

SOUTHERN GROUP CIVIL CONSTRUCTION (PVT) LTD
v.
OCEAN LANKA (PVT) LTD

SUPREME COURT
S. N. SILVA, C.J.,
BANDARANAYAKE, J. AND
ISMAIL, J.
SC APPEAL NO. 69/99
HC NO. ARB/39/97
24 MAY AND 14 JUNE, 2001

Arbitration Act, No. 11 of 1995 – Application for setting aside arbitral award – Section 32 of the Act – The need to set out in the application the grounds for setting aside the award – Period for making the application – Whether grounds set out in written submissions after the lapse of that period can be considered.

The appellant applied to the High Court in terms of section 31(1) read with section 40 of the Arbitration Act, No. 11 of 1995 (the Act) for enforcement of an arbitral award made against the respondent. The respondent applied in terms of section 32 of the Act to set aside the award. Under section 32 such application has to be made within sixty (60) days of the receipt of the award. The High Court consolidated both applications.

In his written submissions filed beyond the requisite period of sixty (60) days, the respondent urged that the award should be set aside on the ground set out in section 32 (1) (b) of the Act that it is in conflict with the public policy in Sri Lanka, a ground which he had not set out in his petition. Counsel for the appellant took up a preliminary objection to that ground that the same had not been set out in the petition but in his written submissions filed beyond the period of sixty (60) days for making the application.

Held:

- (1) The High Court has no power *ex mere motu* to set aside an award on the ground stated in section 32 (1) (b) of the Act, in the absence of material supporting such a finding being contained in the application.
- (2) The time bar of sixty (60) days contained in section 32 (1) should be strictly applied and all grounds of challenge with supporting material on the basis of which a party wishes the High Court to come to a finding

in terms of section 32 (1) (b) should be adduced by an applicant in the application under section 32.

APPEAL from the judgment of the High Court.

K. Kanag-Iswaran, PC with Chandaka Jayasundera for appellant.

Shibly Aziz, PC with P. Wimalachanthiran, A. P. Niles and Rohana Deshapriya for respondent.

Cur. adv. vult.

February 25, 2002

SHIRANI A. BANDARANAYAKE, J.

The appellant is a company engaged in the business of civil 1
construction work, heavy equipment hiring, earth moving and filling
and metal industries. The appellant also undertakes work in the nature
of rock blasting, crushing the blasted rock into specified sizes and
quarrying. The respondent carries on business of manufacturing
knitted fabrics. By an agreement made and entered into on
01. 06. 1995, the appellant and the respondent entered into a contract
for the appellant to provide services to clear the rock out cropping
situated in the respondent's land in EPZ Zone B. This was to be done
by drilling, blasting and crushing the blasted rock boulders and piling 10
the crushed rock at the project site. In terms of the agreement, the
parties agreed to refer to arbitration all disputes or differences that
would arise between the appellant and the respondent.

Disputes arose between the appellant and the respondent and the
sole arbitrator delivered the arbitral award on 04. 06. 1997 (X2).
The appellant in terms of section 31 (1) of the Arbitration Act,
No. 11 of 1995 (hereinafter referred to as the Act), read with section
40 of the Act, made an application for the enforcement of the said
award in the High Court (X3). The respondent made an application
in terms of section 32 of the Act to set aside the said award in the 20
High Court (X4). The High Court consolidated the two actions in terms
of section 35 of the Act.

The appellant objected to the respondent's application in the High Court on several grounds which are as follows :

- (a) in order to set aside the award, specific grounds given in section 32 have to be urged within 60 days of the award. This has not been done by the respondent;
- (b) respondent's ground to set aside the award on the basis of section 24 is misconceived in law as it is not a ground enunciated in terms of section 32; 30
- (c) section 26 of the Act makes the award final and binding on the parties to the arbitration agreement and does not permit any challenge on the merits of the award.

The respondent contended in the High Court that the award was fundamentally flawed and submitted that it should be set aside on the ground that it is in conflict with the public policy of Sri Lanka in terms of section 32 (1) (b). The respondent's position is that, although section 32 (1) of the Act requires an application to set aside an award to be made within sixty (60) days of the receipt of the award, this requirement does not apply to section 32 (1) (b) of the Act. 40

Learned President's Counsel for the appellant took up a preliminary objection that one of the grounds on which the respondent sought to set aside the award, relating to the conflict with the public policy of Sri Lanka, has not been set out in the petition, but only contained in the written submissions filed beyond the period of 60 days after the award was made. The learned High Court Judge overruled the preliminary objections raised by the appellant and fixed the case for further inquiry.

