

**VANIK INCORPORATION LTD**

**v.**

**L.D. SILVA AND OTHERS**

SUPREME COURT

S.N. SILVA, CJ.

WIJETUNGA, J. AND

BANDARANAYAKE, J.

SC APPEAL NO. (CHC) 27/98

HC (CIVIL) 10/97/ARB

22<sup>ND</sup> MARCH, 2000

*Arbitration - Arbitration award - Enforcement - Jurisdiction of the High Court - Parts VII and VIII of the Arbitration Act, No. 11 of 1995 - Whether the High Court of the Western Province ("Commercial High Court") has jurisdiction to enforce the Award - Section 2(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 - Appeal to the Supreme Court - Section 37 of Act, No. 11 of 1995 - Appeal lodged under wrong statute - Validity of the appeal.*

The appellant, acting in terms of parts VII and VIII of the Arbitration Act, No. 11 of 1995 made an application to the High Court of Sri Lanka holden in the Judicial Zone of Colombo (High Court of the Western Province) for the enforcement of an award. The caption to the application described the court as "Western Province Commercial High Court." It was filed before the High Court Judge of the court appointed by the Minister under section 2(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 to exercise exclusive jurisdiction in respect of certain civil matters arising out of "commercial transactions" specified in the 1<sup>st</sup> schedule to the Act. For administrative convenience one of the Judges of the High Court of the Western Province sitting at Colombo has been designated for this purpose; and the court is described as the "Commercial High Court."

The Court having entertained the application upheld a preliminary objection that as the "Commercial High Court" is exercising a "special jurisdiction" it had no jurisdiction in respect of applications under the Arbitration Act, No. 11 of 1995; and that the application was a "nullity". From that decision an application was made to the Supreme Court in terms of section 5(2) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

**Held :**

- (1) Notwithstanding the description of the Court as the "Commercial Court" and statutory complications in the several names ascribed to the court in the relevant statutes the true character of the court before which the application was filed is that of "the High Court of Sri Lanka, holden in the Judicial Zone of Colombo" referred to in the interpretation section 50 of Act. No. 11 of 1995; hence the application was correctly made to the High Court referred to in parts VII and VIII of the Arbitration Act, No. 11 of 1995. As such the court had jurisdiction to enforce the award subject, however, to an appropriate amendment to the caption of the application.
- (2) The appeal to the Supreme Court, though erroneously made under section 5(2) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, is referable to section 37 of the Arbitration Act, No. 11 of 1995 in terms of which an appeal lies to the Supreme Court on a question of law, with leave. Hence the mistaken reference shall not result in the rejection of the appeal.

*Per S.N. Silva, C.J.*

"This finding in favour of the appellant should not be constrained as a licence to make mistakes of this nature as noted above."

**APPEAL** from the judgement of the High Court Colombo.

*K.N. Choksy, P.C. with Mrs. M. Peiris, Ms. Kirisan Wijetunga and Mrs. M. Dias for appellant.*

*R.K.W. Goonesekera, with Palitha Kumarasinghe, for respondents.*

*Cur. adv. vult.*

August 24, 2000.

**S.N. SILVA, C.J.**

This is an appeal from the decision of the High Court dated 16. 03. 1998. By that decision the Judge held that the Court has no jurisdiction in respect of the application of the Appellant. The application was dismissed on the basis that the "invocation" of jurisdiction was a nullity. The Court absolved itself so fully with the application to the extent of even refusing to make an order for costs.

The Appellant filed the said application by way of a petition and affidavit on 09. 07. 1997 to enforce an arbitration award dated 07. 11. 96 (marked B). It appears from the document that the award itself was made pursuant to a settlement. The caption of the petition states that the application was being made in terms of Parts VII, and VIII of the Arbitration Act, No. 11 of 1995. According to the proceedings of 14. 11. 1997 the Court entertained the application by noting -

- (i) that it was presented within the period specified by section 31(1) of the Arbitration Act;
- (ii) the contents of the Arbitration agreement and the award;
- (iii) that no application has been made to set aside the award;
- (iv) that it is a local arbitration and the provisions of sections 33 and 34 of the Arbitration Act which relate to foreign arbitral awards will not apply.

