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

In the matter of an application for Leave to Appeal in terms of Section 37 (2) of the Arbitration Act No. 11 of 1995 against the judgment of the High Court in Case No. HC (Civil) 100/2015 ARB, dated 20.10.2017.

Narendra Thillainathan,
29, Hillcrest Road, Purely,
Surrey CR8 2JF, United Kingdom.

Presently of;
271, Maddison House,
226, High Street,
Croydon CR9 1DF, United Kingdom.

S.C. Appeal No. 200/2018 **Respondent-Appellant**
SC/HC/LA 118/2017
H.C. (Civil) No. 100/2015 ARB **Vs.**

1. Mohomed Khan,
   No. 02, Exeforde Ave,
   Ashford TW15 2EF,
   Middlesex, United Kingdom.

   And also of;
   P.O. Box 31720,
   United Arab Emirates.

   Claimant-Respondent

2. Spencer Services Limited,
   19-20 Bourne Court,
   Southend Road,
   Woodford Green,
   Essex IG8 8HD, United Kingdom.

Formerly of;
29, Hillcrest Road, Purely,
Surrey CR8 2JF, United Kingdom.

Respondent-Respondent

AND NOW BETWEEN

Narendra Thillainathan,
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Surrey CR8 2JF, United Kingdom.

Presently of;
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Respondent-Petitioner-Appellant

Vs.

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Formerly of;
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Respondent-Respondent-Respondent

In the matter of an application under Section 32 read with Section 40 of the Arbitration Act No. 11 of 1995.

Spencer Services Limited,
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S.C. Appeal No. 200A/2018
H.C./Civil/101/2015 ARB

Respondent-Petitioner

Vs.

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Respondent-Respondent-Respondent

In the matter of an application under Section 31 read together with Section 40 of the Arbitration Act No. 11 of 1995, for the enforcement of an Arbitral Award dated 18th February 2015.

Mohomed A. Khan,
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Middlesex, United Kingdom.

And also of;
P.O. Box 31720,
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S.C. Appeal No. 200B/2018 **Claimant-Petitioner**
H.C./Civil/89/2016/ARB

Vs.

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Respondent-Respondents

AND NOW BETWEEN

In the matter of an application for Leave to Appeal in terms of Section 37 (2) of the Arbitration Act No. 11 of 1995 against the judgment dated 20.10.2017 made by the High Court of Western Province (Holden in Colombo) in the exercise of its Civil Jurisdiction.

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Respondent-Respondent-Petitioner

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S.C. Appeal No. 200C/2018
H.C./Civil/89/2016/ARB

Claimant-Petitioner

Vs.

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Respondent-Respondent-Respondent

Before: Hon. P. Padman Surasena, J.
Hon. Janak De Silva, J.
Hon. K. Priyantha Fernando, J.

Counsel:

S. A. Parathalingam, PC with Suren de Silva and Nishkan Parathalingam for the Respondent-Petitioner-Appellant

Chanaka de Silva, PC with Uween Jayasinghe for the Claimant-Petitioner-Respondent

Written Submissions:

10.11.2023 by the Respondent-Petitioner-Appellant

07.11.2023 by the Claimant-Petitioner-Respondent

Argued on: 10.10.2023

Decided on: 14.06.2024

Janak De Silva, J.

These four appeals arise from the judgment dated 20th October 2017 of the High Court of the Western Province (Exercising Civil Jurisdiction) holden in Colombo ("Commercial High Court"). It was held that there are no grounds to refuse the enforcement of the amended Arbitral Award dated 18th February 2015 ("Amended Arbitral Award'). The Commercial High Court proceeded to enforce the Amended Arbitral Award.

At the outset, the learned President's Counsel appearing for both parties concurred that all cases fixed for argument, *viz.* SC Appeal Nos. 200/2018, 200A/2018, 200B/2018 & 200C/2018 are cases stemming from one judgment of the Commercial High Court and therefore, it would suffice for this Court to pronounce one judgment in respect of all those cases in a consolidated hearing.

