to do everything for the proper conduct of the arbitration....’.
- [12] It is also stated in the matter of **(Beitsma)** that “as admittedly, the power of the Supreme Court of Seychelles to decline jurisdiction at the request of either party to a commercial transaction where the court is

seized of a dispute which is subject to an arbitration agreement is now provided for under the Article 113-1 of the Commercial Code. And that the procedure to request the court to do so remains as stated in **(Beitsma v Bingham No.1)** and confirmed by the **(Court of Appeal in Emerald Cove Ltd v Intour S.r.i.)**

[13] Now, the law as set out in the matter of **(Wartsila NSD Finland OY and United Concrete Products Civil Appeal No. 16 of 2003)** (supra), is in a gist that firstly, an arbitration clause in a contract is severable from the rest of the contract and that as such it stands on its own as a separate agreement independent from the main contract; secondly, that the Seychelles Court should not decline jurisdiction and so shut its door to a litigant unless it is sure that the arbitration agreement is valid and subsisting under the law governing the contract and this the applicant must do so by evidence; thirdly, that the applicant must at the time of the application show a readiness, through evidence, that he was at the commencement of the proceedings ready and willing to do everything for the proper conduct of the arbitration; and fourthly, that needless to say, that the applicant must also prove that an arbitration agreement as contemplated by the common law and article 113-1 of the commercial code exist and that it unequivocally obliges the parties to the agreement to resort to arbitration as at the first instance, as compared to other judicial remedies.

[14] It is to be borne in mind in line with the fourth precondition as laid out at paragraph [13] above, namely, the unequivocal ousting of the jurisdiction of the Supreme Court by an arbitral clause, that with the promulgation of the Seychelles Constitution in 1993, the right to come before a Court of Justice and seek redress has been elevated to a constitutional right. Hence, this Court should decline its Jurisdiction in favour of a non-judicial forum only in clear circumstances and where

the evidence shows that the 'intention of the parties to the contract reflected in the wording of the contract read as a whole, that they want their case to be decided by a forum other than the courts, this contrary to their constitutional right to fair hearing before this Court'. *In the latter regard, the Court should be especially cautious where proceedings have already been instituted by a party to the contract, such as in this case.*

[15] Now, in the current Application, as illustrated at paragraph [2] above, the Applicant attaches an affidavit in support as clearly outlined in a gist, *that the civil action in the main suit in Civil Side 11 of 2016 is based entirely on a written contract dated the 16th day of February 2011 and is registered. That the said contract is a binding agreement in conformity with section 2 of the said agreement and has the force of law. That the said contract mandates arbitration with respect to any breach of agreement as per section 21. That Laws of Seychelles apply in accordance with section 24.10 and that the latter is an ouster clause which mandates Arbitration in a legal dispute inter parties and that finally, the Applicant is willing to do all that is necessary to ensure, deliver and respect arbitration and shall corporate and participate in arbitration, and fully respect any arbitration Order, and as a result moves for stay of proceedings in the main suit, dismissal of the main suit and the interlocutory injunction dated the 8th day of April 2016.*

[16] After having carefully scrutinized the Affidavit and supporting submissions and attachments in support of this Application in the light of the legal preconditions as set out at paragraph [13] above and the pleadings filed thus far, this Court finds that the Applicant has not proved to the satisfaction of this Court that the Arbitration agreement is valid and subsisting. It follows thus that I cannot decline jurisdiction for the following reasons.

[17] Firstly, the existence of the Arbitration clause 21 of the Agreement, it is clear by virtue of the same arbitration clause that it is *“subject to any specific provision to the contrary in this agreement”*. That clause is to be read with the provisions of Article 1134 of the Civil Code (CAP 33) which clearly indicates with certainty that, *‘agreements shall not be revoked except with the mutual consent or for causes which the law authorises and that they shall be performed in good faith’* and the provisions of Article 1156 of the Civil Code, which in turn is directly relevant in the current instance provides that, *“in the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meanings of the words and that in the absence of clear evidence , the court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood’*, and more importantly in the same light, the provisions of Article 1161 of the Civil Code which provides in clear terms that *“all the terms of the contract shall be used to interpret one another by giving to each other meaning which derives from the whole.”*

