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

In the matter of an application for leave to appeal in terms of Section 37 of the Arbitration Act No. 11 of 1995

Hatton National Bank Limited,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

SC Appeal No 38 - 39/06
SC (HC) L.A. Appl. No 32 - 33/06
HC/ARB/1890/04

CLAIMANT–RESPONDENT-APPELLANT

-VS-

1. Casimir Kiran Atapattu
2. Tracy Judy de Silva

Carrying on business in partnership under the name, style and firm of M/s Soul Entertainments of No. 400/60/7, Bauddhaloka Mawatha,
Colombo 07.

RESPONDENT-PETITIONER-RESPONDENT

Before	**:**	Hon. N.G. Amaratunga J, Hon. Saleem Marsoof, P.C., J and Hon. P.A. Ratnayake J
Counsel	**:**	Nigel Hatch P.C. with K. Geekiyanage and Ms. P. Abeywickrema for the Appellant. Harsha Amarasekara P.C. with Kanchana Pieris for the Respondents.
Argued on	**:**	09.06.2011 ; 23.06.2011
Written Submission on:		27.07.2011
Decided on	**:**	25.06.2013

SALEEM MARSOOF J.

These appeals were taken up for argument together as they relate to the same arbitral award dated 9th December 2003. In the High Court, the application of the Appellant, Hatton National Bank Ltd., (hereinafter sometimes referred to as "HNB") to have the said award set aside, and the application filed by the Respondents, who were carrying on business in partnership under the name, style and firm of '*Soul Entertainments'*, (hereinafter sometimes referred to as "SOUL"), for the enforcement of the same, were consolidated, and one judgment was pronounced. By its judgment dated 13th February 2006, the High Court refused HNB's application to have the award set aside, and ordered the enforcement of the award as contemplated by Section 31(6) of the Arbitration Act No. 11 of 1995.

It may be useful at the outset to outline the material circumstances in which the aforesaid award dated 9th December 2003 was made. HNB, which is an incorporated banking company that also engages in the business of commercial leasing, had at the request of SOUL, granted certain financial accommodation 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, bearing No: 2609/007/119 dated 16th November 1995 (C1) providing for the lease of the said Apogee Speakers to SOUL for a period of 36 months. The fact that the delivery of the said set of speakers was accepted by SOUL has been acknowledged by the Acceptance Receipt marked P2, a copy of which was produced at the arbitration hearing by HNB.

It is common ground that SOUL had initially complied with the Lease Agreement and duly paid the lease rentals for more than half the period of lease, and it is also not disputed that HNB purported to terminate the said Agreement by its letter dated 2nd June 1998, (P3) on the alleged basis that SOUL had defaulted in the payment of rentals. More than a month after the said purported termination of the Lease Agreement, the said Apogee Speakers were claimed by SOUL to have been destroyed in a fire that also destroyed the lorry bearing No. 47-1430. It was the position of SOUL that the lorry caught fire while the speakers were being transported from the *La Kandyan* Hotel in Kandy to Colombo after a musical show and dinner dance held at the said hotel on 5th July 1998.

Certain arbitral awards which resulted from certain claims made by SOUL against Janashakthi General Insurance Company Limited, which had issued a comprehensive policy with respect to the said lorry, were the subject matter of the judgment of this Court in *Kiran Attapattu v Janashakthi General Insurance Company Limited*, SC Appeal No. 30-31/2005, which was pronounced on 22nd February, 2013. It is noteworthy that Janashakthi General Insurance Co. Ltd., which had repudiated the claims of SOUL on the ground that the fire was not accidental and had been self induced for the purpose of making false claims, failed to establish its defence of arson to the satisfaction of the arbitration tribunal, and this Court had reversed the decision of the High Court to set aside the decision of the arbitral tribunal. This Court concluded that the High Court had erred in holding that the tribunal had misapplied the applicable law relating to the standard of proof in civil cases where fraud is alleged.

It is evident that the arbitration proceedings that resulted in the impugned award dated 9th December 2003 commenced with a notice dated 21st July 1999 issued by HNB on SOUL and SOUL's response dated 26th July 1999. Since the aforesaid correspondence did not fully disclose the nature of the dispute or the ambit of the proposed arbitration, with the objective of clarifying the matters regarding which the parties were at variance, it was agreed at the very first sitting of the arbitral tribunal held on 22nd September 1999 that HNB would file a Statement of Claim and SOUL will file a Statement of Defence on certain specific dates that were agreed upon.

Accordingly, HNB filed its Statement of Claim (A) on 13th October 1999 claiming a sum of Rs. 1,770,400/- together with interest being the amounts due to it as arrears of rental on the Lease Agreement (C1), and a further sum of Rs. 4,250,000/- with interest being the value of the Apogee Speaker system that was leased out to SOUL. SOUL responded with its Statement of Defence (B) dated 5th November 1999 wherein it claiming that it has paid the lease rentals for 28 months and the purported letter of termination date 2nd June 1999 "is wrongful and / or is unlawful and / or is contrary to terms of the Lease Agreement and / or is 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 which occurred on or about 5th July 1998 at Peradeniya" and thereby the Lease Agreement became frustrated. HNB, through its Replication dated 24th November 1999 (C), contested most of the averments in the said Statement of Defence.

The tribunal made its unanimous award dated 9th December 2003 after several days of hearing. By the said award, the tribunal partly rejected the claim made by HNB, and directed HNB to pay SOUL, on the basis of latter's counter-claim, a sum of Rs. 2,067,168/- found to be the amount of loss suffered by SOUL due to HNB's failure to insure the Apogee Speaker system, which amount was arrived at by deducting from Rs. 4,250,000/- being the agreed original value of the Apogee Speaker system, the sum of Rs. 720,000/- awarded to it by the arbitral awards made against Janashakthi Insurance Co. Ltd., in the connected case 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 (C1), and interest thereon. The bone of contention in these appeals is essentially the legality of the rejection by the arbitral tribunal of the claim of HNB for the return of the Apogee Speaker system or its agreed value.