Leave to Appeal was granted on the following questions of law:

(1) Does the said judgment err in law in that the learned High Court Judge has failed to duly appreciate and direct himself on the law on which the Petitioner sought a setting aside of the purported Corrected Award?

(2) Does the said Judgment err in law in that the Learned High Court Judge has failed to provide any reasons as to how the purported corrections in the purported Corrected Award [which has been permitted to be enforced] are permitted or countenanced in terms of Section 27 of the Arbitration Act No. 11 of 1995?

(3) Does the said Judgment err in law in that the learned High Court Judge has failed completely to consider and/or provide any reasons with regard to the objection raised by the Appellant that the Arbitral Tribunal has failed to make the purported corrections within the time period of 14 days as mandated by Section 27 of the Arbitration Act?

Factual Matrix

Admittedly a Loan Agreement dated 31st January 2012 ("Loan Agreement") was entered into between the Claimant-Petitioner-Respondent ("Claimant") and Respondent-Petitioner-Appellant ("Appellant") and Respondent-Respondent-Respondent ("Respondent") as the Borrower.

In terms of the Loan Agreement, a sum of US Dollars Seven Hundred Thousand only (USD 700,000/-) ("Loan Capital Sum") was loaned by the Claimant to the Borrower.

In accordance with Islamic Financing principles, the said Loan Capital Sum was not to attract any interest but attract a profit or return to the Lender computed at the rate of Thirty-Five percent (35%) of the Loan Capital Sum which is US Dollars 122,496/= ("Return").

The Borrower was to repay the Loan Capital Sum together with the Return to the Lender in full on or before 2nd August 2012.

Admittedly the Loan Capital Sum was disbursed. However, the Borrower failed to repay the Loan Capital Sum and the Return before the due date.

In or around February 2014, the Claimant commenced arbitration proceedings in Colombo pursuant to Clause 4.5 of the Loan Agreement. In the Statement of Claim, the Claimant sought an Award jointly and/or severally against the Appellant and Respondent:

> *"A. In a sum of United States Dollars Eight Hundred and Twenty-two Thousand and Four Hundred and Ninety-Six (USD 822,496/=);*
>
> *B. Together with a return on the Capital Sum of United States Dollars Seven Hundred Thousand (USD 700,000/=), calculated at a rate of 35% (or at such other rate as may be determined by the Tribunal) per annum, commencing from the 2nd August 2012 until the full and final settlement of the award;*

C. Cost of Arbitration; and

D. Such other and further reliefs as to this tribunal shall seem meet."

The following admissions were recorded on 4th June 2014:

1. Execution of the Loan Agreement is admitted.
2. It is also admitted that the Borrower received a sum of US $ 700,000 referred to in Clause 2.3 of the Agreement.
3. It is admitted that the Borrower caused a cheque for the sum of British Pounds 500,000 to be given.
4. The Borrower did not refund the sum of US $ 700,000 or any part thereof up to date.
5. The aforesaid cheque for British Pounds 500,000 was presented for payment but dishonoured.

In view of the admissions, the Arbitral Tribunal ("Tribunal") directed the Appellant and the Respondent to begin the case. After obtaining time to lead evidence, they failed to do so.

The Tribunal delivered the award in favour of the Claimant on 18th February 2015 ("Original Award"). The operative part reads as:

> *"We award the Claimant a sum of USD 700,000/= together with a further sum of money calculated at 10% per annum from 02.08.2012 till payment in full."*

The Claimant filed a motion dated 19th February 2015 moving that the Tribunal correct the Original Award in terms of Section 27 (1) (a) of the Arbitration Act No. 11 of 1995 ("Act"). A copy of the motion was served on the Appellant and Respondent. In the motion it was claimed that due to an inadvertent omission and/or clerical error and/or typographical error, the principal amount payable has been stated in the Original Award as USD 700,000/= whereas it should be USD 822,496/=. The Claimant prayed that the Tribunal insert the sum of USD 822,496/= instead of USD 700,000/=.