[18] On the above basis, Article 20 of the Agreement, provides for breach and cancellation as follows:-

20.1:- In the event that either of the parties breaches any term of this agreement, which terms are all deemed to be material, and where such breach is capable of being remedied remains in breach for a period of twenty (2) Business Days after the defaulting Party receives a written notice from the non-defaulting party to remedy such breach, then the non-defaulting party shall be entitled, at its option and without prejudice to any other rights which it may have in law, to either (a) cancel this Agreement and claim from the defaulting party such damages as it may have suffered as a result of such cancellation;

or (b) to claim immediate specific performance of that defaulting party's obligations."

- [19] I note the Rulings of the Supreme Court in the matters of (**Raymond Cambou versus Eden Island Development Company (Seychelles) Limited**) and (**Le Roux v Eden Island (2012) SLR 175**) to the joint effect that, *'it appears that in some cases the jurisdiction of the Supreme Court can be ousted in favour of an arbitration process even in such cases as this one with the either or clause'*. I am with respect, of the humble opinion that in this case, the intention of the parties as read in light of the relevant provisions of the Civil Code as clearly highlighted above as to the *'intention of the parties' was but to oust 'arbitration' in situations arising out of Section 20 of the agreement* and this is clearly evident from the averments of the Plaintiff wherein breach of the Agreement and cancellation is thus being invoked in line with section 20 thereof (ex-facie the pleadings).
- [20] Further, in line with the reasoning in the above cited case law with respect to the law governing applications for referrals to arbitration, I am further of the view that the Applicant has not proved that the Arbitration agreement is valid and subsisting hence I cannot decline the Jurisdiction of this Court on that basis. The only proof adduced by the Applicant on the validity and subsistence of the Arbitration agreement as valid and subsisting are the averments in the Affidavit attached in support. At paragraph 4 of Mr. Hirani's Affidavit, he avers that the contract is a binding agreement and has force of law and at paragraph 5 thereof that, the said contract mandates Arbitration with respect to any breach of the agreement as per section 21. It is trite that as per the provisions of Article 1134 of the Civil Code that *'agreements lawfully concluded shall have the force of law for those who have entered into them.'* However, given the severability of the separate arbitration agreement, I am of the view that the Applicant

should have gone further in its effort to prove to this Court of the validity of the arbitration agreement under its proper jurisdictional law. It is to be noted that this Court has not heard the matter on its merits and it would be improper for the Court to assume certain facts, without the presence of strong and cogent evidence in that regards.

[21] I am of the further view that the Applicant has on evidence failed to show a readiness for him to submit to arbitration at the commencement of the proceedings in this case for it is evident that the Applicant chose to file a defence to the Plaint dated 14th day of June 2016. Hence the Applicant chose to make a defence on the facts. No plea as to referral to arbitration is taken. I take note that the Applicant changed Counsel thereafter and it is only then that an attempt is being made to resort to arbitration and that in March 2017. It is further noted that the only averments in Mr. Harini's Affidavit as to his willingness to comply to arbitration is founded at paragraph 8 thereof wherein he avers that he would do all that is necessary to ensure, deliver and respect arbitration and at paragraph 9 thereof that, he would cooperate and participate in arbitration and fully respect any arbitration orders. In the latter respect, the averments is clearly couched in the present and future tenses. It thus to my mind amounts to the Applicant saying that he is ready to respect Arbitration process as of the day of him swearing the Affidavit which is the 22nd day of January 2017.

[22] I accordingly based on the above reasons, dismiss this Application on the basis that the Applicant has failed to show readiness to submit to arbitration at the commencement of the proceedings in this case and that the Applicant has further failed to show that there exist an arbitration agreement within the agreement between the parties ousting the jurisdiction of this Court.

[23] I so order.

Signed, dated and delivered at Ile du Port on 9th day of June 2017.

Govinden J

Judge of the Supreme Court