

LANKA ORIX LEASING COMPANY LTD
v.
PINTO AND OTHERS

SUPREME COURT
AMERASINGHE, J.,
ISMAIL, J. AND
WIGNESWARAN, J.
SC APPEAL NO. 67/2000
SC (HC) LA NO. 25/2000
HIGH COURT NO. HC/ARB/332/99
SEPTEMBER 25, 2001

Arbitration – Arbitration Act, No. 11 of 1995 – Enforcement of "award on agreed terms" – Sections 14, 25 and 31 of the Act – Mere record of a settlement not enforceable.

In the course of an arbitration under the Arbitration Act, No. 11 of 1995, the appellants and the respondents – partnership arrived at a settlement on 18.11.1998 in terms of section 14 of the Act. That agreement was recorded and signed by the parties and the arbitrator. However, no arbitral award was made in terms of section 14 (3) and section 25 (1) of the Act pursuant to such agreement; nor was a copy of such award made and signed by the arbitrator delivered to the respondents as required by section 25 (4) of the Act. Thereafter, the appellant sought to enforce the settlement before the High Court of Colombo under section 31 of the Act "deeming it an arbitral award in terms of the provisions of sections 14 and 25 of the Act No. 11 of 1995".

Held:

The so called award, viz, the document containing the settlement dated 18.11.1998 tendered for enforcement was not in conformity with the law. A formal award on agreed terms should have been prepared and signed by the arbitrator in terms of sections 14 (3) and 25 (1) of the Arbitration Act and a copy thereof should have been delivered to the respondents as required by section 25 (4) of the Act. The mere recording of the agreement was not enforceable in terms of section 31 of the Act.

APPEAL from the judgment of the High Court.

Romesh de Silva, PC with *Hiran de Alwis* for appellant.

M. U. M. Ali Sabry with *Manoj Nanayakkara* for respondents.

Cur. adv. vult.

November 29, 2001

WIGNESWARAN, J.

The appellant and respondents arrived at a settlement on 18. 11.1998 before an Arbitrator in the presence of lawyers appearing for either side. Trevor Felix Nihal Pinto represented the respondents' partnership 'T. F. N. Pinto & Sons'. The Legal Officer of the appellant Limited Liability Company and the abovesaid T. F. N. Pinto on behalf of the respondents' partnership signed the said settlement. The settlement signed by parties and the Arbitrator (marked document "C") is annexed to this judgment as a schedule. 1

Since the respondents defaulted payment in terms of the settlement, the appellant sought to register and enforce the abovesaid settlement in the High Court of Colombo deeming it an Arbitral Award in terms of the provisions of sections 14 and 25 of the Arbitration Act, No. 11 of 1995. 10

The High Court Judge, Colombo, by his order dated 01. 08. 2000 refused enforcement with costs payable by the appellant. He held that there had been non-compliance with the provisions of section 25 (4) of the Arbitration Act.

Leave to appeal was granted by the Supreme Court on 20. 11. 2000 against the said order on the question whether the learned High Court Judge was in error in holding in the circumstances of the case, specially having regard to Document "C" (vide schedule to this judgment), that a failure to deliver notice formally rendered the award unenforceable. 20

It was contended before us by Mr. Romesh de Silva, President's Counsel, that the purported arbitral award was on agreed terms, signed and accepted by the parties present in person and represented by Attorneys-at-law to whom signed copies of the purported arbitral award was delivered and therefore the question of conforming to the provisions of section 25 (4) of the Arbitration Act did not arise in this instance. It was submitted that the respondents having been defaulters in terms of the Lease Agreement between parties who had breached the terms and conditions of the settlement reached between them, the purported arbitral award must be allowed to be registered and enforced. 30

Mr. M. U. M. Ali Sabry, Counsel for the respondent argued that document 'C' did not constitute an arbitral award in terms of the Law, that in any event no notice was given in terms of section 25 (4) of the Arbitration Act and that the application for Leave to Appeal had not sought to vacate or set aside the High Court Judge's order dated 1. 8. 2000 and therefore, the Supreme Court could not grant a relief 40 not prayed for. These matters would presently be examined.

Validity of document 'C' (vide schedule) for Enforcement :

Document 'C' is an agreement entered before the Arbitrator. It sets out the settlement arrived at between parties. Item 4 specifically states that in terms of the agreement reached the parties to enter into an arbitral award on agreed terms in Colombo. It further states, that the arbitral award on agreed terms to be entered was set out in document 'C' in terms of section 14 read with section 25 of the Arbitration Act, No. 11 of 1995.

Section 14 reads as follows:

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- (1) *It shall not be incompatible with arbitration proceedings for an arbitral tribunal to encourage settlement of the*

dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or any other procedure at any time during the arbitral proceedings to encourage settlement.

