

AIRPORT AND AVIATION SERVICES (SRI LANKA) LTD.
v
BUILD MART LANKA (PVT.) LTD.

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
SOMAWANSA, J.
RATNAYAKE, J.
SC 110/2007
SC HC LA 46/2007
HC A.R.B. 998/2006 & 1249/2007

Arbitration Act 11 of 1995 – Section 32 – Application under Section 32 to set aside award – Out of Time? What is the time period? – Computation of the 60 day period? – Is it from the date of award or date of receipt of award?

After several dates of hearing, the Tribunal pronounced its award on 31.5.1986. The appellant was not informed of this, and he was absent on this date. The appellant had received the award on **14.06.2006** and he filed an application in terms of section 32 in the High Court to set aside the award. The respondent had also filed an application to enforce the award.

The High Court dismissed the application of the appellant on the basis that it was not filed within 60 days from the date of pronouncement of the award.

Held:

Application for the purpose of setting aside an award by the High Court must be made within a time period of 60 days and the said period is taken into account **from the receipt** of the award by the party making such application to the High Court – and **not from the date of the award**.

APPEAL from an order of the High Court of Colombo with leave being granted.

Case referred to:

- (1) *Southern Group Civil Construction Pvt. Ltd. v Ocean Lanka (Pvt.) Ltd.* SC 69/99 SCM 25.02.2002.

Gamini Marapana PC with Navin Marapana for respondent-petitioner-appellant.
Nihal Fernando PC with Rudra Anthony for claimant-respondent-respondent.

July 22, 2008.

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of Colombo dated 14.11.2007. By that judgment the High Court had made order dismissing the respondent-petitioner-appellant's application (hereinafter referred to as the appellant) made in terms of Section 32 of the Arbitration Act, No. 11 of 1995 on the sole ground that the application was out of time and allowed the application made by the claimant-respondent-respondent (hereinafter referred to as the respondent). The appellant sought Leave to Appeal from this Court, which was granted to consider the following question.

"Has the learned High Court Judge correctly interpreted the provisions of Section 32(1) of the Arbitration Act, No.11 of 1995?"

The facts of this appeal as submitted by the appellant, *albeit* brief, are as follows:

The respondent, on or about 04.09.2003 had initiated arbitration proceedings against the appellant claiming damages, *inter alia*, for breach of contract. After several dates of hearing, the Tribunal had pronounced its Award on 31.05.2006. The appellant was not informed of this date and the appellant has been absent and unrepresented on that day. On 14.06.2006, appellant had received by registered post the said Arbitration Award. The covering letter sent by the Arbitration Centre along with the said Award was dated 07.06.2006 and it appeared that the letter was posted on or about 07.06.2006.

Thereafter on 02.08.2006 the appellant filed an application in the High Court in terms of Section 32 of the Arbitration Act, No. 11 of 1995 (hereinafter referred to as the Arbitration Act) to set aside the aforesaid Award (Application No. HC/ARB 998/2006). The respondent also had made an application (Application No. HC/ARB 1249/2007) to execute the said Award in terms of Section 31 of the Arbitration Act. The appellant had filed objections to the application filed by the respondent bearing No. HC/ARB 1249/2007 and had

stated *inter alia* that since the appellant's application bearing No. HC/ARB 998/2006 was pending in Court, not to proceed with the application filed by the respondent.

Both applications were however, called in Open Court on 24.09.2007 and the learned Judge of the High Court consolidated both applications in terms of Section 35 of the Arbitration Act. On 14.11.2007, learned Judge of the High Court had made order dismissing the application filed by the appellant under Section 32 of the Arbitration Act on the sole ground that it was out of time and allowed the application filed by the respondent bearing No. HC/ARB 1249/2007.

Having stated the facts of this appeal, let me now turn to consider the question on which Leave to Appeal was granted by this Court.

Section 32 is contained in Part VII of the Arbitration Act, which deals with 'applications to Courts relating to Awards'. Section 32 refers to the applications for setting aside arbitral awards and Section 32(1) reads as follows:

"An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, **within sixty days of the receipt of the award.** (emphasis added)"

It is therefore quite clear that even on a plain reading of the section an application for the purpose of setting aside an arbitral award by the High Court must be made within a time period of sixty days and the said period is taken into account from the **receipt of the award by the party making such application to the High Court.** This Court had referred to the required time period contained in Section 32(1) of the Arbitration Act and had clearly stated that an application to set aside an Arbitral Award has to be made within sixty (60) days of the **receipt of the Award in *Southern Group Civil Construction (Pvt.) Ltd. v Ocean Lanka (Pvt.) Ltd***⁽¹⁾.

