,

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)

BAFFOE-BONNIE, JSC

BENIN, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/03/2018

28TH MARCH, 2018

DE SIMONE LIMITED ……. PLAINTIFF/APPELLANT/APPELLANT

VRS

OLAM GHANA LIMITED ……. DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

BENIN, JSC:-

This appeal largely turns on a true and proper construction to be placed on sections 6(1) and 7(5) and to some extent section 54(2) of the Alternative Dispute Resolution Act, 2010 (Act 798) hereafter called the Act. The questions that arise for determination are two-fold, namely: (i) whether parties to a contract with an arbitration clause, can resort to court litigation in respect of matters covered by the arbitration clause; (ii) if they can, what standards should apply to determine the question.

The brief facts of this case are as follows. The defendant employed the services of the Plaintiff to construct some specified structures for a factory at Kpone. The terms of

,

engagement were reduced into writing and embodied in a contract which was duly executed by both parties. The plaintiff brought an action against the defendant at the High Court for certain reliefs which are not relevant to recall in this decision, suffice it to say that the basis for the action was the alleged violation of the contract. Pleadings closed and all pre-trial processes came to an end and the actual hearing of the case commenced.

The instant proceedings culminating in this appeal was triggered by an application filed by the defendant asking the court to refer the parties to arbitration in accordance with the terms of their contract which application was vehemently opposed by the plaintiff. The trial court did not accede to the application in its terms because it was filed out of time in view of the provisions of section 6(1) of the Act which permits the defendant to apply for the reference to arbitration after entry of appearance. This means the defendant's right to arbitration is waived if he enters a statement of defence, thereby evincing intent to contest the action on its merits. Though they did not advance reasons to support their decision, both lower courts were right in the construction placed on section 6(1) of the Act. We will deal with this in detail later in this decision.

Having rejected the application for reference to arbitration because of the waiver of the agreement to arbitrate, the trial court on its own motion applied the provisions of section 7(5) of the Act to refer the parties to arbitration. The said section 7(5) provides that:

"Where in any action before a court the court realises that the action is the subject of an arbitration agreement, the court shall stay the proceedings and refer the parties to arbitration."

The trial court considered this provision to be mandatory. It also considered that the court has no discretion in the matter upon a realisation that the contract contains an arbitration clause. In the court's view, time is of no essence under section 7(5) of the Act. The court also relied on section 72 of the Courts Act, 1993 (Act 459) which enjoins

,

the court to promote reconciliation.

The plaintiff unsuccessfully appealed to the Court of Appeal. The court below in affirming the trial court's decision, appeared not to have endorsed the view that time is not of the essence, for the court shared the view of counsel for the plaintiff that it would be illogical to make a reference before judgment. However, having regard to the other reasons proffered by the trial court, the court below upheld the trial court's decision to make reference to arbitration. However, the court below failed to state an opinion on what stage in the proceedings an application for reference to arbitration could not be entertained by the court.

This is thus a second appeal by the plaintiff. The sole ground of appeal raised herein reads: " The Court of Appeal erred in law when it misconstrued the provisions of the Alternative Dispute Resolution Act, 2010 (Act 798) in affirming the ruling of the trial court referring the matter to arbitration notwithstanding the stage the hearing of the matter had reached at the trial."

Arguments by counsel

Counsel for the plaintiff virtually rehashed all the arguments he made at the Court of Appeal. Firstly, he talked about the court not applying a common sense approach in construing the provision in question. How far common sense comes into play, counsel did not give the details. Next, he argued that time is of the essence in the sense that it would be illogical and unfair for the court to proceed with the hearing of a matter only for it to make a reference to arbitration at the end. Counsel therefore submitted that "it would not be prudent and logical for a court to do so especially when the courts are enjoined to dispose of cases before them expeditiously...."

Thirdly, counsel was of the view that even though the language used in section 7(5) of the Act was mandatory, nonetheless the lawmaker did not intend that the power should

,

be applied at any stage of the proceedings and should thus not be construed as such. Any such construction would render the provision in section 6(1) of the Act, "superfluous, unnecessary and redundant....."

Counsel further stated that the inclusion of sections 6 and 7 was a clear indication that the Act was not meant to oust the jurisdiction of the court in contract containing arbitration clause. Hence there is the need to read the enactment as a whole. In view of this, "the proper interpretation of the said section 7(5) vis-a-vis section 6(1) would be that the trial court could only on its own motion refer a matter to arbitration when it discovered the presence of the arbitration clause before the defendant took any further step after entering appearance to the suit..."