Before the High Court, HNB sought to have the award set aside 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" (Section 32(1)(a)(iii) of the Arbitration Act No. 11 of 1995), and that, in any event, it "is in conflict with the public policy of Sri Lanka" (Section 32(1)(b)(ii) of the Arbitration Act). The High Court, by its judgment dated 13th February 2006, rejected the first of these contentions on the ground that no objection to the jurisdiction of the arbitral tribunal was raised by HNB at any stage before the said tribunal, and went on to reject the second contention of HNB on the ground that it had failed to establish that the award was in conflict with any public policy of Sri Lanka. The High Court emphasized that it did not possess appellate powers over an arbitral tribunal, and that it was not entitled to interfere with the findings of such a tribunal except to the extent provided in Part VII of the Arbitration Act. The Court concluded that in the circumstances, the application of HNB to set aside the award has to be refused, and the application of SOUL to enforce the award must be allowed.

On 18th May 2006, after hearing submissions of learned Counsel, this court has granted leave to appeal against the aforesaid judgement of the High Court in regard to the following substantial questions:-

(a) Has the High Court erred in law in determining and/or holding that the said arbitral award did not violate Section 32(1) (a) (iii) and/or Section 32 (1) (b) (ii) of the Arbitration Act No. 11 of 1995 having regard to the several findings contained in the said award unsupported by and/or contrary to the evidence, more particularly the finding that the said Lease Agreement (C1) did not constitute a valid lease of the property set out in the schedule there to by the Appellant as "Lessor" to the Respondents as "Lessee";

(b) Has the High Court erred in law in determining and/or holding that the said arbitral award did not violate Section 32(1) (a) (iii) and/or Section 32 (1) (b) (ii) of the Arbitration Act No. 11 of 1995 having particular regard to the finding contained in the said award that the said Lease Agreement (X1/C1/F1) did not constitute a valid lease of the property set out in the schedule by the Appellant as "Lessor" to the Respondents as "Lessees", notwithstanding the presence of an admission regarding the entering into of the said Lease Agreement andor the absence of an issue raised by the 1st Respondent relating to its illegality and/or the 1st Respondent's affirmation and reliance on the said Lease Agreement and that the Petitioner was the owner of the leased equipment in his Plaint in D.C. Colombo case No. 23778/ MR marked at the arbitration as C (40);

(c) Has the High Court erred in law in determining and/or holding that the said arbitral award had allegedly been made in accordance with the Issues raised by both parties thereby disregarding inter alia the Appellant's objection to issues to 9 and 10 raised by the 1st Respondent and/or the Tribunal's rejection of the additional issue sought to be raised by the petitioner as regards the 1st respondent seeking the identical relief in two forums namely, in D.C. Colombo action No. 23778/ MR which action is still pending as at date in the District Court and in his counter-claim in the application to arbitration.

(d) Has the High Court unlawfully declined to exercise jurisdiction and/or erred in law in determining and/or holding that the said Court cannot interfere with said arbitral award which purported to apply the principles set out in the Judgment in *Silva v Kumarihamy* 25 NLR 449 to the said Lease Agreement (C1);

(e) Has the High Court erred in law in failing to take cognisance of and/or determine that on the evidence, the 1st Respondent had approbated and reprobated and/or taken contradictory stands in his defence as regards inter alia the legality of the said Lease Agreement and/or that the Appellant was the owner of the leased equipment;

(f) Has the High Court erred in law in determining and/or holding that the Appellant was allegedly estopped from objecting to the jurisdiction of the Arbitrators as the Petitioner did not challenge same and/or because the Petitioner had allegedly not objected to the submission of matters not within the terms of and/or beyond the scope of submissions to arbitration despite the Appellant specifically impugning the said arbitral award on this aspect.

(g) Has the High Court unlawfully declined to exercise jurisdiction and/or erred in law in determining and/or holding that the said arbitral Tribunal can rely on "severability" and/or such other principles in arriving at its findings as contained in the said award which cannot be interfered with by the High Court despite the Petitioner specifically impugning the said arbitral award on these aspect;

(h) Has the High Court unlawfully declined to exercise jurisdiction and/or erred in law in determining and/or holding that the said Court cannot interfere with the findings of the said award and/or that the arbitral Tribunal can adhere to any legal principle in arriving at its findings as contained in the said award which cannot be interfered with by the High Court;

(i) Is the said Judgement of the High Court liable to be set aside for having misapplied and/or failed to apply fundamental principles of law relating to commercial leasing and/or by failing to take cognisance that under the said lease Agreement (C1) it is the Petitioner who was entitled to any insurance proceeds thereby disentitling the 1st Respondent to the award in his favour based on his purported counter-claim.

However, in my view these substantive questions may conveniently be reduced into the following primary questions:-

[1] Did the High Court err in holding that the impugned arbitral award dated 9th December 2003 should be enforced as it was not liable to be set aside on the basis that it purported to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contain decisions on matters beyond the scope of the submission to arbitration?

[2] Did the High Court err in holding that the failure of HNB to raise any objection before the arbitral tribunal under Section 11 of the Arbitration Act No. 11 of 1995 on the basis that it had no jurisdiction to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, preclude or prejudice the application of HNB to have the award set aside in terms of Section 32(1)(a)(iii) of the said Arbitration Act?

[3] If question [1] above is answered in the affirmative and question [2] is answered in the negative, is the entire award liable to be set aside in terms of Section 32(1)(a)(iii) of the Arbitration Act No. 11 of 1995, or can the decisions of the arbitral tribunal on the matters submitted to arbitration be separated from those not so submitted and upheld, while the part of the award which contains decisions on matters not submitted to arbitration is set aside as contemplated by the proviso to that Section?

[4] In any event, is the award dated 9th December 2003 liable to be set aside in terms of Section 32(1)(b)(ii) of the Arbitration Act No. 11 of 1995 on the basis that it is in conflict with the public policy of Sri Lanka?

I propose at the outset to focus on these primary questions, in the context of which the several substantive questions on which this Court has granted leave to appeal may readily be answered.

[1] Excess of Jurisdiction

Learned President's Counsel for HNB has contended before this Court that the arbitral tribunal has strayed outside its mandate. He has submitted that in the process, the arbitral tribunal has purported to deal with a dispute, difference or question not contemplated by or not falling within the terms of the submission to arbitration, thereby rendering the resulting award liable to be set aside in terms of Section 32(1)(a)(iii) of the Arbitration Act of 1995. He has further submitted that in the circumstances, the High Court erred in allowing the enforcement of the award contrary to Section 34(1)(a)(iii) of the said Act.

