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 of the Arbitration Act No. 11 of 1995

Kiran Atapattu,
40/60/7, Bauddhaloka Mawatha,
Colombo 07.

SC Appeal 30-31/2005
HC/ARB/1202/2002
HC/ARB/1149/2002
HC/ARB/1150/2002
HC/ARB/1151/2002

CLAIMANT-PETITIONER-APPELLANT

VS

Janashakthi General Insurance Co. Ltd., of No. 467, Muttiah Road,
Colombo 03.

RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: Hon. N.G. Amaratunga, J.,
Hon. Saleem Marsoof, P.C., J. and
Hon. S. I. Imam, J.

COUNSEL: Faiz Musthapha P.C. with J.B. Shantha Perera for Claimant– Petitioner–Appellant.

Nigel Hatch P.C. with K. Geekiyanage and Ms. P. Abeywickrema for Respondent.

ARGUED ON: 24.02.2010; 01.06.2011; 14.05.2012

WRITTEN SUBMISSION OF THE APPELLANT: 02.07.2012

WRITTEN SUBMISSION OF THE RESPONDENT: 06.08.2012

DECIDED ON: 22.02.2013

SALEEM MARSOOF J:

In these appeals, which were taken together for hearing with the consent of all Counsel, the Appellant sought to challenge the consolidated judgment of the High Court which set aside three arbitral awards made by a tribunal of three arbitrators and refused the enforcement of the same. The said awards had been made in favour of the Appellant pursuant to three claims made by him on the basis of three insurance policies issued by the Respondent insurance company.

Before looking at the substantive questions of law arising for determination by this Court in these appeals, it will be useful to outline the salient facts that will be material to the decision of this Court. By the comprehensive motor vehicle policy marked P1A, Colombo Engineering Enterprises, of which the Appellant was sole proprietor, insured Nissan lorry bearing No.47-1370 for Rs. 800,000 with the Respondent on 10th September 1996 for the period 16th September 1997 to 15th September 1998. By the insurance policy marked P1B, the Appellant insured certain musical instruments and sound system equipments for Rs. 1,500,000/- with the Respondent on 30th November 1997 for the period from 30th November 1997 to 30th November 1998. By the policy marked P1C, a partnership firm named Soul Enterprises, of which the Appellant was precedent partner, obtained insurance cover from the Respondent for certain musical instruments and sound equipments for Rs. 1,341,500/- for the same period.

The Appellant claimed that on 5th July, 1998, the said Nissan lorry had carried to Kandy from Colombo, *inter alia*, a load of musical instruments and sound system equipments, being property covered by the other two polices marked P1B and P1C, for use for the purpose of providing music at a dinner dance to be held at La Kandyan Hotel, Kandy that evening. According to the Appellant, after the dance was over, the vehicle left the said hotel on at about 4 am the next morning to return to Colombo with the said musical instruments and sound system equipments, with one Nihal Perera, who was an employee of the Appellant attached to Colombo Engineering Enterprises who was in charge of the musical instruments and sound equipments, and several others. The Appellants claimed that when the said lorry was proceeding on Dangolla Road, having left the Hotel about twenty or thirty minutes back, it caught fire resulting in the destruction of the vehicle and the musical instruments and the sound system equipments carried in it. It was the Appellant's position that the said fire was caused by an electrical defect in the vehicle, and he claimed from the Respondent Rs. 7,531,500/- which included Rs. 800,000/- for the lorry, Rs. 2,481,500/- being the value of the musical instruments and Rs 4,250,000/- being the value of the sound setup, but the Respondent failed and neglected to honour the said claim on the basis that the vehicle had been deliberately set on fire by the Appellant, and that none of the instruments and equipments covered by the policies marked P1B and P1C had been carried in the lorry at the time of the fire.

Upon the claims by the Appellants being repudiated by the Respondents, the dispute was referred to arbitration before a panel of three arbitrators. The arbitrators heard the testimony of the Appellant's witnesses Nihal Perera, who had been in the lorry at the time of the fire, and F. Henry Silva, who was the officer in charge of crimes at the Peradeniya Police Station within the limits of which the incident by which the lorry and its contents were destroyed, had occurred, as well as the testimony of the Appellant, Kiran Atapattu, who testified on his own behalf. Thereafter Police Constable Weerasooriya of Peradeniya Police and K.I. Jegatheesan, a retired Government Analyst, who testified on behalf of the Respondent gave evidence, and the arbitrators unanimously upheld the claims of the Appellants. However, the arbitrators were not unanimous in regard to the quantum of their awards. In the consolidated majority award marked Z1 dated 30th January 2002, arbitrators Hon. Justice S.B. Goonewardene (Chairman) and Mr. Ben Eliathamby, P.C. (Member) awarded to the Appellants the sum of Rs. 2,350,000/- being the aggregate of the following:-

> In the claim on insurance policy marked P1A, an award in a sum of Rs. 385,000/- being the value of the covered item, and Rs. 130,000/- as costs of arbitration.
>
> In the claim on the insurance policy marked P1B, an award in a sum of Rs. 720,000/- being the value of the covered goods, together with a sum of Rs. 245,000/- as costs of arbitration.

