IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Section 37 (2) of the Arbitration Act No. 11 of 1995.

S C Appeal No. 119/2017

(with S C Appeal No. 120/2017)

SC/HC/LA No: 87/2016

HC No: HC/ARB/57/2013

ARB No: SLNAC/166/12/2006

1. Sathsindu Forwarding & Security (Pvt) Limited,
   No. 80,
   Navam Mawatha,
   Colombo 02.

2. Bagnold Associates Limited,
   No. 85,
   Grace Church Street,
   London, EC3 0AA,
   United Kingdom.

CLAIMANTS

Vs.

Sri Lanka Ports Authority,
No. 19,
P.O Box No. 595,
Church Street,
Colombo 01.

RESPONDENT

AND BETWEEN

1. Sathsindu Forwarding & Security (Pvt) Limited,

No. 80,
Navam Mawatha,
Colombo 02.

2. Bagnold Associates Limited,
No. 85,
Grace Church Street,
London,
EC3 0AA,
United Kingdom.

CLAIMANT-PETITIONERS

Vs.

Sri Lanka Ports Authority,
No. 19,
P.O Box No. 595,
Church Street,
Colombo 01.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Sri Lanka Ports Authority,
No. 19,
P.O Box No. 595,
Church Street,
Colombo 01.

RESPONDENT-RESPONDENT-APPELLANT

Vs.

1. Sathsindu Forwarding & Security (Pvt) Limited,
No. 80,
Navam Mawatha,
Colombo 02.
2. Bagnold Associates Limited,
No. 85,

Grace Church Street,
London, EC3 0AA,
United Kingdom.

CLAIMANT-PETITIONER-RESPONDENTS

Before: **JAYANTHA JAYASURIYA PC CJ**

P. PADMAN SURASENA J

E. A. G. R. AMARASEKARA J

Counsel: Vikum De Abrew SDSG with Chaya Sri Nammuni SSC for the Respondent-Respondent-Appellant

Nihal Jayawardena PC with Shyamalie Goonewardena & Radhya Herath for the Claimant-Petitioner-Respondents

Argued on: 12 - 01 - 2021 and 29 - 03 - 2021

Decided on: 22 - 03 - 2022

P Padman Surasena J

The Respondent-Respondent-Appellant, Sri Lanka Ports Authority (hereinafter referred to as the SLPA), entered in to the agreement dated 22-01-2004 (produced marked **P 4**), with the 1st Claimant-Petitioner-Respondent, a company incorporated in Sri Lanka, which acted in association with the 2nd Claimant-Petitioner-Respondent, Bagnold Associates Limited, a company incorporated in the United Kingdom, to conduct Port Security Consultancy Service according to the International Code for the Security of Ships and Port Facilities (ISPS) required by the Diplomatic Conference on Maritime Security held in London in December 2002 which had called for development of new measures relating to the security of ships and port facilities. For convenience, the 1st Claimant-Petitioner-Respondent and the 2nd Claimant-Petitioner-Respondent will hereinafter be jointly referred to in this judgment, as the Claimants.

Schedule A of the afore-stated agreement (hereinafter referred to as the Agreement), specified the services entrusted to the Claimants by the SLPA, while Schedule B of the Agreement specified the rates of payment for the provision of the said services. The Claimants had agreed to complete the said services within the time scale specified at the end of Schedule

B of the Agreement. For easy reference I would reproduce below, the two of the above-mentioned schedules to the Agreement.

Schedule A which sets out the services entrusted to the Claimants is as follows.

Schedule A

SCOPE OF WORK

Phase 1

Port Facility Security Assessment (PFSA)

A risk analysis of a port facility's operation in order to determine its risk to be the subject of any attack and its vulnerabilities in relation to such attack known as "Port Facility Security Assessment" (PFSA) of the Seaports of Sri Lanka and would address following.

a. *Identification and evaluation of important assets and infrastructure it is important to protect.*
b. *Identification of the possible threats to the assets and infrastructure and likelihood of their occurrence, in order to establish and prioritize security measure.*
c. *Identification, selection and prioritization of countermeasures and procedural changes and their level of effectiveness in reducing vulnerability.*
d. *Identification of vulnerabilities*
e. *Recommendations*

\- ***4 Weeks***

On getting approval of the Port Facility Security Assessment report by your Designate Authority, the Port Facility Security Plan (PFSP) would be prepared.

Phase 2

Port Facility Security Plans (PFSP)

A plan developed to ensure the Application of measures designed to protect the port facility and ships, persons and Cargo, Cargo transport units and Ship's stores within Port facility from the risks of a Security incident known as ***Port Facility Security Plans (PFSP)*** *of the Sea Ports of Sri Lanka and would address following.*

a. *Detail the security organisation of Port Facility.*

b. *Detail of Port Facility's link with other relevant authorities and the necessary commutation system to allow the effective continuous operation of the organization and its links with others, including ships in port;*
c. *Detail the basic security level 1 measures, both operational and physical, that will be in place;*
d. *Detail the additional security measures that will allow the port facility to progress without delay to security level 2 and, when necessary, to security level 3;*
e. *Provide for regular review, or audit, of the PFSP and for its amendments in response to experience or changing circumstances; and*
f. *Detail reporting procedures to government of Sri Lanka's contact points.*

- 4 Weeks

Phase 3

Training of Port Facility Security Officers

SATHSINDU/BAGNOLD *undertakes to design a training program and conducted aid program for up to ten persons.*

- *Understanding the reasons for the ISPS code*
- *ISPS Code content and requirements.*
- *Understanding the ISPS Code.*
- *Carrying out port critically assessments.*
- *Carrying out port vulnerability assessments.*
- *Ship & port interface.*
- *Understanding port security searches and search technology.*
- *ISPS documentation*
- *Developing an ISPS security manual.*

- ***3 Days to 01 Week***

In return, the SLPA had agreed to pay for the above-mentioned services, as per the payment scheme provided in Schedule B which is as follows.

Schedule B

ISPS PAYMENT SCHEDULE

	An advance payment of 50% of the total cost upon signing the Agreement	*US $ 60,000.00*
	25% to be paid at the time of submitting the security manuals	*US $ 30,000.00*
	25% to be paid at the time Government accepts security manuals	*US $ 30,000.00*
	Total	***US $ 120,000.00***

TIME SCALE

Phase	***Local***	***Foreign***
01		*4 Weeks*
02	*4 Weeks*	
03		*1 Week*

By virtue of the aforementioned payment schedule, the SLPA, upon signing the Agreement, was required to make an advance payment of 50% of the total cost which the SLPA had duly paid to the Claimants.

After the lapse of one year and six days to be exact, the Claimants, by the Notice of Arbitration dated 28th January 2005, had informed the SLPA that a dispute had arisen as the SLPA was in breach of their obligations under the Agreement as it had refused to pay the balance part of the total payment. The Claimants stated in the said notice that they are entitled to the balance payment since they had performed the services under the Agreement.

As the parties had agreed to refer for arbitration, any dispute arising between them regarding the performance of the contract as per clause 15 of the Agreement, the Claimants had referred the aforesaid dispute for arbitration by way of the afore-mentioned Notice of Arbitration.

The dispute in respect of which the Claimants had given Notice of Arbitration to SLPA, could be gathered by the following averments in the said Notice of Arbitration, produced marked **P 3** in this proceeding.[1]

[1] The said Notice of Arbitration was annexed marked X 8 to the Statement of Claim filed in the arbitral tribunal.

"In terms of Clause 2 of the above-mentioned agreement, Sri Lanka Ports Authority established by Act No. 51 of 1979, appointed our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) and/or in association with Bagnold Associates Limited as the Recognized Security Organization (RSO) and to perform the services listed in Schedule A annexed thereto upon the payment of rates mentioned in Schedule B to the said agreement for and on behalf of the Sri Lanka Ports Authority.

Our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited have performed their obligations and/or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of US $ 60,000/- being 50% of the total payment that should be paid under the agreement mentioned above.

However, as the Sri Lanka Ports Authority in breach of its obligation under the above Agreement failed and neglected to pay the balance sum of US$ 60,000/. Therefore our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited are entitled to claim the said balance sum of US$ 60,000/- together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004. Further, our clients the said Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited have incurred a sum of Rs. 126,823.60 as expenses incurred to them and thus in terms of Clause 4.1.3 of the said Agreement entitled to claim the same together with the interest at the rate of 12% per annum from 23rd of March 2004.

However, as the Sri Lanka Ports Authority repeatedly failed and neglected to pay the above mentioned sums to our clients as per the said Agreement, through their Attorneys-at-law, sent a letter of demand dated 27th November 2004 demanding the above mentioned sums from Sri Lanka Ports Authority."

Thus, the dispute, the Claimants had referred for arbitration before the relevant arbitral tribunal as per the Notice of Arbitration, is the non-payment by the SLPA, the balance sum of US Dollars 60,000/=, in breach of its obligation under the Agreement despite the completion of the performance by the Claimants, their obligations under the Agreement. It is because the Claimants had carried out the services entrusted to them by the Sri Lanka Ports Authority that the former had claimed the balance sum of US Dollars 60,000/=.

Accordingly, having taken necessary steps to have the arbitrators appointed, the Claimants had filed in the arbitral tribunal, their Statement of Claim dated 05th January 2007 in which

they have described in detail, the dispute that had arisen between the Claimants and the SLPA.

The dispute in respect of which the Claimants have filed the said Statement of Claim, could be gathered by the averments contained in the 14th and 15th paragraphs in that Statement of Claim produced marked **P 5** in this proceeding. The said paragraphs are reproduced below for easy reference.