Section 32(1)(a)(iii) of the Arbitration Act No. 11 of 1995, provides that an arbitral award may be set aside by the High Court if it deals with a dispute falling outside the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Similarly, according to Section 34(1)(a)(iii) of the Arbitration Act, the High Court may refuse to recognize or enforce such an award, in these circumstances. The provisos to these provisions create exceptions in regard to decisions on matters submitted to arbitration which can be separated from those matters that were not so submitted, the effect of which may conveniently be considered when dealing with primary question [2] above.

In the context of the submission made on behalf of HNB that the impugned arbitral award ought to have been set aside or its enforcement refused in the High Court on the basis that the said award exceeded the mandate conferred on the tribunal by the parties, three possible situations have to be considered. Firstly, had there been no valid agreement to submit the dispute in question to arbitration and the arbitrators nevertheless handed down an award, the High Court has the jurisdiction to set aside the award or refuse to enforce the same as provided for in Section 32(1)(a)(i) and 34(1)(a)(i) of the Arbitration Act. These provisions have been formulated in the lines of Article V paragraph 1(a) of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards,1958 (New York Convention). It is noteworthy that HNB and SOUL have not at any stage contested the validity of the agreement to arbitrate, and no submissions were made before this Court on the basis that there was no valid agreement to submit the dispute for arbitration or that the arbitral tribunal lacked the jurisdiction to entertain the dispute presented it for resolution by arbitration at the commencement of the arbitration proceedings.

Secondly, where there is a valid agreement to refer the dispute for arbitration, but the arbitrators in making their award exceed the scope of the dispute so referred for arbitration, that is, where the resulting award relates to differences beyond the ambit of the mandate of the arbitrators, the award may be set aside or its enforcement may be refused for want of jurisdiction. Thirdly, where the arbitrators purport to act within the scope of their mandate, but in the process exceed their authority by dealing with claims that the parties have not submitted to them, enforcement may be refused for transgression of the arbitrators' mandate. In the latter two instances, where the arbitrators rely on a valid arbitration agreement, Section 32(1)(a)(iii) and 34(1)(a)(iii) of the Arbitration Act, framed in the lines of Article V paragraph 1(c) of the New York Convention, come into play. What is sought to be challenged by HNB in these appeals is the award made by the tribunal on the basis of issues Nos. 9 and 10 raised by SOUL in the teeth of strong objection taken to them by learned Counsel for HNB, and the question is whether the arbitral tribunal by its order dated 28th February 2000 which allowed the said issues to be raised thereby expanding the scope of the dispute purported to be determined by it, and thereby transgressed its mandate. For

the determination of these appeals, it is therefore necessary to focus on the question as to what constituted the mandate of the arbitral tribunal in the instant case.

It is trite law that the mandate of the arbitrator or arbitral tribunal has to be discerned from the arbitration clause in the contract under which the dispute was referred for arbitration, or from the submission agreement, but will be further delineated for instance, by the Terms of Reference in an ICC arbitration. Since the instant case did not involve arbitration under the ICC Rules, and was in fact an *ad hoc* form of arbitration which did not require the filing of Terms of Reference, one has to first look at Article 25 of the Lease Agreement (C1), under which the dispute between HNB and SOUL was in fact referred for arbitration.

Article 25, which is titled 'Arbitration', provides as follows:-

> In the event of any default or non-observance by Lessee of the terms and conditions contained in this Lease Agreement or in any other case and in the event of any dispute, difference or question which may from time to time and at any time hereafter arise or occur between Lessor and Lessee or them respective representatives or permitted assigns touching or concerning or arising out of, under, in relation to, or in respect of, this Lease Agreement or any provision matter or thing contained herein or the subject matter hereof, or the operation, interpretation or construction hereof or of any clause hereof or as to the rights, duties, or liabilities of either party hereunder or in connection with the premises or their respective representatives or permitted assigns including all questions that may arise after the termination or cancellation of this lease, such dispute difference or question may, notwithstanding the remedies available under this Lease Agreement or in law, by Lessor only, after 14 days or Lessor presenting its final claim on disputed matters, be submitted in writing at its sole option for arbitration by a single arbitrator to be nominated by the parties or if such nomination is not practicable, by two arbitrators, one to be appointed by Lessor and the order by Lessee and the other by Lessee and an umpire to be nominated by the two arbitrators and if either party refuses to nominate an arbitrator, by sole arbitrator to be nominated by the other party.
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> *Lessor shall forthwith notify Lessee of every matter in dispute or difference so submitted, and only such dispute or difference which has been so submitted and no other shall be the subject of arbitration between the parties.* It is hereby agreed that if either party refuses to take part in the arbitration proceedings or does not attend the same the arbitrator or the arbitrators and the umpire shall and shall be entitled to proceed with the arbitration in the absence of such party and make his or their award after notice to such party. The relevant provisions of the Arbitration Ordinance (Cap.98) and the provisions of the Civil Procedure Code or any statutory re-enactment or modification thereof for the time being in force in so far as the same may be applicable shall govern and shall be applicable to such arbitration.(*Emphasis added*)

Except for the fact that the above arbitration clause is one-sided and contemplates the initiation of arbitration proceedings only at the instance of the Lessor and not of the Lessee, it has been couched in extremely wide language to include every conceivable dispute, difference or question that could arise between the parties. No objection was raised by HNB or submissions made on its behalf before the tribunal, the High Court or at the hearing before this Court to the effect that the tribunal lacked jurisdiction to entertain the counter-claim of SOUL against HNB due to the one-sided nature of the arbitration clause, and HNB was content to contend that the arbitral tribunal strayed outside its mandate by purporting to deal with a dispute, difference or question not contemplated by or not falling within the terms of the submission to arbitration.

In this context, it is significant to note that since HNB's notice of arbitration dated 21st July 1999 and SOUL's response dated 26th July 1999 did not adequately clarify the ambit of the proposed

arbitration, and in the absence of any terms of reference to guide the tribunal in regard to the true nature of the dispute placed before it by the parties, on the first date of the arbitration hearing, the contending parties were persuaded to file a statement of claim and a statement of defence, which were intended to clarify the exact scope of the matters the parties wish to place before the tribunal. It is significant that despite the width of the arbitration clause in Article 25, the second paragraph of Article 25 clearly lays down that "only such dispute or difference which has been so submitted and no other shall be the subject of arbitration between the parties" and in all the circumstances of this case, it would be legitimate, in my opinion, to consider the contents of the statements of claim and defence filed by the parties for the purpose of defining the mandate of the arbitral tribunal.

