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

*In the matter of an appeal with Leave to Appeal obtained from this Court.*

**LANKA ORIX LEASING COMPANY LIMITED.**
Presently of No. 100/1, Sri Jayawardenapura Mawatha, Rajagiriya.

**PETITIONER**

SC Appeal No. 113/2014
SC Appeal No: SC (HC) LA 67/2013
Case No. HC/ARB/1263/02

**VS.**

**WEERATUNGE ARACHCHIGE PIYADASA**
Carrying on business as Sole Proprietor under the name, style, and firm "Weeratunge Textile", of No. 12, Super Market, Hakmana.

**RESPONDENT (DECEASED)**

**ELLEGODA GAMAGE KAMALA RANI WEERATUNGE**
No. 12, Main Street, Hakmana.

**SUBSTITUTED RESPONDENT**

**AND NOW BETWEEN**

**LANKA ORIX LEASING COMPANY LIMITED.**
Presently of No. 100/1, Sri Jayawardenapura Mawatha, Rajagiriya.

**PETITIONER/APPELLANT**

**VS.**

**WEERATUNGE ARACHCHIGE PIYADASA**
Carrying on business as Sole Proprietor under the name, style, and firm "Weeratunge Textile", of No. 12, Super Market, Hakmana.

**RESPONDENT-RESPONDENT (DECEASED)**

**ELLEGODA GAMAGE KAMALA RANI WEERATUNGE**
No. 12, Main Street, Hakmana.

**SUBSTITUTED RESPONDENT-RESPONDENT**

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| **BEFORE:** | Nalin Perera, CJ.<br>Priyantha Jayawardena, PC, J.<br>Prasanna Jayawardena, PC, J. |
| **COUNSEL:** | Shanaka de Livera for the Petitioner-Appellant.<br>Priyantha Alagiyawanna with Gevindu Senevirathne for the Substituted Respondent-Respondent. |
| **ARGUED ON:** | 12th November 2018 |
| **WRITTEN SUBMISSIONS FILED:** | By the Appellant, on 03rd June 2016 and 11th December 2018.<br>By the Substituted Respondent-Respondent on 20th May 2015 and 11th December 2018. |
| **DECIDED ON:** | 05th April 2019 |

Prasanna Jayawardena, PC, J,

This appeal arises out of an application made to the High Court of Colombo [exercising Civil Jurisdiction] under section 31 (1) of the Arbitration Act No. 11 of 1995 ["the Act"] to enforce an arbitral award.

The petitioner-appellant ["appellant"] is a Company which, *inter alia*, carries on Finance Leasing Business. On 26th February 1998, the appellant entered into a lease agreement with the respondent-respondent ["the respondent"]. By that lease agreement, the appellant, who was the owner of a motor vehicle, leased the motor vehicle to the respondent for a period of thirty months subject to the respondent's agreement and undertaking to pay 30 monthly lease rentals of Rs.13,134/-[plus BTT] to the appellant. The respondent also agreed and undertook to pay interest on the amount of any delayed lease rentals to the appellant. The respondent paid only a few monthly lease rentals. Thereafter, the respondent defaulted in paying the monthly lease rentals due to the appellant under the lease agreement. Therefore, the appellant terminated the lease agreement and demanded payment of the monies due thereunder. The lease agreement specified that, upon termination of the lease agreement due to non-payment of lease rentals, the respondent was bound and obliged to return the motor vehicle to the appellant [who was its owner] or pay the value of the motor vehicle to the appellant. Therefore, upon termination of the lease agreement, the appellant also demanded that the respondent return the motor vehicle to the appellant or pay its value to the appellant. The respondent did neither.

The lease agreement provided that a dispute arising out of the lease agreement should be resolved by arbitration. By a reference to arbitration dated 22nd September 2000, the appellant referred its claim against the respondent to arbitration. The claim was for the sum of Rs.618,107/- together with interest on *"the balance rentals receivable of Rs. three hundred and fifty-three thousand and one hundred and ninety seven rupees".* [Rs.353,197/-]. These were the monies due as at 20th September 2000 under the lease agreement. The appellant also claimed the return of the appellant's motor vehicle or, in the alternative, the payment of its value, being a sum of Rs.300,000/-.

In its statement of claim filed in the course of arbitration proceedings before the Arbitrator, the appellant stated that the sum due, as at 24th January 2001, was Rs. 667,487/- with interest on the aforesaid sum of Rs. 353, 197/- from 24th January 2001 until payment in full. The increase in the total sum due from Rs. 618,107/- to Rs. 667,487/-, is, obviously, due to the accrual of interest on the sum of Rs. 353,197/- during the period of a little more than four months from 20th September 2000 to 24th January 2001.