> *"14. An agreement to that effect was entered into between Sathsindu Forwarding & Security (Pvt) Limited (SFSL), the first named claimant, in association with Bagnold Associates Limited, the second named claimant and the Sri Lanka Ports Authority the(sic) for conducting of port security consultant services for international code for the security of ships and port facilities (ISPS) and to perform the services listed in Schedule A annexed thereto upon the payment of rates mentioned in Schedule B to the said agreement for and on behalf of the Sri Lanka Ports Authority.*
>
> *A true copy of the said Agreement is annexed hereto marked as "**X2**" and pleads the same as part and parcel hereof.*
>
> *15. The claimants above named have performed their obligations to the full satisfaction of the SLPA and/or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of US$ 60,000/- being 50% of the total payment that should be paid under the agreement mentioned above.*
>
> *In proof of the said contention, the claimants annexe herewith marked as "**X3 (a)**", "**X3 (b)** and "**X3 (c)**" respectively, true copies of the said invoice, letter dated 26th January 2004 and receipt issued by the 1st Claimant."*

Moreover, in the said Statement of Claim, the Claimants have also stated the following.

i. *The Claimants have submitted the Port Facility Security Assessment (PFSA) and the invoice for payment for work carried out for SLPA in terms of the agreement for part payment.*
ii. *The Claimants have prepared the Port Facility Security Plans (PFSP).*
iii. *In the meantime, in April 2004 the Parliamentary election was held after which a different political party formed the Government.*
iv. *Thereafter the Government has appointed Sri Lanka Navy as the designated authority and the Recognized Security Organization (RSO) for ports security.*

v. *The LTTE almost carried out a major attack on the port of Colombo on 16-06-2006 which would have caused heavy damaged to the port of Colombo and to the city of Colombo. The attack failed purely due to bad weather.*

vi. *The 1st Claimant sent a letter dated 24-03-2004 to the Respondent with an attached invoice for an immediate payment of US Dollars 30,000 /=.*

vii. *The Claimants are therefore entitled to claim the balance sum of US Dollars 60,000 together with the interest at the rate of 12 percent per annum on the said sum from the date of 23rd March 2004 from the SLPA.*

viii. *The Claimants have incurred a sum of RS. 126,823.60 as expenses incurred to them and thus in terms of clause 4.1.3 of the agreement are entitled to claim that amount also together with the interest.*

ix. *The Claimants have sent a letter of demand dated 27-11-2004 to the SLPA.*

The Claimants, in keeping with the dispute they had referred for arbitration, had only prayed in their Statement of Claim, the following relief:

a. *an award in a sum of US $ 60,000/- or its equivalent sum in Sri Lanka rupees, together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the Respondent,*

b. *further award in a sum of Rs. 126,823.60 as expenses incurred to them together with the interest at the rate of 12% per annum from 23rd of March 2004, and*

c. *Costs of the arbitration.*

The SLPA filing its Statement of Defence, had taken up inter alia, the following positions.

(i) *Following the tragic events of 11.09.2001, IMO adopted new provisions to the SOLAS convention in December 2002 in order to enhance maritime security.*

(ii) *IMO by resolution amended the SOLAS convention under which the said ISPS security arrangements became mandatory from 01.07.2004.*

(iii) *The SLPA entered into the agreement in order to comply with the mandatory requirements under ISPS Code.*

(iv) *The SLPA paid a sum of US $ 60,000/= as an advance payment in terms of the agreement.*

(v) *The Claimants have failed to fulfill their obligations in terms of the agreement.*

(vi) *The Claimants are not entitled for any payment under the agreement as the Claimants have failed to carry out their obligations under the agreement.*

(vii) Sri Lanka Navy has fulfilled the requirements under the ISPS Code before the deadline given for the implementation of the same.

At the commencement of the inquiry before the arbitral tribunal, both parties framed issues to be decided by the arbitral tribunal. This was also done in keeping with the dispute that was referred for arbitration. It is relating to that particular dispute, that the parties had submitted their respective pleadings before the arbitral tribunal. The issues (as per the award as well as the written submissions filed by the parties in the arbitral tribunal) raised respectively by the Claimants and the SLPA, would help identify the nature of the said particular dispute, the arbitral tribunal was dealing with, in the instant case.

Issues raised by the Claimants:

i) Did the Claimants enter into the agreement marked X 2[2] to perform the services described in the said agreement?
ii) Did the Claimants perform the obligations contracted in terms of X 2?
iii) Did the Claimants make a demand by X 6[3]?
iv) Did the [SLPA] refuse to make payment in terms of X 7[4]?
v) Are the Claimants entitled to the sums referred to in paragraphs 44 of the Statement of Claim?
vi) If one or more issues are answered in favour of the Claimant, are the Claimants entitled to the reliefs prayed for in the claim?

Issues raised by the SLPA:

i) Was there a valid contract between the Claimant and the [SLPA]?
ii) Was there a valid Arbitration Agreement to refer the purported dispute for arbitration due to one or more aforesaid reasons?
iii) Was there a valid reference for arbitration?
iv) Has the tribunal jurisdiction to hear this arbitration and grant relief prayed for by the Claimant?
v) If any one or more issues above are answered in favour of the [SLPA], should the Statement of Claim be dismissed in limine by the tribunal?
vi) Without prejudice to the above issues, did IMO adopt new provisions to the SOLAS convention in December 2002 in order to enhance maritime security?

[2] The Agreement produced (in the Supreme Court) marked **P 4** in this appeal.
[3] The letter of demand dated 27-11-2004 annexed to the Statement of Claim.
[4] The letter dated 24-12-2004 by which the SLPA had replied the above letter of demand.

vii) Did IMO resolution amend the SOLAS convention under which the said ISPS security arrangements became mandatory from 01-07-2004?

viii) Did the [SLPA] enter into the agreement marked X 2 in order to comply with the mandatory requirements under the ISPS Code?

ix) Did the [SLPA] pay a sum of US $ 60,0000/- as an advance payment in terms of the agreement marked X 2?

x) Did the Claimant fail to fulfill its obligations in terms of the agreement?

xi) Did the [SLPA] appoint the Claimants as a Recognised Security Organization (RSO)?

xii) Are the Claimants entitled for payment under the agreement?

xiii) Has the Sri Lanka Navy fulfilled the requirements under the ISPS Code before the deadline given for implementation of the same?

xiv) If any one or more of the issues above are answered in favour of the [SLPA], should the Statement of Claim be dismissed in limine by the tribunal?

xv) Are the Claimants entitled for the relief prayed for, in the Statement of Claim?

xvi) Are the Claimants estopped from claiming any money in terms of the agreement due to their conduct?

xvii) Is the amount claimed by the Claimant excessive?

xviii) If any one or more of the issues above are answered in favour of the [SLPA], should the Statement of Claim be dismissed in limine by the tribunal?

xix) Had the Claimants failed to discharge its obligation for the advance payment made even after the time period stipulated in the agreement?

xx) Had the Claimant failed to fulfill its obligations for the advance payment made in terms of the agreement marked X 2?

xxi) Did the Claimants fail to fulfill its obligations for the advance payment made even after the time period stipulated in the agreement?

xxii) *Has a cause of action accrued to the [SLPA] against the Claimant to recover the aforesaid sum of US $ 60,000/- with the interest at the rate of 12% per annum on the said sum from 23-04-2004 up to the date of award and legal interest on the aggregate amount mentioned in the award till payment in full?*

The above issues clearly show that all three stakeholders in this arbitration, namely the two rival parties and the arbitral tribunal, had focussed on the dispute of non-payment by the SLPA, the balance sum of US Dollars 60,000/=, in breach of its obligation under the Agreement, despite the completion of the performance by the Claimants, their obligations

under the Agreement. This is because it was the said dispute that the Claimants had referred for arbitration before the arbitral tribunal.

However, after the completion of the inquiry, the arbitral tribunal had unanimously awarded the Claimants a sum of US$ 48,000/- being the balance of 90% of the total cost (US$ 120,000/-) after deducting the advance of US $ 60,000/- already paid to the Claimants by the SLPA. In the award, the arbitral tribunal had held that the Claimants are entitled to the said 90% of the total sum in terms of clause 10.3 of the Agreement on the basis that the SLPA had prevented the Claimants from carrying out the services entrusted to them.

Being aggrieved by the award of the arbitral tribunal, the SLPA filed in the High Court, the petition and affidavit dated 28-03-2013 in the case bearing No. HC ARB/ 57/ 2013 in terms of section 32(1) of the Arbitration Act No. 11 of 1995 (hereinafter sometimes referred to as the Arbitration Act), seeking to set aside the aforesaid arbitral award. Thereafter, the Claimants filed an application dated 28-05-2013 bearing case No. HC ARB/ 112/ 2013, seeking to enforce the said arbitral award under section 31 of the Arbitration Act. The learned High Court Judge having consolidated those two applications in terms of section 35 of the Arbitration Act, pronounced the judgment which is impugned in this appeal. The learned High Court Judge by that judgment had dismissed the application of the SLPA refusing to set aside the arbitral award and made order in the same judgment recognizing and enforcing the arbitral award.

Being aggrieved by the judgment of the learned High Court Judge, the SLPA has filed the instant appeal to challenge the order refusing to set aside the arbitral award. This Court, when the Leave to Appeal application pertaining to the instant appeal was supported before it, having heard the submissions of the learned Counsel for both parties, by its order dated 12-06-2017, has granted Leave to Appeal in respect of the questions of law set out in sub-paragraphs (a), (b) and (c) of paragraph 18 of the Petition dated 15-01-2016 filed by the SLPA. The said questions of law read as follows.

a) *Is the judgement of the High Court contrary to the provisions in sections 4, 15, 18, 24 and 25 of the Arbitration Act?*
b) *Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32 (1)(a)(iii) of the Arbitration Act?*
c) *Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32 (1)(b)(ii) of the Arbitration Act?*

Since there is a reference to sections 4, 15, 18, 24 and 25 of the Arbitration Act in the afore-stated question of law set out in paragraph 18 (a) of the petition, reproducing those sections first, would be convenient.

Section 4 of the Arbitration Act describes the arbitrability of the dispute as follows:

> *"Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or, is not capable of determination by arbitration."*

Section 15 of the Arbitration Act specifies the duties of the arbitral tribunal as follows:

> *15. (1) An arbitral tribunal shall deal with any dispute submitted to it for arbitration in an Impartial, practical and expeditious manner.*
>
> *(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.*
>
> *(3) An arbitral tribunal may, notwithstanding the failure of a party without reasonable cause, to appear before it, or to comply with any order made by it, continue the arbitral proceedings and determine the dispute on the material available to it.*
>
> *(4) Parties may, introduce new prayers for relief provided that such prayers for relief fall within the scope of the arbitration agreement and it is not inappropriate to accept them having regard to the point of time at which they are introduced and to other circumstances. During the course of such proceedings, either party may, on like conditions, amend or supplement prayers for relief introduced earlier and rely on new circumstances in support of their respective cases.*

Section 18 of the Arbitration Act describes the commencement of arbitral proceedings as follows:

> *18. An arbitration shall be deemed to have been commenced if -*
>
> *a) a dispute to which the relevant arbitration agreement applies has arisen; and*
> *b) a party to the agreement -*

(i) has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of, the dispute to arbitration; or

(ii) has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in or approve the appointment of, an arbitral tribunal in relation to the dispute.

Section 24 of the Arbitration Act describes the law applicable to the substance of dispute as follows:

24. (1) An arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties to any arbitration agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The provision of subsections (1) and (2) shall apply only to the extent agreed to by the parties.

(4) The arbitral tribunal shall decide according to considerations of general justice and fairness or trade usages only if the parties have expressly authorised it to do so.

Section 25 of the Arbitration Act describes the form and content of the arbitral award as follows:

25. (1) The award shall be made in writing and shall be signed by the arbitrators constituting the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14.

(3) The award shall state its date and place of arbitration as determined in accordance with section 16. The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators constituting the arbitral tribunal in accordance with subsection (1) of this section shall be delivered to each party.

Having reproduced the above sections, let me first consider the questions of law set out in paragraphs 18 (a) and 18 (b) of the petition since the main thrust of the arguments advanced by the learned Senior Deputy Solicitor General who appeared for the SLPA was directed towards the issues set out in those questions.

