

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DISISION)
AT DAR ES SALAAM

MISC.COMM.CASE NO. 14 OF 2001

BAHADURALI E. SHAMJI -----1ST PETITIONER
TADEMA OVERSEAS LIMITED -----2ND PETITIONER

AND

THE TREASURY REGISTRAR –
MINISTRY OF FINANCE – TANZANIA-----1ST RESPONDENT

THE ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA-----2ND RESPONDENT

HOLIDAY AND RESORT INVESTMENTS LTD –3RD RESPONDENT

ALNOOR JAMAL----- 4TH RESPONDENT

SHABIR ABJI -----5TH RESPONDENT

R U L I N G

NSEKELA, J.

This is a petition which has been instituted under section 4 of the Arbitration Ordinance Cap.15 and Rule 6 of the Arbitration Rules, 1957, the petitioners being Bahadurali E Shamji and Tadema Overseas Limited. The five respondents are (i) The Treasury Registrar; (ii) The Attorney General; (iii) Holiday and Resort Investments Ltd; (iv) Alnoor Jamal and (v) Shabir Abji. In order to appreciate the nature of the petition, I take the liberty to quote in extenso the contents of the petition. It reads –

*" 6. That the first petitioner and the fourth respondent acquired beneficial interest in **Tadema Overseas Limited**, the second petitioner, by a deed of assignment executed on 27th May 1992 which is marked Annex 1 hereto.*

7. That subsequent to the said assignment, Tadema Overseas Limited the second petitioner executed a joint venture agreement on 28th September 1993 with the Treasury Registrar, first respondent on behalf of the Government of Tanzania, whereby the Tadema Overseas Limited acquired interest in, and possession of New Africa Hotels Limited, which entitled Tadema to the sole and exclusive responsibility for the operation and management of the Hotel, by subscribing 77% shareholding while the first respondent was allotted 23% shareholding in the new hotel business.....

8. That your petitioners have been denied the benefits of the Joint Venture Agreement with the first respondent by the third, fourth and fifth respondents through their fraudulent misrepresentation to the Treasury Registrar the first respondent, when they executed a Novation Agreement on the 23^d October 1993, purporting that the second petitioner had discharged itself of its obligations under the Joint Venture Agreement of the 28th September 1993, to operate and manage the New African Hotel, a claim which is denied by the petitioners.....

9. That the said conduct of the first respondent of executing the Novation Agreement and granting possession of the New African Hotel to the third, fourth and fifth respondents amounts to a breach of the said Joint Venture Agreement, thereby giving rise to a dispute which the petitioners have sought to settle amicably, without success. The second respondent is therefore a necessary party to the dispute.

10. That Article 16 of the Joint Venture Agreement provides for submission to arbitration by the parties to the Joint Venture Agreement to settle dispute arising out of or in connection with the said Agreement,

11. That your petitioners aver that if the dispute is submitted to arbitration, a great deal of hardship will be caused to the petitioners due to the uncompromising attitude so far manifested by the third, fourth and fifth respondents, and further that the first, second respondents have been ready and willing to submit to adjudication before the Courts by virtue of their conduct, express and implied.....

12. Your petitioners aver further that save for the said Arbitration Clause, the dispute is a fit matter to be entertained by your Honourable Court, hence it can exercise its discretion, I crave leave to refer your Honourable Court to a plaint which your petitioners intend to file in the Honourable Court should leave be granted."

On the 23.4.2001 the first and the second respondents filed a notice to the effect that they had no objection to the petitioners non-compliance with the requirements of clause 16 (c) to (h) of the Joint Venture Agreement. These provisions set forth the machinery for setting in motion the arbitration process should there be a dispute between the parties thereto. On their part, the third; fourth and fifth respondents have raised five preliminary objections to the petition, namely –

- " (i) That the petition is time-barred;*
- (ii) That the petition is incurably defective on the ground that it is not signed by the Petitioner;*
- (iii) That the first petitioner has no **locus standi** in the petition on the ground that he is not privy to the Joint Venture Agreement dated 28th September, 1993.*
- (iv) That the petition is incompetent on the ground that it has not been authorized by the 2nd petitioner and on the further ground*

