IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT ACCRA, GHANA
AD 2015

CORAM: ATUGUBA, JSC (PRESIDING)
ADINYIRA (MRS), JSC
GBADEGBE, JSC
BENIN, JSC
AKAMBA, JSC

C O N S O L I D A T E D
CIVIL APPEAL
NO. J4/63/2013

11TH NOVEMBER,2015

WESTCHESTER RESOUCES LTD. - - PLAINTIFF/RESPONDENT RESPONDENT

VRS

ASHANTI GOLDFIELDS CO. LTD. - - DEFENDANT/APPELLANT APPELLANT

AND

AFRICORE (GH) LTD. ... PLAINTIFF/RESPONDENT RESPONDENT

VRS

ASHANTI GOLDFIELDS CO. LTD. ... DEFENDANT/APPELLANT APPELLANT

JUDGMENT

ATUGUBA, JSC:-

FACTS

The facts that are germane to this appeal are that the respondents sued the appellant in the High Court, Accra for damage for breaches of a mining exploration agreement. Pursuant to an arbitration clause in the said agreement the trial judge Mrs. Dordzie J, upon application by the respondents, stayed the action and referred the claims therein to arbitration.

For the purposes of the said arbitration the respondents appointed professor Essien whilst the appellant appointed Nana Dr. S.K.B. Asante as their respective arbitrators. Subsequently Dr. Date-Bah JSC was nominated as umpire but the appellant, through its solicitors objected that Dr. Date-Bah JSC, then a serving justice of the Supreme Court of this country, could not properly be appointed as umpire. Amidst the wrangling over Dr. Date Bah's status, Dr. Nana S.K.B. Asante resigned as arbitrator but the appellant quickly replaced him with Mr. J.K. Agyemang.

The parties were also not *ad idem* as to the procedural rules to govern the arbitration.

In these circumstances and subsequent to correspondence between the parties, the matter went back to the trial court for determination at the respondents' instance.

In the course of the proceedings the consolidated suits were struck out and never relisted before their final determination by the trial court in favour of the respondents.

PRELIMINARY OBJECTIONS

Two preliminary objections have been taken *in limine* by the appellant to the whole trial.

(a) Case Struck out

The appellant contends that inasmuch as the suits were struck out and never relisted upon application, the whole trial is a nullity which is not within the purview of the saving provisions of O.81 of the High Court (Civil Procedure) Rules, 2004 C.I.47. O.81 of C.I.47 is as follows:

"ORDER 81

Effect of Non-compliance with Rules

1. Non-compliance with rules not to render proceedings void

(1) Where, in beginning or purporting to begin any proceedings or *at any stage in the course of or in connection with any proceedings*, there has by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, *the failure shall be treated as an irregularity and shall not nullify the proceedings*, any step taken in the proceedings, or any document, *judgment or order* in it.

(2) The Court may, on the grounds that there has been such a failure as stated in subrule (1), and on such terms as to costs or otherwise as it considers just

(a) set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or

(b) exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just.

2. Setting aside for irregularity

(1) An application may be made by motion to set aside for irregularity any proceedings, any step taken in the proceedings or any document, judgment or order in it, and the grounds of it shall be stated in the notice of the application.

(2) No application to set aside any proceedings for irregularity shall be allowed unless it is made within a reasonable time and the party applying has not taken any further steps after knowledge of the irregularity."(e.s)

The trial of the case without relistment of the same constitutes "proceedings" within the purview of O.81 r.1 of CI 4 and the default in not relisting it formally before resumption of the hearing is one of procedure. The striking out of the case sent it out of the cause list for trial but not out of the jurisdiction of the court. It is trite law that a suit is pending in court and the court has jurisdiction over it to the extent of matters still outstanding in respect of it so long as a step can be taken in it. See *Awoonor Renner v. Thensu* (1930) 1 WACA 77 and *Koglex (Gh) Ltd (No. 2) & Another v Attieh* (No. 2) (2003-2004) SCGLR 75.

