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

In the matter of a Leave to Appeal Application against the refusal to enforce an Arbitral Award by the High Court under and in terms of section 31(1) of the Arbitration Act No. 11 of 1995.

Orient Financial Services Corporation Limited,
No: 46, 48,
Dr, N.M. Perera Mawatha,
Kota Road,
Borella.

Petitioner

Supreme Court Case No:- SC/Appeal/42/2015

Commercial High Court Case No:- HC/ARB/55/2012

Vs

1. Ranepuradewage Upathissa
   No. 272/4,
   Himbutana Patugama
   Mulleriyawa,
   Angoda.

2. Ranepuradewage Bandula
   No. 37/11, Chappell Lane,
   Nugegoda.
   No. 23A,

Chappell Lane,
Nugegoda.

3. Kalinga Gamini Silva,
No. 105,
Mahinda Mawatha,
Wellampitiya.

4. Nakalandage Marvin
Perera,
No. 138/10,
Pamunuwila Road,
Gonawila.

Respondents

AND NOW

Orient Financial Services Corporation Limited,
No: 46, 48,
Dr, N.M. Perera Mawatha,
Kota Road,
Borella.

Petitioner-Appellant

Vs

1. Ranepuradewage Upathissa
No. 272/4,
Himbutana Patugama
Mulleriyawa,
Angoda.

2. Ranepuradewage Bandula
No. 37/11, Chappell Lane,
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No. 105,
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No. 138/10,
Pamunuwila Road,
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Respondents-Respondents

AND

Orient Financial Services
Corporation Limited,
No. 46, 46,
Dr. N. M. Perera Mawatha,
Kota Road,
Borella.

Petitioner

Supreme Court Case No:- SC/Appeal/46/2015

Commercial High Court Case No:- HC/ARB/55/2012

Vs.

1.Ranepuradewage Upathissa,
No. 272/4,
Himbutana Patumaga,
Mulleriyawa,
Angoda.

2. Ranepuradewage Bandula,
No. 37/11, Chappell Lane,
Nugegoda.

No. 23A,
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No. 105,
Mahinda Mawatha,
Wellampitiya.

4. Nakalandage Marvin Perera,
No. 138/10,
Pamunuwila Road,
Gonawala.

Respondents

AND NOW

Orient Financial Services
Corporation Limited,
No. 46, 48,
Dr. N. M. Perera Mawatha,
Kota Road,
Borella.

Presently known as

Orient Finance PLC,
No. 75, Arnold Rathnayake Mawatha,
Colombo 10

Petitioner-Appellant

Vs

1. Ranepuradewage Upathissa,
   No. 272/4,
   Himbutana Patugama,
   Mulleriyawa,
   Angoda.

2. Ranepuradewage Bandula
   No. 37/11, Chappell Lane,
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   No. 105,
   Mahinda Mawatha,
   Wellampitiya.

4. Nakalandage Marvin Perera,
   No. 138/10,
   Pamunuwila Road,
   Gonawila.

Respondent-Respondent

Before : Priyantha Jayawardena PC, J
Kumudini Wickremasinghe, J
Mahinda Samayawardhena, J

Counsel : Nishkan Parathalingam with Upeka Sooriyapatabadige for the Petitioner-Appellant in SC/Appeal/42/2015 and SC/Appeal/46/2015 .

W. Madawalagama for the Respondent-Respondent in SC/Appeal/42/2015 and SC/Appeal/46/2015

Argued on : 29th March, 2023

Decided on : 25th September, 2023

Priyantha Jayawardena PC, J

The above appeals were taken up for hearing as the parties informed court that the questions of law where Leave to Appeal were granted by this court are identical. Hence, both parties agreed to consolidate and take up the two appeals and to have one judgment in respect of both appeals.

Facts of the case

These two appeals were filed to set aside the two Orders of the learned High Court Judge dated 2nd of December, 2012 which refused to enforce an arbitral award made against the respondents-respondents (hereinafter referred to as the "respondents").

The 1st and 2nd respondents had entered into a Master Finance Lease Agreement bearing Agreement No. ML 06175 dated 27th of September, 2006 with the petitioner-appellant (hereinafter referred to as the "appellant-company"), who has been engaged in lease financing business to obtain lease finances to purchase equipment/vehicles from time to time. In terms of the said

agreement, each vehicle obtained on a lease was added to it by a separate schedule made to the said agreement.

