

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 443 OF 1979

Between:

SAHEB NAIDU trading as SAHEB NAIDU
CONSTRUCTION

PLAINTIFF

- and -

ROBERT TURNER & CO., LTD.

DEFENDANT

Mr. S.M. Koya for the Plaintiff.
Mr. P.I. Knight for the Defendant.

DECISION

The dispute between the parties arises out of a Building Contract entered into by the parties on the 3rd August, 1978.

The Indorsement of Claim on the writ of summons discloses that the plaintiff seeks (inter alia) a declaration that the building contract was constituted by the documents referred to in the indorsement.

The defendant entered an appearance to the writ and then applied to this Court for a stay of proceedings pursuant to section 5 of the Arbitration Ordinance. The defendant alleges that the Building Contract provides for any dispute between the parties arising out of the contract to be referred to arbitration.

The plaintiff denies there was any agreement to refer any dispute to arbitration.

The affidavit in support of the defendant's application exhibited a copy of the contract consisting of three pages. The contract refers to contract drawings and specifications. No where in this alleged contract of three pages is there any reference to arbitration.

The contract however is made subject to Conditions stated to be annexed to the contract. Page 1 of the specifications and page 29 of the Conditions - the latter containing an arbitration clause - were also exhibited to the affidavit.

On the 19th February, 1980 when this matter first came before me I stated that if the contract - that is the complete contract - was put in by consent the Court would be in a better position to consider the matter. I stated I was not happy to act on what was clearly only two pages of documents that were incorporated in or formed part of the contract.

The contract signed by the parties has not been produced. What has been produced is a copy of what is styled "Standard Form of Building Contract for use without quantities private edition 1963" which has a set of conditions annexed and a copy of specifications. These documents have not been signed by anyone.

Had the original contract been produced for inspection a perusal of it would have disclosed whether it contained the arbitration clause which the defendant contends is contained therein or its absence which is what the plaintiff contends. I am not persuaded by statements in affidavits filed in support of the defendant's application that the contract contains the alleged arbitration clause or the annexing of a copy of that clause which contains neither the signatures or initials or either of the parties or their representatives. The signed copy of the complete contract should have been produced.

The photocopies of the executed contract indicate that the contract has not been stamped. A building contract is liable to stamp duty and until it is stamped section 105(1) of the Stamp Duties Ordinance provides that the document shall not be of any validity.

There appears to be a dispute as to whether the contract contains an arbitration clause. This dispute would have to be resolved in favour of the defendant before the Court could decide whether there should be a stay of proceedings. No purpose is served in my view in trying only one issue when all issues could be dealt with at the same time. Section 5 of the Arbitration Ordinance provides that the Court may make an order staying proceedings "if satisfied that there is no sufficient reason why the matter should not be referred" to arbitration.

I am not so satisfied. The application is dismissed. However, I consider that costs of this application should be costs in cause and I so order.

(R.G. KERMODE)

JUDIE

SUVA,

6 MAY, 1980.