At the outset, it must be remembered that arbitration is a process dependant solely on the agreement of the parties. The party autonomy is fundamental to such process. When one traverses through the provisions of the Arbitration Act, it becomes clear that the Act has recognised the party autonomy to a great extent. For example, the parties are free to determine the number of arbitrators of an arbitral tribunal;[5] the parties are free to agree on a procedure for appointing the arbitrators;[6] the parties are free to agree on any appropriate procedure including mediation and conciliation to encourage settlement at any time during the arbitral proceedings;[7] the parties are free to agree on the place of arbitration;[8] the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[9] It is also open for the parties to agree: on the manner in which evidence before arbitral tribunal shall be given,[10] on the mode in which they could be represented before arbitral tribunal.[11] Moreover, the parties also can agree to an exclusion agreement as per section 38 of the Act. Thus, the principle of party autonomy could be seen permeating the entire Act as the guiding principle through those and also the other provisions of the Act. It is the said guiding principle which the Courts also adopt and give effect to, when deciding cases involving arbitrations. This is perhaps why arbitration is sometimes referred to as a private method of dispute resolution. In the arbitration process, the Government is not involved; the court system is not involved (except as provided for in the Act); the parties do not have to rely on any Government institution for resolution of their dispute. Process of conducting the arbitration, venue, time, mode of adducing evidence are all decided by agreement of parties. Although it is the agreement of the parties which first establishes the arbitral tribunal, it would thereafter be the arbitral tribunal which would eventually take over the whole affairs of

[5] Section 6.
[6] Section 7 (subject to the provisions of the Act).
[7] Section 14.
[8] Section 16.
[9] Section 17.
[10] Section 22.
[11] Section 23.

conducting the arbitration to its conclusion. However, one must not forget that it is basically the agreement of the parties which initially founds the arbitral tribunal and it is the parties and parties alone which confer it with jurisdiction by referring a dispute to it, for adjudication.

Although it is a private method of dispute resolution, once the arbitral tribunal makes an award, the law of the country (Arbitration Act) steps in to recognize and enforce that award. However, this is not without any limitation. The law (Arbitration Act) has put in place, certain legal framework within which the arbitral tribunal must operate. Courts will recognise and enforce an award made by an arbitral tribunal only if it had conducted its affairs (leading to the relevant award) within the framework specified by law. The afore-stated limitations are reflected in section 32 of the Act. Thus, it would be opportune at this juncture to reproduce that section. This is more so as the questions of law set out in Paragraphs 18 (b) and 18 (c) are also centred around some of the provisions in the said section.

Section 32 of the Arbitration Act.

(1) 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 –

(a) where the party making the application furnishes proof that -

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Sri Lanka ; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on maters beyond the scope of the submission to arbitration:
Provided however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act : or

(b) where the High Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka: or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka.

(2) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application."

In the instant case, in clause 15 of the Agreement, the parties had agreed that any arbitration must be determined and resolved according to the rules and procedures as per the laws of Sri Lanka. Indeed, in the Notice of Arbitration dated 28-01-2005 itself, the Claimants also have relied on the provisions of the Arbitration Act No.11 of 1995. There is also no dispute that the provisions of the Arbitration Act must apply in this instance.

The main contention of the SLPA is that the arbitral tribunal had unlawfully made an award in relation to a new matter, raised for the first time by the Claimants in their written submissions, filed after the conclusion of the inquiry. It is because of that, the SLPA argues that the award of the arbitral tribunal must be set aside under section 32(1)(a)(iii) of the Arbitration Act. It is that argument I would now consider.

The Claimants commenced the inquiry proper, led evidence of witnesses and marked documents. They attempted to prove that they had fulfilled their obligations under the Agreement, as claimed in their Statement of Claim. However, the SLPA by way of cross examination, leading evidence of witnesses and by producing documents showed the arbitral tribunal, that the Claimants in fact had not fulfilled their obligations as per the Agreement. Perusal of the arbitral award shows clearly that the arbitral tribunal had accepted the position that the Claimants had not completed fulfilling their obligations as per the Agreement.

After the conclusion of the inquiry, both the Claimants and the SLPA had filed their respective written submissions. Some of the averments in the written submissions filed by the Claimants after the inquiry,[12] clearly show that the Claimants too do not assert positively that they had completely fulfilled their obligations as per schedule A of the Agreement. This is evident as the Claimants had more specifically used the phrase *'having almost completed'* in paragraph 84 of the written submissions dated 10.05.2012. It is in the said written submissions that the

[12] Page 949 & 969 of the appeal brief.

Claimants, for the first time, had claimed 90% of the total cost as per clause 10.3 of the Agreement.

Perusal of the proceedings of the arbitral tribunal shows that the arbitral tribunal had concluded recording of evidence on 03-09-2009, on which date, a date for correction of proceedings was fixed. Thereafter the arbitral tribunal had proceeded to make corrections of the proceedings on several dates i.e., 18-11-2009, 27-11-2009 and 16-02-2010.

The Claimants had thereafter filed their final written submission dated 10-05-2012. Proceedings dated 20-06-2012 shows that the learned Counsel for the Claimants Mr. Nihal Jayawardena had made an oral submission before the arbitral tribunal on that date (i.e., 20-06-2012) and thereafter continued his submission on 11-07-2012 also. Thereafter, on the same day (i.e., 11-07-2012), the learned Deputy Solicitor General Mr. De Abrew had started replying the aforesaid submissions made on behalf of the Claimant. (Same Counsel had continued to represent their respective parties in the High Court as well as in this Court.)

The sequence of the above events would clearly show that the arbitral tribunal had proceeded to hear the oral submissions of the learned Counsel for both parties, after both parties had filed their respective written submissions; the Claimants on 10-05-2012 and the SLPA on 22-05-2012 (as per the date stamp placed on the written submissions of the SLPA). Perusal of the aforesaid oral submissions made by the parties (recorded in the proceedings before the arbitral tribunal), also clearly shows that the Claimants had not advanced a case based on clause 10.3 of the Agreement up until that moment. The submissions made by the learned Deputy Solicitor General shows that the claim under clause 10.3 of the Agreement, put forward by the Claimants for the first time in their written submission filed after conclusion of recording of evidence, had taken the SLPA by surprise. The said submission also reveals that the learned Deputy Solicitor General had sufficiently appraised the arbitral tribunal of the above position well before it pronounced the award dated 30-01-2013.

However, despite the above position being brought to its attention, the arbitral tribunal had just brushed aside the said position and proceeded to make an award on the new claim put forward by the claimant in their final written submission. This has clearly deprived the SLPA any opportunity of defending such a claim before the arbitral tribunal. This clearly is tantamount to the arbitral tribunal breaching the provisions in section 15 (2) of the Arbitration Act which has stipulated that an arbitral tribunal shall afford all parties an opportunity, of presenting their respective cases. When the SLPA did not know that the Claimants would finally rest their case on clause 10.3 of the Agreement how could the SLPA have presented its case to defend such a claim? This is primarily due to the fact that the Claimants had not

referred any such dispute arising out of clause 10.3 of the Agreement for adjudication before the arbitral tribunal. The operative part of the said award dated 30-01-2013, (produced marked **P 2** in this proceeding) which is reproduced below would shed further light on the above issue.

> *"… Therefore, in view of the failure by the Respondent to perform its obligations in relation to the PFSAs the Claimants could not have completed performance in respect of PFSPS and in view of the foregoing statement of law set out by C G Weeramantry, the Respondent cannot seek to avoid liability on the basis that Claimants have not performed their obligations in relation to the PFSPs as per the agreement C9.* ***The Claimants in paragraph 22 of their written submission dated 10/05/2012 submit that they are entitled to 90% of the total sum in terms of Clause 10.3 of the agreement C9****.[13] For the foregoing reasons I am in agreement with this submission* ***on the ground that the Respondent's employees prevented Claimant 1 from carrying out the services as contemplated in Clause 10.3****. [14] Accordingly, 90% of US$ 120,000/- amounts to US $ 108,000. The advance of US $ 60,000 already [paid] to Claimant 1 by the Respondent would have to be deducted from this sum. Therefore, the balance sum payable by the Respondent to Claimant 1 will be US $ 48,000/- …"*

The phrases emphasized by me in the above quotation which was extracted from the award clearly show that, the entitlement to 90% of the total sum in terms of clause 10.3 of the Agreement was put forward by the Claimants for the first time in their written submissions dated 10-05-2012, filed after the conclusion of the inquiry; and the arbitral tribunal had made the award in relation to that claim so made in the said written submission, on the ground that the SLPA had prevented the Claimants from carrying out the services, as contemplated in clause 10.3.

The Claimants did not refer for arbitration, any dispute arising out of a situation where the SLPA had terminated the services of the Claimants or the SLPA or its employees had prevented the Claimants from carrying out the services entrusted to them. It would only be to such an istance, the aforestated clause 10.3 of the Agreement would apply. Further, as per the said clause, it would only be under such circumstances that the SLPA is required to pay the Claimants, 90% of the total sum payable, in terms of Schedule B of the Agreement, irrespective of the amount of work completed. The said clause 10.3 is reproduced below.

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[13] Emphasis is mine.
[14] Emphasis is mine.

"10.3. If the SFSL services are terminated or SLPA its employees prevented the SFSL to carry out the Services due to any reason SLPA shall pay 90% of the total sum payable in terms of schedule B irrespective of the extent of work carried out."

The dispute, the Claimants had referred for arbitration, is the failure on the part of the SLPA to pay and settle a sum of US$ 60,000/- (being 50% of the total payment that should be paid under the Agreement) after the Claimants had performed their obligations to the full satisfaction of the SLPA. It is that claim that the Claimants had demanded from the SLPA through the letter of demand dated 27-11-2004 annexed marked **X - 6** to the Statement of Claim and produced in the inquiry before the arbitral tribunal marked **C -34**. The paragraph extracted from the said letter of demand which is reproduced below would clearly confirm that it was indeed the dispute.

"Our clients state that they carried out the said services as per the Agreement but the Sri Lanka Authority having paid a sum of US $ 60,000/- failed and neglected to pay the balance sum of US $ 60,000 and together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 and the expenses incurred in terms of Clause 4.1.3 of the said Agreement of Rs. 126,823.60 together with interest at the rate of 12% per annum from 23rd March 2004. "

According to the said letter of demand, it is for the recovery of the said claim (in case the SLPA fails to pay) that the Claimants had instructed their Attorneys at Law to institute legal proceedings against the SLPA.

The Claimants neither divulged nor invited the arbitral tribunal to adjudicate, any dispute revolving around the question whether the SLPA had terminated the services of the Claimants or whether the SLPA or its employees had prevented the Claimants from carrying out the entrusted services which would have called for application of clause 10.3 of the Agreement.

It is only in the written submissions filed after the conclusion of the inquiry,[15] that the Claimants had admitted (as I have already adverted to), the fact that they had not completely fulfilled their obligations as per Schedule A of the Agreement. (The arbitral tribunal too upheld this position).