The 3rd and 4th respondents were the guarantors to the said Master Finance Lease Agreement and furnished an indemnity to secure the lease finance facilities given on the said agreement.

The said Master Finance Lease Agreement provided for the parties to enter into addenda to the said agreement when and where a vehicle is taken on a lease finance basis by the respondents. Such addenda were considered as part and parcel of the said Master Finance Lease Agreement.

Further, Clause 19 of the said agreement stated that, if the 1st and 2nd respondents fail to comply with the terms and conditions of the said agreement, the appellant-company may, *inter alia,* request the respondents to make all the payments due under the Master Finance Lease Agreement. Furthermore, if the said respondents fail to make payments, the appellant-company may terminate the said agreement.

Moreover, Article 36 of the said Master Finance Lease Agreement stated that in the event of a dispute arising from any default or non-observance of the terms and conditions contained in the said agreement by the 1st and 2nd respondents, including the default and/or delay in paying lease rentals, such disputes shall be submitted to arbitration.

The said the Master Finance Lease Agreement defined the term 'equipment schedule' as follows;

> *"The term of each equipment schedule hereto is subject to any and all conditions and provisions set forth herein as may from time to time be amended. Each equipment schedule be substantially in the form annex hereto and made part hereof shall incorporate therein all the terms and conditions as Lessor and Lessee have agree upon such equipment schedule is enforceable according to the terms and conditions therein. In the event of a conflict between the provisions of this Master Lease Agreement and any equipment schedule hereto the provisions of equipment schedule shall prevail with respect to that equipment."*
>
> [emphasis added]

Further, Clause 36 of the Master Finance Lease Agreement contained an arbitration agreement. It reads as follows;

"**Article 36: Arbitration Clause**

In the event of any default or non-observance by the Lessee of the terms and conditions contained in this Master Finance Lease Agreement including the default and/or delay in paying lease rentals or in any other case and in the event of any dispute, difference or question or matter which may from time to time and any time hereinafter arise or occur between Lessor and Lessee of their respective representatives or permitted assigns touching or concerning or arising out of, and in relation to or in respect of this Master Finance Lease Agreement or any provision matter or thing contained herein or the subject matter thereof, or the operation interpretation or construction hereof or of any clause hereof or as to the rights duties or liabilities of either party hereunder or in connection with the premises or their respective representatives or permitted assigns including all questions that may arise after the termination or cancellation of this lease, such disputes, differences or question or matter may, notwithstanding the remedies available under this Master Finance Lease Agreement or in law, be submitted for Arbitration by a sole Arbitrator to be appointed by the parties if such appointment is not practicable two arbitrators one to be appointed by the Lessor and the other by the Lessee and an additional Arbitrator to be appointed by the two Arbitrators and if either party refuses to appoint an arbitrator, by the sole arbitrator appointed by the other party."

[emphasis added]

After the parties entered into the said Master Finance Lease Agreement, at the request of the 1st and 2nd respondents, the appellant-company had purchased a Renault Prime Mover bearing registration No. 48–0044 described in the schedule (L 060263) to the Master Finance Lease Agreement for the purpose of leasing the same to the 1st and 2nd respondents.

Thereafter, on the following day, another lease finance facility was obtained by the 1st and 2nd respondents for the Tantri 40-foot trailer bearing chassis No. T–27737–06 under the said Master Finance Lease Agreement. In the second instance, the parties had executed an addendum to the said Master Finance Lease Agreement (L060273).

However, the respondents had failed and/or neglected to pay the monthly installments set out in the said Master Lease Financing Agreement in respect of both the equipment referred to in the

schedules to the Master Finance Lease Agreement. Hence, the appellant-company had sent several Letters of Demand to the respondents, requesting them to pay the arrears.

As the respondents did not pay the arrears set out in the said Master Finance Lease Agreement, the disputes that arose from the non-payment of installments were referred to two separate arbitrations in terms of Article 36 of the said agreement by the appellant.