Counsel urged the court to take into account emotional stress parties endure in having a matter heard, the expenses involved, time wasted, and the very fact that parties themselves have willingly submitted to the court's jurisdiction, to deny the court the right to refer them to arbitration.

For his part, counsel for the defendant/respondent made reference to section 72 of the Courts Act on promoting reconciliation, and consequently endorsed the dictum of Adinyira JSC in the case of BCM Ghana Ltd. v. Ashanti Goldfields Ltd. (2005-2006) SCGLR 602 at 611, wherein she urged courts to strive to uphold dispute resolution clauses in agreement. Counsel's submissions appear to have endorsed the views of the courts below. In particular he was of the view that having regard to the object of the Act which is to secure expeditious and less time-consuming means of litigation, section 7(5) of the Act should be construed without time constraint. Thus with regard to the argument that it would be illogical to abort the trial before judgment and refer the parties to arbitration, counsel thinks it should be left for a future decision when such facts do arise. But for the instant case, only the plaintiff's representative was giving evidence when the court made the reference. And having regard to the nature of the evidence to be adduced, it was a fit case to refer the parties to arbitration under the terms of the arbitration provision in their contract, in order to "achieve speedy and

,

effective justice, avoid delays and unnecessary expense....." Further counsel made reference to Orders 28 and 64 of C. I. 47 in submitting that the reference could be made at any time.

Consideration by court

At first blush, one is tempted to agree with the opinions expressed by the courts below on the construction of section 7(5) of the Act since it appears imperative in its language or letter. But the spirit behind it is entirely different as will shortly unfold. It should be borne in mind that it is a cardinal principle in the construction of a statute that all its provisions must be read together in order to make any construction of a particular provision therein fit into the purpose and object of the statute. It is also permissible to construe the provisions of a statute by reference to other existing statute in order to unearth the legislative intent.

As the title of the Act clearly suggests, it is to allow parties to choose an alternative forum for the resolution of their dispute other than the regular court. Thus any construction will have to bear this general purpose of the Act in mind. However, as the court below rightly stated, the Act does not oust the jurisdiction of the courts in matters where originally there was an arbitration agreement. Where a court is called upon to decide whether or not it may proceed with a case notwithstanding the inclusion of an arbitration clause in the contract, two provisions in the Act have to be considered. The first is contained in section 6(1) which provides:

"Where there is an arbitration agreement and a party commences an action in a court, the other party may on entering appearance, and on notice to the party who commenced the action in court, apply to the court to refer the action or a part of the action to which the arbitration agreement relates, to arbitration."

,

As earlier stated the right is waived if the defendant proceeds to file a defence to contest the case on merit. Thus the court can proceed to hear the case, the arbitration clause notwithstanding. This is because a right to arbitration, like any contractual right, can be waived either expressly or by conduct. The waiver of a defendant's right to arbitration is conclusively presumed under section 6(1) of the Act if the defendant does not raise it after the entry of appearance and goes on to take fresh steps in the matter aimed at defending the claim. In those circumstances the court shall proceed to hear and determine the dispute. The underlying reason is that parties should not proceed with litigation if they do not intend to do so. Thus any objection to the court as the forum should be raised in the early stages of the process, whilst the opportunity avails the parties. Section 6(4) clearly anticipates that at the time section 6(1) is invoked, only interim measures would have been filed and considered. Obviously at this point, the writ of summons and a statement of claim, if any, should be the only form of pleadings on the file. This should be contrasted with the provisions of section 7(3) of the Act where the law anticipates that at the time the court makes a reference under section 7(1) pleadings would have closed. Section 6(4) reads:

Unless otherwise agreed to by the parties, where proceedings in court are stayed for the purpose of arbitration, any security given, property detained, injunction or restraining orders imposed in the original action shall apply to the arbitration.

All these are interim measures, and significantly the section excludes the pleadings, unlike section 7(3), which provides that:

Where at the time of reference under this section pleadings are closed, the pleadings shall be deemed to be the claim, defence, reply, counterclaim and defence to counterclaim as the case may be in the arbitration proceedings.

Sections 6(4) and 7(3) when read together would confirm that an application under section 6(1) should be made before the defence is filed on merits, unless the defence is coupled with an application to stay proceedings. The filing of a defence on merits

,

signifies a clear intent to litigate, and an acceptance of the plaintiff's offer to waive arbitration, by the issuance of the writ in court.

