Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd
[2003] SGHC 234

Case Number : Suit 527/2003

Decision Date : 10 October 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Sadique Marican (Tito Isaac and Co) for plaintiff; Ng Siew Hoong (Peter Moe and Partners) for defendant

Parties : Chong Long Hak Kee Construction Trading Co — IEC Global Pte Ltd

Arbitration – Stay of court proceedings – Court's discretion to grant stay after defendant taken step in proceedings

Civil Procedure – Stay of proceedings – Application for stay in favour of arbitration agreement – Defendant serving 48-hour notice requiring plaintiff to file and serve its Defence to defendant's Counterclaim – Whether step in proceedings nullifying intention to arbitrate

1 This is an appeal by the defendant against the decision of Assistant Registrar Teo Hsiao-Huey who dismissed the defendant's application for a stay of proceedings pursuant to an arbitration clause.

2 In this action, the plaintiff claims $399,199.32 in respect of works carried out for the defendant under a written sub-contract dated 8 February 2003 which contains the following term:

> '**Article 5: Settlement of disputes – Arbitration**
>
> 5.1 In case any dispute or difference shall arise between the Main Contractor and the Sub-contractor either during the progress or after the completion or abandonment of the Works as to :
>
> 5.1.1 the construction of this Contract; or
>
> 5.1.2 any matter or thing of whatsoever nature arising hereunder or in connection herewith then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties to act as Arbitrator, or, failing agreement within fourteen (14) days after either party has given to other written request to concur in the appointment of an Arbitrator, a person to be appointed to the request of either party by the person named in Appendix 1 to the Conditions provided always the Main Contractor and the Sub-contractor are at liberty to agree between themselves to refer such dispute or difference for mediation prior to referring the same to Arbitration I an effort to solve the matter.'

3 On 26 May 2003, this writ of summons was filed. It was served on the defendant two days later. On 3 June, the defendant entered an appearance in the action. On 18 June, at a pre-trial conference ('PTC') before the Registrar, the defendant indicated that it intended to file an application for stay of proceedings pursuant to the arbitration clause. Accordingly, no directions for the further conduct of the proceedings were given and the PTC was adjourned to 1 August 2003.

4 On 20 June 2003, the plaintiff served a 48-hour notice on the defendant to file and serve the Defence failing which judgment in default would be entered. The defendant stated that having no other alternative to preserve its legal position, it filed its Defence and Counterclaim on 23 June 2003. Paragraph 1 of the Defence proclaims that the defendant was filing its defence without prejudice to

its right to file an application to stay proceedings on the basis that the parties had agreed that the cause of action alleged in the Statement of Claim be referred to arbitration. The Counterclaim which begins at paragraph 9 states that the defendant repeats paragraphs 1 to 8 of the Defence. At the same time, the defendant filed the present application for a stay of proceedings.

5 On 4 July 2003, the Assistant Registrar heard and dismissed the defendant's application on the ground that it had taken a step in the proceedings within the meaning of s 6 (1) Arbitration Act. She awarded the plaintiff costs fixed at $300.

6 On 8 July 2003, the defendant's solicitors sent the following letter to the plaintiff's solicitors:

> 'We refer to the above matter and to the writ of summons which was served on your clients on 23rd June 2003.
>
> Please note that your clients' Defence to Counterclaim is overdue. Kindly let us have the same ***within 48 hours hereof***, failing which we have our clients' strict instructions to enter Judgment against your clients and proceed with execution proceedings thereafter for recovery of the Judgment sum.'

(The 'writ of summons' referred to in the letter should have read 'Defence and Counterclaim'.)

Accordingly, the plaintiff filed its Defence to Counterclaim on 9 July 2003.

7 On 17 July 2003, the defendant filed an appeal against the Assistant Registrar's decision of 4 July 2003 (Registrar's Appeal No. 220 of 2003), the appeal before me. The appeal proceeded on the same preliminary issue of whether the defendant had taken a step in the proceedings, thereby depriving itself of the right to apply for a stay

The Decision of the Court

8 S 6 (1) Arbitration Act provides:

> 'Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.'