The SLPA did not file its Statement of Defence to defend any dispute arising out of any incident where SLPA had either terminated the services of the Claimants or had prevented the

[15] Page 949 of the appeal brief.

Claimants from carrying out the services entrusted to them. That would be a situation falling under clause 10.3 of the Agreement which would have in all probability required the SLPA to adopt a different 'strategy' in its defence. The SLPA in their pleadings, had only focused on the particular dispute that was referred for arbitration. i.e., its alleged failure to pay a sum of US $ 60,000.00/= being 50% of the total payment that should be paid under the Agreement upon the Claimants completing the performance of their obligations to the full satisfaction of the SLPA. That was the case the SLPA had defended in the course of the inquiry before the arbitral tribunal.

Thus, it is clear from the above facts that the parties had not mandated the arbitral tribunal to resolve any dispute arising out of any situation to which clause 10.3 of the Agreement applies. This was simply because there was no such dispute arisen between the parties. Indeed, it is clear that the SLPA had become aware of such a claim (under clause 10.3 of the Agreement) only after the Claimants had filed their written submission dated 10-05-2012 which is a date after the completion of the inquiry. Therefore, the arbitral tribunal could not have focused its mind on such a dispute during the inquiry as the parties had not invited the arbitral tribunal to consider and resolve that kind of dispute. The Claimants chose to raise it for the first time in their written submissions filed after the conclusion of the inquiry.

As per the provisions of the Arbitration Act, once the arbitral tribunal makes an award, there can be no review of its merits subject however to the aforesaid grounds of challenge set out in section 32 of the Act. This is the law and it is the parties who on their own volition agree to be bound by that law. However, this does not mean that an arbitral tribunal, once formed by the agreement of the parties, can go on voyages of discovery of disputes between the parties which formed it, irrespective of the fact that the parties before that tribunal had not referred such disputes for adjudication by the tribunal. The arbitral tribunal therefore has a legal duty to stay within its limits. These limits must be basically gathered cumulatively from the Notice of Arbitration, pleadings such as Statement of Claim and Statement of Defence, and issues. That is the wish of the parties; that is what the parties had agreed; that is the only power conferred on it by the parties; and that is the power conferred on the arbitral tribunal by law. Thus, an arbitral tribunal must take all possible steps to ensure that it remains within its terms of reference. It must guard its boundaries so that neither the tribunal nor any party before it could cross them. This is further illustrated by the following citations.

In their work, 'Law and Practice of International Commercial Arbitration',[16] the authors underscore the need for an arbitral tribunal to remain within its mandate in the following way:

> *"An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine. This rule is an inevitable and proper consequence of the voluntary nature of arbitration.[17] In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come. It is the parties who give to a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of its mandate. The rule to this effect is expressed in several different ways. Sometimes it is said that an arbitral tribunal must conform to the mission entrusted to it; [18] or that it must not exceed its mandate; or that it must stay within its terms of reference,[19] competence or authority. Another way of expressing the rule (which is followed in this book) is to state that an arbitral tribunal must not exceed its jurisdiction (this term being used in the sense of mandate, competence or authority)."*

In the case of Oberoi Hotels (Pvt) Limited Vs. Asian Hotels Corporation Ltd,[20] the appellant (Oberoi) being the owner of the premises of Oberoi Hotel, entered into a Technical Assistance and Operating Agreement (TAOA) dated 08-03-1970 with the respondent Company (Asian Hotels), which provided for the promotion of the hotel named, "Lanka Oberoi" and the services to be performed by the appellant (Oberoi) in managing the hotel. After some years of operation under the said agreement, the appellant (Oberoi) sent Notice of Arbitration dated 19-03-1997 to the respondent (Asian Hotels). The dispute referred for arbitration was in relation to certain failures and interferences by the respondent (Asian Hotels) as reflected in the following two paragraphs of the said Notice of Arbitration.

> *"1. You have failed-*

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[16] Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides; (2004), 4th Edition, London: Sweet & Maxwell, at page 248 (paragraph 5-30).

[17] *In some states, such as Chile, some matters must be referred to arbitration (see Jorquiera & Helmlinger, "Chile" in International Arbitration in Latin America (Blackaby, Lindsey & Spinillo eds), p.95. It is questionable whether such compulsory arbitration is in fact arbitration in the true sense of the word since it lacks the necessary element of consent. Such "arbitrations" are outside the scope of this book.*

[18] *See, e.g., French Code of Civil Procedure 1981, Art.1502.3.*

[19] *Under the ICC Arbitration Rules, Art. 18, an arbitral tribunal must draw up its own "Terms of Reference" for signature by the parties and the tribunal and for approval by the ICC's Court, before proceeding with the arbitration.*

[20] SC/LA No. 28/2000, decided on 25-11-2002. [Reported in 2002 BALR 23 and also in Cabral's ALR (Vol I)].

(a) to complete the refurbishment works;

(b) to provide a hotel which can be operated as a modern fully-equipped hotel, catering to International Tourist and Business Trade.

2. You have interfered with, obstructed and prevented the exercise of the

absolute control and discretion in the operation of the Hotel vested".

The respondent (Asian Hotels) replying by letter dated 16-05-1997 denied the allegations and counter claimed damages on the basis of certain lapses on the part of the appellant (Oberoi). The respondent (Asian Hotels) also by this letter appointed its arbitrator. As per the letter dated 22-07-1997, the nominated arbitrators had notified that a chairman has been appointed to the arbitral tribunal. Thereafter, the respondent (Asian Hotels) by the letter dated 19-09-1997 sent to the appellant (Oberoi), had informed that in the circumstances set out in that letter, 'the Management Contract has terminated by operation of the circumstances of law/ has ceased to subsist in law' and the respondent (Asian Hotels) would have the right to formally terminate the agreement. The arbitral tribunal in that case, having considered the contents of that letter, in paragraphs 1, 2 and 3 of the award held that the agreements continued to exist and to be binding up to the date of close of the hearing in Colombo i.e., 16-10-1998 stating in the award as follows:

"Accordingly, we hold that although notice of 19-9-97 was given in good faith on legal advice, it was not effective to bring the contract to an end, either through a unilateral right of termination or on the ground of a repudiation by the Oberoi".

It was on the above finding that the tribunal in that case had considered remedies contained in paragraphs 1, 2 and 3 of the award and held that the agreements continued to exist and to be binding up to the date of close of the hearing in Colombo i.e., 16-10-1998. The respondent (Asian Hotels) then made an application to the High Court seeking to set aside the award, in terms section 32(1)(a)(iii) of the Arbitration Act on the basis that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration. The High Court set aside this part of the award holding that the letter dated 19-09-1997 did not come within the scope of the submission to arbitration, since it was sent six months after the commencement of arbitral proceedings. His Lordship Sarath N Silva Chief Justice seeing no error in the judgment of the High Court, examined in that judgment the applicable law namely, sections 15, 18, 24, 25 and 50 of the Arbitration Act. The following two paragraphs extracted from that judgment would be relevant for the instant case too.

"….The words "any dispute submitted to it for arbitration" [in section 15 of the Arbitration Act][21] *should be understood consistent with the provisions of Section 18 as meaning, any dispute that had arisen relevant to the arbitration agreement and submitted by way of a reference to arbitration by the parties. Similarly, Section 24 which deals with the law that will be applicable on the basis of which the arbitral tribunal will make its decision, is to be understood as requiring the arbitral tribunal to decide the dispute which has arisen and submitted to arbitration by way of a reference by the parties, "in accordance with such rules of law as are chosen by the parties ...". The same construction should be carried through to the making of an award as provided in Section 25 of the Act. The term "award" is defined in Section 50(1) to mean, "a decision of the arbitral tribunal on the substance of the dispute". In this provision too the phrase "substance of the dispute" should be construed to mean, the substance of the dispute that had arisen and submitted to arbitration by way of a reference by the parties. …"*

"…. It is seen that the touchstone in all situations is "the submission to arbitration". Therefore the question as to the validity of the award or any decision contained therein has to be decided primarily on the basis of the dispute that has arisen and submitted to arbitration by way of a reference by the parties. The leeway that is provided in paragraph (iii) is that the High Court should not look at only the strict letter of the submission to arbitration, but look at the entirety of the submission and ascertain whether the award deals with a dispute as envisaged by the parties or whether decisions contained in the award come with the terms of the scope of the submission to arbitration. In brief, the test is to ascertain whether the award contains matters which the parties could reasonably be said to have intended, to be decided by the arbitral tribunal, when they submitted the dispute, that had arisen, to arbitration. This is in keeping with the basic principle that an arbitral tribunal derives jurisdiction solely from the submission to arbitration by the parties. …"

Hatton National Bank Limited Vs. Casimir Kiran Atapattu and another,[22] is another case in which this Court had to consider whether the High Court had erred in law in holding that the arbitral award relevant to that case did not violate Section 32(1) (a) (iii). I would albeit briefly, advert to the facts of that case only to the extent relevant to the afore-stated section.

[21] The addition of the phrase within brackets is mine.
[22] SC Appeal 38/2006, SC Appeal 39/2006 decided on 25-06-2013, [Cabral's ALR (Vol I) 547].

Hatton National Bank Limited (HNB), granted certain financial accommodation to the respondents (Casimir Kiran Atapattu and another), who were carrying on business in partnership under the name, style and firm of Soul Entertainments (SOUL), to enable the latter to meet the initial expenses of importing into Sri Lanka, one set of Apogee Speakers from the United States of America. As security for the said financial accommodation, SOUL entered into a lease agreement, which provided for the lease of the said Apogee Speakers to SOUL for a period of 36 months. The said lease agreement meant that the HNB remained and continued to be the owner of the said Apogee Speakers. SOUL had initially complied with the lease agreement and duly paid the lease rentals for more than half the period of the lease. HNB by its letter dated 02.06.1998, sought to terminate the said agreement on the basis that SOUL had defaulted the payment of rentals. More than a month after the said termination of the said lease agreement, SOUL claimed that the said Apogee Speakers were destroyed in a fire. According to the Statement of Claim the HNB claimed a sum of money being the amounts due to it as arrears of rental on the lease agreement, and a further sum of money being the value of the Apogee Speaker system that was leased out to SOUL. According to the Statement of Defence, SOUL claimed that it had paid the lease rentals for 28 months and the letter of termination was wrongful and was of no force or avail in law. SOUL also contended that in any event the subject matter of the lease agreement, namely the Apogee Speaker system was destroyed by fire and therefore the lease agreement had become frustrated. The tribunal in that case, in its unanimous award had partly rejected the claim made by HNB, and directed HNB to pay SOUL, on the basis of latter's counter-claim, a sum of money found to be the amount of loss suffered by SOUL due to HNB's failure to insure the Apogee Speaker system, and a further sum of Rs. 1,462,832/- being the lease rentals SOUL had neglected to pay HNB in terms of the lease agreement, and interest thereon.