In the claim relating to insurance policy marked P1C, an award in a sum of Rs. 645,000/- being the value of the covered goods, together with a sum of Rs. 225,000/- as costs of arbitration.

The third arbitrator, Mr. Nihal B. Peiris, in a separate award marked Z2, while agreeing with the reasons and findings of the majority of the Tribunal, awarded an aggregate of Rs. 4,486,500/- to the Appellant, which consisted of Rs. 500,000/- on the policy marked P1A, Rs. 1,500,000/- on the policy marked P1B, Rs. 1,341,500/- on the policy marked P1C, with costs.

The Respondent moved the High Court in terms of Section 32 of the Arbitration Act. No. 11 of 1995 seeking to set aside the aforesaid three awards, and the Appellant filed an application to have the said awards enforced in terms of Section 31 read with Section 34 of the said Act. When the said applications of the Appellant and Respondent were taken up for argument in the High Court on 30th June 2003, it was agreed by the parties to consolidate the said applications and determine them on the written submissions filed by the parties, and the Learned High Court Judge made order accordingly.

The High Court, by its impugned judgment dated 4th November 2004 allowed the application to set aside the awards, and refused the enforcement application. On 30th March 2005, this Court has granted leave to appeal on the questions set out in paragraph 27(i) to (iv) of the petition, which are reproduce below:-

(i) Has the High Court Judge misdirected himself in law in acting on the basis that the arbitrators had wrongly applied the burden of proof of fraud as being "beyond reasonable doubt"?

(ii) Has the High Court Judge misdirected himself in law in applying the burden of proof for establishing fraud in civil proceedings on a "balance of probabilities"?

(iii) Has the High Court Judge misdirected himself in law in rejecting the insurance policies marked P1A, P1B and P1C on the ground that the said documents were uncertified when both parties had admitted the said insurance policies P1A, P1B and P1C?

(iv) Has the High Court Judge misdirected himself in failing to consider the evidence led in the arbitration proceedings in determining the issues arising in this case?

In addition to the above questions, on an application by the learned President's Counsel for the Respondent, the Court also made order that the following substantial questions should be included for a full determination of the matters in dispute. These additional questions are as follows:-

1. Are the said arbitral awards made contrary to public policy, in that they have failed to consider that "double insurance" has been taken in respect of musical instruments?

2. Is the award of three sets of costs at the arbitration contrary to public policy considering that there was only one hearing in respect of all three claims?

Certification of Copies of the Arbitration Agreement and Award

Before getting into more intricate aspect of this judgment, it is convenient to deal at the outset with a very simple question, namely question (iii) raised by learned President's Counsel for the Appellant, as to whether the learned High Court Judge misdirected himself in law in rejecting

the insurance policies marked P1A, P1B and P1C on the ground that the said documents were uncertified, when the said policies had been admitted before the arbitral tribunal. There is no dispute that the application made by the Appellant under Section 31 of the Arbitration Act No. 11 of 1995 for the enforcement of the award was accompanied by copies of P1A, P1B and P1C certified by only the Attorney-at-law for the Appellant as "true copy" and was not the original of the said policies. The documents had been admitted by the parties at the commencement of the arbitral hearing, and were also relied upon by the Respondent in its application to set aside the award made under Section 32 of the Arbitration Act.

Section 31(2) of the Arbitration Act provides as follows:-

> *An application to enforce the award shall be accompanies 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.*
>
> *For the purposes of this sub-section, 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.*

One of the grounds on which the High Court decided to set aside the awards made by the tribunal was that the said policies, which constitute the contracts based on which the claims were made, had not been properly certified. Section 31 (2) is a mandatory provision, and provides that the application to enforce the award shall be accompanied by the original of the Arbitration Agreement and the original of the award or copies certified in the arbitral tribunal or a member of the tribunal or is otherwise certified, to the satisfaction of the Court. If the provision is not complied with, the application will have to be dismissed in *limine*. The defect cannot be cured by submitting the said duly certified documents at a subsequent stage. However, it is useful to note that when a similar objection to that taken up by the Respondent in this case, albeit with respect to the award and not the contract on the basis of which it was made, was taken up in *Kristley (Pvt) Ltd. v The State Timber Corporation (STC)*, (2002) 1 SLR 225, M.D.H. Fernando J, with whom Gunasekere J. and Wigneswеran J. agreed, dealt with the objection in the following manner at pages 239 to 240 of his judgment:-

> *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.

In my view, the above quoted words apply with equal force to the decision of the instant case, although what has been challenged in this case is not the award of the arbitral tribunal but the contract on the basis of which it was made. It is crucial that in both these cases the responded to the claim had in its application to set aside the award relied on the very documents objected to in the High Court. While it is of vital importance to protect and preserve the credibility and integrity of the arbitral process by eliminating all possibilities for unscrupulous persons abusing the process of court, it is equally important to provide an efficient mechanism for the enforcement of arbitral awards. In the light of these considerations, it is clear that the High Court erred in upholding the objection taken up by the Respondent to the copies of the policies marked P1A, P1B and P1C when they had been admitted at the commencement of the hearing at the arbitral tribunal and had also been relied upon by the Respondent itself in its application to set aside the award made under Section 32 of the Arbitration Act.

Was the Award made contrary to the Public Policy of Sri Lanka?

