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

In the matter of an appeal filed under and in terms of Section 37 of the Arbitration Act, No. 11 of 1995.

SC Appeal No. 43/2024
HC No: CHC/127/2018/ARB

Softlogic Finance PLC,
No. 13, De Fonseka Place,
Colombo 5.

PETITIONER

Vs

Kollurage Priyanka Don Kollurage,
No. 425 B3, Thalagala,
Kiriwaththuduwa.

RESPONDENT

And now between

Softlogic Finance PLC,
No. 13, De Fonseka Place,
Colombo 5.

PETITIONER – APPELLANT

Vs

Kollurage Priyanka Don Kollurage,
No. 425 B3, Thalagala,
Kiriwaththuduwa.

RESPONDENT – RESPONDENT

Before: **Murdu N. B. Fernando, PC, CJ**
Janak De Silva, J
Arjuna Obeyesekere, J

Counsel: Senaka De Saram with Waruna Amunugama for the Petitioner – Appellant

Vijith Singh for the Respondent – Respondent

Argued on: 21st March 2024

Written Submissions: Tendered on behalf of the Petitioner – Appellant on 8th May 2024

Tendered on behalf of the Respondent – Respondent on 3rd May 2024

Decided on: 24th July 2025

Obeyesekere, J

This is an appeal arising from a judgment delivered by the High Court of the Western Province holden in Colombo [**the High Court**] on 4th December 2020. By the said judgment, the High Court refused to enforce the arbitral award entered in favour of the Petitioner – Appellant [**the Appellant**]. Aggrieved by the said judgment, the Appellant sought and obtained leave to appeal from this Court on 21st March 2024, with the learned Counsel for the Appellant raising two questions of law and the learned Counsel for the Respondent – Respondent [**the Respondent**] raising a further three questions of law. Acting in terms of the proviso to Rule 16 of the Supreme Court Rules, 1990, Court proceeded to hear the learned Counsel on the said questions of law, and thereafter afforded the parties an opportunity of tendering written submissions.

While I shall refer to the said questions of law later in this judgment, it should perhaps suffice to mention at this stage that the said questions relate to the right of a person against whom an arbitral award has been made and who has not filed an application to set aside the said award, to participate in an application made under Section 31(1) of the Arbitration Act, No. 11 of 1995 [**the Act**] for the enforcement of such award, and the role of the High Court under and in terms of the Act when called upon to enforce an award in such circumstances.

The facts in brief

The Appellant and the Respondent had entered into a Lease Agreement on 14th February 2011. In terms of the said Agreement, the Appellant had leased a light motor vehicle to the Respondent for a period of five years and the Respondent was required to make a monthly payment of Rs. 65,344 as lease rental for the said period. The Respondent was also required in terms of the said Agreement to hand over the motor vehicle to the Appellant, either upon the expiration of the period of the lease, or upon its prior termination, or on the failure on the part of the Respondent to adhere to the terms and conditions of the Agreement including the failure by the Respondent to make payment of the monthly rentals. If the Respondent failed to hand over the vehicle as aforesaid, the Respondent was required in terms of the said Agreement to pay the Appellant a sum of Rs. 2,366,076 being the residual value of the vehicle.

The Agreement also stipulated that any dispute between the parties arising under the said Agreement shall be referred for arbitration. Clause 36 of the said agreement provided *inter alia* that, "*In the event of any default or non-observance by the Lessee of the terms and conditions contained in this Lease Agreement including the default and/or delay in paying lease rentals or in any other case and in the event of any dispute, difference or question or matter which may from time to time arise or occur between lessor and lessee under and/or in relation to or in respect of this Lease Agreement or any provision matter or thing contained herein …. such dispute difference or question or matter may notwithstanding the remedies available under this lease agreement or in law be submitted for arbitration by a sole arbitrator to be appointed by the parties …*".

The Appellant states that the Respondent failed to make regular payment of the monthly lease rentals and had thereafter stopped making payment of the monthly rentals. Having served the requisite notices in terms of the said Agreement, the Appellant had terminated the said Lease Agreement and demanded:

(a) the repayment of a sum of Rs. 1,078,825 being the amount outstanding as at 19th February 2015, together with interest from 20th February 2015; and

(b) the vehicle be returned to the Appellant or else that the Respondent pay a sum of Rs. 2,366,076 being the residual value of the vehicle.

The Respondent had not replied to the said demand.