HNB sought to have the award set aside before the High Court primarily on the basis that it dealt with "a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration" under section 32(1)(a)(iii) of the Arbitration Act. The High Court, rejected that contention on the ground that no objection to the jurisdiction of the arbitral tribunal was raised by HNB at any stage before the said tribunal. In that case, one of the questions of law this Court granted Leave to Appeal against the aforesaid judgment of the High Court was aimed to ascertain whether the High Court had erred in law in determining and/or holding that the said arbitral award did not violate section 32(1) (a) (iii). The paragraphs which immediately follow the instant, would show that this Court had held that the award in that case fell within section 32(1)(a)(iii) of the Arbitration Act as the arbitral tribunal in that case had strayed

beyond its limits to consider some issues not taken up in the Statement of Defence and were altogether inconsistent with SOUL's conduct and pleadings.

In the said case, certain admissions were recorded which included, an unqualified admission that that HNB entered into a lease agreement with SOUL. The Counsel for SOUL had sought to formulate issues No. 9 and 10, but were strongly objected to, by the counsel for HNB on the basis that those issues were not covered by the pleadings and in fact inconsistent with the position taken up by SOUL in its correspondence with HNB as well as its Statement of Defence. The said issues Nos. 9 and 10 were to the following effect:

9. Did the HNB have a right to enter into the said lease agreement?

10. Was the HNB the "owner" of the Apogee Speaker system*?*

The arbitral tribunal, without giving any reason, allowed issues Nos. 9 and 10 to stand. Subsequently, in the award, the tribunal inaccurately stated that "the following issues were agreed upon by the parties at the commencement of the inquiry", and proceeded to set out the 31 issues on which it based its award. That included issues No. 9 and 10 which Counsel for HNB had strongly resisted. It was in that backdrop that His Lordship Justice Saleem Marsoof PC, holding that the purpose of rejecting the claim of HNB for the return of the Apogee Speaker system or the payment of its agreed value, was created by the tribunal's failure to reject issues Nos. 9 and 10 based on the objection taken to them by the Counsel for HNB, despite the fact that they did not arise from the pleadings, and were altogether inconsistent with them, answered the afore-stated question of law (in respect of which this Court had granted Leave to Appeal in that case) in the affirmative and in favour of HNB, and stated as follows:

> *"In conclusion, it needs to be emphasised that the manner in which the arbitral tribunal arrived at its astonishing award is most revealing, and demonstrates not only that the arbitral tribunal was, to say the least, altogether confused in regard to what exactly was legitimately in issue in the case, but also that it had wittingly or unwittingly strayed outside its mandate. It is trite law that the mandate of an arbitral tribunal to decide any dispute is based on party autonomy and is confined to the limits of the power conferred to it by the parties in express terms or by necessary implication. An arbitration tribunal does not have the freedom that Italian poet Robert Browning yearned for in his famous Andrea del Sartio, I. 97, or as those lesser mortals who are not that poetically inclined would put it, the freedom of the wild ass; it is obliged to act within, and not exceed, its mandate. …"*

Let me continue further with the discourse relevant to the issues at hand. In the instant case, the Claimants have neither prayed for any relief under clause 10.3 of the Agreement nor framed any issue in relation to such a claim. It is despite the absence of such a claim that the arbitral tribunal had awarded the Claimants a sum of US $ 48,000/= together with simple interest at the rate of 12% per annum from the period beginning 27-11-2004 until the payment is paid in full, together with costs in the sum of Rs. 250,000/- against the SLPA. Section 15(1) of the Arbitration Act mandates an arbitral tribunal to deal with any dispute submitted to it for arbitration in an impartial, practical and expeditious manner. As has been held in the case of Oberoi Hotels,[23] section 15 of the Arbitration Act does not confer on an arbitral tribunal to deal with any dispute between parties to an arbitration agreement. An arbitral tribunal can validly exercise its jurisdiction to conduct an arbitration only in respect of any dispute that had arisen relevant to the arbitration agreement and submitted by way of a reference to arbitration by the parties for its adjudication.

Similarly, section 4 of the Arbitration Act also must be interpreted in the same way. Thus, section 4 of the Arbitration Act too does not empower an arbitral tribunal to deal with any dispute between parties to an arbitration agreement but only disputes that had arisen relevant to the arbitration agreement and submitted to it by way of a reference to arbitration by the parties for adjudication.

It is the same interpretation that should be provided to section 24 of the Arbitration Act which has stipulated the law which an arbitral tribunal must apply to decide a dispute. The phrase "in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute" must therefore mean as held in Oberoi Hotels[24]case, as empowering the arbitral tribunal to decide the dispute which has arisen and submitted to arbitration by way of a reference by the parties, in accordance with such rules of law as are chosen by the parties.

In the instant case, although there is an arbitration agreement between the Claimants and the SLPA, neither party had submitted any dispute arising out of any situation falling under clause 10.3 of the Agreement for arbitration by the arbitral tribunal. Thus, the arbitral tribunal in the instant case, has made an award on a matter not submitted before it by any party, for arbitration.

As per section 15(2) of the Arbitration Act, it is mandatory for an arbitral tribunal to afford all parties an opportunity, of presenting their respective cases. In the instant case, the arbitral

[23] Supra.
[24] Supra.

tribunal has failed to comply with that requirement as well. (I have already commented on this above).

Section 15(4) of the Arbitration Act has not granted an unrestricted freedom for any Party to introduce new prayers for relief. Such new prayers can only be permitted having regard to the point of time at which they are introduced and the other relevant circumstances. It is only in their written submissions, that the Claimants for the first time change the character of the scope of the arbitration by introducing a new matter under clause 10.3 of the Agreement. The Claimants did not make any application for insertion of a new prayer invoking the provisions in section 15 (4). Thus, the relief granted to the Claimants by the arbitral tribunal is not something even the Claimants had prayed for, as a relief.

An arbitration must have commenced before it could be concluded, for nothing that has not commenced can be concluded. Section 18 of the Arbitration Act requires fulfilment of two requirements before one could assert the fact that a particular arbitration has commenced. These two requirements are set out in limbs (a) and (b) of that section. First requirement is that a dispute to which the relevant arbitration agreement applies must have arisen between parties. Second requirement can be fulfilled in one of the two ways set out in section 18 (b) and that is when *a party to the agreement* -

i. has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of, the dispute to arbitration; or

ii. has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in or approve the appointment of, an arbitral tribunal in relation to the dispute.

As has been mentioned above, in the instant case, the pleadings, issues, documents produced and evidence recorded, show that no dispute arising out of any situation falling under clause 10.3 of the Agreement had arisen between the Claimants and the SLPA. Thus, the above mentioned first requirement under section 18 (a) does not exist.

The dispute, the Claimants had referred for arbitration before the relevant arbitral tribunal as per the Notice of Arbitration, is the non-payment by the SLPA, the balance sum of US Dollars 60,000/=, in breach of its obligation under the Agreement despite the completion of the performance by the Claimants, their obligations under the Agreement. The Claimants had not referred to any dispute arising out of any situation falling under clause 10.3 of the Agreement in the Notice Arbitration **P 3**. Thus, the notice the SLPA has received (**P 3**) is not a notice falling under section 18 (b) of the Arbitration Act as far as any dispute arising out of any

situation falling under clause 10.3 of the Agreement is concerned. Therefore, the second requirement under section 18 (b) also does not exist in the instant case. This means that no arbitration with regard to any dispute arising out of any situation falling under clause 10.3 of the Agreement has ever commenced.

'Award' has been defined in section 50 (1) of the Arbitration Act as follows.

"award" means a decision of the arbitral tribunal on the substance of the dispute.

As has been held in the case of Oberoi Hotels,[25] the phrase "substance of the dispute" in section 50 (1) must be interpreted to mean, the substance of the dispute that had arisen and submitted to arbitration by way of a reference by the parties. The fact that no arbitration in relation to any dispute arising out of any situation falling under clause 10.3 of the Agreement has ever occurred, establishes conclusively that no award in terms of section 50 (1) in relation to that kind of dispute can exist in law.

Thus, the term "award" in section 50(1) must mean, a decision of the arbitral tribunal on the substance of the dispute which has arisen and submitted to arbitration by way of a reference by the parties. Similarly, the award referred to in section 25 of the Arbitration Act must only mean an award which qualifies to fall under the above interpretation.

Perusal of the judgment of the learned Judge of the High Court shows that in view of the issue: '*Did the Claimants fail to fulfill its obligations in terms of the agreement?'*, the learned High Court Judge had concluded that the arbitrators were obliged to consider the question whether the Claimants have failed to fulfill the obligations of the agreement fully or partially and if partially, why the Claimants were unable to fulfill the obligations fully. The learned Judge of the High Court had also taken into account, the presence of the issue: *'Are the Claimants entitled for payment under the agreement?'.* It is on that basis that the learned Judge of the High Court had taken the view that the claim under clause 10.3 of the agreement is not a new claim taken up for the first time by the Claimants in the written submissions. The learned Judge of the High Court has also taken the view that the Claimants have only brought the contractual term to the attention of the tribunal with regard to the manner in which compensation should be awarded in the event of such breach of the agreement by the respondent when the services by the claimant was prevented by the respondent. Moreover, the judgment of the High Court also reveals that the learned Judge of the High Court in view of the issue: *'Has a cause of action accrued to the [SLPA] against the Claimant to recover the aforesaid sum of US $ 60,000/- with the interest at the rate of 12% per annum on the said*

[25] Supra.

sum from 23-04-2004 up to the date of award and legal interest on the aggregate amount mentioned in the award till payment in full?', has taken the view that the arbitrators were also required to refer to any other term of the agreement and consider whether the claimants are entitled to payments under any of the clauses in the agreement.

It must be observed that paragraph 15 of the Statement of Claim (**P 5**) reads "The claimants above named have performed their obligations to the full satisfaction of the SLPA and /or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of USD 60,000/- being 50 % of the total payment that should be paid under the agreement mentioned above". The Claimants maintain the same position in the Notice of Arbitration (**P 3**). However, the SLPA in paragraph 16(iv) of its Statement of Defence (**P 6**) had disputed this claim and had pleaded that it paid the said sum of USD 60,000/- which was 50 % of the total payment **as an advance payment** as it was required to do so in terms of the agreement. The fact that the said sum of USD 60,000/- was required to pay as an advance, is clearly borne out from the *'ISPS PAYMENT SCHEDULE'* in Schedule B of the Agreement.

Clause 4.1.1 of the Agreement (**P 4**) reads: "In consideration of the services to be rendered by the SFSL under this agreement SLPA shall pay to SFSL the amounts at terms as per agreed Schedule B and such additional sums (if any) as shall from time to time agreed by the parties in writing". Further, item 1 of schedule B of the Agreement requires the SLPA to make an advance payment of 50% of the total cost **upon signing the agreement**. Therefore, the above payment is NOT made in recognition of any work carried out by the Claimant as claimed in the Notice of Arbitration but paid as an advance just after signing the agreement. Therefore, there cannot be any ambiguity on that issue.