- that it is premature as the second petitioner has not complied with the provisions of Article 16 of the Joint Venture Agreement.*
- (v) *That the petition does not disclose a cause of action against the 4th and 5th respondents."*

The learned advocates for the parties have submitted at considerable length and have exhibited erudite knowledge on the issue, for which I am grateful. At this point in time however, the issue revolves around section 4 of the Arbitration Ordinance which provides –

*" Unless a different intention is expressed a submission shall be irrevocable, **except by leave of the court**, and shall be deemed to include the provisions set forth in the First Schedule hereto, in so far as they are applicable to the reference under submission."* (emphasis supplied)

And in terms of section 2 "**submission**" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. The parties are in agreement that indeed Annexure 2 to the petition contains a submission in terms of section 2 of the Arbitration Ordinance. It is embodied in clause 16 of the Joint Venture Agreement. The modality of selecting arbitrators is in clause 16 (d). The prayer of the petitioners for the moment is for the court to grant to the petitioners leave to institute legal proceedings in court and dispense with altogether clause 16. As far as I can gather from the contents of the petition, no attempt has been made to set in motion the arbitration process. Annexure 2 to the petition is the Joint Venture Agreement dated the 28th September, 1993 between the Treasury Registrar (first respondent) and Tadema Overseas Limited (second petitioner) Clause 16 which deals with the governing law and arbitration is particularly relevant for our present purposes and I quote three sub clauses –

"16 (b) Amicable settlement

The parties shall use their best efforts to settle all disputes arising out of or in connection with this Agreement, or the interpretation thereof, amicably.

(c) Right of Arbitration

Any dispute between the parties as to the matters arising out of or in connection with this Agreement or the interpretation thereof which cannot be settled amicably within forty five (45) days after receipt by one party of the other party's request for such amicable settlement may be submitted by either party to arbitration.

(d) Selection of Arbitrators

Each dispute submitted by a party to arbitration shall be heard by an arbitration panel composed of three arbitrators, or a sole arbitrator in accordance with the following provisions:

- (i) Each party shall appoint one arbitrator and these two arbitrators shall jointly appoint a third arbitrator who shall be the chairman of the arbitration panel. If the arbitrators named by the parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the parties has been appointed, the third arbitrator shall at the request of either party be appointed by the International Centre for Settlement of Investment disputes.*
- (ii) If, in a dispute one party fails to appoint its arbitrator within thirty (30) days after the other party has appointed its arbitrator the party which has named an arbitrator may apply to the International Centre for*

Settlement of Investment Disputes to appoint a sole arbitrator for the matter in dispute and the arbitrator appointed pursuant to such application shall be the sole arbitrator for the dispute."

The petitioners have submitted that the cornerstone of their case is contained in paragraphs 8 and 9 of the petition. The petitioners have candidly admitted the existence of clause 16 of the Joint Venture Agreement. Notwithstanding this the petitioners have alleged the existence of fraud and misrepresentation perpetrated by the third; fourth and fifth respondents with the apparent connivance of the first and second respondents who executed what was termed as "illegal" Novation Agreement. Lastly on this point, the petitioners have submitted that "a dispute which involves fraud is not arbitrable," " since an award based on fraud is liable to be set aside by the court under section 15 of the Arbitration Ordinance". The first and second respondents are somewhat ambivalent to the proposal to dispense with the arbitration procedure. In their written Notice to the court dated 24.4.2001, they stated that they had no objection to the petitioners' filing a suit in court and abandoning arbitration but in the written submissions these two respondents have expressed the view that the petitioners have not disclosed the basis as to why arbitration should not take its course. Mr. Werema, learned Principal State Attorney, has submitted that the question of the alleged fraud or misrepresentation can be dealt with by the Arbitrators under the arbitration clause unless, their jurisdiction is prohibited by law. The learned advocate for the third; fourth and fifth respondents has resisted the petition. It has been submitted that a submission to arbitration is contractual and that the role of the court should be the enforcement of contractual obligations and not to facilitate or encourage their breach. Secondly it was argued that the petitioners have made vague claims of hardship without giving any particulars thereof and the nature of the alleged uncompromising attitude by these respondents without any elaboration. These allegations are

not enough to move the court to exercise its judicial discretion and revoke the submission to arbitration.

