

UDUWARA & OTHERS
v
L.B. FINANCE CO. LTD.

COURT OF APPEAL
AMERATUNGA, J.
C.A. L.A. 269/03
D.C. COLOMBO 30364/MR/02
OCTOBER 21, 2003

Lease agreement – Two guarantors – Arbitration clause in lease agreement – Disputes referred to arbitration – Award made – Can the guarantors be sued under the guarantee bonds to obtain payment under the Award? – Civil Procedure Code, section 18 – Necessary party.

Held:

- i) The guarantors were not signatories to the lease agreement and in the arbitration clause there was no reference to guarantors.
- ii) In the guarantee bonds signed by the defendants there was no reference to arbitration in respect of the question relating to defendant guarantors' liability under the bonds.

Per Amaratunga, J.

“An agreement to proceed to arbitration being an agreement in derogation of a party's right to have recourse to a court of law, there must be specific consent expressed by the plaintiff in writing, if his claim against the guarantors too is to be submitted to arbitration before action is filed in court; there is no such agreement.”

On the question of addition of a party—

- iii) As an award had been made the lessee is not a necessary party in any event, under section 18.

APPLICATION for leave to appeal from an order of the learned District Judge of Colombo.

Ali Sabri with *Eresha Malidasa* for defendant-petitioner
Mahesh Katulanda for plaintiff-respondent

January 13, 2004

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against the order of the learned District Judge of Colombo rejecting the objection raised by the defendant-petitioners (defendants) to the jurisdiction of the District Court to entertain and try the action filed against them by the plaintiff-respondent (plaintiff). The defendants were the guarantors of the obligations of a lessee named W.L. Wijesiri arising out of a lease agreement entered into between the said Wijesiri and the plaintiff to lease the vehicle belonging to the plaintiff to the said Wijesiri. The said lease agreement has been produced, marked B, along with the defendants' leave to appeal application. 01

Clause 25 of the said lease agreement is a clause what is commonly known and called an arbitration clause. It provides that all disputes, differences and questions arising between the LESSOR and the LESSEE in relation to or in respect of the said lease agreement shall be referred to arbitration by a single arbitrator according to the Arbitration Ordinance, the Civil Procedure Code or any statutory re-enactment or modification thereof for the time being in force. The guarantors were not signatories to this lease agreement and in the arbitration clause there was no reference to guarantors. 10

The two guarantors have signed two separate guarantee bonds guaranteeing the performance of the lessee's obligations under the lease agreement and undertaking the performance of lessee's obligations in the event of his failure to act according to his obligations. 20

In the guarantee and indemnity bonds signed by the defendants there were no references whatsoever to arbitration proceedings in respect of questions relating to the defendants' liability under the bonds. Instead the bonds contain a clause stating that they agree that guarantors are liable in all respects under the bond as principal debtors including the liability to be sued before recourse is had against the lessee. The use of the word 'sued' very clearly indicates that the action contemplated against the guarantors in the event of their failure or refusal to fulfill their obligations under the bonds is an action in a court of law and not proceedings before an arbitrator. 30

When the lessee had failed to perform his obligations under the lease agreement, the plaintiff acting according to the arbitration clause has proceeded to arbitration and obtained award. The lessee has failed to satisfy the award and in the present action the plaintiff has sued the defendants in the District Court of Colombo under the guarantee bonds to obtain payment under the Award and interest payable thereunder. The defendants have objected to the jurisdiction of the District Court on the basis that the plaintiff had no right to file action against them and that the plaintiff should proceed to arbitration against the guarantors too. Their argument was that since their guarantee bonds referred to the lease agreement, the arbitration clause was incorporated into the said bonds. The learned Judge has rejected this argument on the basis that the agreement to resort to arbitration existed only between the lessee and the lessor. 40

This conclusion was correct. An agreement to proceed to arbitration being an agreement in derogation of a party's right to have recourse to a Court of Law, there must be specific consent expressed by the plaintiff in writing, if his claim against the guarantors too is to be submitted to arbitration before action is filed in court. There is no such agreement. 50

The other argument of the defendants was the lessee was a necessary party to the action and without adding the lessee in terms of section 18 of the Civil Procedure Code, the action was not properly constituted. The learned Judge has held that since the matter concerning the lessee had been dealt with in arbitration proceedings and an award had been made he was not a necessary party to the action against the defendants. 60

Both reasons given by the learned Judge for rejecting the objections of the defendants were correct in law. As such there is no reason to grant leave to appeal. Accordingly leave to appeal is refused and the application is dismissed costs fixed at Rs. 5000/-.

Application dismissed.