

CELWEERA S.A.
v.
MALSHIP BULKFERT (PVT) LTD

SUPREME COURT
S.N. SILVA, CJ.
ISMAIL, J. AND
J.A.N DE SILVA, J.
SC APPEAL No. 16/2001
(HC/ARB/448/2000)
8TH JULY AND 1ST AUGUST 2002

Arbitration - Enforcement of award - Section 31 of Arbitration Act, No. 11 of 1995 - Requirement to file the arbitration agreement or a certified copy thereof - Section 31 (2) (b) (ii) of the Act.

The appellant claimant ("the claimant") applied to the High Court in terms of section 31 (1) of the Arbitration Act, No. 11 of 1995 ("the Act") for enforcement of an award which had been made in London against the respondent. One of

the documents filed with the application was marked "D" being "a certified copy of the Bagging Contract" (viz. the Arbitration Agreement) as required by section 31 (2) (b) of the Act. Document "D" was certified "true copy" by the attorney-at-law for the respondent (and presumably filed of record by the attorney-at-law for the claimant). The respondent in his objections admitted that the document "D" was the Bagging Contract entered into with the claimant.

The High Court Judge overlooked the above facts and erroneously observed that the document "D" had been certified "true copy" by the claimant and hence dismissed the application under section 31 on the ground that the said document was not duly certified to the satisfaction of the court in terms of section 31 (2) (b) (ii) of the Act.

Held:

Per J.A.N.de Silva, J

- (1) "..... High Court Judge misdirected himself in holding that the notation "true copy" (on the document "D") is the seal of the attorney- at-law for the claimant when in fact the seal is of the attorney-at-law for the respondent. This is in fact a serious misdirection of fact and of law."
- (2) In view of the admission of the document "D" by the respondent as the Arbitration Agreement, the respondent could not have invited the court to dismiss the application on the ground that there was no copy of the agreement as required by section 31 (2) (b) of the Act. The High Court failed to give full effect to section 31 (2) (b) (ii) of the Act.

APPEAL from the judgment of the High Court

Case referred to:

1. *Kristly (Pvt) Ltd v. The State Timber Corporation* (2002) 1 SRI LR 225 at Pg 239

R.de Silva, PC with P.Kumarasinghe for petitioner.

Ikram Mohamed, PC with Kushan de Alwis for respondent.

Cur.adv.vult.

November 22, 2002

J.A.N.DE SILVA, J.

This is an appeal against the judgement and order dated 03.10.2000 of the High Court, setting aside an arbitration award on

the ground that the claimant-appellant (the appellant) has failed to comply with section 31 (2) (b) of the Arbitration Act, No. 11 of 1995.

The appellant and the respondent entered into a Bagging Contract dated 7th February 1994. A dispute arose and the said dispute was referred to arbitration in London. The arbitration was duly held and an award was made in London. The appellant made an application dated 8th March 2000 to the High Court of Colombo, seeking *inter alia*, to file the arbitration award dated 10th March 1999, its reasons and the supplementary awards to be duly registered and enforced for judgement and decree accordingly. The appellant annexed several documents to the said petition. One of which was the document filed of record marked "D" which was a certified copy of the Bagging Contract.

The respondent raised a preliminary objection that the appellant has failed to file the original Arbitration Agreement under which the purported awards were alleged to have been made or a duly certified copy thereof, in terms of section 31 (2) (b) of the Arbitration Act, No. 11 of 1995 and therefore the said application should be dismissed *in limine*. The learned High Court Judge upheld the said objection and refused the application for enforcement and dismissed the same with costs.

At the hearing of this appeal the learned President's Counsel for the respondent submitted that the failure of the appellant to file the original Arbitration Agreement under which the purported awards are alleged to have been made or a duly certified copy thereof, in terms of section 31 (2) of the Arbitration Act, No. 11 of 1995 is fatal to the said application of the appellant.

Section 31 (2) (a) requires an application to enforce an award to 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 duly made or a duly certified copy of such agreement and that, a copy of the arbitration agreement shall be deemed to have been duly certified if-
 - (1) 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 it was not in fact, so certified; or

- (2) It has been otherwise certified to the satisfaction of court.

The learned High Court Judge held, *inter alia* that,

"The question of certification warrants the examination of the relevant position of the law as found in section 31 (2). The copy tendered to court bears two certifications. One purported to have been made by a partner of a firm of solicitors in English whose seal is not placed or affixed to such certification, which bears no date. His certification is to the effect.

