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

In the matter of an application for the exercise of the inherent powers of the Supreme Court, as the highest and final Superior Court of Record under and in terms of Article 118 read with Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Wakachiku Construction Co. Ltd., of No. 23-18, 2-Chome, Shimomeguro-ku, Tokyo 153-0064, Japan and having its Colombo Liaison Office at # 250-3rd Floor, Apartment #6, Liberty Plaza, R.A. De Mel Mawatha, Colombo 3, Sri Lanka.

Petitioner

S.C. Misc. 01/2011 Vs.

Road Development Authority,
Sethsiripaya
Battaramulla

Respondent

Before Saleem Marsoof, P.C., J.

K. Sripavan, J.

S.I. Imam, J.

Counsel :K. Kanag-Isvaran P.C. With S. Kanag-Isvaran for the Petitioner.
A.H.M.D. Nawaz D.S.G. For the Respondent.

Argued on : 06.02.2012

Written Submissions
Filed : By the Petitioner on 28.03.2012.
By the Respondent on 16.04.2012

Decided on : 06.02.2013

SRIPAVAN, J.

The Petitioner by its Petition dated 21st April 2011, inter alia, moved Court to exercise its inherent jurisdiction to set aside the Order of the High Court dated 11th March 2011 and to declare that the said High Court did not have jurisdiction to have entertained proceedings in H.C. (ARB) No. 2404/2010 instituted by the Respondent.

The facts relating to this application are briefly as follows:-
The Petitioner is a foreign construction company which was engaged in construction work for the Respondent Authority. When disputes arose during the course of the works, the Petitioner referred the said disputes first to the Engineer and then to the Adjudicator in terms of the provisions of Clause 19.1 to 19.3 of the Conditions of Contract. Being dissatisfied with the decision of the Adjudicator, the Petitioner thereafter referred the said disputes to arbitration by its letter dated 10th December 2009 in terms of Clause 19.5. The Petitioner in its letter nominated the following three Arbitrators in accordance with Clause 19.5 and requested the Respondent to select one of them to serve as an Arbitrator within the stipulated time of 21 days.

1. Mr. Daniel Atkinson, FICE, FCI Arb
2. Mr. David Loosemore, FICE, MCI Arb

3. Mr. Neville Tait, FICE, FCI Arb

The Respondent by its letter dated 18th December 2009 refused to comply with the request made by the Petitioner and made a counter request to name Sri Lankan Arbitrators for consideration. In response thereto, the Petitioner by its letter dated 21st December 2009 urged the Respondent to select one Arbitrator from the list submitted by letter dated 10th December 2009 within the contractually stipulated period of 21 days and informed that the failure on the part of the Respondent to do so would result in the Petitioner itself selecting one of them to be the sole Arbitrator in terms of Clause 19.5.

The Respondent, however, by its letter dated 28th December 2009 advised the Petitioner that the decision conveyed by its letter dated 18th December 2009 remained unchanged. Thus, the Respondent rejected the three names nominated by the Petitioner in toto. As the Respondent failed to select the sole Arbitrator, within the stipulated period, the Petitioner, with notice to the Respondent duly appointed Mr. J. Neville Tait as per Clause 19.5 of the Conditions of Contract. By letter dated 15th June 2010, Mr. J. Neville Tait accepted the appointment and forwarded a "Draft Arbitration Procedure for Comment" by both the Petitioner and the Respondent.

Though the Petitioner by letter dated 28th June 2010 made certain comments on the conduct of the Arbitration proceedings as set out in the "Draft Procedure", no comments or suggestions were made by the Respondent to the sole Arbitrator.

It is in this backdrop, the Respondent purported to invoke the jurisdiction of the High Court under Section 7 [Part III of the Arbitration Act No. 11 of 1995 (hereinafter referred to as the "Act"] and pleaded, inter alia, that the Petitioner had unilaterally appointed an Arbitrator in violation of it's

contractual obligations and the provisions of the Act, that a situation contemplated under Section 7(3)(b) of the said Act had arisen, and that the High Court was required to appoint a suitable Arbitrator from a list submitted by the Respondent thereby reversing and nullifying the contractually agreed procedure for the appointment of Arbitrators.

Section 7(3)(b) of the Act provides that, "*Where under an appointment procedure agreed upon by the parties, the parties or the Arbitrators, are unable to reach an agreement required of them under such procedure, any party may apply to the High Court to take necessary measures towards the appointment of the Arbitrator or Arbitrators*".

The Respondent urged the following grounds before the High Court for refusing to select a sole Arbitrator from the three Arbitrators nominated by the Petitioner in terms of Clause 19.5 of the Contract :-

> (a) The nominated Arbitrators are foreign nationals residing outside the country and would be extremely expensive as Colombo is the place of Arbitration;
>
> (b) The Contract is based on ICTAD general conditions and the nominated Arbitrators do not show any experience in ICTAD conditions and any other law of Sri Lanka. The Contract provides that the applicable law is the law of the Democratic Socialist Republic of Sri Lanka.