The question as to whether the award in question was contrary to the public policy of Sri Lanka, arises in the context of three separate questions coming up for determination in this case. The learned High Court Judge had held that the arbitral tribunal had violated the public policy of Sri Lanka when it erred in law in applying the higher standard of proof usually applicable in a criminal case to the proof of fraud by an insurer. Questions (i), (ii) and (iv) raised by learned President's Counsel for the Appellants relating to the proof of fraud are interrelated. The question of public policy has also been raised by learned President's Counsel for the Respondent directly in questions (1) and (2) suggested by him for the consideration of Court. These questions relate respectively to the concept of "double insurance" and the award of costs, and have been raised on the footing that the arbitral tribunal has misconstrued the applicable principles of law relating to these matters.

Before going into details, it may be useful to make some general remarks on the question of public policy in the context of the enforcement and setting aside of arbitral awards. While Section 26 of the Arbitration Act provides that "subject to the provisions of Part VII of this Act, the award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement", Sections 32(1)(b)(ii) and 34(1)(b)(ii) of the Arbitration Act which appear in Part VII thereof, refer to the concept of public policy, and provide respectively that an arbitral award may be set aside and / or its enforcement refused on the ground that it is contrary to the public policy of Sri Lanka. In applying these provisions great caution should be exercised, particularly in the context that an arbital award is the end result of arbitration proceedings, which give effect to the intention of the parties to a dispute to refer their dispute for arbitration without resorting to the more time consuming process of litigation. The concept of party autonomy has been recognized by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, also known as the New York Convention, and is reflected in almost all the provisions of the Sri Lanka Arbitration Act, which has as its objective the efficient enforcement of arbitral awards, irrespective of whether they are foreign or local awards. The New York Convention as well as the Arbitration Act of Sri Lanka provide that an arbitral award may be set aside or refused enforcement if it is contrary to public policy.

It is in this connection important to bear in mind the *dictum* of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd (*1902) AC 484 at page 500 that "public policy is always an unsafe and treacherous ground for legal decision". Seventy-eight years earlier, Burrough, J., in *Richardson v Mellish* (1824) 2 Bing 229 at page 252, had warned against the dangers that excessive reliance on the concept can give rise to, describing public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." Lord Denning MR, however, was not a man to shy away from unmanageable horses, and in *Enderby Town Football Club Ltd. v. Football Association. Ltd.* (1971) Ch. 591 at page 606, he responded to Burrough J's warning with his characteristic quip that "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". The Supreme Court of India, in paragragraph 92 of its landmark decision in *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* AIR 2003 SC 2629; (2003) AIR SC 2629 at page 2639, observed that-

> *Had the timorous always held the field, not only the doctrine of public policy, but even the Common Law or the principles of Equity would never have evolved….. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy.*

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. It is in the light of these observations that this Court will proceed to consider the three questions outlined above in the context of the impugned decision of the High Court which overturned the findings of the arbitral tribunal, which was unanimous in holding that the Respondent was not entitled in the circumstances of the case to repudiate the claims made by the Appellant

Proof of fraud

Questions (i), (ii) and (iv) raised by learned President's Counsel for the Appellants relating to the proof of fraud maybe conveniently considered together. While it is common ground that the lorry bearing No. 47-1370 was almost totally destroyed by a fire, the dispute between the Appellant and the Respondent really centred around the question of how the fire was caused. The Appellant founded his claims under the relevant policies on the basis that the fire was accidental and was caused by some electrical problem in the lorry itself, and hence the Respondent was liable upon the contracts of insurance to indemnify the Applicant, while the Respondent resisted the claims on the basis that the lorry was deliberately set on fire and that the claims made for indemnity are fraudulent, with the result that they must altogether fail. The arbitrators unanimously upheld the claims although they differed in regard to the quantum payable under the policies.

It is trite law that all contracts of insurance are governed by the duty of *uberrimae fidei* or utmost good faith, and any fraudulent claims arising from self-induced loss including those caused with intent to commit fraud may be justifiably repudiated by the insurer. *See,* Lord Atkin in *Beresford v Royal Insurance Co [1938] A.C. 586; See also, Heyman v Darwins [1942] A.C. 356.* The basis of exclusion of the liability of an insurer to pay in such and similar circumstances, was explained by Lord Atkin in *Beresford* at page 595 in the following manner:

> "On ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the assurance money is payable. The insurers have not agreed to pay on that happening."

While it is clear that in such cases the burden of proof of establishing fraud falls on the insurer, the question that arises in this appeal is whether the applicable standard of proof is the criminal standard of proof beyond reasonable doubt, or the civil standard of preponderance of probabilities, or something in between. The learned High Court Judge had taken the view that it is the lesser of these two standards, namely proof on a preponderance of probabilities that applies in such a case to establish fraud, and has set aside the award in favour of the Appellant, and allowed the application of the Appellant for enforcing the same, on the basis that the arbitrators had erred in law and that their awards are contrary to the public policy of Sri Lanka.