(2) *If, during arbitral proceedings the parties settle the dispute, the arbitral tribunal shall, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.*

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(3) *An arbitral award on agreed terms shall be made in accordance with section 25 and shall state that it is an arbitral award on agreed terms.*

(4) *An arbitral award on agreed terms has the same status and effect as any other arbitral award made in respect of the dispute.*

Section 25 reads as follows :

(1) *The award shall be made in writing and shall be signed by the arbitrators constituting the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.*

(2) *The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14.*

(3) *The award shall state its date and place of arbitration as determined in accordance with section 16. The award shall be deemed to have been made at that place.*

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- (4) *After the award is made, a copy signed by the arbitrators constituting the arbitral tribunal in accordance with sub-section (1) of this section shall be delivered to each party.*

For the determination of this matter sections 31 (1) and (2) are also important. The said section 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 90*
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.*

When section 31 (2) (a) refers to the original of the award it refers to the decision of the arbitral tribunal on the substance of the dispute (vide section 50) made in writing and signed by the Arbitrator in terms of section 25 (1) and cannot refer to any document of agreement ¹⁰⁰ signed by parties and the Arbitrator which does not have the stamp of an award. An award is delivered by the Arbitrator, not by the parties. When section 25 (2) refers to an "award on agreed terms" under section 14, it means the recording of the settlement between parties in the form of an arbitral award but on agreed terms. The award must state when prepared and signed by the Arbitrator that it is an arbitral Award on agreed terms. In this instant document 'C' says in its last paragraph that an "arbitral award on agreed terms to be entered", etc. In the 4th item of the agreement it is stated as follows:

"4. On these terms the parties agree to enter into an arbitral award ¹¹⁰ on agreed terms in Colombo."

Nowhere is it said that the an arbitral award on agreed terms is hereby entered nor does document 'C' refer to itself as an arbitral award on agreed terms in its caption or elsewhere. A mere recording of the agreement of parties should not be considered as an award. Such recording is only a statement of the agreement between parties. The award itself must be capable of enforcement. It must, therefore, have the stamp and sanctity of an award like a decree which lucidly and succinctly sets out the order or direction in a judgment. The Arbitrator is expected to look into the validity, legality, enforceability, ¹²⁰ etc., of the terms of settlement and enter a formal arbitral award on the basis of the agreed terms. Suppose parties agree upon a course of action which is unenforceable since it is contrary to the policy of the law the Arbitrator is expected to call up the parties and have it changed or rectified. For example, document 'C' in item 3 speaks of a sum of Rs. 1,626,514 payable on default when the amount agreed in item 1 was only Rs. 1,000,000 as full settlement. There should have been an award for Rs. 1,626,514, for such a sum to become payable on default. There is no such award.

It is to correct such lapses that the formal award before preparation ¹³⁰ and signature must have the Arbitrator's fullest attention. He cannot merely sign any and every agreement between parties and allow it to be taken to Court for enforcement. Arbitrators need not be lawyers. But, they should ascertain whether all parts or portions of agreements are capable of conformation and / or enforcement or otherwise. To that extent they must be trained and experienced.

Further, it is also desirable to put the terms of settlement into an enforceable form when there is an element of future performance. Although many settlements involve immediate implementation of the agreed terms, settlements such as the one under consideration, have ¹⁴⁰

provisions for payment of instalments and for further transactions to be carried out in terms of the agreement. Thus, an Arbitral Tribunal is expected to ensure that its award is not only correct and proper but also valid and enforceable. It is only an award which will qualify for recognition and enforcement under the law (not mere agreement of parties) which will be admitted by Court. Thus, in this regard the Arbitrator has a role to play even where parties come to a settlement.

Sometimes original Court judges who record a settlement in a partition action for example, forget that the interlocutory decree prepared on the basis of such settlement would confer a conclusive 150 right *in rem* to parties and therefore the Judge is under an obligation to examine the settlement from the standpoint of the provisions of the Partition Act and see that all matters in dispute are adequately determined without leaving room for future uncertainty. Failure on the part of Judges to adequately examine the terms of settlement between parties have given rise to much heartache and further litigation between parties.

An arbitral award is final and binding on the parties to the arbitration agreement (*vide* section 26). Therefore, the Arbitrator is duty bound to examine the agreement between parties and enter an enforceable 160 arbitral award on agreed terms.

Further, section 33 of the Arbitration Act recognises a foreign arbitral award as binding and enforceable. So too, our awards are themselves equally recognised in foreign lands. Therefore, there must be formality, unambiguity and *per se* enforceability when such awards are taken to foreign lands. Thus, the necessity for a formal arbitral award in terms of the agreement entered becomes all the more necessary. Mere agreement of parties cannot be sent for enforcement abroad.