Accordingly the Court directed that notice be issued on the Respondent to consider whether judgment should be entered in terms of the award. The Respondents raised certain objections, the one relevant to this appeal is to the jurisdiction of the Court. This objection which found acceptance with the Judge relates to the description of the Court in the caption as "Western Province Commercial High Court" (a direct translation of the original document in Sinhala). The objection was upheld by the Judge on the basis that the "Commercial High Court" is exercising a special jurisdiction in terms of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 and that it has no jurisdiction in respect of applications under the Arbitration Act No. 11 of 1995. Accordingly it was held that the invocation of jurisdiction was a "nullity" as noted above.

The Petitioner filed this appeal by way of an application for leave to appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996. Leave to appeal was granted on the question whether the High Court Judge erred in coming to the finding that the Court had no jurisdiction to entertain the application for enforcement in terms of the Arbitration Act, No. 11 of 1995. The Respondent was granted leave to appeal on the question whether this Court should entertain the application for leave to appeal since the decision is a judgment from which a final appeal should be filed.

The several provisions adverted to by Counsel refer to the Courts described as the High Court of the Republic of Sri Lanka, High Court of the Province, High Court of a judicial zone and the Commercial High Court. The complications that manifest at the surface, pursuant to the several names ascribed to the Court, may be untangled if the history of these institutions is traced.

The High Court was at first established in Sri Lanka as a Zonal Court exercising original criminal jurisdiction by the Administration of Justice Law, No. 44 of 1973. It thereby succeeded to the original criminal jurisdiction of the Supreme Court established under the Courts Ordinance. Articles 105(1)(c) and 111(1) of the Constitution at the time of its enactment in 1978 stated that the High Court of the Republic of Sri Lanka shall be the "highest Court of First Instance exercising criminal jurisdiction." The Judicature Act, No.2 of 1978 provided for the exercise of this jurisdiction within judicial zones. Accordingly Judges are appointed by the President to the High Court in terms of Article 111(2) of the Constitution and each person so appointed is known as a "Judge of the High Court" in terms of Section 4 of the Judicature Act. Section 17 of the Judicature Act empowers the Chief Justice to "nominate and assign" a Judge of the High Court to exercise jurisdiction in any specific zone.

The Eleventh Amendment to the Constitution effected in 1987 substituted a new provision as Article 111(1) which

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removed the description that it is "the highest court of First Instance exercising criminal jurisdiction." The substituted provision reads thus :

"There shall be a High Court of Sri Lanka, which shall exercise such jurisdiction and powers as Parliament may by law vest or ordain."

However Article 105(1)(c) which describes the "High Court of the Republic of Sri Lanka" as being one of the courts of First Instance was not amended. Be that as it may, the Eleventh Amendment in effect paved the way for the Court to be vested with original and appellate jurisdiction.

The next significant change was effected by the Thirteenth Amendment also enacted in 1987. It introduced Article 154P(1) which provides for a High Court for each Province. Article 154P(2) empowers the Chief Justice to "nominate, from among Judges of the High Court of Sri Lanka such number of judges as may be necessary to each such (Provincial) High Court." The Court thus constituted is vested with an extensive jurisdiction covering original criminal jurisdiction, appellate jurisdiction and writ jurisdiction. The High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 and the amendments to the Workmen's Compensation Ordinance vested further appellate jurisdiction in this Court.

It is in the wake of this rapid expansion of the jurisdiction of the institution previously known as the High Court of Sri Lanka (vide Article 105(1)(c) and Article 111(1)) that the enactments with which we are immediately concerned, were made. The Arbitration Act, No. 11 of 1995 was intended as is evidenced by its recital "to make comprehensive legal provision for the conduct of arbitration proceedings and the enforcement of awards..... ." An examination of the provisions of the Act shows that the High Court is vested with jurisdiction referable to various stages of the arbitral process, to aid and assist the process and to give it the thrust of judicial sanction, where needed. The High Court has jurisdiction to enforce awards and to set aside awards

in given situations. The sections in the body of the Act describe the Court vested with this jurisdiction plainly as the "High Court." The interpretation clause of the Act (section 50) defines the phrase "High Court" to mean the High Court of Sri Lanka, holden in the judicial zone of Colombo or holden in such other zone, as may be, designated by the Minister with the concurrence of the Chief Justice, by Order published in the Gazette."