In the English case of *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd. (1978) 1 Lloyd's Rep. 357* at 361, Lord Denning held that to constitute a step in the proceedings depriving a party of its right to arbitrate, the action of this party "must be one which impliedly confirms the correctness of the proceedings and the willingness of the party to go along with a determination by the Courts of law instead of arbitration." Filing of a defence to contest the case on merits will be construed as a waiver of the right to arbitration. See the case of *Associated Bulk Carriers Ltd. v. Koch Shipping Inc., The Fuohsan Maru (1978) 2 All ER 254.*

It is worthy to compare Section 6(1) to Section 54(2) of the Act. Whereas under Section 6(1) a defendant is deemed to have waived his right to arbitration when he answers on the merits of the case filed in court, the plaintiff under Section 54(2) is not deemed to waive his right to arbitration simply because he commenced proceedings in court. It provides:

"A party's right to arbitration is not waived because the party has initiated judicial proceedings in relation to the subject matter of the arbitration."

This Section is appropriate because a party to an arbitration agreement may commence proceedings in court not with an intention to waive his arbitration rights but only for the purpose of obtaining interim reliefs such as preservation of the subject matter and injunction. The plaintiff may also just have initiated summary proceedings in respect of a non-contentious claim. Such a party may thereafter start arbitration proceedings or apply to the court to stay proceedings and make a referral to arbitration. That partly explains the reason the Act by Section 6(4) preserves interim orders obtained before referral to arbitration. But Section 54(2) does not imply that a plaintiff cannot waive his arbitration rights since that will infringe on fundamental principles of the law of

,

contract. If the party to an arbitration agreement who commences court proceedings expressly or by conduct evinces an intention to waive his arbitration rights, the court will prevent him from resorting to arbitration subsequently.

The other provision that concerns the power of the court to make a referral to arbitration and which is at the centre of this case is section 7(5). This is an innovative provision and a clear departure from the usual provisions of statutes on arbitration. We say it is not usual because if Section7(5) is construed literally as the lower courts suggest, it would mean that even if both parties decide to waive their rights under the arbitration agreement, the court shall nonetheless compel them to resort to arbitration. Take the facts of the case at hand where the lower courts rightly found that the defendant had irrevocably waived its right to arbitration. The plaintiff by opposing the application for referral to arbitration clearly waived its arbitration rights too but the courts below have compelled them to go to arbitration. This interpretation of Section 7(5) leads to an absurdity because it flies in the face of fundamental principles of the law of contract namely the freedom of contract. As earlier pointed out, parties to an arbitration agreement are free to annul it if both of them act together either expressly or by their conduct. Almost all modern arbitration statutes globally are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration of 1985 as amended in 2006. It does not contain such a provision that enables a court to compel contracting parties to seek arbitration against their will. Our research has not discovered a democratic country with a comparable provision in its arbitration statute.

Consequently, Section 7(5) ought not to be construed literally. The Act at Section 27 invokes the legal doctrine of waiver to protect arbitration proceedings where a party with a right to object to the jurisdiction of an arbitration tribunal fails to raise the objection timeously. This provision confirms two concepts: (i) a recognition that a right to arbitration may be waived and (ii) time is of the essence. The same reasoning

,

applies to section 6(1). At Section 7(1) the Act empowers the court to make a referral to arbitration in the absence of a prior arbitration agreement by the parties only on the condition that both parties agree to the court making the referral. All these provisions recognise the right of the parties to choose the mode of resolution of their dispute. Therefore Section 7(5) has to be construed in a manner that accords with the principle of freedom of contract and the doctrine of waiver of arbitration rights that underlie the provisions of the Act. What that means is that the power conferred on the court under Section 7(5) of the Act may only be exercised where there has not been mutual waiver by the parties of their arbitration rights. To construe it otherwise would be to empower the court to overrun the freedom of the parties to annul their arbitration agreement and resort to the court to have their dispute resolved.

Applying the foregoing construction of Sections 6(1), 7(5) and 54(2) of the Act to the facts of this case, we are of the view that since the parties had irrevocably waived their right to arbitration, the court had no right or power to compel them to resort to arbitration. The plaintiff commenced a substantive action on merit, not just an action seeking interim measures or non-contentious relief. And even though section 54(2) says a party does not waive his right to arbitration by the bare fact of having instituted an action in court, yet the subsequent conduct of the plaintiff can result in a waiver.

