

SOLEDAD F. BENGSON, PLAINTIFF-APPELLANT, VS. MARIANO M. CHAN, UNIVERSAL CONSTRUCTION SUPPLY AND LEONCIO CHAN, BOTH OF SAN FERNANDO, LA UNION; MUTUAL SECURITY INSURANCE CORPORATI...

G.R. No. L-27283. July 29, 1977

Ponente: AQUINO, J.

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AQUINO, J.:

This is a case involving arbitration. On June 21, 1965 Soledad F. Bengson and Mariano M. Chan entered into a contract for the construction of a six-story building on Bengson's lot located at Rizal Avenue, San Fernando, La Union. In that contract Soledad F. Bengson bound herself to pay Chan, the contractor, the sum of P352,000 for the materials, labor and construction expenses.

It was stipulated inter alia that the construction would start on July 5, 1965; that the first and second stories, together with the theater, should be completed and available for use within five months from July 5, 1965 and that the construction should be finished within twelve calendar months from that date in conformity with the plans and specifications signed by the parties. The contract contains the following arbitration clause:

"15. Any and all questions, disputes or differences arising between the parties hereto relative to the construction of the BUILDING shall be determined by arbitration of two persons, each chosen by the parties themselves. The determination of said arbitration shall be final, conclusive and binding upon both parties hereto, unless they choose to go to court, in which case the determination by arbitration is a condition precedent for taking any court action. The expenses of arbitration shall be borne by both parties equally."

On May 24, 1966 Soledad F. Bengson filed an action for damages against Mariano M. Chan and the sureties on his performance bond. She alleged that Mariano M. Chan violated the contract by not constructing the first and second stories within the stipulated five-month period; that because the contractor admitted at a conference on May 8, 1966 that he was unable to continue or complete the construction, Soledad P. Bengson terminated the contract; that she suffered damages amounting to P85,000 as a consequence of Chan's failure to construct the commercial building and that Chan did not comply with clauses 7 and 8 of the contract in not attending to his work and in not submitting periodic reports of the work done as a basis for the payment of the laborers' wages. The damages claimed totalled P183,800.

Mariano M. Chan and his sureties, Leoncio Chan (the owner of the Universal Construction Supply) and Mutual Security Insurance Corporation, alleged in their answer that the contractor stopped the construction because Soledad F. Bengson refused to pay for ninety percent of the work already accomplished; that the construction actually started in February, 1966 because of the changes requested by Bengson; that the demolition of the old building was effected from July to December, 1965, and that the stipulation for the construction of the first and second stories within five months was novated by the parties.

The contractor and his sureties further alleged that Soledad F. Bengson had paid him P74,750 but refused to pay

on May 8, 1966 the additional sum of P31,450 as the balance of ninety percent of the work already accomplished worth P118,000; that by reason of Bengson's failure to pay the balance, Chan, notified her that he would stop the construction and that he actually stopped the construction on May 30, 1966 when he was served with a copy of the complaint.

Mariano M. Chan filed counterclaims for P45,223.23 as the balance due on the contract; P15,000 as the value of the materials in the construction yard; P20,000 as reimbursement of the expenses for the demolition of the old building; P5,000 as the value of his construction equipment under Bengson's control and P35,000 as damages.

On November 16, 1966 the defendants filed an amended answer wherein they alleged as an additional affirmative defense that the complaint states no cause of action because Soledad F. Bengson did not first submit the controversy for arbitration as required in the aforequoted paragraph 15 of the construction contract.

After holding a hearing, the trial court in its order of November 24, 1966 sustained that new defense and dismissed the complaint. Bengson appealed.

Appellant Bengson's five assignments of errors may be reduced to the issues of whether the trial court erred (1) in allowing the defendants to plead a new affirmative defense in their amended answer and (2) in holding that the causes of action in plaintiff's complaint are embraced in the requirement for arbitration as a condition precedent to a court action.

(1) We hold that there is no merit in appellant Bengson's contention that the defendants waived the defense of lack of cause of action. It is true that the defendants did not interpose as a defense in their original answer Bengson's failure to resort to arbitration before going to court or the defense that her complaint does not state a cause of action. The omission did not constitute a waiver of that defense because section 2, Rule 9 of the Rules of Court explicitly provides that "defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived; except the failure to state a cause of action which may be alleged in a later pleading, if one is permitted".