The Appellant and the Respondent filed a motion dated 23rd February 2015 objecting to the correction. The Tribunal issued a corrected Award ("Amended Award") dated 18th February 2015. Eight corrections were made to the Original Award by replacing the reference to "USD 700,000/=" with "USD 822,496/=".

The challenge to the enforcement of the Amended Award revolves around this change made to the Original Award.

The Appellant seeks to impugn the judgment of the Commercial High Court on the following grounds:

A. The corrections purportedly made to the Original Award are contrary to the Tribunal's own reasoning as contained in their Original Award;
B. The corrections made to the Original Award are not *"errors in computation, any clerical or typographical errors or omissions or any errors of a similar nature"* falling within Section 27 (1) (a) of the Act;
C. The Tribunal has not meaningfully interpreted the words *"with notice"* contained in Section 27 (1) (a) of the Act;
D. The purported corrections of the Tribunal have not been made within 14 days from the receipt of the Claimant's request for the same, in terms of Section 27 (2) of the Act;
E. The Tribunal has purported to correct the Original Award on the basis that it is *"necessary"* and NOT by reasons of the Claimant's application to correct having been *"justified"* as required by Section 27 (2) of the Act;
F. The purported Amended Award is contrary to public policy; and
G. The Tribunal did NOT correct the Original Award "on the same day" as erroneously understood by the learned Commercial High Court Judge.

Amended Award is contrary to Original Award

The learned President's Counsel for the Appellant submitted that the Tribunal had in its Original Award considered whether 35% per annum as a *"profit"* or *"return"* should be awarded. Having so considered, the Tribunal went on to reject the said prayer, and instead, awarded 10% *per annum* in lieu of the 35% *per annum* claimed by the Claimant in his Statement of Claim.

Accordingly, it was contended that in making the Original Award, the Tribunal has concluded, and decided, that the Claimant was entitled to be repaid the Loan Capital Sum (USD 700,000/=), but not, the *"profit"* or *"return"* of 35% that the Claimant claimed.

In order to appreciate this argument, let me begin by examining the reliefs that the Claimant claimed in his Statement of Claim. They are two-fold:

Firstly, in prayer (A), the Claimant sought a sum of US Dollars Eight Hundred and Twenty-two Thousand and Four Hundred and Ninety-Six (USD 822,496/=). This is the total of the *Loan Capital Sum* of USD 700,000/=, as defined in Clause 2.3 of the Loan Agreement, plus the *Return*, as defined in Clause 3.5 of the Loan Agreement, which amounts to USD 122,496/=.

It is important to note that in terms of Clause 3.5 of the Loan Agreement, the total amount of USD 822,496/= was to be paid by 2nd August 2012.

Secondly, in prayer (B), the Claimant sought a *return on the Loan Capital Sum of USD 700,000/=, calculated at a rate of 35% (or at such other rate as may be determined by the Tribunal) per annum,* ***commencing from the 2nd August 2012 until the full and final settlement of the award*** (emphasis added).

Thus, these two prayers dealt with two distinct amounts.

The Loan Agreement is silent on the entitlement of the Claimant to prayer (B). However, in view of the admission of the execution of the Loan Agreement, there was no dispute between the parties on the entitlement of the Claimant to prayer (A).

This is clear upon a consideration of the Additional Issues Nos. 9(a), 9(b) and 10 filed by the Appellant on 22nd July 2014 which reads as follows:

> *"9 (a) Do the words 'this Agreement shall terminate upon the repayment to the lender in full of the Loan capital Sum together with Return contemplated herein, and thereupon the Corporate Guarantee aforesaid too shall expire and become null and void' establish that the "Borrower" under the Loan* ***Agreement is only liable to repay the Loan capital Sum of USD 700,000 together with the Return of USD 122,496?***
>
> *[…]*
>
> *10. Without prejudice and in any event* ***is the maximum amount payable by the "Borrower" under the Agreement limited to USD 822,496 only?***" (emphasis added)

In these circumstances, there is much merit in the submission of the learned President's Counsel for the Claimant that the Tribunal did not have to take any decision thereon.