In the instant case after the defendant had entered appearance, the plaintiff still had the opportunity to resort to arbitration, because the defendant had then not entered a defence to contest the case on merit. And even after the defence and counter-claim had been filed, the plaintiff filed appropriate responses. The defendant then sought for and was granted a couple of orders to amend the statement of defence. The plaintiff was also allowed to amend the statement of claim. The parties then went into the pre-trial settlements before the trial judge and the matter was set down for trial. At the time the application for a stay of proceedings was put in, the actual hearing had commenced, and the matter had been pending for about three years. Clearly the delay

was inordinate and parties must have been put to expenses, and all these factors ought to have weighed with the court in deciding that the parties had irrevocably waived their right to arbitration. Section 6(1) was not available to the defendant to apply as it had entered a defence on merits. And for purposes of emphasis, once the parties had waived the right to arbitrate, the court did not have the right to compel them to go to arbitration. Section 7(5) of the Act was therefore not applicable in this case.

Yet there was another window of opportunity open to parties to resort to arbitration even after they had waived such right under the terms of their contract. That is unique to the Act and it goes to confirm the legislative intent behind the Act, which is to afford the parties every opportunity to resort to arbitration, if they are willing to do so. We are referring to the very provision in section 7(1) of the Act. The trial court rightly concluded that section 6(1) of the Act was inapplicable since by filing a defence on merits without raising the question of arbitration, the right to resort to arbitration was effectively waived. It meant logically that the arbitration clause was ineffectual and had ceased to exist. In such scenario, the court, with the consent of the parties could still make a reference to arbitration even after the close of pleadings. This is the clear import of section 7(3) of the Act, where the court is enjoined to transmit the pleadings to the arbitration if it makes the reference. But the overriding consideration under section 7(1) is that both parties must agree that a reference be made by the court, not under the arbitration clause in the contract which has ceased to reign, but by the fact that the matter is considered by the court as fit for arbitration. And having regard to the policy of the law to encourage alternative dispute resolution, the court will willingly allow them to go to arbitration if they both agree.

However, in this case the matter had reached a stage where the right to arbitrate was irrevocably lost. And even if the right was still open to be applied under section 7(1) of the Act one party had vehemently opposed the application to go to arbitration. And as stated by the Swedish author Heumann, in his book Arbitration Law of Sweden: Practice and Procedure, 2003, at pp 125-127, whilst discussing waiver of the right to arbitration,

,

the very act of opposing arbitration is an irrevocable and unilateral act.
On Order 64 of C.I.47 referred to by the defendant, the order on its face does not apply to situations where there is an arbitration agreement before the parties come to court as in this case. Rule 1 provides;

"1. If the parties to an action desire that any matter in dispute between them in the action shall be referred to the final decision of an arbitrator, either party or both parties may apply to the Court at any time before final judgment for an order of reference, and on application the Court may make an order of reference accordingly."

Clearly, it is where both parties after being in court desire to undertake arbitration that Order 64 comes into play. This rule should be read subject to Section 7(1) and (3) of the Act as construed above that any reference by the court must be done with the consent of both parties.
It is observed that arbitration as an alternative dispute resolution mechanism has gained worldwide acceptance, particularly in the area of international commerce and trade. This informed the decision by the United Nations to commission the uniform arbitration law, the UNCITRAL Model Law. A large number of countries have since fashioned arbitration laws based on this model law. Thus it is quite convenient to make reference to the relevant provisions of the model law which have been incorporated in national laws, and to see how the courts in the various countries have applied them. This approach is helpful lest any radical departure from common application of the model law should work to the disadvantage of our people if they happen to find themselves in international arbitration fora or other jurisdictions to arbitrate.
It is welcome development that the various jurisdictions we studied have almost the same view on the core questions, whether the parties can resort to court in spite of an arbitration clause in their contract and what standards to apply.

,

We shall examine opinions from some common law as well as civil law jurisdictions in addressing these questions, which are at the core of every discussion in court. For purposes of this decision Articles 8 and 9 of the UNCITRAL Model Law are significant. They provide:

Article 8

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made whilst the issue is pending before the court.

