JAMMU AND KASHMIR HIGH COURT

Dewan Chand

Vs.

State of J. and K

Civil Suit No. 5 of 1960

(S. Murtaza Fazl Ali, J.)

18.04.1961

JUDGMENT

S. Murtaza Fazl Ali, J.

1. This is an application filed by the defendant under Section 34 of the Arbitration Act for staying the suit and referring the matter in dispute to the arbitrator appointed by the parties under the arbitration agreement.

2. The suit way filed by the plaintiff for recovery of ₹ 25000/- due to breach of a contract committed by the defendant. The defendant appeared through the Advocate General on 15-12-60 and was allowed a month's time to file his written statement. It appears, however, that the Advocate General filed a regular Vakalat Namma after getting instructions from his client on 7-3-1961 and on the same day he filed an application under Section 34 of the Arbitration Act. The plaintiff has also filed his objections to this application and the matter was argued before me on 7-4-1961. The original agreement between the parties which formed the basis of the suit has also been filed by the defendant which is marked Ex. D. in the case.

3. The contention of the defendant is that as by virtue of agreement Ex. D the parties had agreed to refer their dispute to the Chief Engineer for arbitration, the court should stay the proceedings and refer the matter to the arbitrator. It is well settled that where parties agree that their disputes should be settled by arbitration, any of the parties has got a right to move the court to stay the suit provided the party concerned is willing to perform its obligation and has come up to the court before tiling the written statement or before taking steps in the proceedings. It is conceded in this case that the defendant has come up at the proper time, that is, before filing his written statement or before taking any effective steps in the proceedings.

4. The application has been resisted by the plaintiff on two grounds. In the first place the objection of the plaintiff is that the arbitration clause contained in the agreement is not an arbitration clause as contemplated by Section 2(a) of the Arbitration Act. Secondly, it has been contended that the defendant must be deemed to have waived his right to settle the dispute by

arbitration.

5. I would first take up the question of the validity of the arbitration agreement. The arbitration clause contained in the agreement Ex. D runs as follows :

> "For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contractor".

6. The clause thus contained in the agreement is in writing and is signed by both parties. There is no dispute on this question. Mr. Prakash appearing for the plaintiff argued that as there are no words in this agreement showing that there has been actual submission or reference to arbitration by any of the parties, hence this is not an arbitration agreement within the meaning of Section 2(a) of the Arbitration Act. It is also contended that the word, "Arbitration." has not also been used in this clause.

7. Section 2(a) of the Arbitration Act reads as under :

> "Arbitration Agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

A perusal of this clause clearly shows that all that the statute requires is that there should be a written agreement to submit a dispute to arbitration. It is not necessary that the words "reference" or "arbitration" should actually be used in the agreement, if the agreement in substance amounts to an arbitration agreement Within the meaning of Section 2 clause (a) of the Arbitration Act.

8. The clause of the agreement quoted above, clearly indicates that the parties have agreed that any dispute between the contractor and the department i.e. the plaintiff and the defendant should be referred to the Chief Engineer and that his decision shall be final and binding on the parties. It is true that the word "reference" is not used in this clause nor it has been mentioned that the Chief Engineer should be the arbitrator, but looking to the substance of the clause, there can be no doubt, that the parties agreed that any dispute between them should be settled by the Chief Engineer. In my opinion, whenever, there is an arbitration clause the court should look to the substance rather than to the form of it and the mere fact that words like '"reference" or "arbitrator" do not find place in the said agreement does not show that the agreement is not an arbitration agreement within the meaning of Section 2(a) of the Arbitration Act. I am fortified in my view by the decision of the Lahore High Court reported in *Governor-General v. Simla Banking and Industrial Co*[1]*.,* where their Lordships made the following observations :

> "It is true that the words 'arbitration' 'arbitrator' or 'Arbitration Agreement' do not appear in the clause but that is, in my view, immaterial as long as the parties can be found to have agreed to allow the matter to be decided by a person of their own selection whose decision was to be final, conclusive, and binding on them".

Under these circumstances, I am clearly of the view that clause 10 of the agreement

[1] AIR 1947 Lah 215

between the parties is an agreement which amounts to an arbitration agreement within the

meaning of Section 2(a) of the Arbitration Act and, therefore, the application of 'the defendant on this ground is maintainable.

9. The next contention raised by the learned counsel for the plaintiff was that the defendant had waived his right to settle the dispute by arbitration. This argument is based on the circumstance that although the plaintiff had given a notice under Section 80 of the Code of Civil Procedure to the defendant before filing the suit yet the defendant did not reply to the notice.