In fact, the Tribunal did not do so and began the Original Award by correctly stating that "the Claimant is seeking an award jointly and severally against the Appellant and Respondent in a sum of USD 822,496/=."

The Tribunal then considered prayer (A) and concluded that they have no difficulty in holding that the Appellant and Respondent are obliged to pay a sum of USD 700,000/= on or before 2nd August 2012.

That is where the Tribunal fell into grave error by overlooking that the Claimant had, in prayer (A) sought a sum of USD 822,496/= and not USD 700,000/=. In fact, the Claimant does not anywhere in the Statement of Claim seek a sum of USD 700,000/= only.

The Tribunal then proceeds to examine prayer (B) of the Statement of Claim from page 5 of the Original Award. In fact, it cannot be any clearer upon an examination of the following extract from the Original Award:

> *"**RETURN ON THE SUM OF US $ 700,000***
>
> *The next question to be considered is whether the Award should be confined to USD 700,000/= or whether the Claimant is entitled to the claim in prayer (b) of the statement of claim."*

Yet, the Tribunal did so by repeating the grave error made earlier by referring to USD 700,000/= instead of USD 822,496/=.

The rest of the Original Award is an examination of whether the Claimant is entitled to the relief claimed in prayer (B) to the Statement of Claim. The Tribunal did not reject the claim of the Claimant to a sum of USD 122,496/= as ***Return*** (with a capital) as defined in the Loan Agreement and claimed in prayer (A) in the Statement of Claim. All references to several extracts from the Original Award relied on by the Appellant deals with prayer (B) and not (A) in the Statement of Claim.

It must be borne in mind that prayer (B) also refers to a *"return"* (with a simple), but this is for the period beginning from 2nd August 2012. The amount claimed as USD 122,496/= as *Return* becomes due prior to that date.

For the foregoing reasons, I have no hesitation in rejecting the contention of the Appellant that the Tribunal had, in the Original Award, rejected the claim made by the Claimant for a sum of USD 122,496/= as Return pursuant to Clause 3.5 of the Loan Agreement.

Section 27 (1) (a) of the Act

The next two contentions of the Appellant are based upon the interpretation of Section 27 (1) (a) of the Act which reads as follows:

> *"27. (1) Within fourteen days of receipt of the award, unless another period of time has been agreed upon by the parties, whether at the request of the arbitral tribunal or otherwise*
>
> *(a) a party, with notice to the other party, may request the arbitral tribunal*
>
> *(i) to correct in the award any errors in computation, any clerical or typographical errors or omissions or any errors of a similar nature; or*
>
> *(ii) to modify the award where a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred;"*

The Appellant contended that the purported corrections made by the Tribunal cannot fall within the meaning of an *"error in computation"*, or *"typographical errors"* or *"clerical error"* because by their own reasoning, the Tribunal had rejected the claim that the Claimant is entitled to "return" or "profit" at 35% *per annum*. It was submitted that the Tribunal does not have the power to carry out a fundamental change to the Original Award.

This contention is misconceived in law. As pointed out earlier, the Tribunal did not reject the claim made by the Claimant for a Return as prayed for in prayer (A) in the Statement of Claim.

The issue we must decide is whether the omission (here I use it in the neutral sense), made by the Tribunal is a matter that can be corrected in terms of Section 27 (1) (a) of the Act.

Both the learned President's Counsel sought to rely on judicial precedent on Section 189 (1) of the Civil Procedure Code which reads as follows:

> *"189. (1) The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment."*

On a plain reading of this provision, it is clear that it has a narrower ambit than Section 27 (1) (a) of the Act. A correction in any judgment or order can be made only where a mistake arises from any accidental slip or omission or to bring a decree in conformity with the judgment. Section 27 (1) (a) of the Act is not so constrained.

The Appellant relied on the decisions in ***Ramasamy Pulle v. De Silva*** **(12 NLR 298)**, ***Dionis Appu v. Arlis et al*** **(23 NLR 346)** and ***Shavin Nona v. Wickramasinghe and others*** **[(2012) 2 Sri.L.R. 400]**. They are not of any particular relevance in determining the issue before us.

