

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Property Finance and Investments Kandy
(Private) Limited
Petitioner

SC Appeal 100/2008

SC(HC) LA Application No.34/2008
High Court Colombo ARB1190/2007

Vs

1. Ms.KHA Meegasmulla,
Municipal Commissioner,
Kandy Municipal Council, Kandy.
2. Kandy Municipal Council Kandy
Respondent

AND NOW BETWEEN

1. WAR Wimalasiri
Municipal Commissioner
Kandy Municipal Council, Kandy.
2. Kandy Municipal Council, Kandy
Respondent-Petitioner-Appellants

Vs

Property Finance and Investments Kandy
(Private) Limited
Petitioner-Respondent-Respondent

Before : Priyasath Dep PC J
Eva Wanasundera PC J
Sisira J De Abrew J

Counsel : Kushan De Alwis President's Counsel with V. Choksey and
Amali Tennakoon for the Respondent-Petitioner-Appellants.
Nihal Fernando President's Counsel with Rohan Dunuwila for
Petitioner-Respondent-Respondent.

Argued on : 21.7.2015

Written Submissions

tendered on : By the Respondent-Petitioner-Appellants on 11.8.2015

By the Petitioner-Respondent-Respondent on 8.10.2009

Decided on : 9.11.2015

Sisira J De Abrew J.

Respondent-Petitioner-Appellants (hereinafter referred to as the Appellant Municipal Council) entered into an agreement with the Petitioner-Respondent-Respondent (hereinafter referred to as the Petitioner-Respondent) for the running and management of the newly constructed four storied car park situated within Municipal Council limits of Kandy; management of parking of vehicles in approved city streets in Kandy; and to collect parking fees from the vehicle parked in the said streets and the car park. Under the agreement the Petitioner-Respondent should pay monthly rentals to the Appellant Municipal Council which is over Rs.280,000/- per month. When the vehicle owners refused to pay parking fees when their vehicles were parked in the said city streets and the car park, the Petitioner-Respondent requested the Appellant Municipal Council to prosecute them with the assistance of the Police. But the Appellant Municipal Council failed to take steps to prosecute those who refused to pay parking fees. As a result of the said dispute the Petitioner-Respondent could not pay the agreed monthly rentals to the Appellant Municipal Council. Thereafter acting in terms of clause 34 of the said agreement, the Petitioner-Respondent referred the dispute to Mr.RMDB Meegasmulla, the Provincial Commissioner of Local Government, Central Province and requested to appoint an arbitrator. Mr. Meegasmulla appointed himself as the Arbitrator and adjudicated on the dispute. The Arbitrator by

writing dated 3.4.2006 made his award and communicated the same to the Appellant Municipal Council (Vide document marked X5).

The Petitioner-Respondent, acting in terms of Section 31 of the Arbitration Act No. 11 of 1995, filed an application on 9.3.2007 in the High Court for enforcement of the said award. The Appellant Municipal Council filed its objection on 19.7.2007 to the said application. The learned High Court Judge, by his judgment dated 25.8.2008, made an order enforcing the arbitral award. Being aggrieved by the said judgment of learned High Court Judge, the Appellant Municipal Council has appealed to this court. This court, by its order dated 25.11.2008, granted leave to appeal on the following questions of law.

1. Whether the document X5 (dated 3.4.2006) submitted to the High Court for enforcement is an award contemplated under the Arbitration Act No. 11 of 1995?
2. Whether the learned High Court Judge erred in law by failing to consider that issue as a threshold issue?
3. Whether the learned High Court Judge was obliged in law in terms of Section 31(6) of the Arbitration Act No. 11 of 1995 to consider any objection to the award as to whether it is an award in terms of the Arbitration Act in the absence of an application to set aside it within 60 days of the receipt of the award?

Main contention of learned President's Counsel who appeared for the Appellant Municipal Council was that the decision of Arbitrator dated 3.4.2006 was not an arbitral award. He contended that the Petitioner-Respondent, by letter dated 25.6.2006 addressed to Mr. Meegasmulla (the Arbitrator) had stated that their agents had discussed with Mr. Meegasmulla not as the Arbitrator but as the Provincial Commissioner of Local Government.