A perusal of the Statement of Claim (A) filed by HNB would reveal that the basis of the claim was the alleged breach of the Lease Agreement by SOUL and the main remedies sought by HNB consisted of an award in a sum of Rs. 1,770,400/- as arrears of lease rental and interest hereon and a further award in a sum of Rs. 4,250,000/- being the value of the Apogee Speakers system leased out to SOUL by HNB, with interest thereon. It is noteworthy that the Statement of Defence (B) filed by SOUL specifically admitted entering into the Lease Agreement, and contained an averment in paragraph 4 thereof that SOUL had made 28 payments of lease rentals as provided in compliance with the lease agreement. The main defence as set out in paragraph 6 of the said Statement of Defence (B) was that the purported termination of the lease by HNB "is wrongful and/or is unlawful and/or contrary to the terms of the Lease Agreement and/or is of no force or avail in law". It was also averred by SOUL in paragraphs 7, 8 and 9 of the Statement of Defence (B) that HNB continued to accept monies from SOUL notwithstanding the aforesaid purported termination and was thereby estopped from asserting that the Lease Agreement has been terminated. In paragraphs 10 and 11 of the Statement of Defence (B), SOUL took up the position that the Apogee Speaker System was destroyed by a fire that took place on 5th July 1998, thereby frustrating the Lease Agreement and relieving SOUL from the obligation to pay the monies claimed by HNB. It is significant that the validity or lawfulness of the Lease Agreement itself was not challenged by SOUL in its Statement of Defence (B), and in fact SOUL had relied on its lawfulness and validity.

What followed thereafter was somewhat intriguing. On 28th February 2000 when the case came up for hearing at the arbitral tribunal after the filing of HNB's Statement of Claim and SOUL's Statement of Defence, certain admissions were recorded which included, an unqualified admission that that HNB "entered into a Lease Agreement No. 2609/007/119 dated 16.11.1995 with the Respondents annexed to the Statement of Claim as C1" (Admission No. 3). Learned Counsel for HNB suggested eight issues which were accepted by the tribunal subject to certain amendments to issue No. 2 proposed by learned Counsel for SOUL, and then learned Counsel for SOUL sought to formulate his issues. What he suggested as issues Nos. 9 and 10, which are quoted below, were strongly objected to by learned counsel for HNB.

9. Does the Appellant (HNB) have a right to enter into the agreement marked C1 annexed to the Claim?

10. Is the Appellant (HNB) the "owner" of the property more fully described in the agreement marked C1 (as set out therein)?

The contention of the learned counsel for HNB was that the above mentioned 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 (B). The arbitral tribunal, without giving any reasons, allowed issues Nos. 9 and 10 to stand. The remaining issues suggested by learned Counsel for SOUL were not objected to by HNB and were accepted by the tribunal as issues Nos. 11 to 28. It is noteworthy that the tribunal, however, permitted learned Counsel for

HNB to formulate certain consequential issues, which were permitted to stand as issues Nos. 29, 30 and 31. These issues are also quoted below:-

29. Is the Respondent (SOUL) estopped from challenging the Appellant (HNB) as to its right to enter into a lease agreement in view of the Respondent (SOUL) entering into a Lease Agreement marked C1, and/or in view of the admission No. 3?

30. Is the Respondent (SOUL) estopped from disputing the ownership of the property more fully described in the Agreement in view of the provisions in the said Lease Agreement marked C1?

31. Can the 1st Respondent (SOUL) have and/or maintain the said counter-claim (a) as it is misconceived in law in view of the terms of the Lease Agreement marked C1; and (b) as the Respondent (SOUL) is disentitled to any reliefs in Law in regard to its claim?

Having examined the relevant arbitration clause, the pleadings consisting of the statement of claim of HNB and the statement of defence filed by SOUL, the admissions recorded and the issues formulated at the commencement of the inquiry, it is now apposite to consider the award dated 9th December 2003, which was made unanimously by the arbitral tribunal based on the aforesaid admissions and issues after several dates of hearing at which the several witnesses called on behalf of HNB and SOUL had testified. In doing so, it is important to stress that as expressly provided in Section 26 of the Arbitration Act No 11 of 1995, subject to the provisions of Part VII of the said Act, the award made by the arbitral tribunal is "final and binding on the parties to the arbitration agreement", and factual matters will only be considered to the extent it is necessary to do so for determining whether the tribunal has purported to deal with a dispute, difference or question not contemplated by or not falling within the terms of the submission to arbitration, or in any other way exceeded its jurisdiction.

When examining the impugned arbitral award, it is noteworthy that at page 4 of the award, the tribunal rather inaccurately states that "the following issues were *agreed upon by the parties* at the commencement of the inquiry", and proceeds to set out the 31 issues on which its award was based, which included issues 9 and 10 to which learned Counsel for HNB had taken strong objection on the ground that it has not been pleaded and was in any event inconsistent with the defence taken up by SOUL in its Statement of Defence. When the tribunal ordered that the said issues should stand, learned Counsel for HNB was compelled to raise issues Nos. 29 to 31 to overcome the situation that arose from the order of the tribunal which upheld issues Nos. 9 and 10.

After proceeding to consider some of the evidence led in the case, at page 9 of the award, the tribunal made another startling statement, which is reproduced below:

> "Although as many as *thirty two issues were suggested and adopted with the consent of the parties,* at the commencement of the inquiry, it is clear that the principal matters which would have to be resolved in order to answer them all are: *whether or not the Agreement C1 is in law a legally binding Lease* whereby the Claimant as the Lessor leases to the Respondent as the Lessee the movable property described in the Schedule to the said document: *whether or not the Claimant, was under an obligation to insure the said property.*"(*Emphasis added*)

It is necessary to observe at once that the above paragraph is replete with errors. Firstly, there were only 31 issues adopted by the tribunal. Secondly, HNB did not consent to issues 9 and 10. Thirdly, the first matter which the tribunal chose as one of the primary issues in the arbitration, namely whether or not the Agreement C1 is in law a legally binding Lease, was never in issue between the parties and was not taken up in the Statement of Defence of SOUL as a justification

for its defaults in the payment of lease rentals. On the contrary, SOUL had taken up the position that it had made 28 out of 36 monthly payments of rentals in accordance with the Lease Agreement, as set out in its issue No. 11 raised before the tribunal. As learned Counsel for HNB submitted before the arbitral tribunal, issues Nos. 9 and 10 were altogether inconsistent with SOUL's conduct and pleadings.