The Petitioner, in its Statement of Objections, inter alia, brought to the attention of the Learned High Court Judge that the High Court was devoid of

jurisdiction to hear and determine the matters raised in the Respondent's purported Petition for the following reasons, namely:-

(a) that the purported Petition filed by the Respondent was not one which was contemplated under and in terms of Section 7 of the Arbitration Act, No. 11 of 1995.

(b) that Section 7(1) of the said Act provides that the parties shall be free to agree on a procedure for appointing the Arbitrators.

(c) that sub-section (2) of Section 7, authorizes the Court to appoint an Arbitrator/Arbitrators, only where the parties have not agreed as to a procedure for appointing an Arbitrator;

(d) that in the instant case parties have, in fact, mutually agreed, in the Conditions of Contract on a procedure for the appointment of an Arbitrator in terms of Clause 19.5 thereof and that fact was common ground between the parties.

(e) that Clause 19.5 provided as follows:

"Any doubt, difference, dispute, controversy or claim arising, out of or in connection with or touching or concerning the execution or maintenance of the works in this contract, or on the interpretation thereof or on the rights, duties, obligations, or liabilities of any of the parties thereto or on the operation, breach, termination, abandonment, foreclosure or invalidity thereof, shall be finally settled by arbitration after written notice by either party to the Contract to the other for a decision to a sole arbitrator to be appointed as hereinafter provided.

The party desiring arbitration shall nominate three arbitrators out of which one to be nominated by other party within 21 Days of the receipt of the said request. If the other party does not nominate one to serve as Arbitrator within the stipulated period the party calling for arbitration shall nominate one of the three and inform the other party accordingly.
The arbitration shall be conducted in accordance with Arbitration Act No. 11 of 1995....."

The High Court by its order dated 11th March 2011 concluded, inter alia, that the procedure adopted by the Petitioner to appoint Mr. J. Neville Tait who is one of the three arbitrators is contrary to Clause 19.5 of the Agreement; that the said act of appointment has been done without authority; that there seems to be no agreement between the Petitioner and the Respondent regarding the appointment of arbitrators; that in such a situation the High Court has the power to appoint a suitable arbitrator under Section 7(4)(sic) of the Act. Accordingly, the High Court appointed Mr. Walter Ladduwahetty as the Arbitrator under Section 7 (4) (sic) of the Arbitration Ordinance(sic).

Learned President's Counsel for the Petitioner submitted that the order of the High Court has shattered and rendered nugatory the legitimate expectation of the legislature and of all parties, local and foreign, who had hitherto believed and /or had been made to believe by the decisions of the Supreme Court, the treatises of jurists and learned writers on the subject, that in Sri Lanka under the Act "parties are free to select an Arbitrator of any nationality, gender or professional qualifications"
(emphasis added)

There is force in the submissions of the Learned President's Counsel. In fact, in the case of *Merchant Bank if Sri Lanka Ltd.* vs. *D.V.D.A. Tillekeratne* (2001) B.A.L.R. 71 this Court held that "party autonomy is a fundamental principle of Arbitration Law and this is given effect to by the legislation in Section 7(1) of the Arbitration Act".

The predicament in which the Petitioner is placed is that it is unable to challenge the Order of the High Court as no appeal or revision lies in respect of any order, judgment or decree of the High Court in terms of Section 37(1) except from an order, judgment or decree of the High Court under PART VII of the Act. (emphasis added).

In terms of Section 26 too there is no right of challenge to the orders of the arbitral tribunal until after an award has been made by the Arbitrator or Arbitrators.

It is in this background, as the legislature did not provide for a challenge to decisions of the High Court under Section 7, the Petitioner invoked the inherent jurisdiction of this Court on the basis that the Supreme Court is the highest and final Superior Court of Record under Article 118 read with Article 105(3) of the Constitution with an unlimited, independent and separate basis of jurisdiction, to protect and fulfill the judicial function of administering justice, in the absence of any express statutory provisions.

Learned President's Counsel relied on Halsbury's Laws of England (4th Edition) 1982, Vol 37 at page 23 which describes the inherent jurisdiction of Court as follows:-

> "*In sum, it may be said that the inherent jurisdiction of Court is virile and viable doctrine and has been defined as being the reserve or fund of powers, which the Court may draw up as necessary whenever it is*

just or equitable to do so, in particular, to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

It would be a matter for determination by the Court in each individual case whether the circumstances of the case make out the necessity to exercise the inherent power and make it incumbent on the Court to exercise that power to do justice between the parties. Hence, the inherent power of the Court has to be exercised carefully and with caution and only where such exercise is justified considering the facts of the case, which saddens the co nscience of the Court.