"I confirm that this is a true copy of the document submitted in the London Arbitration between the parties and relied upon by the Arbitrator."

This conformation does not identify the document as the contract document containing the Arbitration Agreement nor does he state that he possessed the document. The signatory does not divulge the relationship he has with the arbitration proceedings or the Arbitral Tribunal. As such this court does not consider such certification as being sufficient to satisfy this court as to the document containing the Arbitration Agreement, as envisaged in terms of section 31 (2) (ii) of the Act. Sub-section thereof has no application since the document is not supposed to have been certified by the Arbitral Tribunal or any member thereof.

Besides the purported certification by the solicitor in London, the same bears the notation "true copy" under the seal of the attorney-at-law for claimant. If this is correct this is a true copy of a certified copy only, which is not in compliance of requirement of section 31 (2) (ii). If the document tendered is a certified copy as averred by the claimant there cannot be any need to identify it as a true copy. However the existence of the two notations side by side stands in the way of this court accepting the document as a certified copy because this court is unable to give preference of any one of the two notations. The very existence of the two notations purporting to be a certification impairs the operation of anyone of them or the other".

It is observed that the learned High Court Judge misdirected himself in holding that the notation "true copy" is the seal of the attorney-at-law for the claimant when in fact the seal is of the attorney-at-law for the respondent. This is in fact a serious misdirection of fact and of law.

It is also to be noted that the appellant filed annexed to his application (to enforce the award) document marked "D" which the appellant stated was a certified copy of the Bagging Contract. The learned President's Counsel for the appellant drew the attention of court to the objections and affidavit filed by the director of the respondent company in the High Court. In paragraph 7 (a) of the affidavit the respondent states as follows,

"the respondent entered into the Bagging Contract marked "D" with the petitioner above".

In these circumstances President's Counsel for the appellant submitted that there can be no doubt whatsoever that the document marked "D" is in truth and in fact the contract the appellant and the respondent entered into. It is my view that after having admitted document "D" as a true copy of the agreement the parties entered into, the respondent cannot invite the court to dismiss the application on the basis that the original was not tendered to court.

It is appropriate to cite a passage from the judgement of Justice Fernando in a similar case, namely, *Kristly (Pvt) Ltd. v The State Timber Corporation*⁽¹⁾ *"Clause (ii) requires the High Court in each case, having regard to the facts of the case, to decide whether the document is certified to its satisfaction. The learned judge erred in laying down a general rule - founded on a virtual assumption of dishonesty - which totally excludes certification by an attorney-at-law regardless of the circumstances. The position might have been different if the application for enforcement had been rejected promptly on presentation, for then there might have well have been insufficient reason to be satisfied that the copy was indeed a true copy and that would have caused no injustice, as the claimant could have filed a fresh application. But I incline to view that even at that stage the application should not have been summarily rejected. The claimant should have been given an opportunity to tender duly certified copies, interpreting "accompany" in section 31 (2) purposively and widely (as in Sri Lanka General Workers Union v. Samaranayake [1996] 2 Sri LR 268, and Nagappa Chettiar v. Commissioner of Income Tax AIR 1995 Madras 162) Undoubtedly section 31 (2) is mandatory, but not to the extent that one opportunity and one opportunity only, will be allowed for compliance. In the present case, however, the order was not made*

immediately, but only after the lapse of the period of one year and fourteen days allowed for an application for enforcement. By that time the learned judge had consolidated the proceedings: hence he could not have ignored the certified copies filed in the STC's application, which admittedly, were identical in all material respects to the copies tendered with the claimant's application. He had also to consider (even if was not bound by it) the admission in the STC's statement of objections that those copies were "duly certified" as well as the fact that, by then, the claimant had also tendered copies certified in terms of clause (i). It was on all that material that the learned judge had to decide whether the copies had been certified to his satisfaction".

In the above circumstances I hold the learned High Court Judge failed to give full effect to clause (ii) of section 31 (2) of the Arbitration Act, No. 11 of 1995 when there was an admission by the respondent that the agreement marked "D" was a true copy. Therefore I allow the appeal and set aside the order dated 03.10.2000. The High Court is directed to take steps in compliance with Section 31 (2) (b) of the Arbitration Act, No. 11 of 1995.

The appellants will be entitled to costs in a sum of Rs.30,000/= (thirty thousand).

S. N. SILVA, CJ. - I agree.

ISMAIL, J. - I agree.

Appeal allowed.