Fourthly, the second matter which the tribunal considered important, namely whether the Claimant (HNB), was under an obligation to insure the leased property, was in fact raised in issue 21 by SOUL based on the counter-claim raised by it in its Statement of Defence. In paragraph 15 of the said Statement of Defence, SOUL had pleaded that "under and in terms of the aforesaid Lease Agreement, the Claimant HNB was obliged in law to insure the property leased as is more fully contemplated in Article 14 of the Lease Agreement". Issues Nos. 9 and 10 were therefore detrimental not only to the interests of HNB but also to the interests of SOUL, altogether inconsistent with the pleadings and prior correspondence between the parties, and the admissions recorded in the case. It is also obvious that in allowing issues 9 and 10 the tribunal acted in disregard of the cherished principle enunciated in decisions such as *Dinoris Appuhamy v Sophie Nona* 77 NLR 188 that issues cannot be permitted to be framed which will have the effect of converting an action or defence of one character into another of an inconsistent character.

As already noted, the arbitral tribunal in its unanimous award partially rejected relief to HNB on its claim against SOUL, by allowing only its claim for the arrears of lease rentals, while at the same time rejecting its claim for the return of the Apogee Speaker system or its agreed value of Rs. 4,250,000/-. The tribunal held at page 10 of its award, purportedly on an application of the principle enunciated in the decision of this Court in *Silva et al v Kumarihamy* 25 NLR 449, that the Lease Agreement (C1) between HNB and SOUL "cannot be held to constitute a valid lease of the property set out in its schedule" as the subject matter of the said lease belonged to SOUL on the date the said Lease Agreement was executed. The conclusion that SOUL was "in truth and in fact" the owner of the aid property was arrived at by the tribunal on the basis of issue No. 10, which was not an agreed issue in the case, in contravention of SOUL's express acknowledgment in Article 24 of the Lease Agreement that "the Property is and shall at all times remain the sole and exclusive property of the Lessor", and in total disregard of its own finding that SOUL had honoured the said Agreement by paying 28 out of the agreed 36 lease rentals.

It is also interesting to note that the tribunal sought to justify its self-contradictory award by seeking to sever from the said Lease Agreement the part including Article 14 thereof that obligated HNB as the Lessor to "have the property insured with insurers selected and approved by Lessor and in the name of Lessor but at the expense of Lessee" from that part of the Lease Agreement including Article 23 thereof that obligated SOUL to "deliver and surrender up the property" to HNB in the condition in which it was received. Curiously enough, the arbitral tribunal did not refuse to enforce the parts of the Lease Agreement including Article 17(2)(a) thereof, which conferred a right to "claim and receive immediate payment from the Lessee of a part or the entire amount of the total rent payable under this Lease Agreement", and on what basis it severed the HNB's claim for arrears of rental from its claim for the return of the Apogee Speaker system or payment of its value, was not explained anywhere in the award.

Indeed, the occasion for the application of the principle enunciated in *Silva v. Kumarihamy* for 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 learned Counsel for HNB, despite the fact that they did not arise from the pleadings, and were altogether inconsistent with them. The important of pleadings and issues to arbitration proceedings was highlighted in the decision in *Kristely (Pvt.) Ltd. v The State Timber Corporation* (2002) 1 SLR 225, in which this Court set aside a decision of the High Court *inter alia* on the ground that the it was based on findings which did not arise from the issues agreed upon by the parties in the case, and in fact this Court faulted the High

Court for holding that it was the duty of the Arbitral Tribunal to have framed an issue on the question of forgery. The basis of the decision of this Court in *Kristley* was that "each party needed to know from the beginning what case it had to meet". It is significant to note that in that case, this Court held that the failure of the State Timber Corporation to raise an issue as regards forgery was fatal, and that the tribunal was not obliged to frame an issue as to forgery since "it was not even an issue which arose from the pleadings." (at page 244)

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. In the instant case, it is manifest that the arbitral tribunal has overstepped the limits of its mandate and has sought to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contain decisions on matters beyond the scope of the submission to arbitration. I hold that question [1] above has to be answered in favour of HNB and in the affirmative.

[2] Failure to Object to Jurisdiction

This brings me to the question whether the High Court erred in holding that the failure of HNB to take up an objection to the jurisdiction of the arbitral tribunal under Section 11 of the Arbitration Act No. 11 of 1995 on the basis that the admission of issues Nos. 9 and 10 resulted in the tribunal having to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, would preclude or prejudice the application of HNB to have the award set aside in terms of Section 32(1)(a)(iii) of the said Arbitration Act. In fact, I note that one ground, on the basis of which the High Court refused the application of HNB to have the impugned award set aside, was the failure of HNB to take up an objection to jurisdiction when those issues were admitted by the arbitral tribunal.

In this context, it is relevant to note that Section 11 of the Arbitration Act does not compel a party to take up an objection to jurisdiction before the arbitral tribunal itself. That section enacts as follows:-

(i) An Arbitral tribunal may rule on its jurisdiction including any question, with respect to the existence or validity of the arbitration agreement or as to whether such agreement is contrary to public policy or is incapable of being performed; but any party to the arbitral proceedings may apply to the High Court for a determination of any such question.

(ii)Where an application has been made to the High Court under subsection (1) the arbitral tribunal may continue the arbitral proceedings pending the determination of such question by the High Court.

Section 11 gives any party to arbitration proceedings the option of taking up any jurisdictional objection before the tribunal or by applying to the High Court for a determination on a disputed question of jurisdiction. The question is whether, the failure of a party to adopt either of these courses, would prevent that party from seeking to have the arbitral award set aside, or from resisting its recognition and enforcement, on the ground that the arbitral tribunal exceeded its mandate. In answering this question, it will be useful to distinguish between what the authors of Redfern and Hunter, in *Law and Practice of International Commercial Arbitration*, 4th Edition, 5-

31 to 5-35 at pages 248 to 251, describe as an arbitral tribunal's total lack of jurisdiction from a partial lack of jurisdiction.

A total lack of jurisdiction would occur due to the incapacity of a party to the arbitration agreement, or where for illegality or otherwise, the agreement to arbitrate is not valid under the relevant law. A total challenge to jurisdiction could also arise where the arbitration agreement is not in writing, or the dispute placed before the tribunal is entirely outside the scope of the arbitration agreement. The portion is the same where the entire dispute is not arbitrable under the applicable law. In such cases, the alleged excess of jurisdiction may become apparent prior to the actual commencement of arbitration proceedings, and a party who failed to take up its objection to jurisdiction at the first available opportunity may in appropriate cases be deemed to have waived such objection.