In ***Dharmadasa v. Meraya*** **(50 NLR 197)** and ***Thambipillai v. Muthucumaraswamy*** **(57 NLR 97)**, it was held that Section 189 of the Civil Procedure Code permitted a correction where the mistake was of the Judge.

In my view, both Sections 189 of the Civil Procedure Code and Section 27 (1) (a) of the Act must be interpreted based on the legal maxim *Actus curiae neminem gravabit* (An act of the court shall prejudice no man). This maxim was applied in ***Trico Maritime (Pvt) Limited v. Ceylinco Insurance Co. Ltd.*** **[S.C. Appeal No. 101/2005, S.C.M. 26.05.2010]** where the Commercial High Court failed to consolidate applications made to enforce an arbitral award and an application made to set aside the award.

I hold that a correction can be made to an arbitral award pursuant to Section 27 (1) (a) of the Act where, upon a plain and objective reading of the award in the context of the pleadings and evidence led, it is clear that the Tribunal had made an error in computation, clerical or typographical error or omission or any error of a similar nature.

In the present case, the error was entirely of the Tribunal. The Claimant specifically prayed for the repayment of the Loan Capital Sum and Return which amounted to US Dollars 822,496/=. The Arbitral Tribunal clearly did not reject the claim for the repayment of the Return. They analysed only the profit or return payable on the Loan Capital Sum from 02.08.2012. Yet, they made a grave error by awarding the Claimant only US Dollars 700,000/= in the Original Award. Hence, the amendment made by the Tribunal to the Original Award falls within the provisions of Section 27 (1) (a) of the Act.

Notice

The Appellant contends that the Tribunal acted contrary to Section 27 (1) (a) of the Act. It was submitted that the Tribunal has not meaningfully interpreted the words *"with notice"* therein. It is the contention of the Appellant that the Tribunal should have given both parties an opportunity to be heard orally.

In support of this proposition, our attention was drawn to ***O'Reilly and others v. Mackman* and others [(1983) 2 AC 237 at 276]** where Lord Diplock held:

> *"But the requirement that a person who is charged with having done something which, if proved to the satisfaction of a statutory tribunal, has consequences that will, or may, affect him adversely, should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement."*

The decision in ***Nestle Lanka PLC v. Commissioner of Labour et al*** **[C.A. Writ 574/2004, C.A.M. 11.05.2007]** was also relied upon by the Appellant.

The Claimant countered that Section 15 (2) of the Act did not impose any mandatory obligation on the Tribunal to hold oral hearings in respect of every application made to it. Section 15 (2) of the Act reads as follows:

> *"15. (2) An arbitral tribunal **shall** afford all the parties an opportunity, of presenting their respective cases in writing or orally and to examine all documents and other material furnished to it by the other parties or any other person. The arbitral tribunal **may**, at the request of a party, have an oral hearing before determining any question before it."* (emphasis added)

This section uses both *shall* which is followed by *may*. The use of the word *shall* with respect to one matter and use of the word *may* with respect to another matter in the same section of the Act, in my view, generally leads to the inference that the word *shall* imposes an obligation, whereas the word *may* confer a discretionary power.

Section 15 (2) of the Act has two parts. The first part deals with the substantive matter before an arbitral tribunal. There an arbitral tribunal *shall* give all parties an opportunity of presenting their respective cases in writing or orally. The choice is with the relevant party. They may choose to present their cases in writing or orally or in combination as party autonomy is paramount. No doubt an arbitral tribunal is entitled to make relevant inferences where a party does so without offering the witness or document to any cross-examination.

The second part deals with incidental matters arising in the course of the arbitral proceedings. There an arbitral tribunal *may* at the request of a party have an oral hearing before determining any question arising in the incidental matter. In the absence of such a request from a party, an arbitral tribunal may determine the issue

without an oral hearing but after providing parties with an opportunity to submit in writing its position on the application.

In this matter, the Appellant did not request the Tribunal to hold an oral hearing into the application made to amend the Original Award. On the contrary, the Appellant and Respondent were content to submit their objections to the application by motion dated 23rd February 2015.