The relisting of the suit in the circumstances was impliedly done albeit *sub silentio* and an implied act, if within jurisdiction, is valid. The absence of an application for relistment is a curable procedural defect, see *Real Estate Developers Ltd v Fosua* [1984-86]2 GLR 334 C.A and *Bugden v. Ministry of Defence* (1972)1 All ER I C.A. This preliminary objection therefore fails and is dismissed.

(b) The second preliminary objection of the appellant is more serious and fundamental. It is that once the reference was made to arbitration by the trial judge the court could not resume jurisdiction over the case and try it on the merits.

The respondents contend that since both sides participated in the trial the same holds good. Technical justice is not favoured in the modern judicial process. But jurisdiction is judicially settled as a matter going to the root of a court's proceedings.

From the moment the reference of the matter was made to arbitration pursuant to the contractual arbitration clause the whole matter fell to be regulated by the Arbitration Act, 1961 (Act 38), the applicable legislation at the time of the commencement of the consolidated suits, see s.137(2) (b) of the Alternative Dispute Resolution Act, 2010 (Act 798). There is no provision in Act 38 which can warrant the resumption of jurisdiction over this case in the circumstances that transpired after the case had been referred by the court to arbitration.

Any problems about vacancies in the positions of arbitrators (this being a two member arbitration panel under the contract) or of an umpire, are dealt with *inter alia* by sections 11(1) (a) and (b) and 12(1), (2) and 14(c), of the Act. As regards the failure of agreement over the procedural rules for the conduct of the arbitration, suffice it to say that there is nothing in Act 38 empowering the trial court's resumption of jurisdiction to try the case on its merits in such circumstances.

I was at first attracted in favour of the validity of the trial of this case by the High Court by the case of *Neale v Richardson* (1938)1 All ER 753 C.A. It is stated in the headnote thereof as follows:

> "The plaintiff contracted to build a house for the defendant, for which he was to be paid by instalments when a certificate was given by the architect. *In case of disputes, the architect was to act as arbitrator.* A dispute arose, and the architect nominated a person other than himself to act as arbitrator. It being pointed out to him that the contract provided that he himself should be the arbitrator, *he refused to arbitrate or to issue a certificate with regard to the final instalment*. The defendant took no steps to appoint a new arbitrator, *or to stay the present action*:-
>
> HELD: it was the duty of the architect, acting as arbitrator, to decide whether the unissued certificate ought to have been issued. As he had failed to do this, the lack of a certificate was no bar to the plaintiff's right to recover the balance of money due."
>
> "

At 757 – 758 Slesser L.J said:

> "In the present case, *it is clear on the facts that the arbitrator under the contract has refused to arbitrate, and the question of the builder's right to remuneration, in the absence of a final certificate, has failed to be determined.* Following *Brodie's case* ..., an arbitration resulting in favour of the builder for a sum there determined would have enabled him to sue for his payment as if a final certificate for that amount had been granted and not wrongfully refused.

> The defendant in her defence relies upon the absence of a final certificate, and takes no point that a new arbitrator might have been appointed by the court under the Arbitration Act, 1889, s. 5, nor has she herself applied under that section to have an arbitrator appointed in lieu of the architect who has refused to act, *nor taken any steps to stay this action on the ground that the parties had agreed to submit their differences to arbitration*. In these circumstances, I think that *the plaintiff is not precluded from having the whole question determined in court, and that the judge was entitled*, though for reasons different from those upon which he relied, *to take seisin of the matter*, and to refer the claim and counterclaim to the registrar for report." (e.s)

At 758 Scott L.J also said: "The issue depends solely on a question of construction, which can be stated very shortly. Cl. 8 included within its scope as a dispute upon which the architect was to act as arbitrator and adjudicate all differences arising between the parties out of the contract and any dispute about a certificate either issued or refused by the architect under the contract; for instance, whether an issued certificate ought to have been issued.