Article 9

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

These provisions have been enacted either verbatim or in key details in domestic legislations of several countries. Even a country like the USA whose arbitration law ante-dates the model law, the effect of the language employed is not significantly different, as will be seen from its jurisprudence. So if there is an area of law where domestic legislation and jurisprudence do not vary widely, it is in the area of arbitration law.

Section 6(1) of the Act follows closely article 8 of the model law. The Act does not include the urge on the court to deny a reference if it finds the agreement to be null and void or incapable of being performed. That is already the law in this country that where the law has made specific provision for a forum of adjudication, the parties cannot contract out of it. Parties cannot for instance insert an arbitration clause to refer a matter involving constitutional interpretation or felony to arbitration. As earlier

explained, section 54(2) of the Act permits a case to be filed, for instance to seek interim measures, or other reliefs, without compromising the right to arbitration. This also is in similar vein to article 9 of the model law, supra.

We proceed to examine these provisions of the model law, as they reflect in domestic arbitration legislations and as construed by the courts in common law jurisdictions like the UK, USA and Australia; and in civil law jurisdictions like France, Switzerland and Germany. The common strand running through all these jurisdictions, including Ghana, is that they all agree that arbitration is consensual, so the parties are free to waive their right to arbitrate, even if the contract contains a 'no waiver' of arbitration clause. The key point of divergence is at what stage in the proceedings it may be said that parties have waived their right to arbitrate. Some countries like Sweden take the position that the moment a case is filed on merit in court the plaintiff has unilaterally waived the right to arbitrate. And the waiver becomes mutual and complete if the defendant does not move for a stay of proceedings but files a defence on merits. This position is shared by only France. All the other countries mentioned including Ghana, take the position that issuance of a writ per se, even if on merits does not amount to a waiver of the right to arbitrate; it is the subsequent conduct of the parties which will determine whether or not a waiver has resulted.

The other point of divergence is in respect of what standards to apply. But here the views are not significantly divergent as they all agree that delay and how far the proceedings have gone on merit are determining factors. Terminology employed is not uniform and expressions like variation, estoppel by conduct, abandonment, forfeiture, relinquishment, waiver and others have been employed by various jurisdictions. But the conclusion in all cases is that the parties have lost the right to arbitrate. What is important is that the parties have elected to litigate rather than to arbitrate. In Ghana the Act specifically uses 'waiver' in sections 27 and 54(2) so we stick to that expression.
Now to some specific jurisdictions. In the English law, the question of waiver is decided

,

from a consideration of rules relating to breach of contract to arbitrate. Section 9 of the English Arbitration Act of 1996 was deliberately couched in language similar to article 8 of the UNCITRAL Model Law. Reference is made to a case decided prior to the enactment of the 1996 Arbitration Act, which decision is still relevant and applicable to this day. And that is the case of *The Elizabeth II (1962) 1 Lloyd's Rep. 172* where a submission of waiver was made by a party one and a half years after the commencement of litigation by the plaintiff who was party to a contract subject to arbitration. The court took the position that the parties had by their conduct agreed to accept the court's jurisdiction and to vary the arbitration clause. The case of *Downing v. Al Tameer Establishment (2002) EWCA Civ 721* resolved the claim of waiver by reference to a repudiation of contract analysis.

In the USA the preponderance of authority is in favour of a two-tier test to determine if there has been a waiver. The first test is whether in the totality of the circumstances the party applying has acted inconsistently with the arbitration rights and the second test is whether that conduct has in some way prejudiced the other party. When a claim is instituted and the other party responds to it on merit, it affords evidence of conduct inconsistent with right to arbitrate. Taking steps in the action over a considerable period of time with a view to contesting the action in court could be interpreted as constituting prejudice, as time and expense would have been committed. The US cases are based on the doctrine of estoppel. See the case of *Johnson Associates Corporation v. HL Operating Corporation, 680 F. 3d 713 (6th Cir 2012),* where the court also decided at 717 that the presence of a 'no waiver' clause does not alter the ordinary analysis undertaken to determine if a party has waived the right to arbitration. See also *Rota-McLarty v. Santander Consumer USA Inc., no 11-1597, 2012 WL 5936033 (4th Cir) 4th November 2012*, which determined, inter alia, that to inform the inquiry into what constitutes prejudice, the court would consider the amount of delay and secondly the extent of the approving party's trial-oriented activity.

