Tavica Design Pte Ltd v Schindler Lifts (Singapore) Pte Ltd
[2002] SGHC 6

Case Number : OS 600186/2001

Decision Date : 09 January 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Paul Wong [Helen Yeo & Partners] for the appellants/defendants; Karam Singh Parmar [Tan Kok Quan Partnership] for the respondents/plaintiffs

Parties : Tavica Design Pte Ltd — Schindler Lifts (Singapore) Pte Ltd

Judgment

GROUNDS OF DECISION

1. The plaintiffs applied by way of this originating summons for an order that the dispute between them and the defendants be referred to arbitration pursuant to the arbitration clause in their contract.

2. On 12 November 2001 the assistant registrar granted an order in terms of the plaintiffs application and the defendants appealed against that order. The appeal came before me.

3. The plaintiffs were the main contractors in the building of a flatted factory at Kaki Bukit Road 3 and the defendants were one of their nominated sub-contractors, and were responsible for the supply and installation of the lifts system for the building. The defendants commenced an action in the district court against the plaintiffs for payment of $78,193.99 due under their contract. This was disputed by the plaintiffs who subsequently applied by way of this originating summons for the matter to be referred to arbitration and a stay of the district court action. It was not disputed that cl 14.1 of the contract provided that disputes between the parties be referred to arbitration. The clause provides as follows:

> "14.1 Any dispute between the parties hereto as to any matter arising under or out of or in connection with this Sub-Contract or under or out of or in connection with the Sub-Contract Works or as to any certificate decision direction or instruction of the Architect, shall be referred to the arbitration and final decision of a person to be agreed by the parties or, failing such agreement within 28 days of either party giving written notice requiring arbitration to the other, a person to be appointed on the written request of either party by or on behalf of the President or Vice-President for the time being of the Singapore Institute of Architects or, failing such appointment within 28 days of receipt of such written request, such person as may be appointed by the Courts."

4. The plaintiffs' denial of the defendants' claim is based principally on their assertion of a larger counterclaim which would entitle them to set-off the defendants claim. The plaintiffs aver that the liquidated damages clause at cl 9.4 provided for payment of $3,000 a day for each day of delay. They say that there was a delay from 23 April 2001 to the date of completion. They also assert that as at 22 October 2001 the work had not been completed and the architect had refused to issue his certificate of completion on that account. The defendants objection to this originating summons rests on two contentions. First, they say that there was no dispute to be referred to arbitration as there is no basis for a counterclaim because the liquidated damages clause is invalid as it was not a genuine

pre-estimate of damage but was, in fact, a penalty clause (and therefore, ought to be struck down). Secondly, they say that at the time the proceedings commenced the plaintiffs have not shown that they were ready and willing to arbitrate.

5. In an application such as this, the court's discretion must be exercised within the boundaries of s 7(2) of the Arbitration Act, Ch 10 which provides as follows:

> "(2) The court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

In such applications, it is not the courts task to evaluate the merits of the parties claim but merely to see whether on the face of the affidavits, a dispute had arisen; and if so, the matter must be referred to arbitration as agreed by the parties. Section 7(2) is worded in such a way as to confer some degree of discretion to the court, but in exercising that discretion, the court should not be swayed by a submission that the dispute can be easily and readily resolved by the court, except in the clearest instance where not only does the dispute in question yield to a short and expedient resolution without much quarrel, but that the saving in terms of time, expense, and inconvenience to the parties are also taken into account. In the present case, the issue of whether the liquidated damages clause was a penalty clause clearly constitutes a dispute for the arbitrator to decide, and if he is wrong, the recourse lies in an appeal to the courts under the Arbitration Act.

6. There may be instances in which a perusal of the documents reveal, without much enquiry, that there was obviously no dispute between the parties. But on the question posed before me, no such conclusion can be made without a careful enquiry and consideration of the arguments by both sides. There is also an allegation by the plaintiffs through the affidavit of Chia Siang Teck that at the stage of the tender of documents the defendants were asked if they thought that the sum of $3,000 was a fair estimate of liquidated damages and the defendants expressly accepted it without dispute. That being the case, the function of determining whether the liquidated damages clause is a penalty clause must be performed at the arbitration. The time for the courts intervention (other than granting a stay) is not yet.

7. I come to the second issue, that is, whether the plaintiffs were ready and willing to proceed to arbitration at the time of commencement of proceedings. Counsel for the defendants submitted that there was no expression by the plaintiffs in their affidavit of an intention and willingness to proceed to arbitration. How expressive that affidavit should be is a question of fact. In this case, the defendants commenced the district court action on 8 October 2001 and served the papers on the plaintiffs on 11 October 2001. The plaintiffs applied by this originating summons on 22 October 2001, seven days after entering appearance, praying specifically for a stay of the district court proceedings in favour of arbitration. The affidavit of Chia Siang Teck deposed that it was filed in support of that prayer and set out the relevant arbitration clause in their contract. In the interim, letters were exchanged between the parties including one on 12 October 2001 from the plaintiffs stating that they will be claiming liquidated damages from the defendants. A readiness and willingness to arbitrate under s 7(2) does not require a party to answer a writ of summons with an immediate statement in writing that they are so ready and willing. The court must look at the circumstances and conduct of the parties within a reasonable period of time after the writ was served on the said party. In the circumstances of this case, I am satisfied that the plaintiffs had shown a readiness and willingness to proceed to arbitration at the time of commencement of proceedings.

8. I am therefore, of the view that the assistant registrar was correct and the appeal before me was accordingly dismissed.

Sgd:

Choo Han Teck
Judicial Commissioner