The appellant sought leave to appeal from the order of the High Court dated 29. 06. 1999 (X9).

Leave to appeal was granted by this Court on 20. 08. 1999 on the following questions :

'Was the learned Judge of the High Court in error in holding:

- (i) that section 32 (1) entitled the Court *ex mere motu* to set aside the award whether such grounds were included in the petition or not;
- (ii) whether the learned Judge of the High Court was in error in concluding that a party may seek to have an award set aside under section 32 either by way of oral or written submissions, not necessarily within 60 days of the receipt of the award. 60

An overall examination of the provisions of the Arbitration Act, clearly indicates that the grounds on which an arbitral award could be set aside are contained only in section 32. In terms of this provision, a party seeking to set aside an award should make an application to the High Court within sixty (60) days of the receipt of the award. Section 32 (1) is subdivided into paragraphs (a) and (b). Paragraph (a) imposes limitations on the finality of the award by setting out the specific grounds on which a party may challenge the validity of an award.

Section 32 (1) (a) reads as follows :

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"Where the party making the application furnishes proof that –

- (i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question under the law of Sri Lanka; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

- (iii) the award deals 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 : ⁸⁰

Provided, however, that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or in the absence of such agreement, was not in accordance with the provisions of this Act : or . . . " ⁹⁰

Sub paragraph (b) of section 32 (1) provides for setting aside an arbitral award on the finding of the High Court on one of the grounds set out therein. This paragraph reads as follows :

" Where the High Court finds that –

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka ; or
- (ii) the arbitral award is in conflict with the public policy of Sri Lanka."

In terms of the provisions of the Act, the arbitral tribunal is vested ¹⁰⁰ with the power to 'decide the dispute' submitted for arbitration. The High Court is vested with the jurisdiction for the enforcement and recognition of an award or in the alternative to set aside such an award. In terms of section 31 of the Act, a party to an arbitration agreement, pursuant to which an arbitral award is made, may apply to the High Court within one year after the expiry of 14 days of the

making of the award for its enforcement. However, according to section 32 (1), in order to set aside an arbitral award, an application has to be made within sixty (60) days of the receipt of the award.

A plain reading of section 32 (1) reveals clearly that the opening paragraph applies to both sub paragraphs (a) and (b) of section 32 (1). The difference between the two sub paragraphs (a) and (b) is that the former requires an applicant to furnish proof of four situations, whereas the latter permits the High Court to find and arrive at a conclusion on the two situations which would enable an arbitral award to be set aside. However, for the High Court to find that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka or that the arbitral award is in conflict with the public policy of Sri Lanka, as stated in sub paragraph (b), it would be necessary for the party making an application for setting aside an arbitral award, to adduce necessary material for this purpose in his application filed in terms of section 32 (1).¹²⁰

The words in sub paragraph (b) of section 32 (1), 'where the High Court finds' are clearly referable to the application made in terms of section 32 (1) and the material adduced in such application. A finding cannot be made by the High Court in terms of sub paragraph (b) of section 32 (1) other than on the averments of the application and the material contained therein. Therefore, I am of the view that the High Court was in error when it came to the finding that it has the power '*ex mere motu*' to set aside an award on the grounds stated in sub paragraph (b) of section 32 (1) even in the absence of material supporting such a finding being contained in the application.¹³⁰

The next question that has to be considered relates to the application of the time bar contained in the opening paragraph of section 32 (1). I have at the commencement of this judgment adverted to the distinction between the respective time periods with which applications could be made for recognition and enforcement on the one hand and to set aside an award on the other. The clear legislative

intent in having a shorter time period for setting aside an arbitral award is to ensure that a challenge to the validity of the award should be made early and the party having the benefit of the award may take a longer time to enforce it. Such a distinction is not uncommon to our procedure regulating civil action. Even in the case of a decree of the District Court in a regular action, a party seeking to challenge the validity of the decree has to file the notice of appeal within 14 days and the petition within 60 days, whereas in terms of section 337 of the Civil Procedure Code an application for enforcement could be made within 10 years. Therefore I am of the view that the time bar of sixty (60) days contained in section 32 (1) should be strictly applied and all grounds of challenge with supporting material including the material on the basis of which a party wishes the High Court to come to a finding in terms of section 32 (1) (b), be adduced by an applicant in terms of section 32 in the application.

For the aforementioned reasons, the appeal is allowed and the order made by the High Court dated 29. 06. 1999, is set aside. This matter is referred back to the High Court for inquiry *de novo*.

There will be no costs.

S. N. SILVA, CJ. – I agree.

ISMAIL, J. – I agree.

Appeal allowed.

Inquiry de novo ordered.