,

The next case to consider is *Cortez v. Avalon Care Center, 598 Ariz. Adv. Rep. 30 (App. Div. II, December 22, 2010*). The plaintiffs' decedent died while in the care of the defendant, a nursing home. At the time of admission to the home, a contract was signed which, inter alia, required that any claims had to be resolved by arbitration and not by civil action. However, the defendant did not plead the right to arbitration in its answer or move to dismiss the action on that basis. After almost a year later, the defendant came by motion to dismiss the action for arbitration to take place. The trial court granted the request and the plaintiff appealed. The Arizona Court of Appeals reversed the decision, holding that where the plaintiff, as in that case shows an express and intentional relinquishment or by conduct that warrants an inference of such an intentional relinquishment, waiver would be found. On the issue of prejudice, the court held that actual prejudice to enforce waiver was only required where the waiver was based on the ground of unreasonable delay. Consequently, the defendant was held to have waived the right by its substantial participation in the litigation.

But the requirement of prejudice in US jurisprudence is not shared by other jurisdictions. See these Scottish cases: *Presslie v. Cochrane McGregor Group Ltd. (1996) SC 289; La Pantafola D'ora SpA v. Banc Leisure Ltd. (2000) SLT 105*. Australia law also does not require proof of detriment or prejudice as in the USA, in order find estoppel; see *ACD Tridon v. Tridon Australia (2002) NSWSC 896.*

Under the French arbitration law, when a plaintiff commences an action in the national court in a matter which is subject to arbitration, the defendant may move the court objecting to its jurisdiction to proceed with the case. Under article 74 of the French Code of Civil Procedure, such a plea to the court's jurisdiction must be raised 'in limine litis', that is at the commencement of proceedings, or prior to filing a defence on the merits. Thus if the defendant does not challenge the national court's jurisdiction, both parties are deemed to have waived their rights under the arbitration agreement.

German arbitration law is no different from the position in Ghana, and to a large extent

,

that of the French and English. Under German law, like Ghana, a party does not waive its right to arbitrate by initiating judicial proceedings, whether for a substantive right or for provisional measures. However, the arbitration agreement might be revoked by implication if the defendant does not object to the admissibility of the court proceedings prior to the beginning of the oral hearing.

Under Swiss law, if a party to an arbitration agreement commences proceedings in court, with a view to securing a decision on merits, the other party may plead lack of jurisdiction in the court. It is founded on article 7 of the Swiss Private International Law Act. The court must then deny jurisdiction, unless inter alia, the respondent proceeded to the merits without contesting jurisdiction. Thus if the defendant fails to plead lack of jurisdiction prior to pleading on the merits, the state-court will affirm its jurisdiction. This is a tacit mutual waiver of revocation of the arbitration agreement.

It must have become clear by now that in all jurisdictions considered, parties to an arbitration agreement may waive the right to arbitrate. When one party commences judicial proceedings, the other party may apply to the court, ***in limine litis*** or before filing a defence on merits, to decline jurisdiction. If the other party does not apply to the court to decline jurisdiction or, as section 6(1) of the Act requires the party to apply to stay proceedings but goes ahead to file a defence on the merits, he will be deemed to have waived the right to arbitration, and the waiver thus becomes mutual and irrevocable. The court cannot therefore apply section 7(5) of the Act to compel parties to go to arbitration, for reasons already explained. Under the Act the only avenue open to the parties after they have waived the right to arbitration under section 6(1) of the Act is if both parties agree with the court to invoke the provisions of section 7(1) to make reference to arbitration.

To recap, when the trial court judge concluded rightly that the parties had waived their right to arbitration under section 6(1), he had no right to apply section 7(5) as by so

,

doing he was compelling the parties to resort to arbitration against an unwilling party. For by opposing the application for the reference to arbitration, the party opposing was telling the court it was not willing for a reference to be made under section 7(1) of the Act, and that act was unilateral and irrevocable. The court could only apply section 7(5) at any stage in the proceedings before the parties could be said to have waived their right to arbitrate.

For all the foregoing reasons the appeal succeeds and is accordingly allowed. The High Court is ordered to continue with the hearing of the matter from where it left off. The appellant is entitled to costs in this appeal.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

,

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

WILLIAM ADOTEI ADDO WITH HIM DODGE DADJO FOR THE PLAINTIFF/APPELLANT/APPELLANT.

MINKAH PREMO WITH HIM BENEDICT ASARE MOCKLEY AND AWURADJOA ANNIE-BUDU FOR THE DEFENDANT/RESPONDENT/RESPONDENT.