On 04th July 2001, the respondent appeared at the hearing of the arbitration. The proceedings of that day show that the Arbitrator had taken pains to ensure that the respondent, who had not retained an Attorney-at-Law to represent him, had a full understanding of the claim made against him by the appellant. The respondent has acknowledged that he received the statement of claim and was well aware of the monies claimed from him.

Thereafter, the appellant and the respondent have arrived at a settlement of the dispute in terms of which the respondent agreed that he is liable to pay the appellant the sum of Rs. 667,487/- together with interest on a sum of Rs. 353, 197/- from January 2001, until payment in full, and also that he was liable to pay the claimant the value of the vehicle leased to him, which was Rs. 300,000/-. It follows that upon payment of that sum of Rs. 300,000/-, the respondent was entitled to retain possession of the vehicle.

The Arbitrator has read and explained the aforesaid terms of settlement to the parties and, thereafter, entered an arbitral award on the lines of these terms of settlement.

Since the respondent did not comply with his obligations under the arbitral award, the appellant made an application dated 20th June 2002 to the High Court [exercising Civil Jurisdiction] for enforcement of the arbitral award. The application was made under section 31 of the Act.

The respondent filed a statement of objections praying that the appellant's application be refused on the following grounds: he claimed that the arbitral award was not in conformity with section 14 (a) and section 25 of the Act, that the arbitral award was not served on him; that he did not agree to the aforesaid terms of settlement; and that he was tricked into signing the settlement and subjected to injustice.

The inquiry into the appellant's application was decided upon written submissions filed by the parties.

It should be mentioned that the respondent did not make a separate application under section 32 of the Act seeking to set aside the arbitral award.

In his Order dated 16th July 2013, the learned High Court Judge rejected the objections raised by the respondent, holding that the respondent was not under any incapacity; that the respondent had received due notice; and that the respondent was well aware of the terms of settlement which were agreed on between the parties. While those factual findings of the learned High Court Judge are well supported by the documents before the court, the learned Judge has erroneously referred to section 34 (1) (a) (i) and

section 34 (1) (a) (ii) of the Act. These provisions of the Act are part of section 34 of the Act which deals with the circumstances in which the recognition or enforcement of a *foreign* arbitral award may be refused. Thus, these sections of the Act to which the learned Judge referred are irrelevant to the application before the High Court which deals with an arbitral award made in Sri Lanka. However, the reference to the wrong provisions of the Act does not take away from the fact that the learned Judge was correct when he held that the objections raised by the respondent had no substance.

Thereafter, the learned High Court Judge states in his Order that he wishes to consider whether the arbitral award was in conflict with the public policy of Sri Lanka as contemplated in section 34 (1) (b) (ii) of the Act. Here too, the High Court's reference to section 34 (1) (b) (ii) of the Act is misplaced and irrelevant because that provision of the Act deals with the grounds on which the High Court can refuse to enforce a *foreign* arbitral award and states that the High Court is entitled to refuse to enforce a foreign arbitral award if the recognition and enforcement of that award would be *"contrary to the public policy of Sri Lanka"*.

Nevertheless, the learned Judge went on to hold that the arbitral award was in conflict with the public policy of Sri Lanka based on his view that the interest awarded to the appellant exceeded the principal amount due and, therefore, the arbitral award contravened section 5 of the Civil Law Ordinance. On that basis, the High Court dismissed the appellant's application to enforce the arbitral award.

The appellant sought Leave to Appeal from this Court and was granted Leave to Appeal on the following questions of law which are reproduced verbatim:

*(1) The Learned Judge of the High Court has not considered that this is a Leasing Transaction and not a Loan, and that the provisions of the Civil Law Ordinance have no application to this transaction.*

*(2) The Learned Judge of the High Court has not considered that No application has been made to set aside the Award by the Respondent within the requisite time of 60 days (section 32 (1) of the Arbitration Act of 1995).*

The second question of law, though imprecisely framed, raises a central issue of whether the High Court had jurisdiction to set aside the arbitral award on the grounds that the arbitral award was in conflict with the public policy of Sri Lanka when the respondent had not made an application under section 32 (1) of the Act praying that the arbitral award be set aside.

As mentioned earlier, the appellant's application to enforce the arbitral award has been made under and in terms of sections 31 (1) to 31 (5) of the Act. There is no suggestion that the appellant has failed to comply with the procedural and other requirements specified in these sections.