All the learned advocates for the parties at least are in agreement that in the Joint Venture Agreement, annexure 2 to the petition, there is an arbitration clause which cover the dispute involved. And for my part, I am in total agreement with them on this point. However, the learned advocates part company on the question of whether or not on the facts as alleged in the petition, the court should revoke the submission to arbitration. As stated before, Mr. Werema learned Principal State Attorney is ambivalent but leaning towards opposing the petition. Mrs Maajar, learned advocate for the third; fourth and fifth respondents is totally opposed to the idea. What then should be the factors to be taken into consideration before the court grants leave under section 4 of the Arbitration Ordinance? The learned advocate for the petitioners has sought inspiration from paragraph 551 **Vol.2 Halsbury's Laws of England**, 4th edition which reads –

" Where an agreement between any parties provides that disputes which may arise in future between them shall be referred to arbitration and dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court has power so far as is necessary to enable that question to be determined by the High Court, to order that the agreement shall cease to have effect, and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement. Where on the reference of a dispute to a judge arbitrator or judge umpire, it appears to the judge that the dispute involves the question whether a party to the dispute has been guilty of fraud, he may, so far as may be necessary to enable that question to be determined by the High Court, that agreement under which he was appointed cease to have effect and that his appointment be revoked."

A footnote to this paragraph refers to section 24 (2) of the Arbitration Act, 1950 as the authority for the statement. It is of little persuasive authority, if at all, since there is no identical provision in our Arbitration Ordinance, Cap.15. For the sake of clarity, the English provision reads –

" Where an agreement between any parties provides that disputes which pay arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement."

The mandate of the court to revoke a submission by the parties to arbitration is to be found in section 4 of the Arbitration Ordinance. This can be done either by the parties themselves in terms of the agreement or with leave of the court. As a matter of general principle, it has been stated that where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the court would direct that the parties should go before the specified tribunal and should not resort to the courts. The parties herein very clearly chose arbitration to be the modality of settling their disputes but the petitioners want to resile from what was previously agreed upon on the pretext that there was fraud and misrepresentation. These allegations of fraud and misrepresentation have been levelled against the first; third; fourth and fifth respondents, who are not interested so far to clear their reputation in an open court of law. They have instead chosen to honour the sanctity of the arbitration agreement should need arise. One would have expected that the respondents whose character has been impeached would be the ones to rush to court to clear their names! One would also have expected that the petition would contain allegations that complicated questions of law are involved in which case it would not be

prudent to leave such issues to the arbitrators, but there is nothing of that sort. It is alleged in paragraph 9 of the petition that the parties have failed to reach an amicable settlement of their dispute, but this is only the first step under clause 16 of the Joint Venture Agreement. The next step would have been to set in motion the arbitration process by the appointment of arbitrators. This has not been done and it would seem that the petitioners are rushing to the court.

I am fully aware that there are no hard and fast rules as to how judicial discretion should be exercised but taking into account all the surrounding circumstances, I am not inclined to revoke the submission of the parties to arbitration. " **Any dispute**" should not be read as excluding disputes involving fraud or misrepresentation. It is not the function of the court to rewrite and insert provisions to which the parties could have agreed to deal with in a situation which might arise. Although not particularly relevant to the issue at hand, in the case of **Harbour Assurance Co. (UK) v Kansa General International Assurance Co. Ltd** (1993) 3 All ER 897, Hoffman L.J. stated at page 915 as follows:

".....it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. These are, first, the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one stop adjudication, or in other words, the inconvenience of having one issue resolved by the court and then, contingently on the outcome of that decision, further issues to be decided by the arbitrator."

In the event, I do hereby dismiss the petition with costs. It is so ordered.

H.R. NSEKELA,
JUDGE

Court:

Delivered in court in presence of Mr. Nyanduga for the petitioners assisted by Mr. Nyange, and holds brief of Mrs Majaar for, the third, fourth and fifth respondents, and Mr. Nangela for the 1st and 2nd respondents assisted by Ms Mwaikambo, this 19th day of September 2002.

A.R.MRUMA,
DEPUTY REGISTRAR
19/09/2002