Both references to arbitration were taken up separately for arbitration, and the 1st respondent had participated in both of the said arbitrations and had moved for time to settle the claims. Accordingly, the arbitrator had granted time for the 1st respondent to reach a settlement. However, as the parties could not reach a settlement in both arbitrations, both arbitrations had proceeded and the appellants had filed evidence by way of two separate affidavits in both arbitral proceedings in support of their claims against the respondents. Thereafter, the learned Arbitrator made two separate awards in favour of the appellant-company on the 15th of February, 2011. Further, the said arbitral awards had been delivered to the respondents in terms of the Arbitration Act No. 11 of 1995 (hereinafter referred to as the "Arbitration Act").

Subsequently, the appellant-company had filed two separate applications in the High Court against the respondents for the enforcement of the said arbitral awards. In both the said applications the appellant had filed copies of the Master Finance Lease Agreement entered between the appellant and the 1st and 2nd respondents, schedules No. L 0602273 and L 060263 to the said agreement (filed separately in the relevant application), Guarantee and Indemnity for the Master Lease Agreement bearing contract No. ML 060175, Letters of Demands sent to the respondents, Notices of arbitration sent to the respondents, Notice sent by the Arbitration Centre to the respondents along with the registered Article, arbitral proceedings of 22nd of November 2010 and 14th of December, 2010, the arbitral awards dated 15th of February, 2011, and the proof of posting of the arbitral awards to the respondents. All the aforementioned documents were certified by the claimant company and an Attorney-at-Law prior to them filing in court.

Thereafter, the 1st, 2nd and 3rd respondents have filed an Answer supported by an Affidavit to the said applications objecting to the enforcement of the arbitral awards.

Further, both the said applications for the enforcement of arbitral awards were taken up together for inquiry, and the parties had made oral submissions. Thereafter, they had tendered their respective written submissions. In the submissions, the respondents, *inter alia,* submitted that the applications for enforcement of arbitral awards should not be allowed as it was not possible to

have two arbitrations in respect of one arbitration agreement, and thus the arbitral awards made in the said arbitrations were against the public interest. Furthermore, the appellant-company had not filed a certified copy of the entire agreement between the parties along with the application for enforcement of the arbitral award. It is pertinent to note that both parties referred to the provisions of the Civil Procedure Code in support of their respective cases and requested the court to apply the provisions of the Civil Procedure Code in considering their cases.

Judgment of the High Court

Thereafter, the learned High Court Judge delivered one Order in respect of both the applications on the 2nd of December, 2013 refusing to enforce the arbitral awards on the basis that a copy of the arbitration agreement had not been filed in court by the appellant-company in terms of section 31(2)(b) of the Arbitration Act and two arbitrations had been held with respect to one agreement.

Questions of Law

Being aggrieved by the said Order of the learned High Court Judge, the appellant-company sought leave to appeal from this court, and this court granted leave to appeal on the following question of law:

> *"Has the learned High Court Judge erred in his order dated 02.12.2013 in holding that the Petitioner was obliged to file a complete contract under section 31(2)(b) of the Arbitration Act No. 11 of 1995 in enforcement proceeding."*

Further, the respondents raised the following the question of law;

> *"whether the Petitioner has filed an original or a duly certified copy of the arbitration agreement."*

The issues that need to be considered in the instant appeal are whether the appellant-company was required to file;

(a) the entire Master Finance Lease Agreement with schedules; or
(b) only the original arbitration agreement, or
(c) a certified copy of the arbitration agreement

under section 31(2)(b) of the Arbitration Act No. 11 of 1995 along with the applications for enforcement of the arbitral awards.

Enforcement and setting aside of Arbitral Awards

Section 2 of the Arbitration Act states that all arbitral proceedings that commenced in Sri Lanka after the appointed date are governed by the said Act.

Arbitral proceedings commence by a party giving notice of arbitration to the other party to the arbitration agreement and referring the alleged dispute to arbitration. Thereafter, one or more Arbitrators are appointed by the parties to the arbitration agreement depending on the arbitration clause. Upon the arbitral tribunal being constituted, the arbitration proceedings will commence by giving notice to the parties to the arbitration agreement. Further, the arbitration proceedings are concluded the Arbitrator/s should deliver the arbitral award in writing and signed by the Arbitrator/s of the arbitral tribunal. Further, a copy of the said award should be served on the parties. Furthermore, an arbitral award is final and binding on the parties subject to applications that may be made under sections 31 and 32 of the Arbitration Act.

