

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Hatton National Bank Limited
Petitioner-Petitioner-Appellant

SC Appeal 63/2013

SC(HC) LA Application No.110/2012
High Court Colombo ARB/388.2011

Vs

Sella Hennadige Chandrasiri
Respondent-Respondent-Respondent

Before : Buwaneka Aluwihare PCJ
Sisira J De Abrew J
Anil Gooneratne J

Counsel : Palitha Kumarasinghe President's Counsel for the
Petitioner-Petitioner-Appellant.
Sajeevi Siriwardene with Sandamal Madurawela for the
Respondent-Respondent-Respondent

Argued on : 13.7.2015

Written Submissions

tendered on : By the Petitioner-Petitioner-Appellant on 27.7.2015

By the Respondent-Respondent-Respondents on 16.6.2014

Decided on : 15.10.2015

Sisira J De Abrew J.

This is an appeal against the judgment of the learned High Court Judge of Colombo dated 18.12.2012. The learned High Court Judge, by the said judgment, dismissed the application of the Petitioner-Petitioner-Appellant (hereinafter referred to as the petitioner) who, in terms of the provisions of

Section 31 of the Arbitration Act No 11 of 1995, made an application to enforce the arbitral award dated 17.12.2010. Being aggrieved by the said judgment the petitioner has appealed to this court. This court, by its order dated 5.4.2013, granted leave to appeal on questions of law set out in paragraphs 26(1), 26(2), 26(4), 26(5), 26(7) and 26 (9) of the petition of the petitioner dated 31.12.2012 which are reproduced below.

1. Did the learned High Court Judge err in law in failing to appreciate that in the absence of an application to set aside the award in question in terms of Section 32 of the Arbitration Act No 11 of 1995, the High Court, in law, is bound to enforce the award?

2. Did the learned High Court Judge err in law in failing to appreciate or in failing to give proper effect to the provisions of Section 31(6) of the Arbitration Act No 11 of 1995?

3. Did the learned High Court Judge err in law in failing to appreciate that the arbitration proceedings are not 'actions' within the meaning and for the purpose of the Civil Procedure Code and consequently, the provisions of Section 406 of the Civil Procedure Code has no application to such arbitration proceedings?

4. Did the learned High Court Judge err in law in holding that the arbitration proceedings in the application before the High Court are prescribed in law when the provisions of the Prescription Ordinance has no application to the arbitration proceedings.

5. Did the learned High Court Judge err in law in holding that suppression of a material fact disentitles the Petitioner to relief under Section 31 of the Arbitration Act No.11 of 1995 when the remedy provided by Section 31 of the Arbitration Act No 11 of 1995 is not a

discretionary or equitable relief but is a right given by law to a party to an arbitration agreement pursuant to which an arbitral award is made?

6. Did the learned High Court Judge err in law in ordering 'penal costs' against the Petitioner in a sum of Rs.100,000/- when the law does not provide such a penalty?

The Respondent-Respondent (hereinafter referred to as the Respondent) obtained financial facilities from the Petitioner amounting Rs.925,000/- upon an agreement signed by both parties on 3.4.1997. The Respondent, by the said agreement agreed to repay the said amount with interest in 48 installments. Since the Respondent defaulted repayment of the said financial facilities, the Petitioner terminated the agreement and filed an action in the District Court of Monaragala. However the said case was dismissed by the District Judge on 3.12.2008 as the Petitioner failed to pursue the action. Thereafter the petitioner by writing dated 14.12.2009 gave due notice to the Respondent that he would refer the dispute to arbitration and requested him to respond to the said notice in terms of clause 25 of the agreement. As the Respondent failed to respond to the said notice, the dispute was taken up before the sole arbitrator appointed by the Petitioner. The Arbitration centre, by letter dated 17.8.2010, informed the Petitioner and the Respondent the date, time and place of the inquiry of the arbitration and requested the parties to be present on the said date. The Respondent did not respond to the said notice. Thereafter the evidence was led before the Arbitrator and he (the Arbitrator), by his award dated 17.12.2010, made an order that the Respondent should pay Rs. 1,241,917/20 together with interest at the rate of 36% per annum.

Arbitration centre, by letter dated 23.12.2010, communicated the award to the Petitioner and the Respondent. The Petitioner, acting in terms

of Section 31 of the Arbitration Act No.11 of 1995, filed an application in the High Court of Colombo for enforcement of the arbitral award. The learned High Court Judge, by his judgment dated 8.12.2012, dismissed the application and awarded penal cost amounting to Rs.100,000/-. Being aggrieved by the said judgment, the Petitioner has appealed to this Court. The learned High Court Judge observed the following grounds in refusing the said application.

1. As the Petitioner's case, filed in the District Court of Monaragala with regard to the same dispute, had been dismissed by the District Court, he is precluded from filing subsequent action regarding the same dispute.

2. The Petitioner by opting to institute action in the District Court of Monaragala is thereby prevented from referring the same dispute to arbitration.