A seven judge bench of the Supreme Court in *Ganeshanathan* vs. Vivienne *Gunawardene* (1984) 1 S.L.R. 319 took the view that the Supreme Court, as the Superior Court of Record has inherent powers to make corrections to meet the ends of justice, the exercise of which would depend on the facts of each case. (emphasis added) Samarakoon, C.J. At page 329 observed as follows:-

"*As a Superior Court of record there is no doubt that it has inherent powers to make corrections to meet the ends of justice. In Mohamed v. Annamalai Chettiar the Court used its inherent powers to free an insolvent from arrest pending the decision of his appeal to the Privy Council although there was no statutory authority for such an Order. Costs have been awarded to a successful party from the inception of the Supreme Court using its inherent power – Karuppannan v. Commissioner for Registration of Indian and Pakistani Residents. Inherent powers have been used to correct*

errors which were demonstrably and manifestly wrong and it was necessary in the interests of justice to put matters right . Decisions made per incuriam have been corrected."

The cases cited above clearly demonstrate that inherent power implies by its very nature a power which cannot be expressed in terms but which must reside in a Court for achieving the higher and the main purpose of a Court, namely, the purpose of doing justice in a cause before it and for seeing that the act of the Court does no injury or harm to any of the suitors. Circumstances requiring the use of such a power cannot be foreseen. The legislature enacts provisions to meet the circumstances that can be foreseen and once provision has been made in the Statute, the occasion to invoke inherent power in that circumstance practically vanishes. Thus, when the Statue provides a method so as to meet a contingency in a particular manner, any other method thought of by the Court cannot then be said to be a method which would advance the interest of justice. It is in this sense, that no occasion for the exercise of any inherent power arises when the statute expressly provides for what is to be done in that situation. The remedy provided by the statute may not be an efficacious one. It may even lack the necessities to grant quick relief. However, it is well settled and accepted as axiomatic that justice be administered in accordance with the law of the land. It may be pertinent to quote the observation of Martensz, J. in *Alice Kotalawela* vs, *W.H. Perera and another* (1937) 1 CLJ 58.

"Justice must be done according to law. If hardship results from the law in force the remedy must be effected by legislation. There would be chaos if a judge was entitled to create a procedure to meet exigencies of every case in which he considers the law would work

injustice."

This means, if all the powers which will be necessary to secure the ends of justice exists at some point and such existence is recognized by the statute, inherent power of a Court cannot be invoked disregarding express statutory provision. A similar view was expressed by Garvin S.P.J. In *Mohamed* vs. *Annamalai Chettiar* (1932 Ceylon Law Recorder – Vol XII 228 at 229 in the following words :

> "*No Court may disregard the law of the land or purport in any given case, to ignore its provisions. Where a matter has been specifically dealt with or provided for by law there can be no question that the law must prevail, for justice must be done according to law. It is only when the law is silent that a case for the exercise by a Court of its inherent power can arise."*

Learned President's Counsel argued that the legislature did not provide for a challenge to the decision of the High Court made under Section 7 of the Act, which has placed the Petitioner into peril most unreasonably. However, an award once pronounced by an Arbitrator can be challenged on one of the specific grounds set out in Section 32 of the Act which includes "the composition of the arbitral tribunal not in accordance with the agreement of parties or was not in accordance with the provisions of the Act."

Even in the case of *Merchant Bank of Sri Lanka Ltd.* vs. *Tillekeratne* relied on by the Learned President's Counsel, the Petitioner invoked the jurisdiction of the Court after the award has been made by the Arbitrator. As rightly submitted by the learned Deputy Solicitor General, the Act provides a sufficient remedy to the petitioner enabling it to apply to the High Court to set aside the arbitral award on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of parties, Thus, the Act

gives the Petitioner an express provision to invoke the jurisdiction of the High Court in a particular manner once an award is made and the party seeking to enforce the right must resort to that remedy and not to others. It cannot be the duty of any Court to exercise its inherent powers when it plainly appears that, in doing so, the Court would be using a jurisdiction which the legislature has forbidden it to exercise. Any lacuna in the law is to be dealt with by the legislature if it causes any inconvenience or hardship to a litigant.

It is therefore unnecessary to emphasize that the ambit and scope of the Court's power to interpose its inherent authority cannot be invoked in regard to matters which are sufficiently covered by a specific provision of the Act, namely, Section 32 thereof.

For the reasons set out above, this Court refuses to exercise its inherent jurisdiction and dismisses this application, however, in all the circumstances without costs.

JUDGE OF THE SUPREME COURT

MARSOOF, J.,

I agree.

JUDGE OF THE SUPREME COURT.

IMAM, J.

I agree.

JUDGE OF THE SUPREME COURT.