According to schedule B of the Agreement, the total sum of USD 120,000/= was to be paid at three stages:

- Advance payment of 50% (USD 60,000/=) upon signing the agreement
- 25% (USD 30,000/=) to be paid at the time of submitting the security manuals
- 25% (USD 30,000/=) at the time when Government accepts security manuals

Therefore, after the receipt of USD 60,000/- as the advance payment, the Claimants' entitlement to the balance 50% of the total sum arises at two stages in equal sums namely, USD 30,000/- at the time of submitting security manuals and the final payment of USD 30,000/- at the time the Government accepts security manuals. It is therefore pertinent to observe that the Claimants' entitlement to receive the full payment (USD 120,000/-) arises only at the point the SLPA accepts the security manual. Therefore, to receive the 100% of the

sum the Claimants must have completed all their undertakings to the satisfaction of the SLPA too. It is also pertinent to observe, according to **clause 4.1.2** 'SFSL shall be entitled to a ratable proportion of the sum or sums payable under this clause for any broken portion of any work during which its engagement under this agreement subsists'.

The above facts in my view, are important to comprehend the nature of the dispute that was placed for arbitration by the Claimants.

As has already been stated above, the Claimants in the Notice of Arbitration (**P 3**) claim, that they 'have performed their obligations and /or carried out the services for which SLPA has paid and settled a sum of USD 60,000/- being 50% of the total payment that should be paid under the Agreement. The Claimants also allege in **P 3** that the SLPA had breached its obligation under the Agreement and failed and neglected to pay the balance sum of USD 60,000/-. It was on that basis that the Claimants had stated in **P 3** that they are entitled to claim the balance sum of USD 60,000/= together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004. Further, the Claimants had stated in **P 3** that they are entitled in terms of Clause 4.1.3 of the Agreement, to claim a sum of Rs 126,823.60 as expenses incurred by them together with the interest at the rate of 12% per annum from 23rd March 2004".

As per paragraph 15 of the Statement of Claim (**P 5**), the Claimants have stated that they have performed their obligations to the full satisfaction of the SLPA and / or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of USD 60,000/= being 50% of the total payment that should be paid under the Agreement.

In paragraph 29 of **P 5** the Claimants have stated that they are therefore entitled to claim the said balance of USD 60,000/= together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the SLPA. Further the Claimants in paragraph 29 have also stated that in terms of clause 4.1.3 of the Agreement, they are entitled to claim a sum of Rs 126,823.60 as expenses incurred to them together with the interest at the rate of 12% per annum from 23rd of March 2004.

It was on the above basis that the Claimants stated in paragraph 44 of **P 5** that they are entitled to receive a total sum of USD 60,000/= or its equivalent sum in Sri Lanka Rupees, together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the SLPA. Further the Claimants in that paragraph have claimed a sum of Rs 126,823.60 as expenses incurred to them in terms of clause 4.1.3 of the Agreement together with the interest at the rate of 12% per annum from 23rd March 2004.

It was in those circumstances that the Claimants as per paragraph 45 have prayed for;

a. an award in a sum of USD 60,000/= or its equivalent sum in Sri Lanka Rupees, together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the respondent,
b. an award in a sum of Rs 126,823.60 as expenses incurred to them together with the interest at the rate of 12% per annum from 23rd of March 2004, and
c. costs of the arbitration.

The matter initiated by the Claimants for arbitration through the Notice of Arbitration had been further crystalized through the Statement of Claim and the issues raised by the Claimants. Among the six issues raised by the Claimants, issues (ii) and (v) read as:

- Did the Claimants perform the obligations contracted in terms of X2?
- Are the Claimants entitled to the sums referred to in paragraph 44 of the Statement of Claim?

In the light of the above positions, the general reference to a dispute in relation to the performance of the Agreement as referred to in paragraph 33 of the Statement of Claim namely, "Under the above circumstances a dispute and / or [deference] has arisen between the Claimants ..... touching and / or concerning and / or with respect to the performance of the said Agreement marked 'X2' mentioned above" should be taken in conjunction with the specific pleadings in the Notice of Arbitration, Statement of Claim and the issues raised by the Claimants in comprehending the Claimants' case presented for arbitration. When all these matters are taken together, in my view, the Claimants have proceeded for arbitration on the basis that they have performed their obligations fully and are entitled to receive the full amount in the agreement (USD 120,000/=). They had claimed the balance 60,000/= leaving aside the advance received upon the signing of the Agreement.

Issues No. (x), (xi), (xiv) and (xv) raised by the SLPA, in my view, cannot expand the case of the Claimants. Even though the issue on excessiveness in the amount claimed, does not refer to any specific legal provisions or a specific clause in the agreement, the inquiry by the Arbitrators cannot expand to examine clause 10.3 as the said clause is applicable only to a specific factual positions i.e.:

- "that the SFSL services are terminated" and / or
- "SLPA its employees prevented the SFSL to carry out the services.."

The claimants had not pleaded either of these two eventualities in the Notice of Arbitration, Statement of Claim or in the issues. To the contrary, the Claimants had claimed that they had performed their obligations under the Agreement fully while the SLPA had pleaded that the Claimants had failed to fulfill their obligations. Therefore, in the backdrop of the two rival positions taken up by the parties, the excessiveness of the amount claimed by the Claimants has to be considered and evaluated in terms of a general provision in the Agreement namely clause 4.1.2 (i.e., "SFSL shall be entitled to a ratable proportion of the sum or sums payable under this clause for any broken portion of any work during which its engagement under this agreement subsists") without resorting to clause 10.3 which expands the parameters of the dispute referred for arbitration. This is important when considering the scheme of payment in Schedule B (ISPS Payment Schedule) of the Agreement. Therefore, the right for a tribunal to grant a lesser relief that falls within the main relief needs to be interpreted subject to the limitation that granting of such relief should not either expand or change the parameters of the dispute that had been presented for adjudication.

Even when the principle of law that "a failure of one party to perform an entire contract is due to the act of the other party, it is not open to the latter to seek to avoid liability on the ground of non-performance" is invoked to determine the legal obligation of a party, the calculation of payments due, should not have been made based on a clause that expands / changes the parameters of the matter presented. Such calculation should have been based on the clause, which permits the tribunal to consider the proportion of work and the scheme of payment agreed by the parties, in determining the entitlement and responsibilities of the parties.

In view of the foregoing, in my view, the Claimants' submission that 'they did not refer any fresh issue with regard to the non- performance of the Petitioner as per clause 10.3 of the Agreement, but merely brought a contractual term of the Agreement to the attention of the tribunal with regard to the manner in which the quantum of the payment due to the Claimants could be calculated in accordance with the Agreement' is devoid of any merit.

I have already discussed above as to how an arbitral tribunal could assume jurisdiction to decide a dispute. In my view, the High Court in the instant case, has failed to appreciate the fact that the arbitral tribunal had no jurisdiction to adjudicate a dispute which the parties had not referred to it for arbitration. It also had not endeavoured to ascertain correctly, the dispute which the parties had referred to it for arbitration. Moreover, the learned Judge of the High Court has failed to purposively interpret the above issues with a view of keeping the arbitral tribunal within the four corners of its jurisdiction. Further, the arbitral tribunal also has failed to uphold the effect of the provisions in sections 4, 15, 18, 24 and 25 of the Arbitration Act in

their correct spirit. This is a fundamental error directly affecting the jurisdiction of the arbitral tribunal which vitiates the judgment of the High Court.

Thus, I hold that the arbitral tribunal after hearing all the evidence and after receiving the written submissions, had not proceeded to make an award in relation to the dispute that was referred to it, for arbitration.

On the other hand, the arbitral tribunal had made an award relating to a matter which is outside the scope of the dispute submitted by the Claimant for arbitration before it. The dispute that the arbitral tribunal resolved was unknown to the parties. It is not possible for the arbitral tribunal to assume jurisdiction on its own to resolve a dispute which is unknown to the parties. The Arbitration Act does not permit exercise of such arbitrary power by arbitral tribunals.

Although the above comments would sufficiently dispose this appeal, the following few paragraphs also would further demonstrate that the award made by the tribunal in the instant case has dealt with a dispute not contemplated by, and not falling within the terms of the submission to arbitration and contains decisions on maters beyond the scope of the submission to arbitration. As per the agreement (**P4**) the following facts could be gathered. It was after the tragic events occurred on 11th September 2001 that the International Maritime Organization (IMO) had unanimously agreed in November 2001 to develop new measures relating to the security of ships and port facilities for adoption at a conference of contracting governments to the International Convention for the Safety of Life at Sea 1974 (known as the Diplomatic Conference on Maritime Security). In December 2002, the development of the said new measures to be submitted to the said Diplomatic Conference, was entrusted to the Maritime Safety Committee of the IMO. Accordingly, in December 2002, the Maritime Safety Committee had agreed on the final version of the proposed texts, to be submitted to the Diplomatic Conference. The Diplomatic Conference held from 9th - 13th December 2002, had adopted the proposed amendments to the existing provisions of the International Convention for the Safety of Life at Sea, 1974 (SOLAS). Thereafter, the IMO by a resolution had amended Chapter V and XI of SOLAS by which compliance with the Code had become mandatory with effect from 1st July 2004. It is in that background that the SLPA on behalf of the Government of Sri Lanka, had taken steps to enter into the relevant agreement with the Claimants in order to ensure the timely compliance with the aforesaid mandatory requirements specified by IMO.

In clause 1 of the Agreement itself, the parties had agreed the commencement date of the Agreement to be 22nd January 2004. The parties also had agreed in the same clause that the Agreement would be for a period of 03 months from the commencement date. As per clause

4.1.4, SLPA shall make the payments agreed, within seven (07) days of the receipt of the invoice. As per the time scale specified in Schedule B to the Agreement, the Claimants were supposed to complete all three phases within a very short time specified therein. Thus, it can be seen, from the above clauses that the work entrusted to the Claimants were to be carried out on urgent basis. Indeed, the time scale itself reflects this fact.

The Claimants in their Statement of Claim (Paragraph 16) had stated that in fact their foreign consultants visited Colombo, Trincomalee, Galle and Point Pedro sea ports to carry out Port Facility Security Assesment (PFSA) on several dates from February to April 2004. Thus, even during the last stages of the Agreement's validity/operational period, (the Agreement was to end on 22-04-2004) the Claimants had no obstruction to carry out the tasks entrusted to them. On the other hand, the Claimants neither complain that the SLPA had terminated their services nor complain of any obstruction by the SLPA or its employees at any stage which would have prevented them from completely carrying out their obligations. Their clear position was that they had performed their obligations to the full satisfaction of the SLPA. Their complain/dispute that was referred for arbitration was the failure on the part of the SLPA to pay a sum of US $ 60,000.00/= being 50% of the total payment that should be paid under the Agreement despite the completion of the services by them to the satisfaction of SLPA. This means that the Claimants had claimed that they had completed their work, for it is only then that they can claim for the balance US $ 60,000.00/=. That is the payment which the Claimants allege that the SLPA had defaulted. Within that dispute, any obstruction by the SLPA to complete the tasks undertaken by the Claimants cannot exist for such an obstruction should have preceded the completion of the Claimants' obligations.