The position may be different where there is only a partial lack of jurisdiction. A partial lack of jurisdiction may occur where it is asserted by one of the parties, as in instant case, that *some* of the claims (or counter-claims) that have been brought before the arbitral tribunal do not properly come within the mandate of the arbitral tribunal. Generally any lack of jurisdiction in this sense may be cured by agreement of the parties. However, where the opposing party does not agree to the extension of the agreement to arbitrate or the terms of reference so as to include the new claim, it may not be practical or prudent to take up an objection to jurisdiction prior to the tribunal making its award, and the partial excess of jurisdiction may be a legitimate ground for seeking to set aside the arbitral award or for resisting its enforcement. As the authors of Redfern and Hunter, observe in their work *Law and Practice of International Commercial Arbitration,* 4th Edition, 5-31 at pages 249 to 250:-

> .....There are many cases in which the other party objects to new claims being brought into the arbitration and has good legal grounds for its objection. *Such a party is unlikely to agree to extend the jurisdiction of the arbitral tribunal.* In these cases (and indeed, in any case where it seems that it may be exceeding its jurisdiction) the arbitral tribunal should proceed with caution. *If it does exceed its jurisdiction, its award will be imperilled and may be set aside or refused recognition and enforcement in whole or in part by a competent court*. (*Emphasis added*)

This is exactly what happened before the arbitral tribunal in this case. When the arbitral tribunal admitted issues Nos. 9 and 10 suggested by learned Counsel for SOUL, HNB reacted by seeking to raise issue Nos. 29, 30 and 31, in the hope that the tribunal will review the matter when making its final award. Obviously, HNB adopted what it thought was the more prudent course, not only from its own perspective, but also due to the impracticality of raising a jurisdictional objection which could have effectively delayed the arbitral proceedings. In my opinion, the failure to take up any jurisdictional objection at that stage did not amount to a waiver of HNB's right to challenge the resulting award in the High Court, and accordingly I hold that question [2] has to be answered in the affirmative.

[3] Severability of the Award

The proviso to Section 32(1)(a)(iii) and Section 34(1)(a)(iii) of the Arbitration Act No. 11 of 1995 recognize an important exception to the rigours of the rule that any arbitral award that exceeds the scope of the submission to arbitration may be set aside or refused recognition and enforcement. This exception allows a court to sever the parts of the award that deal with matters that were submitted by the parties for determination by the arbitral tribunal from the parts of the award that relate to matters not so submitted, to enable the decisions of the tribunal on matters falling within its mandate to be recognized and enforced, while the parts of the award which go beyond the scope of the submission for arbitration to be set aside. In view of my finding in [1] that the impugned arbitral award did exceed the mandate of the arbitral tribunal and my conclusion that

HNB was not precluded from challenging the award on the basis of excess of jurisdiction, it becomes necessary to separate the legitimate parts of the said award from the other parts of the award which resulted from the transgression of its own mandate by the arbitral tribunal.

Learned President's Counsel for HNB has submitted that by reason of Article 24 of the Lease Agreement (C1), SOUL was precluded from challenging HNB's title to the subject matter of the lease or the validity of the Lease Agreement which it had honoured by paying 28 out of the 36 lease rentals, and in fact it had not sought to question the title of HNB or its right to enter into the Lease Agreement through its correspondence or its Statement of Defence, and that by allowing SOUL to raise issues Nos. 9 and 10, the arbitral tribunal had not only allowed SOUL to approbate and reprobate, but the tribunal itself blatantly exceeded its mandate. He therefore submitted that in terms of the proviso to Section 32(1)(a)(iii) and Section 34(1)(a)(iii) of the Arbitration Act No. 11 of 1995, all parts of the arbitral award that exceeded the mandate of the tribunal should be severed from the rest of the award falling within the ambit of the dispute voluntarily and properly placed before the arbitral tribunal for determination, and I am of the view that the said submission is well founded.

For the purpose of delineating the limits or borders of the parts of the award that fall within the scope of the mandate of the tribunal from resulted from what resulted from the transgression of the said mandate, it is necessary to delve at some length into the mechanics of this astonishing arbitral award. It is best to begin with the key issues to see how they were assumed by the arbitral tribunal. It is noteworthy that having answered issues Nos. 9 and 10 in the negative and in favour of SOUL, the arbitral tribunal proceeded to answer issues Nos.1 (a) to 1(g), which sought *inter alia* to put into issue whether, under and in terms of the Lease Agreement (C1) SOUL undertook to pay the agreed rentals for a period of 36 months; whether it had agreed that in the event of any default in payment, interest at the rate of 36% per annum would be payable on the amounts in default; and whether it was agreed between HNB and SOUL that the title to the said leased property shall always remain vested in HNB, in the following manner:-

1. (a) } Yes, but are of no force or avail in law
   to } as the said Agreement does not, in law,
   (g) } constitute a valid lease.

The arbitral tribunal also went on to answer issue No. 2(1) which was whether SOUL had defaulted in the payment of lease rentals, in the affirmative and in favour of HNB, the tribunal declined to answer issues Nos. 2(b) and 2(c), which were as follows:-

2. (b) Did the Respondent accept in good order and condition the property leased under the said Lease Agreement in terms of the acceptance receipt marked P2?
   (c) Did the Claimant terminate the said Lease Agreement by letter dated 2nd June 1988?

It is noteworthy that issues Nos. 2(a), 2(b) and 2(c) led to certain additional issues suggested by HNB to help quantify amounts claimed by it, and for the purpose of fully dealing with the question of severability, it is necessary to reproduce below certain further issues raised and show before the tribunal and it had dealt with the claim of HNB for arrears of lease rentals and for the return of the Apogee Speaker system or its value.

Issues Nos. 3, 4, 5, 6, 7 and 8 went into the quantification of the arrears of lease rental payable by SOUL and the question of the return of the Apogee Speaker system or its value to HNB in the following manner:

3. Although demanded by the Claimant in the letter of termination dated 2nd June 1988; P3, did the Respondents fail and neglect to:

(a) pay the outstanding due and owing together with the interest thereon; and/or
(b) return the said Lease equipment to the Claimant?

4. Did the Respondents thereafter inform the Claimant that the said leased property was destroyed by fire on or about 5th July 1998?