The primary basis on which the Appellant challenged the finding of the High Court was that it had misapplied the standard of proof required to establish fraud in this case. Learned President' Counsel for the Appellant argued with great force that the High Court had erred in applying the civil standard of balance of probabilities for the proof of fraud, which was by its very nature a serious allegation requiring a higher degree of proof. He submitted that the High Court had in fact treated the unanimous award of the arbitral tribunal, which upheld the claims of the Appellant on the basis that there was no plausible evidence placed before it that could establish fraud to the satisfaction of the tribunal, was arrived at by applying the wrong standard of proof.

In this context, it is necessary to consider the judgment of the High Court carefully. The learned High Court Judge observed as follows in the course of his judgment:–

> මෙම නඩු තීන්දුව අනුව ප්‍රකාශ කර ඇත්තේ, බේරුම්කරුවෙකු නිවැරදි නීතිය අනුගමනය කළයුතු බවත් දිවයිනේ පවතින නීතියට යටත්ව කටයුතු කිරීමට බැඳී, ඇති බවත්ය. මේ අනුව සෑම බේරුම් කරුවෙකුම දිවයිනේ පවතින නිවැරදි නීති තත්ත්වයන් අනුව කටයුතු කිරීමට බැඳී ඇත. එසේ කටයුතු නොකර ප්‍රදානය කරණලද තීරක ප්‍රදානයක්, ශ්‍රී ලංකාවේ මහජන ප්‍රතිපත්තිය සමඟ ඝට්ටනය විය හැකිය.
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> මෙම නඩුවේ ප්‍රදානය කරණලද තීරක ප්‍රදානය අධිකරණය විසින් පරීක්ෂා කර බැලීමේදී අධිකරණයට සනාථ වන්නේ බේරුම්කරුවන් ඉදිරියේ ඉදිරිපත් කරණලද සාක්ෂි විමසා බැලීමේදී තීරක වරයා පෙත්සම්කරුවන් කර ඇතැයි කියන වංචාව සාධාරණ සැකයෙන් තොරව වගඋත්තරකරුවන් විසින් ඔප්පු කළයුතුබව තීරණය කර ඇති බවය. තීරක ප්‍රදානයේදී වැඩිදුරටත් කරුණු දක්වමින් තීරක වරයා 50 එන්.එල්.ආර්. 337 යටතේ වාර්තා ගතවන *ලක්ෂ්මන් වෙට්ටියාර් එදිව මුත්තයියා වෙට්ටියාර්* නඩුව අනුගමනය කරමින් වංචාව සාධාරණ සැකයෙන් තොරව මෙම බේරුම් කිරීමේ විමසීමේදී ඔප්පු කළයුතු බව සඳහන් කර ඇත.
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> මෙම තීරක ප්‍රදානය කිරීමට පෙර කරණලද විමසීමේදී පෙත්සම්කරුවන් විසින් වංචා සහගතව ලොරි රථයට ගිනි තැබීම සම්බන්ධයෙන් වගඋත්තරකරුවන් විසින් කරණලද චෝදනාව සාධාරණ සැකයෙන් තොරව ඔප්පු කර නැති බවට තීරක වරයා නිගමණය කර ඇත. එමෙන්ම මෙම වංචාව නීතිය අනුව සාධාරණ සැකයෙන් තොරව ඔප්පු කළයුතු බවටත් තීරක වරයා සඳහන් කර ඇත.
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> එහෙත් මේ සම්බන්ධයෙන් මෙම අධිකරණය විසින් කරුණු සැළකිල්ලට ගැනිමේදී, අධිකරණය විසින්, *නාරායන්වෙට්ටි එදිරිව මහාධිකරණය රැන්ගුන්*, 1941 ඒ.අයි.ආර්. (පී.සී.) 93 නඩු තීන්දුව කෙරෙහි අවධානය යොමුකරන ලදී. එම නඩුවේදී, 50 එන්. එල්. ආර්. 337 නඩුවෙතීන්දුව ප්‍රතික්ෂේපකර ඇත. එසේම *ඇසෝසියේටඩ් බැටරී මැනුපැක්චර් සිලෝන් ලිමිටඩ් එදිරිව සුලෙයිමාන් ඉංජිනියරින් වර්ක්ස් යුනයිටඩ්* 1975 (77) එන්.එල්.ආර්. 541 වෙනි පිටුවේ වාර්තා ගතවී ඇති නඩු තීන්දුව අනුව මෙවැනි වංචාවක් සිවිල් මුහුණුවරක් ගන්නා බැවින් එවැනි ආරාවුලකදී වංචාව, ඔප්පුකිරීමේ භාරය සාධාරණ සැකයකින් තොරව නොව සාක්ෂිවල වැඩිබර අනුව ඔප්පු කළයුතු බවට තීරණය වී ඇත.
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> තවද, ඊ. ආර්. එස්. කුමාරස්වාමි සාක්ෂි නීතියේ වෙළුම 02. ග්‍රන්ථයේ සඳහන් කරඇත්තේද, සිවිල් මුහුණුවරක් ගන්නා ලද ආරාවුලකදී එම ආරාවුල සාක්ෂි වැඩි බර අනුව ඔප්පු කළයුතු බවයි. මේ අනුව ලංකාවේ දැනට පවතින නීතිය යටතේ සිවිල් මුහුණුවරක් ගන්නා ලද ආරාවුලකදී 'වංචාව' සාධාරණ සැකයෙන් තොරව ඔප්පුකිරීම අවශ්‍ය

නොවන බවත් එය සාක්ෂිවල වැඩි බර අනුව ඔප්පුකිරීම ප්‍රමාණවත් බවත් සඳහන් වේ. රක්ෂණ නීතිය අනුවද වංචාව ඔප්පු කල යුත්තේ සාක්ෂි වැඩි බර අනුවය.