In these circumstances, section 31 (6) of the Act specifies that:

"*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.* "

Thus, it is clear that, where an applicant who seeks to enforce an arbitral award [either an arbitral award made in Sri Lanka or a foreign arbitral award] has filed an application under section 31 (1) and the Court is satisfied the applicant has complied with the requirements of section 31 (2) to section 31(5) of the Act, section 31 (6) of the Act requires the Court to file the arbitral award and give judgment and enter decree according to the arbitral award. It is also clear from section 31 (6) that the only instances in which the Court may refrain from recognizing and enforcing the arbitral award are:

(i) Where there is an application made by another party to the arbitration to set aside the arbitral award under section 32 of the Act and pending its determination; *or*

(ii) The Court sees cause to refuse the recognition and enforcement of the arbitral award under the provisions contained in section 33 and section 34 of the Act.

However, in the present case, the respondent has not made an application under section 32 of the Act to set aside the arbitral award and, therefore, ground (i) stated above will not apply. Section 33 and section 34 of the Act are irrelevant to the present case since they relate only to foreign arbitral awards and the arbitral award in the present case was made in Sri Lanka. Therefore, ground (ii) stated above will not apply either.

Consequently, the learned High Court Judge had no jurisdiction to set aside the arbitral award under the provisions of section 31 (6) of the Act in the course of determining the appellant's application made under section 31 (1) to enforce the arbitral award.

At this stage, it will also be useful to briefly examine the circumstances in which an arbitral award made in Sri Lanka may be set aside by a Court.

A party who wishes to set aside an arbitral award made in Sri Lanka must file an application under section 32 (1) and pray to have the arbitral award set aside. This must be done within sixty days of that party receiving the arbitral award - *vide:* section 32 (1)

Having filed an application under section 32 (1) praying to set aside the arbitral award, he may achieve that result under section 32 (1) (a) upon furnishing proof, to the satisfaction of the Court, of the existence of any one or more of the four grounds specified in section 32 (1) (a) (i) to section 32 (1) (a) (iv) - *ie:* that a party to the arbitration was under an incapacity, or had no notice of the appointment of the arbitrator, or the arbitral proceedings or that the arbitral award dealt with matters outside the scope of the arbitration, or that the composition of the arbitral tribunal was flawed, as more fully set out in these provisions.

As mentioned earlier, the learned High Court Judge has firmly rejected that any of these grounds existed and the respondent has not contested those determinations by the High Court. Therefore, no further consideration of these grounds is required.

An arbitral award made in Sri Lanka may also be set aside in the course of the determination of an application under section 32 (1) of the Act if the High Court is satisfied of the existence of either or both of the grounds specified in section 32 (1) (b) - *ie:* that the subject matter of the dispute is not capable of settlement by arbitration under the law in Sri Lanka as described in section 32 (1) (b) (i) and/or that the arbitral award is in conflict with public policy as described in section 32 (1) (b) (ii).

It should be mentioned that the High Court is entitled to set aside an arbitral award made in Sri Lanka in terms of section 32 (1) (b) (i) and/or section 32 (1) (b) (ii) of the Act either acting on an application made under section 32 (1) claiming that the arbitral award should be set aside in terms of section 32 (1) (b) (i) and/or section 32 (1) (b) (ii) of the Act or acting *ex mero motu,* but based strictly upon the material placed before the Court.

It is patently clear from a reading of section 32 (1) of the Act, that the Court could exercise that power conferred on it by section 32 (1) (b) (i) *and* section 32 (1) (b) (ii) of

the Act and set aside an arbitral award made in Sri Lanka *only* in the course of determining an application made under section 32 (1) of the Act which prays to set aside an arbitral award made in Sri Lanka.

Thus, in SOUTHERN GROUP CIVIL CONSTRUCTION (PVT) LTD vs. OCEAN LANKA (PVT) LTD [2002 1 SLR 190], in comparable circumstances, this Court held that an arbitral award made in Sri Lanka may be set aside on any of the grounds set out in section 32 (1) (a) or 32 (1) (b) of the Act *only* in cases where the party to the arbitration has made an application under section 32 (1) of the Act praying that the arbitral award be set aside.