9 Paragraph 20.035 of *Halsbury's Laws of Singapore*, Volume 2, 2003 Reissue makes the following statements:

> '……. A step taken in the proceedings would nullify the party's right to seek a stay under the statutory provision and is not merely a matter for the exercise of the court's discretion to grant a stay. …..
>
> There is no definitive rule as to what amounts to a 'step in the proceedings'. It is generally accepted that any step which affirms the correctness of the proceedings or demonstrates a willingness or intention to defend the substance of the claim in court instead of arbitration may be construed as such. Clear examples of such steps would be filing of a defence on the merits of the claim …… Where, however, such applications are made with the expressed reservation that a stay application will be made on the basis of the arbitration agreement, the right could be

preserved. However, requests made to the plaintiffs for extension of time for filing a defence; a request for particulars of the claim or to file a defence; filing affidavits in opposition to the continuation of an interim injunction; commencement of an action for the principal purpose of obtaining a mandatory order for delivery up of goods, have been held not to be 'steps in the proceeding'.'

10 In *Yeoh Poh San & Anor v Won Siok Wan* [2002] 4 SLR 91, after the defendant was served with a writ of summons in Malaysia, she entered an appearance here and applied for an order that the proceedings be stayed or dismissed or discontinued on the ground of multiplicity of proceedings or *forum non conveniens.* She failed in that application. Woo Bih Li JC held that when a plaintiff's solicitor was aware that a defendant had filed an appeal against a refusal to order a stay, he should not insist on the filing of the Defence pending the hearing of the appeal. The judge was of the view that this principle applied to an application for a stay on any grounds and was not confined to a challenge based on absence of jurisdiction. He held that to insist on the filing of the Defence would be wrong because it would defeat the very purpose of the appeal. If the plaintiff's solicitor insisted on the filing of the Defence, the defendant's solicitor should apply for an extension of time to file the Defence pending the outcome of the appeal and an extension of time should generally be granted so as not to render the appeal nugatory.

11 On the present facts, the 48-hour notice by the plaintiff's solicitors was given only after the period for the service of the Defence had lapsed and no application for a stay had been taken out despite what was said at the PTC. The 48-hour notice was therefore entirely justifiable. S 6 (1) Arbitration Act implies that an application for stay should be filed before the time for serving a Defence has lapsed, failing which judgment in default of Defence may be entered by the plaintiff. What the defendant ought to have done was to file its application for a stay immediately and not file such an application and the Defence at the same time. Nevertheless, the defendant did make it clear in its Defence that it was not intending to defend the claim in Court.

12 The Malaysian High Court case of *Ting Ung Tuang v Lau Tiong Ik Construction Sdn Bhd* [2001] 6 MLJ 318 does not stand for the proposition that a Defence must be filed in every case. The defendant in the Malaysian case entered conditional appearance (a concept no longer applicable in our Rules of Court) in a suit and allowed such appearance to become unconditional while commencing a fresh action by way of originating summons for a stay under the Arbitration Act. Judgment in default of Defence was therefore entered in the suit. In refusing to set aside the default judgment, the learned judge there held that the dilemma faced by the defendant could have been avoided if an application had been filed to either stay the proceedings or to set aside the same on the ground that the Court did not have jurisdiction in view of the agreement to arbitrate. That way, the judge continued, if the plaintiff took objection to the application, arguments could have been presented to the Court on the true scope, purpose and ambit of a conditional appearance.

13 The defendant was careful enough to reserve its right to apply for a stay in its Counterclaim by incorporating paragraph 1 of the Defence. A Counterclaim is a separate matter from the plaintiff's claim [Order 15 rule 2 (3)] although the rules [Order 15 rule 2 (1)] require a Counterclaim, if made, to be added to the Defence. In a Counterclaim, the defendant takes on the mantle of a plaintiff. The defendant here would therefore be evincing an intention to sue on the subject matter covered by the arbitration clause if no reservation to apply for a stay had been stated in its Counterclaim as well.

14 However, the defendant undermined itself by its action of giving its own 48-hour notice to the plaintiff in respect of its Counterclaim in the period between the Assistant Registrar's decision and this appeal. That notice put it beyond doubt that it was serious in pursuing its Counterclaim in Court and not by way of arbitration as the Counterclaim pertained to matters covered by the arbitration

clause. The 48-hour notice militated against the defendant's solicitors' arguments of an 'unequivocal, clear and consistent' intention to arbitrate the matters in dispute as the Counterclaim and the Defence were intertwined. The service of the 48-hour notice by the defendant was clearly a step in the proceedings within the meaning of s 6 (1) Arbitration Act and thereby nullified the defendant's right to apply for a stay.

15 The defendant's application for a stay under the Arbitration Act therefore failed and must be dismissed. I dismissed the appeal with costs fixed at $1,000 to be paid by the defendant to the plaintiff.

Defendant's appeal dismissed with costs.