The Minister has not designated any court as provided in the second part of the definition. Hence the Court vested with jurisdiction under the Arbitration Act is the one referred to in Article 105(1)(c) and 111 of the Constitution and section 4 of the Judicature Act as the High Court of Sri Lanka. The territorial jurisdiction of the particular court is stated with reference to the division of the country into zones effected in terms of section 3 of the Judicature Act. The particular zone identified is the judicial zone of Colombo. Thus on a plain interpretation of the definition in section 50 of the Arbitration Act, the High Court of Sri Lanka held in the judicial zone of Colombo, will have jurisdiction as provided for in the Act including the jurisdiction to enforce arbitral awards. *A fortiori* a Judge of the High Court of Sri Lanka holding court in the judicial zone of Colombo may exercise that jurisdiction. The Judge who made the impugned order has at all material times been a Judge of the High Court of Sri Lanka holding Court under the territorial limits of the Judicial Zone of Colombo. In addition to that the records show that on 10.10.1996 the Chief Justice has nominated him to exercise the jurisdiction of the High Court in terms of the Arbitration Act, No. 11 of 1995.

In the circumstances the Judge who made the impugned order and the Court in which he presided was amply seized with jurisdiction to hear and determine the application for the enforcement of the arbitral award. The proceedings of 14.11.1997 referred to above have been taken on a clear assumption of jurisdiction. The Judge appears to have swayed to the contrary view by the description of the Court in the caption as the "Commercial High Court." This leads me to advert to the last description of the High Court mentioned at the

commencement of the Judgment. The High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 was enacted to empower the Provincial High Court to exercise jurisdiction in respect of certain civil matters. The First Schedule to the Act specifies that such jurisdiction shall be exercised in relation to actions where the cause of action has arisen out of commercial transactions. The Minister has in terms of section 2(1) of the Act appointed the High Court of the Western Province and in terms of section 2(2)(a) the High Court of the Western Province sitting at Colombo will exercise that jurisdiction. For administrative convenience one of the Judges of the High Court of the Western Province sitting at Colombo is specially designated for this purpose and for similar reasons there is a separate Registry. These administrative arrangements have resulted in the Court exercising this jurisdiction being described as the "Commercial Court." The appendage "Commercial" should be taken merely as a reference to the administrative arrangements referred above and no more. The Petitioner was in error when he described the Court in the caption as "Western Province Commercial High Court" as noted above. However, immediately beneath that description the Petitioner has recited that the application is being made in terms of Parts 7 and 8 of the Arbitration Act, No. 11 of 1995. Therefore in my view there is a proper invocation of the jurisdiction of the High Court. There was certainly no basis to consider the application to be a nullity as stated in the impugned order. The proper course of action would have been for the Judge, who is vested with jurisdiction, to direct an amendment of the caption to bring it in line with the recital that appears beneath the name of the Court. In the circumstances I would answer the first question on which leave to appeal has been granted in favour of the Appellant.

The second question relates to the manner in which the application for leave to appeal has been presented to this Court. Where an application has been made to the High Court for the enforcement of an arbitral award an appeal lies to this Court in terms of Section 37 of the Arbitration Act on a question of law, with leave. The Petitioner has correctly addressed the application

for leave to appeal to this Court but has erred in the recital by stating that it is an application in terms of section 5(2) of Act, No. 10 of 1996. This recital is incorrect since the provisions of Act, No. 10 of 1996 have no bearing on the proceedings at issue, as noted above. In the application to the High Court the Petitioner has made a mistake in the description of the Court but described the application correctly in the recital. On the other hand, in the application for leave to appeal, the Petitioner has described the Court correctly but has erred in citing an incorrect legal provision in the recital. Since the Court is properly designated and the application is for leave to appeal, as it should be in terms of section 37 of the Arbitration Act, I am of the view that the mistaken reference to Act, No. 10 of 1996 should not result in the rejection of the appeal. This finding in favour of the appellant should not be construed as a licence to make mistakes of this nature as noted above. These mistakes may be the result of the complications that manifest and surface in the process in which the jurisdiction of the High Court has evolved. However, these complications would be untangled if each type of jurisdiction vested in the Court is seen in its proper perspective. Legal practitioners cannot be absolved from engaging in such study since they too are presumed to know the law.

The appeal is allowed. I set aside the order dated 16.3.1998 and refer the matter back for a hearing on the issues other than those dealt with in this Judgment. Considering all the circumstances of the case, I make no order for costs.

**WIJETUNGA, J.** - I agree.

**BANDARANAYAKE, J.** - I agree.

*Appeal allowed.*