එබැවින් බේරුම් කිරීමේ ආඥා පනතේ 32(අ) බී. වගන්තිය අනුව මෙම නඩුවට ඉදිරිපත් කර ඇති තීරක ප්‍රදානය ශ්‍රී ලංකාවේ පවතින රාජ්‍ය ප්‍රතිපත්ති සමඟ ඝට්ටනය වෙනබව අධිකරණයට දක්නට ලැබෙයි. විශේෂයෙන් සාධාරණ සැකයෙන් තොරව වංචාවක් ඔප්පු කළයුතු බවට වැරදි නීතිමය සංකල්පයන් සඳහා තීරකවරුන් එළඹ තිබීම, ශ්‍රී ලංකාවේ පවතින නීති සංකල්පයන්ට විරුද්ධව තීරකවරුන් ගෙන ඇති තීරණයන් බව අධිකරණයට සනාථ වේ.

While learned President's Counsel for the Appellant sought to assail the reasoning of the High Court in the first and the last paragraphs of the passage quoted above on the basis that they were too widely formulated and suggested that a mere error of law on the face of the record could justify the setting aside of an arbitral award, learned President's Counsel for the Respondent submitted that such a formulation was consistent with the new and wider approach to public policy adopted by the Indian Supreme Court in *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd. supra.* However, our courts have adopted a more cautious approach and held that it is not every error of law but only a violation of a fundamental principle of law applicable in Sri Lanka that would be held to be contrary to public policy. As Shiranee Thilakawarane J., with whom Dissanayake J and Somawansa J concurred, observed in *Light Weight Body Armour Ltd., v Sri Lanka Army* [2007] BALR 10 at page 13, in the context of the facts of that case-

> *It is generally understood that the term public policy which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural aspects. Thus instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside. However, the facts of this case do not bear out any such incident of illegality, fraud or corruption in order to validate a challenge on the ground of public policy.*

However, it may not be necessary to go into the parameters of the concept of public policy in the context of the facts of this case, as it would appear from the decision of the Supreme Court of Sri Lanka in *Kristley (Pvt) Ltd v State Timber Corporation*, (2002) 1 SLR 225, that the Supreme Court took it for granted that an award procured by means of a forgery was contrary to public policy of Sri Lanka, although on the facts of that case, particularly in the absence of a specific issue on forgery raised before the arbitral tribunal, the Court held that the High Court was not justified in upholding the defence of forgery raised by the respondent.

Learned President's Counsel for the Appellant has also sought to challenge the decision of the High Court on the basis that it had misconstrued the standard of proof applicable for establishing fraud in an insurance case in arriving at the conclusion that the arbitral awards should be set aside and refusing enforcement. In my view, the High Court had not considered the fact that at page 6 of the majority award of the tribunal marked Z1, reference was in fact made to the early Sri Lankan decision of *Lakshmanan Chettiar v Muttiah Chettiar* 50 NLR 337, in which the Supreme Court laid down the principle that while the burden of proving fraud was on him who so alleges, the standard of proof was much higher than the civil standard of preponderance of probabilities. The arbitrators quoted extensively the following passage from Malcolm A. Clarke, *The Law of Insurance Contracts*, 2nd Edition at pages 711-2 pertaining to the law in England with respect to insurance contacts for the purpose of focusing firstly, on the law applicable to the question of fraud in insurance contracts, and secondly, to show what the approach of English Law was to such question:-

> *The duty of good faith between the insurer and insured is sometimes specified as the foundation, although not the only foundation, of the rule that fraud in a claim by the*

insured defeats the claim and terminates the contract of insurance. The rule is often spoken of as a contract term but a term that is 'in accordance with legal principles and sound policy'. Although at the time of the claim as at other times, the duty of good faith is most apparent as it affects the insured claimant, the duty must also be observed by the insurer. .....

The onus of proving fraud is on the insurer. In cases of fraudulent misstatement about the extent of loss, there may be little doubt that the statement was made, but the insurer must also prove that it was false and that the claimant knew it was false. In other cases the insurer's allegation of fraud may be more serious: that the loss occurred as claimed but was deliberately caused by the claimant. In all cases of alleged fraud, the onus, while not that of the criminal law, is greater than the usual balance of probabilities, because the 'more serious the allegation the higher the degree of probability' to be established. Indeed, if the allegation of fraud is that the insured fired his own property, the onus is close to that of facing the prosecution in a criminal case on the same facts, involving a high degree of probability."

It is in the light of this understanding of the law that the arbitral tribunal went on to analyze the evidence led in the case, and arrived at the conclusion that the Respondent had failed to discharge the burden placed on him to establish that the claims were fraudulent.