Moreover, Section 17 of the Act reads as follows:

> *"17. Subject to the provisions of this Act, the parties shall be free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceeding…"*

Clause 4.5 of the Loan Agreement provides that:

> *"[T]he procedure adopted at the arbitration shall be determined by the arbitrators."*

In the foregoing circumstances, I am of the view that the Tribunal did not err by failing to conduct an oral hearing on the application to correct the Original Award in the absence of an application to do so by any party.

Time Limit

The Appellant submitted that the Tribunal had failed to act in conformity with Section 27 (2) of the Act as the purported corrections have not been made within 14-days from the receipt of the request to make corrections.

Section 27 (2) of the Act reads as follows:

> *"27. (2) If the arbitral tribunal considers the request to be justified, it shall make the correction, modification or give the interpretation within fourteen days of the receipt of the request, or such longer period as the parties may agree, to, at the request of the arbitral tribunal. The interpretation shall form part of the award."*

The time line according to the Appellant is as follows:

1. The Claimant made his application to the Tribunal on 19th February 2015.
2. The Appellant and the Respondent tendered their objections on 23rd February 2015.
3. The Amended Award was communicated to the parties by letter dated 13th March 2015.

Thus, it was submitted that the Tribunal did not make the corrections to the Original Award prior to the lapse of 14-days from the date of the Claimant's application to correct the Original Award.

It is the Appellant who asserts that the Tribunal failed to make the correction within the specified time. The 14-day time period begins to run from the date *of the receipt of the request*. It must be established that the Tribunal failed to make the correction within 14-days of the receipt of the request to make the correction. The legal burden of establishing that fact is on the Appellant. In ***Somasundaram v. Kumara and Others*** **[S.C. Appeal 179/2018, S.C.M. 04.04.2024]**, my brother Surasena J. held that as it is the Liquidator who had made the initial application under Section 367 read with Section 370(1) of the Companies Act in that case, in terms of Section 101 of the Evidence ordinance, the legal burden is on the Liquidator to establish the fact he asserts.

It is true that the application to correct the Original Award is dated 19th February 2015. However, there is no material before Court to show the date on which the Tribunal received that request. This is an administered arbitration. Hence, we cannot proceed on the basis that the date of receipt by the arbitration center should also be the date of receipt by the Tribunal.

According to paragraph 66 of the petition of the Appellant filed in S.C. Appeal 200/2018, the Attorney-at-Law for the Appellant received a letter dated 13.3.2015 on 17.3.2015 from the Arbitration Centre enclosing the Amended Award.

Nevertheless, there is no evidence as to the date on which the Amended Award was in fact made by the Tribunal nor the date on which the request for correction was received by the Tribunal.

As the learned President's Counsel for the Claimant pointed out, the burden was on the Appellant to submit this evidence.

For the foregoing reasons, I am of the view that the Appellant has failed to establish the fact that the Tribunal failed to make the corrections within 14 days from the receipt of the request to make corrections.

In any event, even if the Tribunal has failed to make the corrections within the stipulated time, it should not invalidate the Amended Award. As pointed out above, the correction of the Original Award was necessitated due to the lapse on the part of the Tribunal. Hence, the fact that it was done outside the permitted time should not be held to the determinant of the Claimant. Again the legal maxim *Actus curiae neminem gravabit* (An act of the court shall prejudice no man) applies. Such a lapse on the part of the Tribunal should not prevent the Claimant obtaining the full amount he is entitled in law.

Furthermore, such alleged delay has not prejudiced the substantial rights of the Appellant or occasioned a failure of justice. This is the constitutional benchmark for any intervention by the Court of Appeal in the exercise of its jurisdiction in terms of Article 138 of the Constitution. I am of the view that Court is entitled to adopt that threshold in exercising its appellate jurisdiction in relation to the present matter.

Reasons for Correction

The Appellant submitted that the Tribunal has made the correction as it was deemed *necessary*. It was submitted that Section 27 (2) of the Act permits any correction only where the request is *justified*.