The above facts also show that the Claimants have had free access to those sea ports; and there had been no dispute over an incident in which the SLPA had prevented the Claimants from carrying out their entrusted services during the time the agreement was in force. It was in April 2004, that the Claimants state that a General Election was held and a new political party formed the Government. It was only thereafter that the Claimants had found out from the media about the Sri Lanka Navy being appointed by Government as the Designated Authority & the Recognised Security Organization (RSO) for ports security. The validity period of the Agreement would have ended on 22-04-2004 since it was only for 03 months commencing from 22-01-2004. The fact that the Claimants had prayed for the balance sum of US $ 60,000/- together with the interest at the rate of 12% per annum on the said sum from 23rd March 2004 from the SLPA, too indicates that it is their position that they had finished their task by that time. Thus, when the Claimants had advanced that kind of case,

one cannot expect the SLPA to predict in advance, that the Claimants, at the stage of the final written submissions, would bring in a claim under clause 10.3 of the Agreement.

For the foregoing reasons, I answer the questions of law in respect of which this Court has granted Leave to Appeal in the following manner.

Answer to the question of law set out in paragraph 18(a) of the petition:

The High Court has failed to uphold the effect of the provisions in sections 4, 15, 18, 24 and 25 of the Arbitration Act in their correct spirit and hence the judgment of the High Court is contrary to those sections.

Answer to the question of law set out in paragraph 18(b) of the petition:

The learned Judge of the High Court should have set aside the arbitral award in terms of the provisions of Section 32 (1)(a)(iii) of the Arbitration Act as the award has dealt with a dispute not contemplated by and not falling within the terms of the submission to arbitration, and contains decisions on maters beyond the scope of the submission to arbitration.

In view of the above conclusion, it would not be necessary to consider the question of law set out in paragraph 18(c) of the petition.

In these circumstances, the judgment of the High Court cannot be allowed to stand. I set aside the judgment of the High Court dated 04.11.2016.

I have held that the award made by the arbitral tribunal deals with a dispute not contemplated by and not falling within the terms of the submission to arbitration, and contains decisions on maters beyond the scope of the submission to arbitration. In the said award there is no decision on the dispute submitted to it for arbitration. The sole decision in the award, is a decision on a matter not submitted to arbitration.

Moreover, the Claimants have failed to present their case on the basis that they are entitled to receive payment for the specific work that they have performed (on a ratable proportion under clause 4.1.2). The case they had presented was on the basis that they have fully performed their duties under the contract. Furthermore, the Arbitrators did not use such criteria when they determined the Claimants' entitlement, but based the award on clause 10.3 which mandates payment of 90% of the total sum, irrespective of the volume of work completed by the Claimants. Therefore, in my view the High Court was not in a position to invoke the proviso to section 32(1)(a)(iii) of the Arbitration Act in making its determination.

Thus, the separation in terms of the proviso to section 32 (1) (a) (iii) does not arise.

For the foregoing reasons, I also set aside the arbitral award dated 30-01-2013.

The learned High Court Judge after consolidating both applications filed respectively by the SLPA and the Claimants in the High Court, had pronounced one judgment applicable to both of them. Thus, it would suffice for this Court also to pronounce one judgment in respect of both the appeals namely SC Appeal No. 119/2017 and SC Appeal No. 120/2017 as the said appeals correspond to the aforesaid two applications in the High Court. Therefore, this judgment will apply to both cases bearing Nos. SC Appeal 119/2017 (HC ARB/ 57/ 2013) and SC Appeal 120/2017 (HC ARB/ 112/ 2013).

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA PC CJ

I agree,

CHIEF JUSTICE

E. A. G. R. AMARASEKARA J

I had the opportunity of reading the draft judgement written by his lordship justice P. Surasena. With all due respect to the views expressed by his lordship Justice P. Surasena, I prefer to express a dissenting view with regard to the matter before us.

1. This application before us was originally a leave to appeal application against the Judgment dated 04.11.2016 made by the High Court of Colombo in case No. HC/ARB/57/2013 which confirmed the award made in arbitration No SLNAC/166/12/2006.

2. This Court granted leave on 3 questions of law, namely;
   - Is the judgment of the High Court contrary to the provisions in sections 4,15, 18, 24, and 25 of the Arbitration Act?
   - Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32(1)(a)(iii) of the Arbitration Act?
   - Has the Judge of the High Court failed to set aside the Arbitral Award in terms of the provisions of Section 32(1)(b)(ii) of the Arbitration Act?

3. In the Judgment written by his lordship Justice Surasena, it appears that the conclusion is that, due to a reference to clause 10.3 of the agreement in the written submissions of the Claimant – Respondents (hereinafter sometimes referred to as the claimants), the Arbitration Tribunal had exceeded the jurisdiction they were bestowed with by the party autonomy or in other words by the reference for arbitration by the parties.

4. I am not in disagreement with what has been said by his lordship in his judgment in general with regard to the party autonomy in relation to arbitration proceedings and also with regard to the jurisdiction of the Arbitral Tribunal that it shall not go on a voyage of discovery and exceeds the mandate given to it by the reference of the dispute by the parties. I do not intend to express contrary views to the views expressed by the authorities cited by my brother judge. However, it is my view that in an application made in terms of section 32 of the Arbitration Act, the applicant must produce before the High Court proof to establish his application and the scope of the court to set aside the award is limited to the grounds highlighted by the section itself. Thus, the High Court has no jurisdiction to decide on the facts relating to the dispute, other than what is necessary to decide the existence of any ground / grounds for setting aside the award mentioned in the section itself. Thus, in my view, this court sitting in appeal over the decision of the High Court is also circumscribed

in deciding on facts other than what is necessary to decide the existence of any ground/ grounds for setting aside the award mentioned in the said section itself. Further, with all due respect to the view expressed by his lordship justice Surasena, I hold a different opinion with regard to what had been referred for arbitration by the parties in the matter at hand; In other words, a different opinion as to the dispute presented for the arbitration by the Parties.

5. By giving notice P2 in terms of Section 18, the Claimants put in motion the arbitration proceedings. It is true that in the said notice, the Claimants have referred to the dispute in the manner they saw it or wanted to present it, but Claimants are only a party to the dispute. In the process, opposite party also has presented the dispute in the manner it saw the dispute or wanted to present it. After giving notice, the Claimants have filed a statement of claim and the Respondent before the arbitration tribunal, namely the Appellant in this matter has filed a statement of defense and however, thereafter parties have framed issues before the Arbitral Tribunal. Once issues are framed, the dispute becomes crystalized in issues because parties expect the answers for issues from the tribunal in the form of its decision. None of the issues have been objected on grounds such as that they were not in conformity with the notice, or pleadings tendered or that they were not within the scope of the agreement for arbitration or they were too wide in scope etc. Thus, the arbitrators were invited to answer the issues raised by the parties as it finalized the nature of the dispute placed before it by both the parties. If the issues raised before an Arbitral tribunal are within the ambit of the arbitration agreement, I think arbitral tribunal is bound to answer them; when those issues exceed the scope of the arbitration agreement, arbitrators have to answer accordingly, stating that they are not arbitrable since they fall outside the arbitration agreement.

6. Following paragraphs from the said notice have been quoted by his lordship Justice Surasena in his draft Judgment.

> *"In terms of Clause 2 of the above-mentioned agreement, Sri Lanka Ports Authority established by Act No. 51 of 1979, appointed our clients Sathsindu Forwarding & Security (Pvt) limited (SFCL) and/or in association with Bagnold Associates Limited as the Recognized Security Organization (RSO) and to perform the services listed in Schedule A annexed thereto upon the payment of rates mentioned in Schedule B to the said agreement for and on behalf of the Sri Lanka Ports Authority.*

Our clients Sathsindu Forwarding & Security (Pvt) limited (SFCL) in association with Bagnold Associates Limited have performed their obligations and /or carried out the said services for which Sri Lanka Ports Authority has paid and settled a sum of US $ 60,000/- being 50% of the total payment that should be paid under the agreement mentioned above.

However, as the Sri Lanka Ports Authority in breach of its obligation under the above Agreement failed and neglected to pay the balance sum of US$ 60,000/-. Therefore, our clients Sathsindu Forwarding & Security (Pvt) limited (SFSL) in association with Bagnold Associates Limited are entitled to claim the same together with the interest at the rate of 12% per annum from 23rd of March 2004.

However, as the Sri Lanka Ports Authority repeatedly failed and neglected to pay the above mentioned sums to our clients as per the said agreement, through their Attorneys-at law, sent a letter of demand dated 27th November 2004 demanding the above mentioned sums from Sri Lanka Ports Authority."

Those paragraphs contain the claim, and state that the Claimants performed their obligations and/or carried out the services for which the Claimants were paid USD 60,000 being 50% of the total payment that should be paid under the agreement. It further states that Sri Lankan Ports Authority (Respondent – Appellant, hereinafter sometimes referred to as the appellants) is in breach of its obligations. The Claimants in those paragraphs state their entitlement to the balance payment and to the expenses together with interest, and further states that due to the failure of the SLPA, the Claimants through their lawyers had sent a letter of demand. However, the three paragraphs following the quoted paragraphs are also necessary to grasp the dispute contained in the notice. First of those 3 paragraphs that follows the aforesaid quoted paragraphs indicates how the Respondent – Appellant, Sri Lanka Ports Authority, disputed the claim of the claimants by stating that the Claimants were never appointed as RSO (Recognized Security Organization).The 2nd of those 3 paragraphs which is quoted below states the dispute that the Claimants wanted to refer for arbitration.

"Under the above circumstances a dispute and/or difference has arisen between the Claimants…… and the Sri Lankan Ports Authority, …….. and/or concerning and/or with respect to the performance of the said agreement mentioned above."

Thus, the Claimants described the dispute in the backdrop of their claim and the stand taken up by the Appellant as one arisen with regard to the performance of the relevant

agreement. By the 3rd of the 3 paragraphs following the above quoted paragraphs the claimants refer the said dispute for arbitration. Thus, what was referred to the arbitration by the notice was a dispute with regard to the performance of the agreement in the backdrop of the two stances as described in the notice. Full performance of the obligations as stated by the Claimants belongs to the stance they have taken. In my view it is within the authority of the tribunal to accept fully or partly or reject such stances. Further, it appears the Claimant has referred to the US $60,000/- advance as a payment made for the obligations performed /services carried out. An advance is generally paid for with a purpose. Maybe it is necessary for the preparatory/initial works. In my view, there is nothing wrong in referring to it as a payment for obligations done or services performed after such initial/preparatory work is done. On the other hand, as a finding on facts, the tribunal had answered issue no. 24 and 25 negatively indicating that the claimants did not fail in fulfilling their obligations for the advance payment.