It is manifest that the approach of the arbitral tribunal was consistent with the law and practice in Sri Lanka. In *Lakshmanan Chettiar v. Muttiah Chettiar* 50 NLR 337, which was a civil action filed by a professional money lender against his agent claiming that he had fraudulently and in breach of trust assigned a decree made in his favour to a third party without any consideration, the court had to decide whether the assignment was fraudulent, and Howard, C.J. (with Canakaratne, J. concurring) held that the standard applicable to the proof of fraud was akin to the criminal standard. His Lordship observed at page 344, that "fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt" as such a finding "cannot be based on suspicion and conjecture." This decision was followed in *Yoosoof v. Rajaratnam* 74 NLR 9, in which in the context of an inquiry under Section 325 of the Civil Procedure Code, G.P.A. Silva A.C.J., observed at page 13 that-

Both principle and precedent would support the view that when a transfer is effected for valuable consideration the burden of proving that it was fraudulent rests on the plaintiff in these circumstances. It is an accepted rule that such a burden even in a civil proceeding must be discharged to the satisfaction of a Court. For that degree of satisfaction to be reached, the standard of proof that is required is the equivalent of proof beyond reasonable doubt.

However, in *Associated Battery Manufacturers (Ceylon) Ltd. v. United Engineering Workers Union* 77 NLR 541 at 544, and *Caledonian Estate Ltd., v. Hilaman* 79 - 1 NLR 421 at 426, it has been observed by this Court that allegations of misconduct in labour tribunal proceedings may be proved on a balance of probabilities. It is clear from these decisions that while the civil standard is generally applicable, the more serious the imputation, the stricter is the proof which is required. As explained by Lord Nicholls in *Re H (Minors)* [1996] AC 563, at page 586 –

The balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to

whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.

Explaining the principles enunciated by the courts in this regard, Phipson on Evidence (16th Edition – 2005) at page 156, emphasizes that-

....attention should be paid to the nature of the allegation, the alternative version of facts suggested by the defence (which may not be that the event did not occur, but rather that it occurred in a different way, or at someone else's hand), and the inherent probabilities of such alternatives having occurred.

In the recent decision of this Court in *Francis Samarawickrema v Dona Enatto Hilda Jayasinghe and Another*, [2009] 1 SLR 293, the Supreme Court has adopted this approach, exploding the theory that fraud in a civil case has to be proved beyond reasonable doubt, subject of course to the to the qualification that in applying the standard of the balance of probabilities, the court should always bear in mind that, as Lord Nicholls observed in the *dicta* quoted earlier, that *the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*. In my view, since the applicable degree of proof would depend on the seriousness of the charge, the question whether it is the criminal or civil standard of proof that would apply in a civil case involving a charge of fraud, would become difficult to answer without a meaningless play on semantics.

In my opinion, the High Court failed in its impugned judgment, to subject the evidence led by the parties before the arbitral tribunal to careful scrutiny in arriving at its decision to set aside the award. The arbitral tribunal, which was conscious of the standard applicable to the proof of fraud had closely examined all evidence led in the case by both parties and unanimously concluded that the lorry and its contents had been destroyed by fire, and the said fire had been caused by an electrical short circuit in the lorry. Witness Nihal Perera, who testified on behalf of the Appellant, stated in evidence that he was one of the passengers in the vehicle at the relevant time. He stated that the vehicle had transported the musical instruments and sound equipments in question to be used at a dance at a Hotel in Kandy. After the dance, the instruments were being transported to Colombo. The lorry left the Hotel at about 4.00 am and was proceeding along the Kandy-Colombo road. After they had travelled for about 20 or 30 minutes, one of the other passengers in the said lorry banged on some portion of the lorry in the rear and alerted the witness and the other passengers that there was a fire. Nihal Perera testified that, as a result of the fire, the lorry and its contents were completely destroyed. He specifically stated that the fire was not caused by him or any other persons. He also produced two lists of goods that were destroyed. He clarified that he was seated in the cab section of the lorry as a passenger when he was alerted to the fire.

The Appellant, Kiran Atapattu, also testified to the fact that the musical instruments and sound equipments were transported to Kandy in the lorry and that in the early hours of the relevant day, he was contacted by telephone at his home in Colombo by the witness Nihal Perera who informed him that the lorry had caught fire on the return journey. He reached Kandy and went to the spot and he specifically denied the suggestion that the vehicle and its contents had been set on fire at his instance. His evidence was followed by the next witness who was Inspector F. Henry Silva who had been OIC Crimes at the Peradeniya Police Station, within the area of which the incident had occurred. He stated that, at about 6.30 am on the day of the incident, a complaint had been received at the Police Station relating to the fire and he visited the spot at

about 8.20 am. He observed that the lorry was almost completely burnt down. He observed a heap of ash within the vehicle and a set of drums inside the vehicle which was still burning. He observed a large number of musical instruments and equipments within the lorry some of which were burnt and others still burning. He had been at the scene for one hour and in the course of his investigations, he questioned the passengers who had been in the lorry and inmates of houses in the vicinity. According to his investigations and inquiry he concluded that the fire must have been caused by an electrical short circuit in the lorry. He also stated that a retired Deputy Inspector-General of Police had visited the scene along with K.I. Jegatheesan, a retired officer from the Government Analyst's Department, a few days after the fire.