The Appellant cited the decisions in ***Ranjith Flavian Wijeratne v. Asoka Sarath Amarasinghe and Others*** **[S.C. Appeal 40/2013, S.C.M. 12.11.2015]** and ***Benedict and Others v. Monetary Board of the Central Bank of Sri Lanka and Others*** **[(2003) 3 Sri.L.R. 68]**. Both these decisions emphasise the need to give reasons and that if reasons are not given, the court can draw an inference that there is no rational reason for its decision.

In the present case, the Tribunal has given its reasons for making the correction. It is true that the Tribunal does not use the word *justified* in its order. Nevertheless, it is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power **[L. C. H. *Peiris v. The Commissioner of Inland Revenue* (65 NLR 457)]**.

It is clear upon a plain reading of the Original Award that the Tribunal had made an omission in setting out the sum payable in terms of prayer (A) in the Statement of Claim. Thus, the correction made by the Tribunal is justified in terms of Section 27 (2) of the Act.

Public Policy

The learned President's Counsel for the Appellant contended that the Amended Award is in violation of:

i. Section 27 (1) (a) (i) of the Act as the purported corrections were not *"errors in computation, any clerical or typographical errors or omissions or any errors of a similar nature"*;

ii. The principles of natural justice, as the Appellants has not been heard, nor have reasons been given as to why the Arbitral considered the corrections *"necessary"*; and,

iii. The time stipulated in Section 27 (2) of the Act, within which the Tribunal was mandated to act.

Accordingly, it was submitted that it would be contrary to the public policy of this country to enforce the Amended Award.

The public policy principle has received international legal recognition in arbitration matters. Article V.2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and Article 36 of the UNCITRAL Model Law enshrines this principle. It is an acknowledgement of the right of the State and its judicial arm to exercise decisive control over the arbitral process.

This recognition was in spite of the concerns raised by some delegates at the negotiations of the New York Convention. The concern was that it was affording an unsuccessful defendant or a State a second bite at frustrating enforcement. Nevertheless, some delegates viewed it as a necessary "safety-valve".

The Act, *inter alia*, seeks to give effect to the New York Convention. Section 32 (1) (b) (ii) of the Act states that an arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefor, within sixty days of the receipt of the award where the High Court finds that the arbitral award is in conflict with the public policy of Sri Lanka. The Act does not define what is meant by public policy.

The public policy argument is not the most attractive of legal defenses. It is vague and capable of liberal interpretation.

In ***Richardson v. Mellish*** **[(1824-34) All ER 258 at 256]** Burrough J. described it as:

> *"…a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail."*

Lord Davey in ***Janson v. Driefontein Consolidated Mines, Ltd.*** **[(1902) AC 484 at 500]** was more critical in stating that:

> *"…public policy is always an unsafe and treacherous ground for legal decision."*

Sir John Donaldson MR in ***Deutsche Schachtbau-und Tiefbohrgesellschaft mbh. v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.*** **[(1987) 2 Lloyd's Rep. 246 at 254]** sought to elucidate the content of public policy as follows:

> *"Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. … It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised."*

Nevertheless, as Lord Denning MR pointed out in ***Enderby Town Football Club Ltd. v. Football Association Ltd*****. [(1971) Ch. 591 at 606]**:

> *"With a good man in the saddle, the unruly horse can be kept in control".*

This Court has sought to achieve such restraint when confronted with a public policy argument against the enforcement of an arbitral award.

In ***Light weight Body Armour Ltd. v. Sri Lanka Army*** **[(2007) 1 Sri.L.R. 411 at 419-420]** Tilakawardane J. held:

> *"It is also important that a Court considering a challenge on the basis of public policy bear in mind the possibility of the misuse of this doctrine by a defendant in order to avoid the consequences of the arbitral award. Certainly the uncertainty and inconsistencies concerning the interpretation and application of public policy could encourage the losing party to rely on the doctrine of public policy to resist, or at the very least delay enforcement of the arbitral award. Therefore the Court must also bear in mind the very legitimate concern that it*

may afford an unsuccessful defendant and/or the state a second 'bite' at frustrating enforcement."

