

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

SC CHC Appeal No. 14/2014

High Court of Colombo

Case No: HC/ARB/409/2011

People's Merchant PLC,  
(formerly People's Merchant Bank PLC),  
No. 21,  
Navam Mawatha,  
Colombo 03.

**PETITIONER**

-Vs-

Udaya Saman Subhasinghe,  
No. 125/5/1,  
Monarathenna Watta,  
Palliya Road,  
Bogamuwa,  
Yakkala.

**RESPONDENT**

**AND NOW BETWEEN**

Udaya Saman Subhasinghe,  
No. 125/5/1,  
Monarathenna Watta,  
Palliya Road,

Bogamuwa,  
Yakkala.

**RESPONDENT-APPELLANT**

-Vs-

People's Merchant PLC,  
(formerly People's Merchant Bank PLC),  
No. 21, Navam Mawatha,  
Colombo 03.

**PETITIONER-RESPONDENT**

Before: **MURDU N. B. FERNANDO PC J**

**P. PADMAN SURASENA J**

**A. H. M. D. NAWAZ J**

Counsel: S. N. Vijithsing for the Respondent-Appellant

Lasantha Mudalige for the Petitioner-Respondent.

Argued on: 18-02-2021

Decided on: 23-06-2021

**P. Padman Surasena J**

The Petitioner - Respondent filed the Petition dated 13-12-2011 and an Affidavit in the High Court of Colombo praying for a decree, in accordance with the award dated 22-02-2011, made in the arbitration, held in accordance with the agreement between the Petitioner - Respondent and the Respondent Appellant. The purpose of the decree so prayed by the Petitioner – Respondent, was to enforce the said arbitral award in terms of Section 31 of the Arbitration Act No. 11 of 1995 (hereinafter sometimes referred to as 'the Arbitration Act' or 'the Act').

Opposing the above claim, the Respondent - Appellant filed his Statement of Objections dated 07-08-2012 praying *inter alia* for an order to set aside the said arbitral award and for the dismissal of the Petition of the Petitioner-Respondent.

After the inquiry, the learned Judge of the High Court by his order dated 10-12-2012, directed to enforce the said arbitral award and enter a decree as per the said arbitral award.

The Respondent - Appellant thereafter filed the Notice of Appeal dated 24-12-2012, and subsequently also filed a Petition of Appeal addressed to this Court dated 31-01-2013 which includes a prayer to set aside the aforesaid order of the High Court.

It is noteworthy that the said Petition of Appeal does not disclose any legal provision by virtue of which the Respondent - Appellant could have become entitled to file such an appeal to this Court.

When the said appeal was taken up before this Court for argument, the learned Counsel who appeared for the Petitioner - Respondent raised a preliminary objection to the maintainability of this appeal stating that there is no legal provision which enables the Respondent-Appellant to file such an appeal to this Court against the impugned order of the High Court. In other words, it was the submission of the learned Counsel for the Petitioner - Respondent that the law has not provided a right of appeal for the Respondent - Appellant in the instant case.

The Respondent - Appellant has lodged the instant appeal against an order made by the High Court under section 31 (1) of the Arbitration Act which states as follows.

*"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 said Act has set out, as to what the High Court must do when such an application is made.

It reads as follows.

*"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 sections 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".*

To ascertain whether any appeal lies against an order made by the High Court under section 31 of the Act, one has to consider the provisions in section 37 of the Arbitration Act.

Section 37(1).

*"Subject to subsection (2) of this section no appeal or revision shall lie in respect of any order, judgment or decree of the High Court in the exercise of its Jurisdiction under this Act except from an order, judgment or decree of the High Court under this Part of this Act".*

The High Court has pronounced the judgment impugned in the instant appeal under section 31 of the Arbitration Act No. 11 of 1995. The said section (s. 31) is in Part VII of the said Act which according to its heading, deals with the applications to courts relating to awards (including recognition and enforcement of foreign awards). As section 37 is also in part VII of the Act, the phrase *"this Part of this Act"* in section 37(1) is a reference to part VII of the Arbitration Act. Therefore, it is only under section 37 (2) of the Act that an appeal could, if at all, lie to this Court in the instant case.

However, an appeal would be possible under section 37(2) only if the Supreme Court grants leave to appeal on a question of law.

The said provision is as follows.

Section 37(2).

*"An appeal shall lie from an order, judgment or decree of the High Court referred to in subsection (1) to the Supreme Court only on a question of law and with the leave of the Supreme Court first obtained".*

This means that the Respondent - Appellant in the instant case should necessarily have first obtained the leave of the Supreme Court in respect of the instant appeal.

Moreover, the Respondent - Appellant should also have submitted a question of law for the consideration of the Supreme Court for granting of leave. Admittedly, the Respondent - Appellant has not done any of the above. In the above circumstances this Court is unable to consider the instant appeal as an appeal filed under section 37 of the Arbitration Act No. 11 of 1995.

It would be appropriate to refer to the case of Board of Investment of Sri Lanka Vs. Million Garment (Pvt) Ltd,<sup>1</sup> at this stage. In the said case, the Supreme Court was called upon to decide on the time limit for filing applications for leave to appeal under Section 37(2) of the Arbitration Act. The learned counsel who appeared for the respondent in that case, raised a preliminary objection stating that the application for leave to appeal was time-barred as the judgment of the High Court was pronounced on 14<sup>th</sup> May 2012, and the application for leave to appeal was lodged in the registry of this Court on 26<sup>th</sup> June 2012 (on the forty-third day after the pronouncement of the impugned judgment). He therefore argued that the petitioner in that case had filed the said application for leave to appeal outside the time limit prescribed by law, for filing of such applications. His Lordship Saleem Marsoof PC J having considered the provisions relevant to the issue at hand, stated as follows.