Two witnesses were called to give evidence on behalf of the Respondent, namely, Police Constable Weerasooriya of Peredeniya Police and K.I.Jegatheesan, a retired Government Analyst. Witness Weerasooriya read out from the notes made by the I.P. Henry Silva. These notes indicated that I.P. Henry Silva had noticed that the tires and tubes of the vehicle had been burnt and the vehicle had settled on its rims. These observations included the fact that, when IP Henry Silva visited the scene, flames were still visible and the entire rear portion of the lorry had been burnt.

The main witness called on behalf of the Respondent was Jegatheesan, who testified as an expert. He stated that, at the request of the Respondent, he investigated the fire, and had visited the scene on 9th July 1998, several days after the vehicle had caught fire. His evidence suggests that the vehicle had not been guarded during the interval between the fire and his inspection. This witness was of the opinion that the fire had not started from the diesel tanks. His position was that the fire had definitely started from the inside of the lorry and not from the diesel tanks. He was also of the opinion that the fire had not started from the battery area and contended that the fire could not have occurred as a result of an electrical short circuit. He was of the opinion that the fire could have commenced with the use of an inflammable liquid such as petrol.

The arbitral tribunal formed the opinion that his testimony was insufficient to establish with any certainty that the fire was the result of arson, particularly considering the delay in the inspection made by Jegatheesan, which might have resulted in the destruction of whatever meager evidence that may have remained in the scene after the fire. It would appear that the evidence of this witness is flawed in that, on his own admission, he did not carry out any chemical or other scientific tests to determine the cause of the fire. Moreover, under cross-examination, he was compelled to admit that there was nothing in his report to establish that the fire had been deliberately caused, and that he could have written his report from his office without visiting the scene at all. The tribunal also viewed his evidence with caution as he was an expert engaged by the Respondent. In this context it is necessary to quote from the following pertinent observation made by the tribunal at page 15 of the majority award:-

> We do not go to the extent of stating that we disbelieve the witness, but in assessing the worth of his evidence, as in the case of any witness whose evidence is put forward as that of an expert, it is necessary to bear in mind the cautions that have been expressed from time to time by the courts in the evaluation of such evidence.

The tribunal referred in the course of its majority award to the early decision of this Court in *Soysa v Sanmugam* 10 NLR 355, where Hutchinson CJ, was inclined to treat the opinion of an expert as nothing more than slight corroboration of a conclusion arrived at independently, and in any event, never so strong as to turn the scale against the person charged with a criminal act if the other evidence is not conclusive. In the subsequent decision of *R v Perera* 31 NLR 449, Jayawardena A.J. called attention to the danger of acting on the unsupported testimony of an expert. Somewhat similar views have been taken in *Gratiaen Perera v The Queen* 61 NLR 522

and in *Samarakoon v Public Trustee* 65 NLR 100. There are many authorities which show that the courts are aware of the fact that experts are inclined to show conscious or unconscious bias towards those who call them, and are perhaps hostile to those who challenge their views in cross-examination. Thus, in an old case, *Cresswall v Jackson* (1860) F &F 24, Cockburn CJ expressed the view that the evidence of professional witness has to be viewed with some degree of distrust, for it is generally given with some bias. In the case of *Abinger v Ashton* (1874) LR 17 Jessel MR stated that an expert is employed and paid, not merely his expenses but much more by the persons who calls him, and there is undoubtedly a natural bias to do something of use for those who employ him and adequately remunerate him.

In this state of evidence and in the light of the applicable law, I am of the opinion that the finding of the tribunal in this regard is unimpeachable and consistent with authority both on the question of the standard of proof applicable in civil cases involving an allegation of fraud as well as the value of expert evidence. In my view, the High Court had erred in its finding that the awards of the arbitral tribunal should be set aside and its enforcement refused on the basis that the tribunal had misapplied the applicable law relating to the standard of proof in civil cases where fraud is alleged and had failed to assess the evidence led before the arbitral tribunal to determine whether the Respondent would have succeeded with its defence of arson even on a balance of probabilities. Accordingly, questions (i), (ii) and (iv) raised on behalf of the Appellant have to be answered in the affirmative.

The Question of Double Insurance

This court has also granted leave to appeal on the question whether the arbitral awards were made contrary to public policy, in that they have failed to consider that "double insurance" has been taken in respect of musical instruments. Although the question of "double insurance" was taken up on behalf of the Respondent, neither President's Counsel have addressed Court on this question, or adverted to it in their written submissions. However, it appears that this ground of challenge has been raised on the basis that the musical instruments and sound equipments covered by the insurance policies marked P1B and P1C are identical. I have given consideration in this context to the types of items covered by the two respective polices. The description of properties covered by P1B and their values were as follows:-

