2 Phil. 301

[G.R. No. 1085. May 16, 1903]

RUDOLPH WAHL, JR., AND DR. KURT WAHL, PARTNERS IN THE BUSINESS FIRM OF RUDOLPH WAHL & CO., PLAINTIFFS AND APPELLANTS, VS. DONALDSON, SIMS & CO., DEFENDANTS AND APPELLEES.

D E C I S I O N

COOPER, .:

This is an action brought by Rudolph Wahl & Co. vs. Donaldson, Sims & Co., based upon a contract by which the plaintiffs leased to the defendants a certain ship called *Petrarch* for the term of six months, under which contract the plaintiffs claimed that the defendants were indebted to them a balance of $25,484.38, with interest from the 30th day of July, 1901.

Suit was instituted on the. 4th day of March, 1902, and service of citation was had upon the defendants on the same day.

The defendants failed to answer the complaint, and on the ISth day of April, 1902, judgment was rendered by default against, the defendants in favor of the plaintiffs for the sum of $17,892.81.

Afterwards, on the 10th day of June, 1902, the defendants made an application to the Court of First Instance for a new trial, under section 11.3 of the Code of Civil Procedure, 1901. This motion for a new trial was granted by the Court of First Instance, and the judgment by default against the defendants was set aside on the 20th day of June, 1902.

After the granting of the motion for a new trial a demurrer was made by the defendants to the complaint which presented the question of the competency of the Court of First Instance to try the case. The objection was based upon the grounds that there was a provision contained in the contract to the following effect:

> "If there should,arise any difference of opinion between the parties to this contract, whether it may be with reference to the principal matter or in any detail, this difference shall be referred for arbitration to two competent persons in Hongkong, one of which shall be selected by each of the contracting parties, with the power to call in a third party in the event of a disagreement; the majority of the opinions will be final and obligatory to the end of compelling any payment. This award may be made a rule of the court,"

The question presented for our determination is whether a provision of this character is invalid as being against public policy. Agreements to refer matters in dispute to arbitration have been regarded generally as attempts to oust the juridiction of the court, and are not enforced. The rule is thus stated in Clark on Contracts, page 432:

> "A condition in a contract that disputes arising out of it shall be referred to arbitration is good where the amount of damages sustained by a breach of the contract is to be ascertained by specified arbitration before any right of action arises, but that it is illegal where all the matters in dispute of whatever sort may be referred to arbitrators and to them alone. In the first case a condition precedent to the accrual of a right of action is imposed, while in the second it is attempted to prevent any right of action accruing at all, and this can not be permitted."

This seems to be the general rule in the United States, and we understand that in the civil law it is also the rule that, where there is a stipulation that all matters in dispute are to be referred to arbitrators and to them alone, such stipulation is contrary to public policy.

We reach the conclusion that the Court of First Instance should have entertained jurisdiction in this case, notwithstanding the clause providing for arbitration above referred to.

With regard to the sufficiency of the motion to set aside the judgment by default and the order of the court in granting the same, the majority of this court are of the opinion that there was no error in the action of the court. In this the writer does not concur.

The application of the defendants, upon which the judgment was set aside, appears to be defective and not sufficient to have justified the setting aside of the judgment by default.

There was no excuse whatever shown why the defendants failed to answer within the time prescribed by law. The citation was served upon the defendants on the 4th day of March, and the judgment by default was not taken until the 18th day of April, 1902.

The application was based upon section 113 of the Code of Civil Procedure, 1901, which reads as follows :

> "Upon such terms as .may be just the court may relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect: Provided, That application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

This seems to be a literal copy of section 473 of the Civil Code of Procedure of California, and, according to the well-known rule of construction, the decisions of the court of California, made prior to the.adoption of the statute here, should have the same weight that such decisions would have in California.

Under the construction by the supreme court of California of the section in question, it is stated that the application should show merits, and that this should he done with some degree of certainty and not left to surmise.

In the case of Taylor *vs*. Randall (5 Cal., 80) an affidavit had Itwm made to the effect that an instrument had been materially altered without showing in any manner in what the alteration consisted. It was held that this furnished no grounds on which to base a motion to set aside the judgment.

It is said in the case of Bailey vs. Tatte (20 Cal., 422) that the better practice is to prepare and exhibit to the court the defendant's answer at the hearing of the motion. It is also held in the case of Reidy *vs*. Scott (53 Cal., 73) that where the affidavit shows that the defense rests upon matters which would be deemed to be waived except for the interposition of a demurrer, the defense is merely of a technical character and the affidavit is insufficient.

The affidavit in this case states in a general way that the defendants have a counterclaim against the plaintiffs for |125,000, based upon the failure on the .part of the plaintiffs to perform the contract with regard to the *Petrarch*. This statement is too vague and uncertain to show merits in the defense.

After the application to set aside the judgment had been granted, instead of presenting this defense, a demurrer is presented to the petition, based upon the purely technical grounds that under the contract the parties had agreed to settle the matters in dispute by arbitration at Hongkong. If the answer had been prepared by the defendants and presented to the Court of First Instance at the time of the granting of the order, the Court of First Instance must have concluded that the defense was based upon a technicality and the application must have been overruled. But, as stated before, this view is not concurred in by the majority of the court.

The judgment of the court in sustaining the demurrer to the complaint and in holding that the Court of First Instance did not have jurisdiction on account of the clause with reference to arbitration, was erroneous, and it will be set aside and a new trial had. The costs of this appeal is adjudged against the appellees, the defendants. It is so ordered and adjudged.

Torres and *Mapa JJ.,* concur.

Arellano, C. J., and McDonougal, J., did not sit in this case.

Willard, J., concurring, with whom concurs *Ladd, J.*:

I agree with the result.

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