Bandaranayake J, as she then was, held [at p.195-196] "*A plain reading of section 32 (1) reveals clearly that the opening paragraph applies to both sub paragraphs (a) and (b) of section 32 (1). The difference between the two sub paragraphs (a) and (b) is that the former requires an applicant to furnish proof of four situations, whereas the latter permits the High Court to find and arrive at a conclusion on the two situations which would enable an arbitral award to be set aside. However, for the High Court to find that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka or that the arbitral award is in conflict with the public policy of Sri Lanka, as stated in sub paragraph (b), it would be necessary for the party making an application for setting aside an arbitral award, to adduce necessary material for this purpose in his application filed in terms of section 32 (1).*

*The words in sub paragraph (b) of section 32 (1), 'where the High Court finds' are clearly referable to the application made in terms of section 32 (1) and the material adduced in such application. A finding cannot be made by the High Court in terms of sub paragraph (b) of section 32 (1) other than on the averments of the application and the material contained therein. Therefore, I am of the view that the High Court was in error when it came to the finding that it has the power ex mere motu to set aside an award on the grounds stated in sub paragraph (b) of section 32 (1) even in the absence of material supporting such a finding being contained in the application.*

*The next question that has to be considered relates to the application of the time bar contained in the opening paragraph of section 32 (1). I have at the commencement of this judgment adverted to the distinction between the respective time periods with which applications could be made for recognition and enforcement on the one hand and to set aside an award on the other. The clear legislative intent in having a shorter time period for setting aside an arbitral award is to ensure that a challenge to the validity of the award should be made early and the party having the benefit of the award may take a longer time to enforce it. Such a distinction is not uncommon to our procedure regulating civil action. Even in the case of a decree of the District Court in a regular*

*action, a party seeking to challenge the validity of the decree has to file the notice of appeal within 14 days and the petition within 60 days, whereas in terms of section 337 of the Civil Procedure Code an application for enforcement could be made within 10 years. Therefore I am of the view that the time bar of sixty (60) days contained in section 32 (1) should be strictly applied and all grounds of challenge with supporting material including the material on the basis of which a party wishes the High Court to come to a finding in terms of section 32 (1) (b), be adduced by an applicant in terms of section 32 in the application.".*

I wish to add that the requirement in section 32 (1) that an application made thereunder to set aside an arbitral award must be made within sixty days of the receipt of the arbitral award, necessarily means that a party who claims that he did not receive a copy of the arbitral award until he was served with notice of the other party's application under section 31 (1) to enforce the arbitral award, will be entitled to make an application under section 32 (1) to set aside the arbitral award within sixty days of being served with notice of the application to enforce the arbitral award.

In this connection, it may be mentioned that section 40 of the Act requires that an application under section 31 (1) to enforce an arbitral award must be by way of a petition with, *inter alia,* the arbitral award or a duly certified copy annexed thereto and that these documents must be served on the other party. Needless to say, in cases where an application under section 32 (1) to set aside an arbitral award is made only upon service of notice of an application for enforcement, the party who has made the application under section 32 (1) to set aside the arbitral award will have to satisfy the High Court that he had not received a copy of the arbitral award prior to service of that notice and that his application to set aside the arbitral award is made within sixty days of service of that notice.

In the present case, the respondent has not made an application under section 32 (1) of the Act to set aside the arbitral award at any stage - not prior to the appellant's application to enforce the arbitral award nor after notice of that application [together with a copy of the arbitral award] was served on the respondent. The fact that notice of the application under section 31 (1) to enforce the arbitral award [together with a copy of the arbitral award] was served on the respondent, is not in dispute.

In these circumstances, the learned High Court Judge was not empowered to set aside the arbitral award on the ground that the arbitral award was in conflict with the public policy of Sri Lanka, which is a ground set out in section 32 (1) (b) (ii) of the Act.

It should be mentioned here that the resolution of disputes by arbitration is a result of parties to a contract deciding that any disputes between them arising out of the contract

must be resolved by arbitral proceedings and by their choosing to be bound by an arbitral award entered in the course of such arbitral proceedings.

In these circumstances, the power of the High Court to set aside an arbitral award is necessarily confined to the power vested in the High Court within the four corners of the Act. The High Court cannot go on a voyage of its own and purport to set aside an arbitral award other than in the exercise of the powers expressly conferred on the Court by the Act.

For the reasons set out earlier, the second question of law question of law is answered in the affirmative. Consequently, this appeal has to be allowed.

In view of the aforesaid conclusion, there is no need to consider the first question of law.

The petitioner-appellant's appeal is allowed. The Order dated 16th July 2013 of the High Court is set aside. The High Court is directed to proceed to file the arbitral award dated 04th July 2001 and give judgment according to the award in terms of the provisions of section 31 (6) and other relevant provisions of the Arbitration Act. The parties will bear their own costs.

Judge of the Supreme Court

Nalin Perera CJ
I agree.

Chief Justice

Priyantha Jayawardena, PC J
I agree.

Judge of the Supreme Court