Notice of arbitration, arbitration proceedings and the Award

Acting in terms of the aforementioned Clause 36, the Appellant had referred the matter for arbitration by notice of arbitration dated 18th September 2015, claiming the aforementioned sums of money. By the said notice, the Appellant had also nominated an arbitrator to hear and determine the dispute that was referred for arbitration. The following matters have been admitted by the Respondent in the Statement of Objections filed on her behalf in the High Court in relation to the arbitration proceedings:

a) The Respondent received the said notice of arbitration;

b) The Respondent did not have any objection to the arbitrator nominated by the Appellant;

c) The Respondent received a letter dated 18th January 2016 by registered post from the ICLP Arbitration Centre [**the Centre**] informing the parties that the preliminary hearing of the Arbitral Tribunal will be held at 3pm on 26th January, 2016 at the said Centre;

d) The Respondent **participated at the said hearing on 26th January 2016**, where the parties discussed the possibility of a settlement and pursuant to which the matter was postponed to 3rd February 2016;

e) The Respondent received from the Centre under registered post the proceedings of 26th January 2016 and a letter confirming that the next hearing has been scheduled for 3rd February 2016;

f) The Respondent **participated at the hearing held on 3rd February 2016**, and the **matter was postponed to 1st March 2016** upon the Tribunal being informed that the parties are still discussing a settlement.

The Appellant states that **the Respondent was present at the hearing held on 1st March 2016,** and that the Tribunal was informed that the parties have agreed to the terms of settlement. The hearing had accordingly been postponed to 9th March 2016 to enter the terms of settlement. **Thus, the Respondent was aware that the Tribunal was to meet again on 9th March 2016.** However, when the matter was taken up on 9th March 2016, the Respondent was not present and the Tribunal had made the following order:

> "*This matter has been fixed several times for settlement. However **no settlement has been entered into between the parties**, and the Respondent is absent and unrepresented in today's proceedings, **although this date was fixed taking into account of the Respondent's convenience**. In the circumstances the Claimant's application that the matter proceed ex-parte is allowed.*
>
> *The affidavit evidence to be filed by the 10th of June 2016.*"

The proceedings of 9th March 2016 have been sent to the Respondent by the Centre under registered post to the same address as the previous correspondence, the receipt of which correspondence has been admitted by the Respondent. The Respondent did not dispute the contents of the proceedings of 9th March 2016 nor did she take steps to have the said order fixing the matter for *ex parte* hearing vacated nor has the Respondent played any further role in the arbitration proceedings. With the affidavit of the Managing Director of the Appellant dated 10th June 2016 and the documents attached thereto being the only evidence before it, the Tribunal, having considered the said material, had delivered its award on 21st March 2017 [**the Award**] granting the following relief:

(a) The Respondent shall pay the Appellant a sum of Rs. 1,078,825.37 being the amount due as at 19th February 2015 in terms of the Lease Agreement together with interest thereon, from 20th February 2015;

(b) The Respondent shall deliver the motor vehicle to the Appellant or else pay its residual value as agreed under the said Agreement.

By its letter dated 24th March 2017, the Centre had sent the Award by registered post to both parties. While there is no evidence to suggest that the Award was not delivered to the Respondent, I must state that in terms of Section 26 of the Act, subject to the provisions of Part VII thereof, the award shall be final and binding on the parties to the arbitration agreement.

Post award applications to the High Court and consolidation

The provisions of the Act draws a distinction in respect of certain matters between an award made in an arbitration conducted in Sri Lanka and an award made in an arbitration conducted outside Sri Lanka. The latter category of award is defined in Section 50 of the Act to mean a 'foreign arbitral award'. In this judgment, I shall be dealing with the law relating to an arbitral award made in an arbitration conducted in Sri Lanka.

The Act does not confer a party dissatisfied by an arbitral award a right of appeal against such award. The Act however contains provision that enable such a party to make an application to the High Court to set aside the award on limited grounds specified in the Act – vide Section 32. The Act also provides for the party in whose favour the award has been made to make an application to enforce the award and sets out the very limited circumstances in which enforcement may be refused – vide Section 31. These are the only remedies that are provided to both parties post award in an arbitration conducted in Sri Lanka.

I must also state that Section 40(1) sets out the procedure that must be followed when making an application under the Act to the High Court inclusive of applications under Sections 31 and 32. Section 40(2) provides that, "*upon the petition and affidavit being presented to the court it shall by order appoint a day for the determination of the matter of the petition and grant the parties named as respondents to the petition* ***a date to state their objections****, if any, …*". Thus, once an application is made, the respondent is entitled to notice of such application and the right to state its objections to such application, with the scope of such objections in an application for the enforcement of an award dependant on whether the party against whom the award is sought to be enforced has acted in terms of Sections 32.