One Studio Master 24 Channel Audio Mixer	*200,000/-*
One Studio Master 12 Channel Audio Mixer	*100,000/-*
One Studio Master 08 Channel Audio Mixer	*50,000/-*
One Studio Master Audio Mixer	*50,000/-*
One Guitar Amplifier Attax 100 Huges & Kettneattax 100	*45,000/-*
One Roland GP 100 Pre-Amp processor	*55,000/-*
One Roland FC 200 Foot Controller	*40,000/-*
One Boss LU-300L (T) Volume Pedal	*5,000/-*
One Ibanez Electric Guitar-Model No. 540BMAU/N F407829	*65,000/-*
One Digitech GSP 2101 Guitar Pre-Amp Processor	*75,000/-*
Two Music Stands KHS BS 310-SLR 3,000/- Each	*6,000/-*
Three Ultimate KL-29B Axcel Guitar Stands SLR 3,000/- Each	*9,000/-*
One Ultimate MC-66B Mic Stand	*6,000/-*
Two Equalizers Yamaha Q 2031/A (LK01219 & LK01220) – SLR 50,000/- Each	*100,000/-*
One Sennhaiser Cordless Microphone BF 1501	*60,000/-*
Four JBL Monitor Speakers Eow Power 15 – SLR 75,000/- Each	*300,000/-*
Two Equalizers – SLR 60,000/- Each Compressor Limiter Dpr 402-02/3214 Spectral Enhansa – 2-374813GD	*120,000/-*

Three Apex Ultimate Microphone Stands SLR 3,000/- Each	*9,000/-*
Five Shure SM58 Microphones – SLR 12,000/- Each	*60,000/-*
One Roland XP-50 Keyboard – S/N XH58887	*100,000/-*
One Ariana D0200N Semi-Acqoustic Guitar (29183)	*20,000/-*
One Hohner Harmonica	*5,000/-*

This may be contrasted with the description of properties covered by the policy marked P1C and their values as set out in the said policy:-

Tama AF 522X5 Drum Set including: Two Brass Drums, Four Tom Toms, One Floor Tom, One Snare Drum, One Drum Stool, One Hi-Hat Stand, One Cable Hi-Hat, Four Boom Stands, One Double-Bags Drum Pedal, One Snare Drum Stand, One Hi-Hat, Two Crash Cymbals, One Rice Cymbal, One Splash Cymbal and two Drum Racks	*300,000/-*
One Alasis D445 Drum Module S/N D 53301743	*30,000/-*
One Roland SPD 11 Total Percussion AF 8212 T	*40,000/-*
One Roland Ju-1080 Module BH 72245	*68,500/-*
One Ensonic ASR- 10 Keyboard ASR 20422	*115,000/-*
One Roland A 80 Master Keyboard	*150,000/-*
One Ultimate AX-48R Apex Keyboard Stand	*24,000/-*
One Korg I-3 Keyboard - SN 433340	*150,000/-*
One Roland MC 50 MK II Micro Composer	*50,000/-*
One Jupiter TPS-547 GL Saprano Saxophone	*65,000/-*
One Ultimate AX- 48B Apex Keyboard Stand	*24,000/-*
One Roland JV 38 Keyboard - S/N AG 92490	*80,000/-*
One Bass Amplifier Head Wamp 2808	*86,000/-*
One Bass Speakerbox Warric 212-40	*55,000/-*
One Roland RSP 550-Connects Unit	*60,000/-*
One Art-Night Bass with Pedal	*90,000/-*

It is abundantly clear from this comparison that there is no question of double insurance arising in this case. Furthermore, it is clear from the evidence of witness Nihal Perera, who had given the lists of the items that were destroyed in the fire, that the properties covered by insurance policies marked P1B and P1C were in the lorry at the time the fire occurred. Inspector F. Henry Silva, OIC crimes at the Peradeniya Police Station, who visited the scene of the incident the following morning at 6.30 am, had observed a set of drums and a large number of other instruments within the lorry, some which were completely burnt and the others still burning. It is also significant that the insurer under both policies was the Respondent, who would have detected at the time of issuing the policy that they covered identical property, had that been the case. Question (1) raised by the Respondent, has to be answered in the negative.

The Award of Three Sets of Costs

The final question to be considered for the completion of this judgment is whether the award of three sets of costs at the arbitration are contrary to public policy, considering that there was only one hearing in respect of all three claims. There is no express provision in the Arbitration Act of 1995 with respect to the award of costs, but it is universally accepted that any arbitral tribunal may award costs as may be appropriate, unless such relief is precluded by the arbitration clause or terms of reference. In the impugned awards costs of arbitration have been separately awarded with respect to the three policies, despite the fact that the three claims made by the Appellant were consolidated by consent of parties and one hearing took place. In regard to this question too, no submissions were addressed to court, but having considered all

the relevant facts and circumstances of these claims, I am firmly of the opinion that the award of costs was not excessive and were reasonable. This question too, has to be answered in the negative.

Conclusions

For the foregoing reasons, I answer questions (i), (ii), (iii) and (iv) raised by learned President's Counsel for the Appellant, in the affirmative, and both questions raised by learned President's Counsel for the Respondent in the negative. I would allow the appeal, set aside the judgment of the High Court and refuse the application made by the Respondent to set aside the arbitral award. The Appellant's application for the enforcement of the award is allowed, and the High Court is directed to file the awards, give judgment according to the awards, and to enter decree accordingly.

The Appellant shall be entitled to costs of appeal to this court, and to costs in respect of the several applications filed in the High Court in a sum of Rs. 125,000/-.

JUDGE OF THE SUPREME COURT

AMARATUNGA J

JUDGE OF THE SUPREME COURT

IMAM J

JUDGE OF THE SUPREME COURT