*".... I am fortified in my decision that an application for leave to appeal challenging a decision of the High Court to file of record an arbitral award and pronounce judgement and enter decree accordingly has to be lodged within six weeks of the said judgment and decree, since the language of Section 37 (1) of the Arbitration Act manifests a clear legislative intent to curtail appeals from orders and awards of arbitral tribunals with a view to giving full effect to the concept of party autonomy and maintaining the efficacy of the arbitral process. More so, because Section 37 (2) of the said Act seeks to confine appeals to any order, judgement or decree of the High Court made under Part VII of the Act relating to the enforcement and setting aside of arbitral awards by limiting them to those involving a question of law and imposing the further*

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<sup>1</sup> SC (HC) LA 58/2012; Decided on 24.10.2014.

*requirement of obtaining the leave of the Supreme Court for proceeding with the same, with the same objectives in mind. ...."*

The learned counsel for the Respondent - Appellant, Mr. Vijith Sing conceded that the Respondent - Appellant has not first obtained the leave of the Supreme Court on a question of law in the instant appeal. However, he thereafter submitted that this Court nevertheless has jurisdiction to entertain this appeal both under Article 127 of the Constitution and in the exercise of revisionary powers of this Court. It is to the said arguments I would now turn.

Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka is as follows.

*"127. (1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.*

*(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance."*

Article 127 (2) sets out what this Court can do in the exercise of its appellate jurisdiction and therefore the said Article comes into operation only when it considers an appeal lawfully filed before it.

Article 127 (1) has specifically subjected itself to the other provisions of the Constitution. This is clear from the wording "*The Supreme Court shall, subject to the Constitution,..*", found in that Article.

Thus, Article 127 (1) must be read with Article 128 of the Constitution. This is because Article 128 is another provision in the Constitution which has specified several channels through which any appeal can reach this Court.

It is as follows.

Article 128

*"(1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings;*

*(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:*

*Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.*

*(3) Any appeal from an order or judgement of the Court of Appeal, made or given in the exercise of its jurisdiction under Article 139, 140, 141, 142 or 143 to which the President, a Minister, a Deputy Minister or a public officer in his official capacity is a party, shall be heard and determined within two months of the date of filing thereof.*

*(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament."*

As Article 128 (1), (2), (3) refers only to orders or judgements of the Court of Appeal they have no relevance to the instant case as it is an appeal against an order made by the High Court. Thus, the provision applicable to the instant case is clearly Article 128 (4) of the Constitution and the 'law passed by parliament' relevant to the instant case is section 37 in part VII of the Arbitration Act.

I have already dealt with that section and held that the Respondent - Appellant in the instant case, has not first obtained, the leave of the Supreme Court on a question of law, as required by that section and therefore the instant appeal is not an appeal filed under section 37 of the Arbitration Act.

For the above reasons, I have no hesitation to reject the above argument that this Court nevertheless has jurisdiction to entertain this appeal under Article 127 of the Constitution.

Although the learned counsel for the Respondent - Appellant, Mr. Vijitha Sing, submitted that this Court has jurisdiction to consider this appeal in the exercise of its revisionary powers, this Court has not been vested with such power by any law. Mr. Vijith Sing, also did not refer to any provision of law under which this Court could have exercised such revisionary power. In my view there is no merit in this argument and it should suffice to say that 'the Supreme Court is a creature of statute and its powers are statutory' as stated by His Lordship Amerasinghe J in the case of Jeyaraj Fernandopulle vs. Premachandra De Silva and Others.<sup>2</sup>

In the case of Mahesh Agri Exim (Pvt) Ltd Vs. Gaurav Imports (Pvt) Ltd and Others,<sup>3</sup> this Court had to consider the question whether this Court has revisionary jurisdiction against orders made by the Commercial High Court. I had the privilege of agreeing with His Lordship Justice Priyantha Jayawardena who stated in that case, the following.

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<sup>2</sup> 1996 (1) SLR 70.

<sup>3</sup> SC Revision No. 02/2013 Decided on 30-07-2019.



*“The Counsel for the Petitioner submitted that a grave prejudice has been caused to his client and therefore, the Supreme Court should intervene in this matter. He further submitted that this is a fit and proper case to exercise revisionary jurisdiction and/or inherent powers of this Court.*

*We are of the opinion that this Court has no jurisdiction to entertain Revision applications arising from the orders made by the Commercial High Court. Further, the inherent powers of this Court cannot be entertained in this application.”*

Thus, I am of the view that this Court does not have revisionary powers to intervene and consider the instant appeal. For the foregoing reasons, I uphold the Preliminary Objection raised by the Respondent - Appellant. I proceed to dismiss this Appeal.

**JUDGE OF THE SUPREME COURT**

**MURDU N. B. FERNANDO PC J**

I agree,

**JUDGE OF THE SUPREME COURT**

**A.H. M. D. NAWAZ J**

I agree,

**JUDGE OF THE SUPREME COURT**