On the strength of this letter, learned PC contended that the decision of the Arbitrator dated 3.4.2006 was not an arbitral award. I now advert to this contention. Although the Petitioner-Respondent submitted the said letter to Mr. Meegasmulla, he later filed an application for enforcement of the arbitral award under Section 31 of the Arbitration Act No. 11 of 1995. Therefore the contention of learned PC that the Petitioner-Respondent has admitted that the decision of the Arbitrator was not an arbitral award cannot be accepted. When considering the above contention of learned PC, it is relevant to consider the objection of the Appellant Municipal Council filed in the High Court. In paragraph 6 and 10 of the said statement of objection, the Appellant Municipal Council very clearly admitted that the decision of the Arbitrator dated 3.4.2006 was an arbitral award. With this admission the contention of learned PC fails.

The contract between the Appellant Municipal Council and the Petitioner-Respondent was regarding the running and management of the newly built car park; management of parking of vehicles in the approved city streets and the car park; and collection of parking fees. Vehicle owners refused to pay parking fees but the Appellant Municipal Council failed to prosecute them with the assistance of the Police. The Petitioner-Respondent failed to pay monthly rentals to the Appellant Municipal Council. This was the dispute that was referred to the arbitration. One of the decisions of the arbitral award was as follows:

“The Appellant Municipal Council, in terms of the bylaws, should take steps in respect of those who refused to pay parking fees.”

Thus it is clear that the Arbitrator has arrived at a decision on the substance of the dispute. What is an arbitral award? Answer to this question is found in Section 50 the Arbitration Act No. 11 of 1995 which reads as follows.

“‘Award’ means a decision of the arbitral tribunal on the substance of the dispute.”

In my view, if an Arbitrator, at the end of the arbitral proceedings, arrives at a decision on the substance of the dispute referred to him, such a decision can be considered as the arbitral award of the Arbitrator. In the present case, as I pointed out earlier, the Arbitrator at the end of the arbitral proceedings has arrived at a decision on the substance of the dispute. I therefore hold that the decision arrived by the Arbitrator on 3.4.2006 is an arbitral award and it can be considered as the arbitral award on the substance of the dispute referred to the Arbitrator. For the above reasons, I reject the contention of learned PC for the Appellant Municipal Council. For the above reasons, I answer the 1st question of law in the affirmative. In view of the above answer, the 2nd question of law does not arise for consideration.

It has to be noted here that the Appellant Municipal Council has failed to make an application in terms of Section 32 of the Arbitration Act No. 11 of 1995 (the Act) to set aside the arbitral award. If the Appellant Municipal Council was dissatisfied with arbitral award, the proper procedure was to make an application under Section 32 of the Act to set aside the award. For the purpose of clarity I would like to reproduce Section 32 of the Act which reads as follows.

32.

(1) An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefor, within sixty days of the receipt of the award

(a) 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:

(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

(b) 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.

(2) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

An examination of Section 32 clearly reveals that an application for setting aside the arbitral award must be made within sixty days of the receipt of the award. It must be stated here that the Appellant Municipal Council has not made an application under Section 32 of the Act.

Since the Petitioner-Respondent made an application to the High Court under Section 31 of the Act it is relevant to consider Section 31(1) and 31(6) of the Act which are reproduced below.

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.

31 (6) Where an application is made under subsection (1) of this section and there is no application for the setting aside of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in sections 33 and 34 of this Act, it shall on a day of which notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered.

In my view, if the Appellant Municipal Council failed to make an application under section 32 of the Act, it cannot, in an application for enforcement of the award under Section 31 of the Act, move the High Court to set aside the award. In the case of local arbitration, High Court is not obliged, in an application under Section 31 of the Act, to consider an application for the setting aside of an award if the affected party had failed to make an application under section 32 of the Act. In an application for enforcement of arbitral award, High court must be satisfied on following matters that,

1. there is no application for the setting aside of the award under Section 32 of the Act or
2. the court sees no cause to refuse the recognition and enforcement of the award under the provisions of Section 33 and 34 of the Act.

It is noted that Sections 33 and 34 of the Act deal with foreign arbitration. The case that I am considering is a local arbitration. Therefore the High Court must be satisfied only on the 1st ground set out above.

In view of the above reasons, I answer the 3rd question of law in the negative.

For the above reasons, I affirming the judgment of the High Court, dismiss the appeal of the Appellant Municipal Council with costs.

Appeal dismissed.

Judge of the Supreme Court.

Priyasath Dep PC J

I agree.

Judge of the Supreme Court.

Eva Wanasundera PC J

I agree.

Judge of the Supreme Court.