10. In my opinion, the contention does not appear to be well founded. Section 34 gives a statutory right to a party to move the court after the proceedings are taken against him, and therefore mere silence on the part of a party concerned before the suit cannot amount to such a waiver so as to deprive the defendant of his statutory right, granted to it under this section. Moreover, a mere notice under Section 80, does not impose any duty on the defendant to reply to the allegation of the plaintiff. I am supported in my view by the decision of the Lahore High Court reported in AIR 1947 Lahore 215, where while considering an identical argument their Lordships observed as follows :

> "According to the language of the section, the question as to when a party to an arbitration against whom legal proceedings have been commenced is entitled to ask for stay of the proceedings has to be determined by the choice which lie makes not before the proceedings are commenced but after they have been commenced. The silence of the party applying for stay of his omission to remind the party, which has started the proceedings, of his duty not to start them under the agreement between the parties before the proceedings have been started do not, in my view, seem to be material. It is only when a suit or a proceeding has been commenced against a party that the latter can make up his mind as to whether he would apply for stay or not. If he decides to ask for stay he can do so at any time before filing a written statement or taking any other steps in the proceedings' and not thereafter. But during that period (i.e. after the suit or proceedings have been commenced and before a written statement has been filed) which is given to him by law his choice is unfettered and remains unaffected by his silence or omission such as referred to above".

It is obvious that a notice under Section 80 Civil Procedure Code is served for quite a different purpose. Its object is to give sufficient time to the person who is served with the notice to decide whether he wishes to contest the case and if so, he is given sufficient time to make out his defense. The notice, therefore, does, not impose any duty on the defendant to reply to the allegations of the plaintiff prior to the filing of the suit. To the same effect is the decision of the Punjab High Court, reported in *Daulat Ram Rala Ram v. State of Punjab*[2], where also it was pointed out that silence of a party before the proceedings is not of any serious consequence. Under these circumstances, I am unable to agree with the contention that the silence of the defendant in replying to the notice given by the plaintiff under Section 80 Civil Procedure Code amounts to waiver.

[2] AIR 1958 Pun19

11. The last contention put forward by the plaintiff was that as Section 34 confers discretion on the court, the court should refuse to exercise that discretion, because the Chief Engineer who has

been selected as an arbitrator, was in the instant case a person who would foe the most material witness for the plaintiff as he had in his capacity as Superintending Engineer taken certain decisions in favour of the plaintiff. It was also contended that due to these circumstances, the arbitrator was a biased person, and therefore, if the matter is referred to him, the rules of natural justice would be violated. I am however, unable to agree with this contention. There is no reason to suppose that the Chief Engineer has any personal interest in the matter and he would, therefore, be biased to that extent. Moreover, even if he is biased, he would be biased, on the allegations of the plaintiff, in their favour and not against them. Such a grievance, therefore, could have been made by the defendant But not by the plaintiff.
At any rate, the question of bias does not arises because the Chief Engineer not having any personal interest in the matter and being a very high and responsible officer is not expected to do injustice to the parties. I am fortified in my view by the decision of the Punjab High Court reported in AIR 1958 Punjab 19, where their Lordships have made the following observations :

> "Normally the parties to an arbitration are entitled to have their disputes settled by an unbiased arbitrator with no interest in the result of the proceedings. The fact that the Superintending Engineer is interested to the extent that he is employed and paid by the respondent would by itself, be not sufficient to disqualify him from acting as arbitrator. It has not been shown that the Superintending Engineer is biased or that there is probability that he would be biased. In the absence of any indication to the contrary, the presumption is that the gentleman, holding such a high office would keep in mind the duties and responsibilities of an arbitrator and would act as an honest, disinterested and impartial tribunal, absolutely uninfluenced by the fact that lie is the head of the department to which the dispute relates. I shall expect that he would realize that his position as an arbitrator is more responsible than that of a judge and that he would act with scrumptious fairness, because his award is to be the final judgment on the rights of the parties before him".

12. The contention of the plaintiff, therefore, on this score also must be overruled.

13. For the reasons given above, I am, therefore, satisfied that this is a fit case in which the prayer of the defendant for staying the suit and for referring the dispute to the Chief Engineer P.W.D. for arbitration must be allowed.

14. The application is accordingly allowed, and the suit is stayed. The dispute is referred to the Chief Engineer for arbitration.

15. In the circumstances of the case, there will be no order as to costs.
Petition allowed.