In **Sri Lanka Ports Authority v Daya Constructions (Private) Limited** [SC Appeal No. 35/2012; SC minutes of 14th May 2025], my learned brother Janak De Silva, J pointed out that the jurisdiction to set aside and the jurisdiction to enforce an award are distinct and different jurisdictions, and the conditions under which such jurisdictions can be exercised are different. De Silva, J stated further that:

"*In an application made for enforcement pursuant to Section 31(1) of the Act, the matter of the petition is whether the arbitral award should be enforced. When Section 40(2) requires Court to grant the parties named as Respondents a date to state their objections, if any, in writing supported by affidavit, the objections must state the objections to the enforcement of the arbitral award and no more. The jurisdiction that the High Court exercises in such application is limited to determine whether the award should be enforced*.

On the contrary, where the jurisdiction of the High Court is invoked pursuant to Section 32(1) of the Act by way of petition and affidavit, Court must appoint a day for the determination of whether the arbitral award must be set aside. When Section 40(2) requires Court to grant the parties named as Respondents a date to state their objections, if any, in writing supported by affidavit, the objections must state the objections to the setting aside of the arbitral award and no more. The jurisdiction that the High Court exercises in such application is limited to determine whether the award should be set aside."

The only instance where the High Court is empowered to exercise the two jurisdictions at the same time is found in Section 35(1) which provides that, "*Where applications filed in court to enforce an award and to set aside an award are pending, the court shall consolidate the applications.*"

Application by the Appellant for enforcement

It is admitted that the Respondent did not file an application to set aside the Award as provided for in Section 32(1) of the Act. The Appellant filed a petition dated 26th March 2018 supported by an affidavit seeking to enforce the said Award. Annexed to the petition were a certified copy of the Lease Agreement which included Clause 36 containing the agreement to arbitrate, the notice of arbitration, the proceedings of 26th January 2016 and 3rd February 2016, and a certified copy of the Award. Thus, on the face of the application, there was due compliance with the provisions of Section 31(1) and (2).

Upon notice being issued, the Respondent had appeared before the High Court, and having sought and obtained permission of the High Court, filed a Statement of Objections. In the said Objections, the Respondent admitted the narration of the Appellant as to what

transpired before the Arbitrator to which I have already adverted to, and stated as follows:

(a) The parties had reached a settlement whereby she was allowed to pay a sum of Rs. 35,000 per month;

(b) Accordingly, she had paid an initial sum of Rs. 100,000 on 8th November 2016 and thereafter further sums of Rs. 35,000, 35,000 and 70,000 on 31st January 2017, 9th March 2017 and 5th June 2017, respectively;

(c) While the matter had been settled between the parties, the Appellant had acted fraudulently and obtained the Award in its favour;

(d) She did not receive any communication from the Centre relating to the Award;

(e) As the matter has been settled, the Appellant cannot proceed to enforce the Award.

The Respondent was thus making two extremely serious allegations. The first was that the Appellant has acted fraudulently by suppressing from the Arbitral Tribunal the fact that the dispute between the parties had been settled. The second was that the Award has therefore been obtained fraudulently, with the implication being that to enforce such an award would be contrary to the public policy of Sri Lanka. Assuming that this objection was within the provisions of Section 31, the burden was on the Respondent to prove the alleged fraudulent conduct of the Appellant beyond reasonable doubt.

Even though the Respondent stated that the matter had been settled, she did not provide a copy of the terms of settlement nor did she state the date on which she entered into a settlement with the Appellant nor has she provided any further details of the said settlement. Why a lessor who was contractually entitled to be paid a lease rental of Rs. 65,344 per month would agree to accept a sum of Rs. 35,000 per month and that too when interest was overdue for over a year and a half, does not stand to reason.

I must state that although the Respondent has mentioned the receipt numbers for two payments and stated that the other two payments were deposited in a bank account of the Appellant, the Respondent did not annex to the Statement of Objections copies of the said receipts or the deposit slips to establish that she in fact made such payments.