In terms of 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(2) of the Arbitration Act states;

> *"An application to enforce the award shall be accompanied by –*
> *(a) The original of the award or a duly certified copy of such award; and*
> *(b)* ***the original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement****."*
>
> [emphasis added]

Accordingly, in terms of section 31(2)(b) of the Arbitration Act, when filing an application to enforce an arbitral award, the party seeking to enforce the arbitral award is required to file the original arbitration agreement **or** a duly certified copy of such agreement on which the arbitral award was made along with the said application.

Furthermore, section 32 of the Arbitration Act sets out the procedure for making an application to the High Court for setting aside an arbitral award. In that, it states such an application may be made within sixty days of the receipt of the award. Further, the said section sets out the grounds on which an award can be set aside.

Moreover, where applications for the enforcement of an arbitral award and also to set aside an arbitral award are filed in the High Court, section 35 of the Arbitration Act requires to consolidate such applications and to be taken up together for inquiry. The said section was considered in ***Trinco Maritime (PVT) Limited v Ceylinco Insurance Co. Limited*** **[2010] 1 SLR 163,** where it was held that the law contemplates consolidation of applications made to set aside and to enforce the award.

In this regard, it is important to note that it is mandatory to comply with the time frame stipulated in sections 31 and 32 of the Arbitration Act. A similar view was expressed in ***Airport and Aviation Services (Sri Lanka) Ltd. v Buildmart Lanka (Pvt) Ltd*** **[2010] 1 SLR 292,** where it was held;

> *"…… It is therefore quite clear that even on a plain reading of the section an application for the purpose of setting aside an arbitral award by the High Court must be made within a time period of sixty days and the said period is taken into account from the* ***receipt of the award by the party making such application to the High Court…"***
>
> [emphasis added]

Further, a similar view was expressed in ***Lanka Orix Leasing Company Limited v Weeratunga Arachchige Piyasad,*** **SC/Appeal/113/2014 (SC Minutes 5th of April, 2019)**.

However, prior to allowing an application for enforcement of an arbitral award, the court is required to satisfy that there is no cause to refuse the recognition and enforcement of the award, and the application is in conformity with the mandatory requirements set out in section 31(2) of the said Act. Further, a party who has been made a respondent to such an application is not precluded from drawing the attention of the court, if the petitioner has not complied with the mandatory requirements stipulated in the said section notwithstanding the fact that such a party has not filed an application to set aside the award in terms of section 32 of the said Act. In such instances, the court is required to take such matters into consideration when deciding the application for enforcement.

Has the appellant-company complied with section 31(2)(b) of the Arbitration Act?

In the instant appeal, the appellant-company has filed a copy of the arbitration agreement certified by an Attorney-at-Law on which notices of arbitration were given to the respondents along with the applications for the enforcement of the arbitral awards under consideration.

As stated above, appellant-company filed certified copies of the said Master Finance Lease Agreement and the relevant schedules (separately in each application), which contained the 'arbitration agreement' on which the dispute between the parties were referred to arbitration and the arbitral tribunal was established along with both the applications for enforcement of the awards. Particularly, Clause 36 of the aforesaid agreement contained the arbitration agreement where all the parties agreed to refer any disputes arising or concerning the said agreement settled by arbitration.

However, the learned High Court Judge had refused to allow the enforcement of both the arbitral awards on the basis that the entire agreement entered between the parties was not filed in court in terms of section 31(2)(b) of the Arbitration Act No. 11 of 1995 and two arbitrations cannot be held in respect of one arbitration Clause.

Section 31(2) of the Arbitration Act states*;*

> *"An application to enforce the award shall be accompanied by –*
>
> *(a) the original of the award or a duly certified copy of such award; and*
> *(b) the original arbitration agreement under which the award purports to have been* ***or*** *a duly certified copy of such agreement.*
>
> *For the purposes of this subsection a copy of an award or of the arbitration agreement shall be deemed to have been duly certified if –*
>
> *(i) it purports to have been certified by the arbitral tribunal or, by a member of that tribunal, and it has not been shown to the Court that it was not in fact so certified; or*
> *(ii) it has been otherwise certified to the satisfaction of the court."*
>
> [emphasis added]

It is pertinent to note that section 31(2)(b) of the Arbitration Act does not require a party to file the complete contract/agreement in which the arbitration Clause is included in an application for enforcement of an arbitral award. On the contrary, the said section only requires the petitioner to file either the original **arbitration agreement or** a duly certified copy of **such agreement**.