(2) Appellant Bengson's other contention that her causes of action do-not involve disputes relative to the construction of the building and, consequently, should not be submitted for arbitration, is not well-taken.

The trial court sensibly said that "all the causes of action alleged in the plaintiff's amended complaint are based upon the supposed violations committed by the defendants of the 'Contract for the Construction of a Building'" and that "the provisions of paragraph 15 thereof leave very little room for doubt that the said causes of action are embraced within the phrase 'any and all questions, disputes or differences between the parties hereto relative to the construction of the building', which must be determined by arbitration of two persons and such determination by the arbitrators shall be 'final, conclusive and binding upon both parties' unless they go to court, in which case the determination by arbitration is 'a condition precedent for taking any court action'."

Appellant Bengson argues that paragraph 15 refers to disputes as to "the technical process of putting up the building", meaning whether there was an adherence to the plans and specifications, and that her causes of action for damages do not involve questions as to the construction of the building but refer to disputes "based on violation of the contract for construction".

She points out that the contract for the construction of the building and the construction of the building are different concepts, just as the Constitution and the formation of the government under the Constitution are different concepts; that a dispute relating to the construction contract is not necessarily a dispute relative to the construction of the building; that the parties did not have any dispute prior to the filing of the complaint, and that it was only after the filing of the case that a dispute arose between them.

Appellant Bengson alternatively argues that if arbitration is proper, then the trial court in conformity with section 6 of the Arbitration Law, Republic Act No. 876, should have required the parties to proceed to arbitration.

On the other hand, the defendants argue that the broad and inclusive terms of paragraph 15 embrace all breaches of the contract. They point out that the provision of paragraph 4 of the contract regarding submission to arbitration of the contractor's request for extension shows that arbitration is not restricted to disputes relative to "the technical process of putting up the building".

We hold that the terms of paragraph 15 clearly express the intention of the parties that all disputes between them should first be arbitrated before court action can be taken by the aggrieved party.

Bengson's interpretation of paragraph 15 as being limited to controversies with respect "to the joining together of stones, steel, wood and other material to put up a building" has a sophistical flavor. Her superfine distinction between the contract for the construction of the building and the construction of the building is specious but not convincing.

However, although the causes of action in Bengson's complaint are covered by paragraph 15, her failure to resort to arbitration does not warrant the dismissal of her complaint. We agree with her alternative contention that arbitration may be resorted to during the pendency of the case. The Arbitration Law provides:

"SEC. 6. Hearing by court. - A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition the court for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days notice in writing of the hearing of such application shall be served either personally or by registered mail upon the party in default. The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or default be in issue the court shall proceed to summarily hear such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in the proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

"The court shall decide all motions, petitions or applications filed under the provisions of this Act, within ten days after such motions, petitions, or applications have been heard by it.

"SEC. 7. Stay of civil action. - If any suit or proceeding be brought upon an issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action or proceeding until an arbitration has been had in accordance with the terms of the agreement: Provided, That the applicant for the stay is not in default in proceeding with such arbitration."

Within the meaning of section 6, the failure of Soledad F. Bengson to resort to arbitration may be regarded as a refusal to comply with the stipulation for arbitration. And defendants' interposition of the defense that arbitration is a condition precedent to the institution of a court action may be interpreted as a petition for an order that arbitration should proceed as contemplated in section 15.

Therefore, instead of dismissing the case, the proceedings therein should be suspended and the parties should be directed to go through the motions of arbitration at least within a sixty-day period. With the consent of the parties, the trial court may appoint a third arbitrator to prevent a deadlock between the two arbitrators. In the event that the disputes between the parties could not be settled definitively by arbitration, then the hearing of the instant case should be resumed.

WHEREFORE, the trial court's order of dismissal is reversed and set aside. If the parties cannot reach an amicable settlement at this late hour, then the trial court should give them at least sixty days from notice within which to settle their disputes by arbitration and, if no settlement is finalized within that period, it should hold a pre-trial and try the case. No costs.

SO ORDERED.

Fernando, (Chairman), Barredo, Antonio, Concepcion, Jr., and Santos, JJ., concur.

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