

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

In the matter of an Application for Leave to Appeal from the Judgement dated 24.06.2011 of the High Court of Colombo under and in terms of Section 37(2) of the Arbitration Act No.11 of 1995 read together with Article 127, subsection 1 of the Constitution.

Daya Constructions (Private) Limited,
No. 362, Colombo Road, Pepliyana,
Boralesgamuwa.

Claimant

S.C. (Appeal) No. 35/2012

SC (HC) LA Application No: 81/11

High Court No. HC/ARB/1926/09

-Vs-

Sri Lanka Ports Authority,
No.19, Church Street,
Colombo 01.

Respondent

AND

Sri Lanka Ports Authority,
No.19, Church Street,
Colombo 01.

Respondent - Petitioner

-Vs-

Daya Constructions (Private) Limited,
No. 362, Colombo Road, Pepliyana,
Boralesgamuwa.

Claimant - Respondent

AND NOW BETWEEN

Sri Lanka Ports Authority,
No.19, Church Street,
Colombo 01.

Respondent - Petitioner - Appellant

Daya Constructions (Private) Limited,
No. 362, Colombo Road, Pepliyana,
Boralesgamuwa.

AND NOW

Olympus Construction (Pvt) Ltd,
No. 445 ½, Colombo Road, Pepliyana,
Boralesgamuwa.

Claimant - Respondent - Respondent

Before: Hon. Janak De Silva, J.

Hon. Menaka Wijesundera, J.

Hon. Sampath B. Abayakoon, J.

Counsels: Yuresha De Silva D.S.G. for the Respondent - Petitioner - Appellant

Nihal Fernando, P.C. with Rohan Dunuwille for the Claimant - Respondent -
Respondent

Written Submissions: 30.03.2012 by Respondent - Petitioner - Appellant

17.05.2012 by Claimant - Respondent - Respondent

Argued on: 27.03.2025

Decided on: 14.05.2025

Janak De Silva, J.

The Respondent-Petitioner-Appellant (Appellant) and the Claimant-Respondent-Respondent (Respondent) entered into an agreement for the construction of a circuit bungalow for the Appellant by the Respondent in Clappenberg, Trincomalee.

The Appellant terminated the agreement and the Respondent referred the dispute to arbitration as agreed between the parties.

The Arbitral Tribunal made an award dated 07.07.2009 (Award) in favour of the Respondent. The Appellant was held liable to pay a sum of Rs. 8,828,003.29 to the Respondent with interest thereon at 11.32 per annum from 08.11.2006 till payment in full.

Section 31(1) of the Arbitration Act No. 11 of 1995 (Act) requires an application for enforcement of an arbitral award to be made within one year after the expiry of fourteen days of the making of the award. The Respondent did not make an application for the enforcement of the Award.

Section 32(1) of the Act requires an application to set aside an arbitral award made in an arbitration held in Sri Lanka to be made within sixty days of the receipt of the award. The Appellant made an application for setting aside the Award. This appeal arises from that application.

The learned High Court judge dismissed the application made by the Appellant. He went on to enforce the Award as prayed for in the statement of objections filed by the Respondent in the application made to set aside the Award.

The Appellant appealed. Leave to appeal has been granted on the following questions of law:

(1) Did the Honourable High Court Judge err in law by failing to hold that it is mandatory to make an application under Section 31(1) of the Act to enforce an arbitral award?

(2) Did the Honourable High Court Judge err by making an enforcement order in an application made by the Petitioner to set aside the Award in terms of Section 32 of the Act?

These two questions of law must be decided against the competing arguments of the Appellant and Respondent. It is the contention of the Appellant that no order for enforcement of an arbitral award can be made unless there is an application for enforcement made pursuant to Section 31(1) of the Act. The Respondent contends that notwithstanding the absence of such application, an order for the enforcement of an arbitral award can be made where there is a prayer for such enforcement in the statement of objections filed by a party to an application made under Section 32(1) to set aside that award.

Upon a plain reading of the Act, it is clear that there are two distinct provisions which govern the enforcement and setting aside of arbitral awards.

Section 31(1) of the Act deals with the filing and enforcement of arbitral awards and reads as follows:

*“31(1) A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award **apply** to the High Court for the enforcement of the award.*

*(2) An **application** to enforce the award shall be accompanied by*

(a) the original of the award or a duly certified copy of such award ; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement.

For the purposes of this subsection a copy of an award or of the arbitration agreement shall be deemed to have been duly certified if

(i) it purports to have been certified by the arbitral tribunal or, by a member of that tribunal, and it has not been shown to the Court that it was not in fact so certified ; or

(ii) it has been otherwise certified to the satisfaction of the court.

...