The learned President's Counsel for the appellant took up the 170 position that provisions of section 25 (4) of the Arbitration Act would

not apply where parties are present at the time the settlement is reached in Court. It must be noted that section 25 (1) refers to all awards generally and section 25 (2) *inter alia* refers to award on agreed terms under section 14. When section 25 (4) mandates a copy of the award to be delivered to each party it refers to section 25 (1). In other words whether the award is one which carries the reasons for the order or no reasons due to agreement of parties or an award on agreed terms, the delivery of a signed copy of the award on the parties has been mandated. Therefore, it is to be inferred that a copy is expected to be delivered after the award is signed even in respect of an award on agreed terms, because a formal award on agreed terms signed by the Arbitrator was contemplated even after the entering of the terms of settlement between parties. ¹⁸⁰

I, therefore, conclude that the so-called award (document "C") tendered for enforcement in this case was not in conformity with the Law. A formal award on agreed terms should have been prepared, signed by the Arbitrator and a copy thereof should have been delivered to the respondents.

Notice of Award under section 25 (4) :

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Since Mr. Romesh de Silva, President's Counsel, argued that no copy need have been delivered, parties being aware of the settlement, it appears that he was not interested in pursuing the question as to whether a copy was, in fact, delivered on the respondents. No proof of delivery in any event was produced in the High Court and the learned High Court Judge held that it was imperative that an arbitral award to be lawfully effective and enforceable a copy should have been delivered on the parties. I do agree with his finding in this regard. Even though there was no proper arbitral award before Court in this instance, delivery of a copy of the arbitral award on agreed terms signed by the Arbitrator, in terms of section 25 (4) of the Arbitration Act, was imperative. ²⁰⁰

Can Court Grant a Relief Not Prayed For?

The application for Leave to Appeal had not specifically sought to set aside and / or vacate the High Court Judge's order dated 1. 8. 2000. What have been prayed for are (i) Leave to Appeal against the said order dated 1. 8. 2000 (ii) enforcement of the so-called arbitral award marked 'C' (iii) entering of judgment and decree accordingly and (iv) costs.

It is possible to argue that since Leave to Appeal was prayed for ²¹⁰ against the order dated 1. 8. 2000 with enforcement of the so-called arbitral award coupled with a prayer for the entering of judgment and decree accordingly, what it meant was the setting aside of the order dated 1. 8. 2000 to be replaced by a judgment and decree allowing the enforcement of the so-called arbitral award. But, this matter is not relevant since I have already confirmed the judgment of the learned High Court Judge and also held that the so-called arbitral award (document 'C') was not really an award in terms of the Law.

I, therefore, dismiss the appeal with taxed costs payable by the appellants to the respondents.

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The Schedule above referred to:

Document 'C'

– Arbitration –
By and between

Lanka Orix Leasing Co., Ltd. – claimant
v.
T. F. N. Pinto & Sons – respondent

Date : 18th November, 1998

Time : 4.00 p.m.

Arbitrator : Mr. Shamil Perera

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Appearances : Mr. Hiran de Alwis, Attorney-at-Law for LOLC Ltd.
Mr. S. Mohamed, Legal Officer of LOLC Ltd.
Mr. Primal Karunaratne and Mr. Manoj Nanayakkara
Attorneys-at-law for Mr. Pinto.
Mr. T. F. N. Pinto is present.
Mr. R. Rajanayake is absent and unrepresented.

The parties have arrived at a settlement. Mr. Pinto on behalf of the partnership T. F. N. Pinto & Sons agrees to the settlement in the following manner:

- (1) Mr. T. F. N. Pinto agrees to pay LOLC Ltd, a total sum of ²⁴⁰ Rs. 1 million as the full and final settlement of the claim.
- (2) Payment is to be effected in the manner set out herein:
 - a. A sum of Rs. 10,000 to be paid monthly for the months of November and December, 1998 and January, 1999, on or before the last date of each particular month.
 - b. A sum of Rs. 100,000 to be paid on or before the last date of February, 1999.
 - c. The balance sum to be paid in instalments of Rs. 27,200 per month commencing from March, 1999, to be paid in 32 consecutive monthly instalments. Each monthly instalment to be paid on or before the last date of ²⁵⁰ each month.
- (3) If Mr. Pinto defaults in the payment of any two instalments (not being consecutive), the lessor company is entitled to the full amount due, namely a sum of Rs. 1,626,514 together with further interest at 36% per annum till payment in full.

- (4) On these terms the parties agree to enter into an arbitral award on agreed terms in Colombo.

The arbitral award on agreed terms to be entered is set out above in terms of section 14, read with section 25 of the Arbitration Act, No. 11 of 1995.

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sgd.

LANKA ORIX LEASING CO., LTD

sgd.

T. F. N. PINTO & SONS

sgd.

Arbitrator

Time : 5.30 p.m.

AMERASINGHE, J. – I agree.**ISMAIL, J.** – I agree.*Appeal dismissed.*