It is common ground that the Award in question was pronounced on 31.05.2006. It is also not disputed that the appellant, who was the respondent in the arbitral proceedings was neither present nor represented on that day. The proceedings of 31.05.2006 (X3), which clearly supports this position, reads thus:

"The respondent is absent and unrepresented.

Today a copy of the Award was handed over to Mr. K.L.H. Perera, Managing Director of the Claimant Company by us.

There was no appearance for the respondent Company. The Centre is directed to send a signed copy of the Award to the respondent by registered post. (emphasis added)

The Chief Executive Officer of the ICLP Arbitration Centre had thereafter taken steps to comply with the order made by the panel of Arbitrators on 31.05.2006, and accordingly a letter under registered post was sent to the appellant dated 07.06.2006 (x2). The appellant had taken the position that it had received the said document only on 14.06.2006. In support of this contention, the appellant had attached a photo copy of the envelope in which the said award was forwarded to the appellant under registered post (X1).

Learned Judge of the High Court after considering the facts and circumstances of the application filed by the appellant (HC/ARB 998/2006) had taken the position that the appellant had instituted proceedings, beyond the 60 days stipulated by Section 32 of the Arbitration Act. He has clearly stated in his judgment that,

"මෙම බේරුම්කරණ නීති කෘතීන් සඳහා පෙත්සම්කරු සභාගත වී ඇති බවට පෙත්සමේ 17, 18 සහ 19 ඡේදයන්හි සඳහන් වී ඇතත් පෙත්සම්කරු සඳහන් කල් තරම්ව දැන්වීමකින් තොරව 2006.05.31 වෙනි දිනැති බේරුම්කරණ ප්‍රදානය ප්‍රකාශයට පත් කළ බවත් තමාට එය දැන ගැනීමට ලැබුණේ 2006.06.14 වෙනි දිනදී බවත්ය. පෙත්සම්කරු විසින් බේරුම්කරණ ප්‍රදානය අවලංගු කරවා ගැනීම සඳහා වූ ඉල්ලීම මෙම අධිකරණය වෙත ඉදිරිපත් කර ඇත්තේ 2006.08.20 වෙනි දිනදීය. බේරුම්කරණ ප්‍රදානය 2006.05.31 වෙනි දින ප්‍රකාශයට පත් කර ඇති බැවින් තීරණ ප්‍රදානය අවලංගු කරවා ගැනීම සඳහා වූ ඉල්ලීම දින 60 කට පසුව ඉදිරිපත් කර ඇති බව මේ අනුව පැහැදිලිව පෙනී යයි. බේරුම්කරණ පණතේ 32 වෙනි වගන්තිය අනුව තීරණ ප්‍රදානයක් අවලංගු කරවා ගැනීම සඳහා වූ ඉල්ලීමක් එකී ප්‍රදානය ප්‍රකාශ කළ දින පිට දින 60 ක කාල සීමාවක් තුළ ඉදිරිපත් කළ යුතු වෙයි." (emphasis added)

It is common ground that the petitioner instituted proceedings in the High Court of Colombo on 02.08.2006 (Application No. HC/ARB 998/2006). As stated earlier, it is also common ground that the Tribunal had pronounced its Award only on 31.05.2006 and the letter sent by the Arbitration Centre along with the said Award was dated 07.06.2006. According to the appellant, he had received the said Award on 14.06.2006. Section 32 of the Arbitration Act clearly states

that the application for setting aside the arbitral award has to be filed 'within sixty days of the receipt of the award.' The emphasis, it is to be noted in this clause, is on the 'receipt of the award' and hence, the date which is important for a matter initiated in terms of Section 32 of the Arbitration Act, is not the date that the Award was 'pronounced, but the date such Award was received by the party, who is relying on Section 32 of the Arbitration Act.

On an examination of the judgment of the High Court it is thus apparent that the High Court had gone on the basis that an application in terms of Section 32 should be filed within 60 days from the date of the pronouncement of the Award.

In these circumstances, when one considers the aforementioned facts and circumstances, it is absolutely clear that the appellant's application dated 02.08.2006 in case No. HC/ARB 998/2006 was filed clearly within the time frame stipulated by Section 32 of the Arbitration Act.

It is therefore evident that learned Judge of the High Court had erred in holding that the appellant's application filed in the High Court of Colombo, viz., HC/ARB 998/2006 was out of time.

On a consideration of all the material placed before this Court I accordingly answer the question on which Leave to Appeal was granted in the negative.

Accordingly, for the reasons aforesaid, this appeal is allowed and the judgment of the learned Judge of the High Court of Colombo dated 14.11.2007 is set aside.

This matter is referred back to the High Court of Colombo for inquiry *de novo*.

I make no order as to costs.

SOMAWANSA, J. - I agree.

RATNAYAKE, J. - I agree.

Appeal allowed.

Matter referred back to the High Court for inquiry de novo.