(6) Where an application is made under subsection (1) of this section and there is no application for the setting aside of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in sections 33 and 34 of this Act, it shall on a day of which

notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered.”
(emphasis added)

Section 32(1) of the Act applies for the setting aside of arbitral awards and reads as follows:

*“32(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*

...

(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.”

(emphasis added)

Both sections contemplate the making of an *application*. The central issue which arises in this appeal is what is meant by *an application* in Sections 31(1) and 32(1) of the Act.

The Respondent drew our attention to the definition of *application* in Black’s Law Dictionary (7th ed.) which states that it is a request for an order. Our attention was further drawn to the definition given to *petition* in *Black’s Law Dictionary* (9th ed.) and *A Dictionary of Law*, 2nd ed., by L.B. Curzon.

Definitions provided in law dictionaries may be a useful tool in ascertaining the *general* meaning of legal terms. Nevertheless, its utility is lost where the Act has defined or explained the meaning of a particular term used therein.

The Act was enacted *inter alia* to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention). Article III of the Convention embodies the pro-enforcement policy of the Convention. The final text of Article III achieved a balance solution that permits each Contracting State to apply its own national rules of procedure to the recognition and enforcement of foreign arbitral awards, while guaranteeing that such recognition and enforcement will comply with a number of

fundamental principles. The first principle is that, while the recognition and enforcement of foreign arbitral awards under the Convention shall be conducted “*in accordance with the rules of procedure of the territory where the award is relied upon*”, the “*conditions*” under which recognition and enforcement of foreign awards can be granted are exclusively governed by the Convention [UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 Edition, page 77].

Hence the Convention, while ensuring that the *conditions* under which recognition and enforcement of foreign awards are exclusively governed by its provisions, has given the freedom to States to adopt the *rules of procedure* to govern the recognition and enforcement of such awards.

Nevertheless, it is important to note that Article IV(1) of the Convention contemplates the making of an *application* for recognition and enforcement. The Convention is silent on what is meant by application given that it is a matter of procedure left to each State.

The Act adopts a similar approach as the Convention in requiring an *application* to be made, both for enforcement and setting aside of an arbitral award but goes further in explaining how such an application must be made.

Section 40(1) of the Act states that *every application* to the High Court under the provisions of the Act, whether by way of appeal or otherwise, *shall* be by way of *petition and affidavit* and all parties to the arbitration other than the petitioner or petitioners shall be named as respondents to such petition and shall be given notice of the same. The word *every* connotes that there are no exceptions to this rule. Every application must be by petition and affidavit.

The Respondent relied on the decisions in ***P Philip v. Director of Enforcement* [(1976) 2 SCC 174; 1976 AIR 1185]**, ***Faulkner v. Faulkner* [(1941) 2 AER 748]**, ***Russel v. Russel and Roebuck* [(1957) 1 AER 929]** to explain what is meant by application.

In ***Philip (supra)***, it was held that the word 'application' in the saving provision immediately follows the term 'appeal'. It, therefore, takes some colour from the collection of words in which it occurs. It is synonymous with the term 'petition' which means a written statement of material facts, requesting the Court to grant the relief or remedy based on those facts. It is a peculiar mode of seeking redress recognised by law.

The Respondent requests Court to consider the prayer in the statement of objections to be equivalent to a petition as envisaged in Section 31(1) read with Section 40(1) of the Act.

However, **Philip (supra)**, concerned the interpretation of section 484(2)(a) of the Code of Criminal Procedure, 1973 of India which reads as follows:

“(2) Notwithstanding such repeal:-

(a) If, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, contained, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898) as in force immediately before such commencement .. as if this Code has not come into force..... ”

It is in that context that court sought to interpret *application* synonymously with *appeal* and go further and explain what is meant by a *petition*. It did not involve interpreting how two distinct and different jurisdictions can be invoked. Neither did this question arise in **Faulkner (supra)** and in **Russel (supra)**.

Section 31 of the Act deals with enforcement while Section 32 provides for the setting aside of an arbitral award. These are distinct and different jurisdictions. The conditions under which such jurisdiction can be exercised are different.

Section 31(2) provides for the invocation of the power of the High Court to enforce an arbitral award and requires an *application* to be made. Section 40(2) of the Act specifies the procedure to be followed once a petition and affidavit is presented as provided for in Section 40(1) of the Act. Court must appoint a day for the *determination of the matter of the petition*.

In an application made for enforcement pursuant to Section 31(1) of the Act, the matter of the petition is whether the arbitral award should be enforced. When Section 40(2) requires Court to grant the parties named as Respondents a date to state their objections, if any, in writing supported by affidavit, the objections must state the objections to the *enforcement* of the arbitral award and no more. The jurisdiction that the High Court exercises in such application is limited to determine whether the award should be enforced.

