

Dec. 16, 1910

Present : Hutchinson C.J. and Grenier J.

## CRONING v. THE ATTORNEY-GENERAL.

171—D. C. Badulla, 2,420.

*Ordinance No. 15 of 1866, s. 8—Action on contract—Provision in contract for reference to arbitration—Application by defendant to refer matters in dispute to arbitration—Application made after taking time to file answer.*

Plaintiff sued defendant on a contract whereby it was agreed, *inter alia*, that any matter in dispute should be referred to the arbitration of the Director of Public Works. The defendant appeared and obtained time to file answer on three occasions, and on the fourth date, without filing answer, applied to have the matter referred to arbitration.

*Held*, over-ruling plaintiff's objection, that the application was not too late.

Under section 8 of Ordinance No. 15 of 1866 the application need not necessarily be made before taking any steps in the proceedings.

THE facts appear in the judgment of Hutchinson C. J.

*De Sampayo, K.C.*, for appellant.

*Van Langenberg, A. S.-G.*, for respondent.

*Cur. adv. vult.*

December 16, 1910. HUTCHINSON C.J.—

This is an appeal by the plaintiff against an order made under section 8 of the Arbitration Ordinance, No. 15 of 1866, staying proceedings in the action and referring the matters in dispute to the arbitration of the Director of Public Works.

The plaintiff sues on a contract made between him and the Provincial Engineer of Uva, on behalf of the Government, for the construction of a road by him. He claims (1) the balance of money due to him for payment of work done ; (2) to recover the deposit which he made as security for his due fulfilment of the contract ; (3) money retained by the Provincial Engineer in accordance with a clause in the specification which forms part of the contract ; (4) damages for wrongful detention of money due to him ; (5) damages for the wrongful termination of the contract.

The contract is on a printed form, and is headed " Contract C, dated May 21, 1908," and refers to a specification, plans, and drawings signed by both parties. The specification is also on a printed form headed " Contract No. C," signed by both parties on the same date. Clause 25 of it provides that " in case any dispute,

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question, or difference should arise as to the value of any particular work not clearly stated in the bill of quantities or schedules, or with regard to any other matter of account, or as to the proper completion of the work, or the payment therefor, or the construction to be put on any part of the plans or specification, or any other question which can or may arise as to the execution of this contract, such question, construction, or dispute shall be decided by the Director of Public Works, whose decision and award shall be final and binding upon all parties, and from which there can be no appeal.

The defendant on April 27, May 25, and June 15 obtained time to file answer, and then on June 27, without filing answer, applied to have the matter referred to the arbitration of the Director of Public Works and filed an affidavit by the defendant setting out clause 25 of the specification, and alleging that all the causes of action are questions covered by that clause, and that there is no sufficient reason why they should not be referred and that he was at the time of the bringing of the action, and still is, ready and willing to concur in all acts necessary and proper for causing the said matter to be decided by arbitration.

Mr. de Sampayo contended that the specification is not part of the contract ; that clause 25 of the specification is not an agreement to refer to arbitration within the meaning of section 8 of the Ordinance ; and that clause 25 does not cover these causes of action. I think that none of these contentions is tenable. He also urged that if the Court had power to make the order, it had a discretion, and exercised it wrongly, and that the defendant's application was made so late that it ought to have been refused. The plaintiff agreed that the Director of Public Works should be the person to decide on all questions to arise as to the execution of the contract, and that the decision and award should be final and binding on all parties, and he cannot now, without any evidence to show that the Director is not a suitable person, be heard to say that he is not so. And I think that there is nothing in the objection that the defendant's application was too late ; the English decisions on similar objections were given on the English Act, which contains the words which are omitted from our Ordinance : " at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings."

The appeal should be dismissed with costs.

GRENIER J.—I agree.

*Appeal dismissed.*