If this is so, *it means that the parties had agreed that any such issue should be tried by the domestic tribunal, and that an action by either in the courts was liable to be stayed by the other under the Arbitration Act. If, however, the parties did not choose to enforce the domestic tribunal, or were prevented by the action of the agreed tribunal from doing so, the King's courts regained their full jurisdiction, and then the county court judge was entitled to decide the issue as to the certificate which the*

architect would have decided as arbitrator, had he acted as such. It follows, therefore, that, in the circumstances, the absence of the certificate was not an obstacle to judgment at the instance of the builder."(e.s)

Though not free from difficulty, I think the distinguishing features of that case from the present case are that the parties thereto did not engage the provisions of the English Arbitration Act, 1950 but activated the arbitration clause of the contract without invoking the powers of the court under the Act and in particular did not apply for a stay of the court proceedings after procuring any reference of the matters in dispute to arbitration under the Act. Similarly in SL Sethia Liners Ltd. v State Trading Corporation of India Ltd. (1986) 2 AllER 395 C.A in which it was held that an arbitration clause can be waived by the parties, upon the plaintiff's application for summary judgment the defendant unsuccessfully applied for reference to arbitration under the English Arbitration Act, 1975.

It has been emphasized that the arbitration process under an Arbitration Act should be jealously guarded and there should be no or little court interference therewith. Thus in *Birthley District Co-operative Society Ltd v Windy Nook and District Industrial Co-operative Society* (1959) 1 WLR 142 at 143 Streatfield J. said in respect of the then English Arbitration Act 1950, which is in *pari materia* with Act 38 herein, thus:

"*An arbitration is governed by its own particular procedure laid down by the Arbitration Act, 1950*, and R.S.C., Ord. 59, r. 39, and Ord. 52, rr. 3 and 4. And the *procedure for setting aside an award under that Act is by motion to the High Court.*

x x x

That has not been done in this case. Instead, an action to enforce the award has been brought, and it is now sought, as I have indicated, really by way of defence, although in name by counterclaim, to set aside that award by reason of misconduct. It is quite clear from a decision of the Court of Appeal which is binding upon me (*Scrimaglio v. Thorrnett & Fehr)* that *misconduct of the arbitrator cannot be pleaded as a defence to an action to enforce the award.* I say no more about that than just that. That decision is binding upon me. It could not be pleaded by way of defence.

It has also been said in *Pedler v Hardly* that it is very doubtful whether it can be pleaded by way of counterclaim. For myself I would put it even higher; I would have thought that it was a fortiori, *because there is no such thing as an action commenced by writ to set aside an award for misconduct of the arbitrator. The Act of 1950 and the Rules of the Supreme Court lay down the procedure that it is on motion to the High Court and not by action, and if there cannot be a substantive claim in an action to set aside an award for misconduct, when one bears in mind that a counterclaim is a substantive claim it seems to me even stronger that there cannot be a counterclaim on that ground.*

Therefore, for that reason alone I would come to the conclusion that *it would be wrong to grant leave to enter this counterclaim*." (e.s)

See also *Klimatechnik Engineering Ltd. v. Skanska Jensen International* (2005-2006) SCGLR 913 and *BCM Ghana Ltd. v Ashanti Goldfields Ltd.* (2005- 2006) SCGLR 602. To the same effect are the views of Lord Mustill in his article "Conservatory and Provisional measure in International

Arbitration, 9th Joint Colloquium, (ICC Publications, 1993) page 118, Lord Saville in "*Denning Lecture*, 1995, Arbitration and the Courts", page 157 and Claude Raymond in his article "The *Channel Tunnel* Case and the Law of International Arbitration", 109 L.Q.R. 337 at 341; referred to by the appellant.

For all these reasons I hold that the trial in the court below of these consolidated cases despite their prior reference to arbitration under the Arbitration Act, 1961, (Act 38) is a nullity for lack of jurisdiction.

The appeal is accordingly allowed and the judgments of the High Court and Court of Appeal are set aside. The consolidated cases are remitted to the trial court for them to be dealt with in accordance with the applicable law

(SGD) **W. A. ATUGUBA**

JUSTICE OF THE SUPREME COURT

(SGD) **S. O. B. ADINYIRA (MRS.)**

JUSTICE OF THE SUPREME COURT

(SGD) **N. S. GBADEGBE**

JUSTICE OF THE SUPREME COURT

(SGD) **A. A. BENIN**

JUSTICE OF THE SUPREME COURT

(SGD) **J. B. AKAMBA**

JUSTICE OF THE SUPREME COURT

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