5. (a) At the time of the said fire was the said leased property transported in vehicle No. 47-1370 owned by Colombo Engineering Enterprises which is owned and/or controlled by the 1st Respondent?
(b) was the claim, made by the said 1st Respondent to Janashakthi General Insurance Co. Ltd, in respect of the loss of, inter alia, the said leased equipment under the insurance policy of the said vehicle, repudiated by the said insurers?

6. After giving credit to the Respondents for all payments made under the said Lease Agreement P1, is there still due and owing from the Respondents, jointly and/or severally to the Claimant as at 30th November 1998 the sum of Rs. 1,770,400/- together with interest thereon at 36% per annum from the said date until payment in full?

7. Has the Respondents also failed and/or neglected to deliver and surrender up to the Claimant, the equipment which was leased under the said Lease Agreement P1 or to pay its agreed stipulated loss value which is Rs. 4,250,000/-?

8. If any one or more of issues No. 1 to 7 above are answered in the Claimant's favour, is the Claimant entitled to the reliefs prayed for in the prayer to the Statement of Claim against the Respondents jointly and/or severally?

The arbitral tribunal sought to answer these issues as follows:

3.(a) } Though they do not arise, yet no such payments
(b) } were made and the equipment was not returned.

4. Yes.

5. (a) } Yes, the said property was destroyed.
(b) } Yes, but, 1st Respondent was awarded
Rs. 720,000/= by the Arbitration Tribunal

6. Out of the 36 monthly payments, 8 such payments are due and owing to the Claimant (172,503 + 10,351/- x 8) = a sum of Rs. 1,462,832/-.

7. The 1st Respondent has neither returned the said equipment, nor paid such value.

8. A sum of Rs. 2,787,168/- with interest, as set out, is due and owing to the Claimant from the 1st Respondent.

In my view, the tribunal's answer to issue No.8 is altogether erroneous and could give little solace either to HNB or SOUL. Learned President Counsel for HNB has submitted that if issues Nos. 9 and 10 had not been permitted to stand, the sum of money due to HNB under issue No.8 would be much higher that Rs. 2,787,168/- as it would have also embraced the claim of Rs. 4,250,000/- been the agreed value of the Apogee Speaker system, which should have been awarded in favour of HNB, particularly in view of the tribunal's answer to issue No. 7. On the other hand, if all that HNB's entitled to under issue No.8 was the arrears of lease rental for eight months and interest thereon, the sum should be Rs. 1,462,832/- as shown in the tribunal's answer to issue No.6.

As already noted, the arbitral tribunal answered issues Nos. 9 and 10 in favour of SOUL, and proceeded to answer issues Nos. 11 to 31 also in favour of SOUL. It is not necessary for the

purpose of these appeals to set out the said issues at length, as the tribunal refrained from answering issues Nos. 12, 13, 14, 15, 17, 20, 29, 30 and 31 with the explanation that they "do not arise in view of the answer to Issue (1)". Issues 11, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27 and 28 were also answered in favour of SOUL, and what is significant is that the answers of the tribunal to these issues resulted in the award of the sum of Rs. 2,067,168/- to SOUL, which figure was arrived at after setting off from the sum of Rs. 4,250,000/- awarded to SOUL by way of damages for the failure to insure the Apogee Speaker system as contemplated by Article 14 of the Lease Agreement (C1), the sum of Rs. 1,462,832/- found to be payable to HNB in terms of the tribunal's answer to issue No.7, and a further sum of Rs. 720,000/- which SOUL was able to recover from Janashakthi General Insurance Co. Ltd under certain arbitral awards made in separate arbitration proceedings, which awards were affirmed by this Court in its judgement pronounced on 22nd February 2013 in *Kiran Atapattu v Janashakthi General Insurance Company Limited*, SC Appeal No. 30-31/2005. The award of Rs. 4,250,000/- to SOUL as damages for the failure to insure the Apogee Speaker system was made mainly on the basis that the Lease Agreement (C1) is not valid in law, and therefore the alleged termination by HNB of the said Agreement by its letter dated 2nd June 1988 was also invalid, which were conclusions reached by the tribunal having transgressed its mandate by allowing issues Nos. 9 and 10 to stand without the consent of HNB, and in the teeth of strong objection taken by learned Counsel for HNB.

It is, however, significant to note that the arbitral tribunal had answered issue No. 7 in favour of HNB on the question of whether SOUL had "failed and/or neglected to deliver and surrender up to the Claimant, the equipment (Apogee Speaker system) which was leased under the said Lease Agreement (C1) or to pay its agreed stipulated value which is Rs. 4,250,000/-." It is also relevant to note that the Apogee Speaker system was destroyed by a fire that occurred during transit on the early hours of 6th July 1988 after being used at a musical show and dinner dance held at the *La Kandyan* Hotel on 5th July 1998, more than a month after the purported termination of the Lease Agreement for non-payment of lease rentals. In fact, in its Statement of Defence (B), SOUL had taken up the position that the lease agreement was frustrated by the said fire which made it impossible for it to return the Apogee Speaker system to HNB and discharged it from any obligation to pay to HNB its value or any arrears of lease rentals. In the circumstances it is clear that the arbitral tribunal has contradicted itself in allowing to HNB the arrears of lease rentals while rejecting its right for the value of the speaker system.

It is noteworthy that the arbitral tribunal refused to answer issues Nos. 2(b) and 2(c), which focused on whether SOUL had accepted in good order and condition the property leased under the Lease Agreement (C1) and whether HNB had terminated the said Lease Agreement by letter dated 2nd June 1988, simply on the basis that they "do not arise in view of the answer to issue 1". As already noted, the tribunal had refused to answer issues Nos. 1(a) to (g) on the basis of its purported finding that the Lease Agreement was of no force or avail in law as it did not, "in law, constitute a valid lease", a finding reached by the tribunal in the absence of any agreed issue before it as to the legality of the said Lease Agreement. Although issues Nos. 1(a) to (g) were vital for HNB to establish its claim for the return of the Apogee Speaker system, the tribunal disregarded them on the basis of its answers to issues Nos. 9 and 10, despite they did not directly raise any question regarding the validity of the said lease, and were admitted by the arbitral tribunal, in the teeth of strong objection taken by learned Counsel for HNB on the basis that they were outside the pleadings, inconsistent with the positions taken by SOUL in its correspondence and the admissions recorded in the case. In view of the finding of the arbitral tribunal that SOUL was in default of lease rentals at the relevant period, it was important for the tribunal to have answered the aforesaid issues to decide whether SOUL was liable to surrender the Apogee Speaker system to HNB in terms of Article 17(2)(b) read with Article 23 within 7 days of the letter dated 2nd June 1988, or to pay HNB its value.