7. As I said before, this notice only expresses the dispute as indicated by one party, namely the claimants, and the dispute for arbitration get crystalized only when the issues are framed. Now I would like to bring the attention to some of the issues raised on behalf of the Appellant at the inquiry, namely, issues number 15, 17, 20, 21, and 22 of the Appellant Respondents which are quoted below.

"*15. Did the Claimant fail to fulfill its obligations in terms of the agreement?*

17. Are the Claimants entitled for payment under the agreement?

20. Are the claimants entitled for the relief prayed for in the statement of claim?

21. Are the Claimants estopped from claiming any money in terms of the agreement Due to their conduct?

22. Is the amount claimed by the Claimant excessive?"

Thus, it was the Appellant itself which wanted answers to the above issues. It is true that these issues were raised without prejudice to the issues raised by the appellant with regard to the jurisdiction of the arbitration tribunal entertaining the statement of claim, namely issues no.06 to 10, but those issues have been answered in favour of the Claimants by giving sufficient reasons by the tribunal. In my view, since the issues raised regarding the jurisdiction were answered in favour of the claimants, the dispute referred for arbitration by the parties is also comprised of the issues quoted above. When the Appellant asks

whether the claimants are entitled for payment under the agreement or whether they are estopped from claiming any money in terms of the agreement, and whether the amount claimed by the Claimant is excessive, they do not refer to any legal provisions or limit the question of excessiveness or entitlement to any identified clause in the agreement, but these issues cannot be understood out of context. Those questions including the excessiveness of the claim or entitlement to the claim have been raised in contemplation of the contractual relationship between the parties; thus, the questioning goes to the extent of asking whether the claim is excessive and whether the claimants are entitled to payments under the agreement. Hence it was none other than the Appellant who wanted the tribunal to inquire as to the questions whether the amount claimed by the Claimant is excessive as per the contract between them or whether claimants are entitled to payments in terms of the agreement. In such a situation, irrespective of the reference to clause 10.3 of the agreement in written submissions of the Claimants, the Tribunal is bound to peruse such clauses if they apply to the factual situation revealed by the evidence led before it. My view is that when the entitlement for a payment is questioned in terms of an agreement without referring to any specific term in the agreement it contemplates the whole agreement. It is for the relevant party to frame issues in such a manner to express what is intended by them. However, if an issue is too wide or devoid of clarity, the opposite party can object to the issue when it is raised if it is prejudicial to it. In the case at hand, the appellant has raised the afore quoted issues without any objections. I do not think that this court being a court exercising appellate jurisdiction should devolve on an exercise that limit the scope of the issues as the inquiry based on facts is not within the task of this court.

8. On the other hand, written submissions cannot be considered as an instrument that refer a dispute for arbitration. It is there to present an analysis of the evidence led and to show applicable law. The Claimant has not raised or proposed any new issues through it. What the paragraph 22 of the written submissions of the Claimant says is that in any event they are entitled to 90% of the balance. The use of the words "in any event" indicate that the Claimant did not abdicate his claim for the balance but it brings to the notice of the tribunal that when and if the tribunal comes to the conclusion that the Claimant could not fulfill their obligations due to the fault of the Appellants, they are entitled to that amount as per the agreement. One must not forget that whether the claim was excessive was put in issue by the Appellant itself. Further, the tribunal came to its conclusions on the facts revealed by evidence led prior to the filing of written submissions and if such evidence were not

within the framework contemplated by issues, it could have been objected by the relevant party at the time they were placed before the tribunal.

9. In my view, a Court can always grant a lesser relief by giving reasons if it falls within the main relief prayed for (***Allis Vs Senevirathne (1989) 2 SLR 335***, ***Attanayake V Ramyawathie (2003) 1 S L R 401 at 409)***. However, it cannot exceed what has prayed for in giving relief. I do think that it should be the same in arbitration proceedings. On the other hand, the Arbitral Tribunal had the plenary jurisdiction with regard to the disputes arising from the agreement if they are referred to it. It is the Appellant who invited to see whether the claim is excessive or whether the claimants are entitled to payment in terms of the agreement. The Appellant should not be allowed to challenge the award before a forum which exercises supervisory jurisdiction when the tribunal found that a certain amount has to be reduced or the full payment of balance is not due owing to a clause in the agreement when it granted relief when the Appellant itself raised issues whether the claim was excessive or whether the claimants are entitled in terms of the agreement. Further, a dispute exists only when there is a difference between the stances taken by the parties. Basically, granting relief is within the domain of the court or tribunal. However, there can be disputes as to the relief when parties take different stances as to the nature, quantum or scope of the relief that can be given. In the case at hand, as per the issues raised, the Claimants' position was that they performed the obligations as per the agreement marked X2 and made a demand by X6 and the Appellant refused to make payment and they are therefore entitled to the sums referred to in paragraph 44 of the statement of claim. It appears that the main stance of the Appellant was that there was no valid contract and valid arbitration agreement between parties and therefore the tribunal has no jurisdiction to hear and grant relief. However, on analysis of facts relating to the contractual relationship between parties, the tribunal has decided by giving adequate reasons that there was an agreement between parties which also contained an arbitration agreement and the tribunal has jurisdiction to hear and grant relief. However, without prejudice to the aforesaid main stance, the Appellant among other things had taken up the position that;

   - the Claimants failed in fulfilling their obligations and also that the Claimants were not appointed as RSO (Recognized Security Organization),
   - the Claimants are not entitled to payment under the agreement as well as to the reliefs prayed for in the statement of claim and Claimants are estopped from claiming

money in terms of the agreement and further that the amount claimed by the claimant is excessive.

Thus, in my view, the Appellant had brought forward a dispute to be resolved by the arbitral tribunal with regard to the fulfilment of obligations by the claimants and the entitlement of the claimants for payment in terms of the agreement as well as to the excessiveness of the claim made by the claimant, in case its main stance with regard to the jurisdiction was to be rejected. Hence, in my view, the award made by the Tribunal was within the parameters of the reference for arbitration. One may argue that a party cannot take a different stance during the proceedings. Generally, this type of argument is based on the provisions in the Civil Procedure Code, namely section 150 and its explanation 2. The said section and explanation applies to courts of law and in fact, it appears the Claimants had relied on a similar argument against the Appellant with regard to taking up a different stance but the Tribunal had refused the said argument in favour of the Appellants stating that applies only to courts of law- vide page 8 paragraph 3 of the Award. Even if it applies it is a limitation on the relevant party and the tribunal is not restricted by it in answering the issues raised by the opposite party.

10. On the other hand, even if consideration of clause 10.3 of the agreement by the tribunal is considered wrong, the High Court or this Court just cannot totally refuse the claim of the Claimant if the effect of it can be separated – vide Section 32(iii) proviso of the Arbitration Act. In this regard it is important to see the findings of the Arbitral Tribunal with regard to the dispute prior to applying the clause 10.3 of the agreement. In this regard, I would quote the following part from the arbitral award.

"Therefore, it is evident that the cause for the none completion of the obligations is because the employees of the Respondents took up a position contrary to the express provisions in the agreement C9 to the effect that (a) the Claimants were not RSO; and (b) the Respondents could not review and approve the PFSA and thus the conduct of the employees of the Respondent prevented the Claimants from carrying out its services in terms of the agreement C9. It is relevant to mention that "where a failure of one party to perform an entire contract is due to the act of the other party, it is not open to the latter to seek to avoid liability on the ground of none performance"; vide C G Weeramantry in Law of Contracts (page 605). Therefore, in view of the failure by the Respondent to perform its obligations in relation to the PFSAs the Claimants could not have completed performance in respect of PFSPS and in view of the foregoing statement of law set out by C G Weeramantry, the Respondent cannot seek to avoid liability on the basis that Claimants

have not performed their obligations in relation to the PFSPs as per the agreement C9" (in this quoted part the Appellants are referred to as Respondents)

The above shows that if the application of clause 10.3 is taken away, the finding of the tribunal was that the Appellant cannot avoid liability on the ground of non-performance of the claimants, since the Appellant was the one who prevented the Claimants from performing their obligations. In other words, it says that wrongdoer cannot benefit from its wrong. Thus, it appears that the Arbitral Tribunal has applied clause 10.3 of the agreement in favour of the Appellant since there was such a clause, if such application is removed from the arbitral award its finding is that the Appellant cannot avoid liability on the basis of non-performance as it has happened due to the fault of the Appellant. In other words, finding was that the Appellant is liable in the same manner the contract was duly performed by the Claimants. The attempt of the Appellant now is to use the application of clause 10.3 in reducing the claim of the claimant by the tribunal in their favour irrespective of their fault, to quash the relief granted to the Claimants.

If application of clause 10.3 is separated and removed, the finding of the tribunal indicates that the Appellant should be liable since it cannot take up the defense of non performance. That was a finding by the tribunal based on facts placed as evidence before the Tribunal.

11. The Appellant attempts to argue if the claimants put in issue the application of clause 10.3, it could have presented its case to meet that. Firstly, it is the appellant itself which raised the issue of excessiveness of the claim as per the agreement as well as Claimants' entitlement to payment in terms of the agreement. Now it cannot blame the claimants. On the other hand, this argument cannot hold water as the finding of the tribunal indicates that if it was not for this clause, as per the law, Appellant cannot take up the non-performance in its defense indicating that the Appellant is liable in the same way when the obligations are duly performed by the claimants.

The tribunal on the material placed before it has decided that there was a valid agreement between the parties and there was an agreement to refer disputes for arbitration and therefore, the tribunal had jurisdiction to proceed with the reference for arbitration. The tribunal has given adequate reasons for its conclusions. There was no substantial material to show that any party to the arbitration agreement was under any incapacity.

For the reasons given above in this judgment by me, it is my view that the award was within the parameters of the reference for arbitration by the parties. It was the Appellant who wanted arbitrators to go into the questions of the claimant's entitlement as per the agreement and the excessiveness of the claim. The finding of the tribunal was that the Appellant cannot take up the position that the Claimants did not fulfil the obligation in terms of the contract since it was the fault of the Appellant that hindered the performance of the obligations by the Claimants. The Appellant had the notice of Arbitration, took part in the arbitration proceedings and had the opportunity to lead evidence on the issues framed. I cannot find that the composition of the tribunal or the procedure followed was not in accordance with the agreement or in conflict with the Arbitration Act. I do not see any ground to hold that the subject matter of the dispute is not capable of settlement by arbitration under the laws of this country. Since there was an agreement between the parties with regard to certain services to be performed by the Claimants and an arbitration agreement to refer dispute for arbitration, where no illegality, unlawfulness or immorality is involved I do not think that the award is in conflict with the public policy of this country. Learned High Court Judge has discussed in detail why the Award should not be considered as one against public policy. I cannot find fault with reasons given by the learned High Court Judge in that regard. Therefore, the questions of laws allowed by this court have to be answered in the negative. Thus, I affirm the judgment delivered by the learned High Court judge. This appeal has to be dismissed.

JUDGE OF THE SUPREME COURT