Section 3(1) of the Arbitration Act states:

> *"An arbitration agreement may be in the form of* ***an arbitration clause in a contract*** *or* ***in the form of a separate agreement."***
>
> [emphasis added]

Further, section 3(2) of the said Act states that an arbitration agreement should be in writing. In terms of the section 3(2), it shall be deemed to be in writing if it is contained in a document signed by the parties or in exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement.

Furthermore, section 12 of the Arbitration Act states;

> *"An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement when ruling upon the validity of that arbitration agreement for the purpose of determining the jurisdiction of the arbitral tribunal."*
>
> [emphasis added]

Hence, an arbitration Clause in an agreement or a contract is recognised as a separate contract, distinct and independent from the main contract. In the circumstances, section 31(2) of the Arbitration Act only requires to file either the original arbitration agreement or a duly certified copy of the arbitration agreement entered between the parties.

It is pertinent to note that in the matters under reference the parties did not enter into separate agreements/contracts for the purpose of obtaining the two lease financing facilities to purchase the prime mover and the trailer under reference. As stated above, there was one Master Finance Lease Agreement and two schedules to the said agreement which are part and parcel of the said agreement. Further, as stated above, the arbitration Clause was included in said Master Finance Lease Agreement and it was applicable to the entire agreement which include the said schedules to the agreement.

It is pertinent to note that, there can be circumstances where it is not possible to file the original arbitration agreement in court, including instances where there are multiple applications for enforcement of arbitral awards. Thus, the Arbitration Act has made provisions to cater to such instances by including a provision to file 'a duly certified copy' of the arbitration agreement with applications for the enforcement of arbitral awards. The phrase 'a duly certified copy' requires the court to satisfy itself that a copy of the original arbitration agreement has been filed in court. In the case of ***Kristley (Pvt) Limited v The State Timber Corporation*** **[2002] 1 SLR 228** the copies of the awards tendered with the claimant's application certified by an Attorney-at-Law were held as "duly certified copies within the meaning of section 31(2)(ii) of the Arbitration Act. It was further held that even in a case where the copy of the award filed with the application is not a duly certified copy, the application for enforcement may not be summarily rejected without giving an opportunity to tender duly certified copy as the word "accompany" in section 31(2) has been included in the said section purposively and thus, it should be interpreted widely. In that judgment, Fernando, J held at pages 239 and 240;

> *"The learned High Court Judge failed to give full effect to clause (ii) of section 31 (2). That clause unambiguously provides for a mode of certification additional to that prescribed by clause (i). But, for that clause certification by the Registrar of the Arbitration Centre would not have been acceptable. Clause (ii) requires the High Court in each case, having regard to the facts of the case, to decide whether the document is certified to its satisfaction. The learned Judge erred in laying down a general rule – founded on a virtual presumption of dishonesty – which totally excludes certification by an Attorney-at-Law regardless of the circumstances. The position might have been different if the application for enforcement had been rejected promptly on presentation, for then there might well have been insufficient reason to be satisfied that the copy was indeed a true copy: and that would have caused no injustice, as the claimant could have filed a fresh application. But, I incline to the view that even at that stage the application should not have been summarily rejected. The claimant should have been given an opportunity to tender duly certified copies interpreting "accompany" in section 31 (2) purposively and widely (as in Sri Lanka General Workers' Union v Samaranayake and Nagappa Chettiar v. Commissioner of Income Tax.) Undoubtedly, section 31 (2) is mandatory, but not to the extent that one opportunity, and one opportunity only, will be allowed for compliance. In the present case, however, the order was not*