On the contrary, where the jurisdiction of the High Court is invoked pursuant to Section 32(1) of the Act by way of petition and affidavit, Court must appoint a day for the *determination of whether the arbitral award* must be set aside. When Section 40(2) requires Court to grant the parties named as Respondents a date to state their objections, if any, in writing supported by affidavit, the objections must state the objections to the *setting aside* of the arbitral award and no more. The jurisdiction that the High Court exercises in such application is limited to determine whether the award should be set aside.

The decision in ***Lanka Orix Leasing Company Ltd v. Weeratunge* [(2019) 1 Sri LR 528]** supports this approach. There an application was made to the High Court to enforce an arbitral award under Section 31 of the Act. The respondent filed a statement of objections wherein he pleaded inter alia that the award was not a valid award, the award had not been served on him, and that he had been tricked into signing the settlement forming the basis of the award. The respondent had not made an application to set aside the award under section 32 of the Act.

After inquiry, the High Court made order rejecting all of the objections pleaded by the respondent. However, the High Court went on to consider whether the award was contrary to the public policy of Sri Lanka and held that the award was contrary to public policy and dismissed the appellant's application for enforcement of the award.

In appeal, the Supreme Court held that (supra. at 529) when an application to enforce an arbitral award is made to the Court in conformity with Sections 31(1) to 31(5) of the Act, Section 31 (6) requires the Court to file the award and give judgment and enter decree according to the award unless there is an application pending determination made by another party to the arbitration to set aside the award under Section 32, or the Court sees cause to refuse the recognition and enforcement of the award under Sections 33 and 34. Court went on to hold that a party who wishes to set aside an arbitral award made in Sri Lanka must file an application under Section 32(1) within sixty days of that party receiving the award. The Court acting *ex mero motu* may set aside an award on the ground that it is in conflict with the public policy of Sri Lanka under Section 32(1)(b)(ii), but based strictly upon the material placed before the court and *only in the course of an application made under Section 32(1)*.

As was emphasized in ***Mohamed v. Annamalai Chettiar* [1932 CLR Vol. XII 228]**, 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.

In ***Wakachiku Construction Co. Ltd. Vs. Road Development Authority* [(2013) 1 Sri LR 164 at 175]** Court held that the Act gives a party 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.

The Act contemplates of only one instance where the High Court is empowered to exercise the two jurisdictions at the same time. That is when as required by Section 35(1), the High Court must consolidate applications made to enforce an award and an application to set aside the same award. In ***Trico Maritime (Pvt) Limited v. Ceylinco Insurance Co. Limited* [(2010) 1 Sri LR 163 at 167-168]** it was held that the law contemplates the consolidation of applications made to set aside the award and to enforce the award and that it is the duty of the High Court to consolidate the two applications and take them up together. This confirms the mandatory nature of the obligation on the Court.

The Respondent contended that the Appellant had failed to object to the relief claimed by the Respondent in the statement of objections and as such is estopped from raising such objection at this point. Nevertheless, as pointed out earlier, the jurisdiction of the High Court in an application made under Section 32(1) of the Act is limited to considering whether an arbitral award should be set aside. There is a patent lack of jurisdiction which prevents a High Court from considering whether the award should be enforced in an application made pursuant to Section 32(1) to set aside that award.

The Respondent contended that since the application made by the Appellant to set aside the Award has been rejected by the High Court, the Appellant cannot now object to the enforcement of the Award. Reliance was placed on Section 35(2) of the Act which states the Court shall not permit a party to an arbitration to object to the enforcement of the award on any of the grounds specified in section 34 where an application to set aside the award under section 32 has been refused.

This is misconceived in law. Firstly, the Respondent has failed to properly invoke the jurisdiction of the High Court to enforce the Award. As such the question of objecting to the enforcement does not arise. Secondly, Section 34 applies only to the recognition or

enforcement of foreign arbitral awards. The Award is an award made in an arbitration held in Sri Lanka.

For all the foregoing reasons, I answer the questions of law as follows:

(1) Did the Honourable High Court Judge err in law by failing to hold that it is mandatory to make an application under Section 31(1) of the Act to enforce an arbitral award? Yes

(2) Did the Honourable High Court Judge err by making an enforcement order in an application made by the Petitioner to set aside the Award in terms of Section 32 of the Act? Yes

Accordingly, the judgment of the High Court dated 24.06.2011 is varied by setting aside the part by which the enforcement of the Award was allowed. Consequently, there is no judgment which allows the enforcement of the Award. The Respondent has failed to make an application in terms of Section 31(1) of the Act to enforce the Award. The Award cannot now be enforced.

For the avoidance of any doubt, that part of the judgment of the High Court which dismissed the application made by the Appellant to set aside the Award remains in force.

Appeal allowed. The Appellant is entitled to its costs.

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J.

I agree.

JUDGE OF THE SUPREME COURT

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE SUPREME COURT