The jurisdiction of the High Court under Part VII of the Arbitration Act is confined to the setting aside and the recognition and enforcement of arbitral awards, and does not allow the High Court

or this Court to reconstruct arbitral awards on the basis of their findings. Accordingly, answering question [3], I hold that the award made by the arbitral tribunal in favour of HNB for the sum of Rs. 1,462,832/-, being the lease rentals in arrears and interest thereon up to the date of the award namely, 9th December 2003, may be severed from the award made by the tribunal in favour of SOUL for a sum of Rs. 4,250,000/- by way of damages, to enable the award in favour of HNB to be recognized and enforced, and the award in favour of SOUL to be set-aside as being in excess of the mandate of the tribunal.

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(D) Public Policy

This brings me to the question whether the impugned arbitral award dated 9th December 2003 was in conflict with the public policy of Sri Lanka. Although the learned President's Counsel for the Appellant sought to assail the said award on the basis that that it was made in disregard of fundamental principles of law and was therefore in conflict with public policy of Sri Lanka.

Sections 32(1)(b)(ii) and 34(1)(b)(ii) of the Arbitration Act which appear in Part VII thereof, refer to the concept of public policy, and provide respectively that an arbitral award may be set aside and / or its enforcement refused on the ground that it is contrary to the public policy of Sri Lanka. These provisions echo the corresponding provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, also known as the New York Convention. However, it is important to bear in mind that and Burrough, J., had in *Richardson v Mellish* (1824) 2 Bing 229 at page 252, warned against the dangers that excessive reliance on the concept can give rise to, describing public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd (*1902) AC 484 at page 500 had cautioned that "public policy is always an unsafe and treacherous ground for legal decision", to which Lord Denning MR, responded in *Enderby Town Football Club Ltd. v. Football Association. Ltd.* (1971) Ch. 591 at page 606, with his characteristic quip that "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". The words of these great judges were sufficient to impress upon me that in applying the provisions of Sections 32(1)(b)(ii) and 34(1)(b)(ii) of the Arbitration Act, great caution should be exercised, particularly in the context that an arbitral award is the end result of arbitration proceedings, which give effect to the intention of the parties to a dispute to refer their dispute for arbitration without resorting to the more time consuming process of litigation. It is therefore fortunately that for the purpose of deciding these appeals, I do not go into the question of "public policy" in view of the conclusions reached by me in parts [1] to [3] of this judgment.

Conclusions

So far in this judgment I had refrained from seeking to answer the specific substantive questions on which leave to appeal had been granted to HNB by this Court, as I considered it convenient to deal with them under the headings [1] Excess of Jurisdiction, [2] Failure to Object to Jurisdiction [3] Severability of Award and [4] Public Policy. Having examined these primary questions, it is now easy to deal with the specific substantive questions on which leave to appeal had been granted by this Court.

Insofar as substantive questions (a) and (b) are concerned, it must be observed at the outset that Section 26 of the Arbitration Act of 1995 makes the arbitral award "final and binding on the parties to the arbitration agreement" subject to Part VII of the said Act, and it is not for the High Court, or for this Court sitting in appeal over decisions of the High Court under Part VII of the Arbitration Act to assess the correctness of any finding of the arbitral tribunal, particularly from an evidentiary perspective. Hence, I would in answering substantive questions (a),(b)(c)(d),(e) and (h), stress that the question as to whether the Lease Agreement (C1) constituted a valid lease of the property set out in the schedule thereto, was not a dispute falling within the mandate of the

arbitral tribunal, and therefore the arbitral tribunal erred in basing its award on a matter that was not properly in issue before the tribunal, just as much as the High Court erred in not setting aside and enforcing the said award. I have set out in great detail under the headings [1] Excess of Jurisdiction, and [2] Failure to Object to Jurisdiction, the reasons that led me to the aforesaid conclusions.

For the reasons explained in detail under the heading [2] Failure to Object to Jurisdiction, I would answer substantive questions (f) in the affirmative and in favour of HNB. Similarly, for the reasons fully set out under heading [3] Severability of the Award, I would in answering substantive question (g) hold that the award made by the arbitral tribunal in favour of HNB for the sum of Rs. 1,462,832/-, may be severed from the award made by the tribunal in favour of SOUL for a sum of Rs. 4,250,000/-, to enable the award in favour of HNB to be recognized and enforced, and the award in favour of SOUL to be set-aside as being in excess of the mandate of the tribunal. In regard to all the aforesaid substantive questions, I hold that the High Court fundamentally erred in failing to take cognizance of the fact that the arbitral tribunal had manifestly exceeded its mandate in allowing issues Nos. 9 and 10 suggested by SOUL to stand, and basing its judgment on the findings of the arbitral tribunal on these issues.

For the foregoing reasons, I answer substantive questions (a) to (h) on which leave to appeal had been granted by this Court in favour of HNB, and find that it is not necessary to answer question (i) for the purpose of disposing of these appeals. I would partly allow the appeals and set aside the judgment of the High Court dated 13th February 2006. I would also partly allow prayer (d) of the petition of HNB filed in this Court, and set aside the award dated 9th December 2003 made by the arbitral tribunal in favour of SOUL in excess of its mandate as prayed for by HNB in prayer (f) of its petition, but in view of my conclusion that the legitimate parts of the award maybe severed from its part that resulted from the transgression by the tribunal of its mandate, I would make order as prayed for by HNB in prayer (g) of its petition filed in this Court, and allow the award of the arbitral tribunal in favour of HNB for the sum of Rs. 1,462,832/- being the lease rentals in arrears with interest thereon at the legal rate from 31st May 1998 until the date of the award namely, 9th December 2003, and thereafter on the aggregate amount until payment in full, be recognized and enforced. The High Court is directed to file the award and give judgment in terms of the said award in favour of the Claimant-Respondent-Appellant (HNB) for the said sum of Rs. 1,462,832/- and interest thereon as aforesaid, and to enter decree accordingly.

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

JUDGE OF THE SUPREME COURT

AMARATUNGA J

JUDGE OF THE SUPREME COURT

RATNAYAKE PC J

JUDGE OF THE SUPREME COURT