made immediately, but only after the lapse of the period of one year and fourteen days allowed for an application for enforcement. By that time, the learned Judge had consolidated the proceedings: hence he could not have ignored the certified copies filed in the STC's application, which admittedly, were identical in all material respects to the copies tendered with the claimant's application. He had also to consider (even if he was not bound by it) the admission in the STC's statement of objections that those copies were "duly certified", as well as the fact that, by them, the claimant had also tendered copies certified in terms of clause (i). it was on all that material that the learned Judge had to decide whether the copies had been certified to his satisfaction. In deciding that issue, he was perfectly correct in noting that the Court had to ensure that it 'gave judgment according to the award" (cf section 31 (6)) : the object of section 31 (2) was to ensure that the High Court did have true copies of the award. It was not reasonable, on the facts of this case, to conclude that the copies initially filed were anything but true copies of the originals. There was not even the faintest suspicion or suggestion that they were inaccurate."

Furthermore, a careful consideration of section 12 of the said Act shows that the sole purpose of the requirement to file the arbitration agreement along with an enforcement agreement is to ascertain whether the arbitral tribunal had the jurisdiction to make the award sought to be conferred by the High Court.

Therefore, I am of the view that the learned High Court Judge erred in his Orders dated 2nd of December, 2013 when he held that the appellant-company is required to file the complete contract that contained the arbitration agreement in terms of section 31(2)(b) of the Arbitration Act when filing an application to enforce the arbitral award. Further, the learned High Court Judge erred in law and fact when he did not act on the certified copy of the arbitration agreement filed along with the application for enforcement by the appellant.

Is it possible to refer several disputes to arbitration based on one arbitration agreement?

Section 50 of the said Act defines the term "arbitration agreement" as follows;

> "*Arbitration Agreement" means an agreement by the parties to submit to arbitration* <u>*all*</u> ***or*** <u>*certain disputes*</u> <u>*which have arisen*</u> ***or*** <u>*which may arise*</u> *between them in respect of a defined legal relationship whether contractual or not."*
>
> [emphasis added]

A careful consideration of the said section shows that unlike civil actions filed in the District Court, the Arbitration Act provides a simple and flexible procedure to resolve disputes between the parties that are subject to the said Act. It is pertinent to note that the phrase "all ***or*** certain disputes which have arisen ***or*** which may arise between them" allows the parties to refer all or some of the disputes between them to arbitration. Further, the phrase "which have arisen ***or*** which may arise between them*"* allows the parties to refer disputes when and where they arise.

Thus, the appellant-company was entitled in law to refer the disputes arising from or concerning the arbitration Clause in the said Master Lease Financing Agreement jointly or separately to arbitration to resolve the disputes between the parties. In view of the above, I am of the view that the learned High Court Judge erred in law by holding that it is not possible to have multiple arbitrations based on one arbitration agreement.

Does the Arbitration Act No. 11 of 1995 allow to file an answer in enforcement of arbitral awards?

It is noteworthy to mention that in the instant appeals, the 1st, 2nd and 3rd respondents have filed an answer supported by an affidavit objecting to the enforcement of both arbitral awards. However, there is no provision in the Arbitration Act to file an answer in an application for enforcement of an arbitral award. As stated above, only objections can be filed by a respondent in such an application.

Conclusion

In the circumstances, I am of the view that the following questions of law should be answered as follows;

Has the learned High Court Judge erred in his order dated 02.12.2013 in holding that the Petitioner was obliged to file a complete contract under section 31(2)(b) of the Arbitration Act No. 11 of 1995 in enforcement proceeding.

Yes

Whether the Petitioner has filed an original or a duly certified copy of the arbitration agreement.

Yes, the appellant has filed a duly certified copy of the arbitration agreement.

Therefore, both appeals are allowed. I set aside the Orders of the learned High Court Judge dated 2nd of December, 2012 and grant the reliefs prayed for in the petitions No. SC/Appeal/42/2015 and No. SC/Appeal/46/2015 filed in the High Court.

Further, I direct the learned High Court Judge to enter decree in terms of section 31(6) of the Arbitration Act.

The Registrar is directed to send this judgment to the relevant High Court to act in terms of the law.

I order no costs.

Judge of the Supreme Court

Kumudini Wickremasinghe, J

I Agree

Judge of the Supreme Court

Mahinda Samayawardhena, J

I Agree

Judge of the Supreme Court