In ***Kiran Atapattu v. Janashakthi General Insurance Co. Limited*** **[S.C. Appeal 30-31/2005, S.C.M. 22.02.2013]** Marsoof J. held:

"It is therefore obvious that while the dynamism of the concept of public policy cannot be denied, it is important to exercise extreme caution in applying the concept."

A helpful insight into the content of public policy in the 1985 UNCITRAL Model Law is found in the Commission Report (UN Doc. A/40/17, para. 297) which states:

"It was understood that the term 'public policy', which was used in the 1985 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording 'the award is in conflict with the public policy of the State' was not to be interpreted as excluding instances or events relating to the manner in which it was arrived at."

Nevertheless, it can be stated that public policy does not furnish an opportunity to the losing party to oppose recognition and enforcement to reargue the merits of the case or to allege that the case was wrongly decided [UNCITRL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, (1958), 2016 Edition, 248].

The Appellant is seeking to resist the enforcement of the Amended Award on public policy grounds based on alleged procedural irregularities. Every procedural violation does not give rise to a violation of public policy. It must be of a fundamental nature. As Fouchard Gailard Goldman on International Commercial Arbitration points out [E. Gaillard, J. Savage, eds., (1996), 996], it is consistent with the letter and spirit of the

New York convention that, as a matter of principle, mandatory rules of the enforcement forum should be considered as part of its public policy when they reflect that forum's fundamental concepts of morality and justice, from which no derogation can be allowed. Our procedural laws are founded upon the rules of natural justice. It is a fundamental principle of our law. Hence, enforcement of an arbitral award may be refused on grounds of public policy in the event that there has been a breach of the rules of natural justice or due process.

This is in addition to the ground enshrined in Article V.1 (b) of the New York Convention, which is similar to sections 32 (1) (a) (ii) and 34 (1) (a) (ii) of the Act, which provides that enforcement may be refused if the party against whom the award is invoked was not given proper notice of the formation/identity of the tribunal or of the arbitration proceedings, or was otherwise unable to present his case [*See* van den Berg, *The New York Convention of 1958*, (Kluwer, 1981), pp. 296-311].

Nevertheless, the allegations of the Appellant are unsustainable in law as more fully explained earlier. The correction made by the Tribunal falls within the ambit of Section 27 (1) (a) (i) of the Act. The Appellant had due notice of the application to correct the award. The Appellant placed its objections before the Tribunal in writing. No application was made for an oral hearing by the Appellant. The correction made by the Tribunal is justified in terms of Section 27 (2) of the Act. The Appellant has failed to prove that the Tribunal failed to make the correction within 14-days of the receipt of the request. In any event, the time stipulated in Section 27 (2) of the Act is directory and not mandatory.

For the foregoing reasons, I hold that the enforcement of the Amended Award is not contrary to the public policy of Sri Lanka.

Commercial High Court Judgment is Flawed

The Appellant submitted that there are many flaws in the judgment of the Commercial High Court. In particular, it was contended that the learned Judge of the Commercial

High Court erred in holding that the Tribunal had made the corrections and delivered the Amended Award on the same day.

This is obviously erroneous. The Amended Award was issued later. Nevertheless, there is nothing wrong in dating the Amended Award on the same day as the Original Award. The Tribunal did not issue a fresh award. It only made corrections to the Original Award. Any correction made pursuant to Section 27 (1) of the Act forms part of the original award. It is a recognised international practice as reflected in Article 38 of the UNCITRAL Arbitration Rules and Article 33.1 of the Singapore International Arbitration Centre (SIAC) Rules.

The complaint on the failure on the part of the learned Commercial High Court Judge to properly evaluate the issues before it is not without merit. Nevertheless, the order made to enforce the Amended Award is correct in law.

For all the foregoing reasons, all three questions of law are answered in the negative.

Accordingly, the appeal is dismissed.

As for costs, I am mindful that there were four appeals on the same facts. The Appellant shall pay the Claimant a sum of Rs. 50,000/= as costs for each appeal.

Appeal dismissed.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court