

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Civil Appeal No. 15 of 1978

000162

BETWEEN:

KALAP DEI

Appellant

and

1. RAM LAKHAN
2. NARAYAN REDDY
3. JASWANT PRASAD
4. BANSRAJ SINGH
5. SOLOVI REDDY

Respondents

Mr. S. Frasad, Counsel for the Appellant
Mr. B.C. Patel, Counsel for the Respondents.

JUDGMENT

This is an appeal from the ruling of a magistrate in a sugar cane gang dispute.

The plaintiff and the defendants were parties to a cane harvesting agreement dated 6/5/74. The statement of claim alleges that because the defendants failed to carry out the agreement the plaintiff had to make other harvesting arrangements which cost an additional \$1680.25.

Para 12 of his amended statement of claim refers to Clause 22 of the said agreement which provides that all disputes shall be referred to the Independent Chairman.

Para 13 alleges that his attempts to bring the matter to arbitration have failed.

She claims \$1680.25 damages.

The original statement of claim was filed on 16/8/76 which would be about 2 years after the alleged loss was sustained. The defendants were served with it on 24/8/76 but do not appear to have filed a Statement of Defence although they appeared in Court on 15.9.76. The hearing was adjourned to 10/11/76 for further consideration, although there is no indication of this in the very badly prepared record sent to the Supreme Court.

Nothing further developed until the parties appeared before the learned magistrate on 10/2/78 when their advocates Mr. Prasad and Mr. Jai Ram Reddy made submissions about the effect of the arbitration clause No. 22 (supra). The hearing according to the original record, was deferred to 24/2/78 for a ruling although there is no mention of this appearance or of the submissions that were made in the typed record prepared for the Supreme Court.

One gathers that the reason for the re-appearance of the parties before the magistrate on 10/2/78 was because the plaintiff had filed an amended statement of claim on 11/1/77 to which the defendants filed a statement of defence on 24.1.77. There was a reply thereto on 12/5/77.

On 7/2/78 formal notice to produce was filed by the defendant against the plaintiff and on 9/2/78 the plaintiff filed his notice to produce to the defendant.

Following these notices the parties as I have said appeared before the learned magistrate on 10.2.78 and made submissions which appear on the file cover of the original record. He deferred a ruling until 24/2/78 but I can find no trace of the court sitting or the parties appearing on 24/2/78 or any subsequent day in that month.

On 16/2/78 the plaintiff's solicitor, Mr. S. Prasad, had filed an affidavit enclosing a copy of a letter which he had sent to the Independent Chairman of The Sugar Industry and of the reply he received thereto.

The learned magistrate heard further submissions on 28/3/78 from the same advocates. He delivered his ruling on 21/4/78.

Mr. J.R. Reddy, for the defendants, had argued that by virtue of the arbitration clause No. 22 (supra), the parties were not, under the provisions of the Arbitration Ordinance, Cap.30, properly before the Court.

Mr. S. Prasad relied upon S.5 of the Arbitration Ordinance, and argued that if the defendants had wished to object to the proceedings they should have applied for them to be stayed under section 5 and submitted that it was too late now to complain

that the Court had no jurisdiction.

In his ruling the learned magistrate referred to S. 3 of the Arbitration Ordinance which states that the arbitration clause shall be irrevocable except by leave of the Court or by mutual consent.

Under the Arbitration Ordinance, court means the Supreme Court and there had been no application to the Supreme Court to revoke clause 22 (the arbitration clause) and it had not been revoked by mutual consent.

The learned magistrate referred to Mr. Prasad's (plaintiff's) submissions that S.5 of the Ordinance barred the defendants from relying upon the arbitration clause at that stage of the proceedings and he stated that Mr. Prasad had misconstrued the provisions of the Ordinance. He stated that the plaintiff (Mr. Prasad) should have applied to the Supreme Court under S.3 to revoke the arbitration clause and when it was revoked he would have been free to institute proceedings.

He ruled that the court had no jurisdiction and he struck out the claim ordering the plaintiff to pay the costs.

The plaintiff appeals against that ruling and the arguments before me were similar to those presented to the magistrate.

S.5 of the Arbitration Ordinance reads as follows; and I quote only the relevant portions -

"5. If any party to a submission, _____
-----commences any legal proceedings in any court against any other party to the submission, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other step in the proceedings apply to the court to stay the proceedings and that court -----
-----may make an order staying the proceedings."

By S. 2 "Submission" means an agreement to submit differences to arbitration.

It is obvious that section 5 can only apply to those situations where no application has been made to the Supreme Court under S.3 to revoke the arbitration clause.

If the arbitration clause has been revoked by the court under S.3 there can be no parties to the submission because the arbitration clause no longer exists. Therefore, S.5 which permits a party to a submission to apply for a stay of proceedings cannot be invoked.

Consequently in the instant case S.5 of the Ordinance applies because none of the parties had applied under S.3 to have the arbitration clause 22 revoked.

Under S.5 it was open to the defendants to apply to the Supreme Court for the proceedings in the magistrate's court to be stayed before delivering any pleadings or taking any other step in the action. Mr. B.C. Patel for the respondents (defendants) submitted that S.5 was only intended to apply to proceedings in the Supreme Court and pointed out that pleadings are not essential in the magistrate's Court and therefore the filing of a statement of defence could not be regarded as a step in the proceedings.

S.2 of the Ordinance says that unless the context otherwise requires "court means Supreme Court." Thus every reference to a court is not necessarily a reference to the Supreme Court.

In my view S. 5 means what it says when it refers to proceedings being instituted in "any court". There is only one Supreme Court and the expression "any court" must be intended to include courts other than the Supreme Court.

If a defendant chooses to file a statement of defence in a magistrate's Court he has done something which the court can act upon e.g. it can act upon any admissions contained in the defence. In my view he has taken a step in the proceedings by filing a defence. Moreover, the defendants in the instant case filed notices for the plaintiff to produce documents etc. at the hearing.

Para 555 of Halsbury, Vol. II, 4th Edn., sets out as the English law a replica of our S. 5 (supra). Para 563 states that service of a defence is a step in the proceedings.

In my view S.3 does not, as I have said, prevent a party to a submission from instituting proceedings in a court. But if proceedings are instituted without revoking the arbitration clause the other party may point this out to the court in which the proceedings have been instituted and ask under S.5 that they be stayed. However, such other party cannot apply for a stay under S. 5 if he has already taken a step in the proceedings.

With respect, it is my opinion that the learned magistrate erred in ruling that the plaintiff had to apply for the arbitration clause to be revoked before she could institute proceedings. If that were so then there would be no need for S. 5 which only applies where there is in existence an unrevoked arbitration clause.

The Order of the magistrate is set aside. The proceedings are restored and may be proceeded with in the usual manner.

The respondents will pay the costs of this appeal which I fix at \$85.00.

LAUTOKA,
7th DECEMBER, 1978.

(Sgd.) J.T. Williams,
JUDGE.

Messrs. S. Prasad & Co., Counsel for the Appellant
Messrs Stuart, Reddy & Co., Counsel for the Respondents.

Date of Hearing: 2nd of November, 1978.