3. The Petitioner has not disclosed to the Arbitrator the fact that action had been filed in the District Court of Monaragala.

4. The Petitioner's cause of action is prescribed in law and is therefore incapable of being referred to Arbitration and therefore the reference to arbitration is null and void.

5. The arbitral award is null and void in law as it had been obtained by misrepresentation, suppression of facts and fraudulent means.

6. The application for enforcement of the arbitral award has been made fraudulently and maliciously.

Learned President's Counsel for the Petitioner contended that the learned High Court Judge could not have considered the above grounds in view of Section 31(6) of the Arbitration Act. Learned Counsel for the Respondent

however contended that that the above grounds could be considered by the Learned High Court Judge. I now advert to the above contentions.

It is significant to note that the Respondent has not made an application to set aside the arbitral award in terms of Section 32 of the Act. How does a person affected by an arbitral award seek to set aside such an award? What is the procedure that he should adopt? The answers to the above questions are found in Section 32 of the Arbitration Act which is reproduced below.

“(1) An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of the receipt of the award

(a) where the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the Law to which the parties have subjected it or, failing any indication on that question, under the law of Sri Lanka ; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration:

Provided however that, if the decision on the matters submitted to arbitration can be separated from those not so submitted ,only the

part of the award which contains decisions on matters not submitted

to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act: or

(b) where the High Court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka ; or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka.

(2) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.”

An examination of Section 32 of the Arbitration Act reveals that if a person is dissatisfied with the arbitral award which was made against him, such person must, within sixty days of the award, make an application to the High Court to set aside the award and he must establish one of the grounds set out in Section 32 of the Arbitration Act. It has to be stated here that the Respondent had not made an application to the High Court under section 32 of the Arbitration Act. The Petitioner filed the application in the High Court for

enforcement of the arbitral award under Section 31 (6) of the Act. In order to arrive at the correct decision in this case, it is necessary to consider Section 31(1) and 31 (6) of the Arbitration Act which are reproduced below.

Section 31(1) of the Arbitration Act

“A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award.”

Section 31 (6) of the Arbitration Act:

“Where an application is made under subsection (1) of this section and there is no application for the setting aside of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in Section 33 and 34 of this Act it shall on a day of which notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered.”

It is undisputed that the Petitioner filed an application under Section 31 (1) of the Arbitration Act (hereinafter referred to as the Act) within the time stipulated

in the said section. It is also undisputed that the High Court issued notice to the parties in terms of Section 31(6) of the Act.

When I consider Section 31(6) of the Act, it appears that when an application is made under Section 31 (1) of the Act for the enforcement of the arbitral award, the High Court Judge must, before making an order under Section 31(6) of the Act, be satisfied that

- (1) there is no application for the setting aside of the arbitral award under Section 32 of the Act. OR
- (2) court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in Section 33 and 34 of the Act.

An examination of Section 31(6) of the Act reveals that that the High Court, in an application made under Section 31(1) of the Act, cannot go beyond the above limits and that the High Court cannot consider any other grounds other than the grounds referred to above. In my view, in the absence of an application to set aside the arbitral award in terms of Section 32 of the Act, the High Court, in law, is bound to enforce the award.

Sections 33 and 34 of the Act deal with foreign arbitration. The arbitral award in question in this case is not a foreign arbitral award. It was made in Sri Lanka. Therefore the second criterion cited above has no application to the present case. It is undisputed that there was no application before the High Court

for the setting aside of the arbitral award in terms of Section 32 of the Act. When I consider the above matters, I am of the opinion that the learned High Court Judge was wrong when he considered the grounds set out in his judgment which I have stated in this judgment.

Learned counsel for the Respondent tried to contend that in England, India and Malaysia ground of prescription is considered in an application for enforcement of arbitral award. I would like to state here that in those countries the relevant Acts have brought legal provisions to the effect that plea of prescription would apply to an application for enforcement of arbitral award. But the Arbitration Act in Sri Lanka does not contain such provisions.

The learned High Court Judge, in his judgment, has ordered penal costs against the Petitioner in a sum of Rs.100,000/-. In my view the law does not provide for imposition of such a penalty. The penalty costs ordered by the learned High Court Judge cannot be permitted to stand.

In view of the above reasons, I answer the 1st, 2nd and 6th questions of law in favour of the Petitioner. In view of the reasons given in this judgment, it is not necessary to answer 3rd, 4th and 5th questions of law raised by the Petitioner.

For the above reasons, I hold the view that the judgment of the learned High Court Judge cannot be permitted to stand. I therefore set aside the judgment of the learned High Court Judge dated 18.12.2012.

High Court is directed to enforce the arbitral award and enter judgment and decree in terms of the arbitral award as provided in Section 31(6) of the Arbitration Act No 11 of 1995. The appeal is allowed. No costs

Appeal allowed.

Judge of the Supreme Court.

Buwenaka Aluwihare PC,J

I agree.

Judge of the Supreme Court.

Anil Goonertane J

I agree.

Judge of the Supreme Court.