Furthermore, even if the Respondent did pay the said sums of money as part of a settlement, the above sums of money could not have resulted in the full settlement of the sums claimed from the Arbitral Tribunal nor the monthly lease rental of Rs. 65,344 that the Respondent was required to pay. The fact that a settlement had not been reached in spite of discussions having taken place is further confirmed by the proceedings before the High Court where the parties had discussed a settlement. It is therefore clear that the Respondent had not substantiated the allegations of fraud and that she was clearly trying to mislead Court.

This attempt by the Respondent to mislead the High Court seems to have been successful for the reason that, despite the above infirmities with the version of the Respondent, it is clear from the impugned judgment that the High Court was disturbed by the allegation of the Respondent that the award has been obtained by fraud. The High Court had accordingly directed the Appellant to produce the proceedings of 1st March 2016 and, solely on the basis that the Appellant failed to produce such proceedings, dismissed the application filed by the Appellant for the enforcement of the Award.

Questions of Law

This Court, having heard both learned Counsel, granted leave to appeal on the following questions of law raised by the learned Counsel for the Appellant:

(1) Did the High Court err in law when it failed to consider that the Appellant is only required to annex the arbitral award and the agreement to arbitrate when making an application for enforcement in terms of Section 31(2) of the Act?

(2) Did the High Court err in law by acting outside the scope of the powers conferred on the High Court in terms of Section 31(6) of the Act?

The learned Counsel for the Respondent raised the following three questions of law:

(1) Did the Respondent become aware of the arbitration award only after she received notice of the High Court?

(2) Could the Respondent have moved the High Court to set aside the award in the Statement of Objections filed in response to an application for enforcement?

(3) Whether the Commercial High Court has the jurisdiction to consider the said Statement of Objections under Section 31(6) of the Act?

In my view, the above questions of law brings into focus the following two issues:

(a) The right of a person against whom an arbitral award has been made and who has not filed an application to set aside the said award to participate in an application for enforcement of such award.

(b) The role of the High Court when called upon to enforce an award including the right of the High Court to call for documents over and above those specified in Section 31(2) of the Act.

Arbitration, party autonomy and minimum curial intervention

In order to give context to the decisions that I will be reaching with regard to the above questions and issues, I shall commence by considering the principal of party autonomy and the recognition thereof by Court.

Arbitration is a method of alternative dispute resolution that is chosen by the parties to an agreement in order to provide them with an expeditious and binding resolution of disputes that may arise under their agreement by obviating the complexities of the cumbersome, expensive and time consuming traditional court process. Modern arbitration law prioritizes the power of the arbitral tribunal to decide on the disputes referred to it, including the power to decide on its own jurisdiction, and accordingly, an arbitral award, once made, is binding on the parties and enforceable without delay, both nationally and internationally. It is acknowledged that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, better known as the New York Convention and to which over 170 countries are parties, have contributed significantly in arbitration becoming the preferred mode of settling international commercial disputes.

Arbitration offers the parties a realistic choice to resolve their disputes at a pace they are comfortable with. Given that parties to an international commercial contract often come from different countries, arbitration allows the parties to settle disputes in a forum and before a tribunal that is neutral and not connected to either party's home jurisdiction.

The parties also have the opportunity of choosing an arbitrator with particular technical or legal expertise and who is therefore better suited to grasp the intricacies of the particular dispute. Furthermore, parties have the freedom to custom design arbitral procedures, which thereby ensures an efficient and expeditious process. This is reflected in Section 17 of the Act in terms of which the parties shall be free to agree on the procedure to be followed by the tribunal in conducting the proceedings.

This autonomy that the parties enjoy play a pivotal role in determining the scope and extent of an arbitration. It is the parties that decided to include in their agreement arbitration as their preferred mode of dispute resolution and the parties shall thus have the freedom to design the arbitral process. Hence, it would not be an exaggeration to state that party autonomy is the golden thread that runs through the entire process of arbitration, and beyond. The need to respect party autonomy manifested by the parties contractual bargain has been accepted as the cornerstone underlying judicial non-intervention in arbitration. It is in this backdrop that the Courts have adopted an unequivocal judicial policy of facilitating and promoting arbitration and has been slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration.

Fairness in the arbitration process is a multidimensional concept which on the one hand, requires the arbitral tribunal to treat the parties equally and to allow them reasonable opportunities to present their case as well as to respond to the case of the other party. It requires the arbitrator to exercise a reasonable initiative with the parties' involvement. On the other hand, in the name of fairness a court must not be allowed to be used as a platform where a dissatisfied party can have a second bite at the cherry while depriving the successful party of the fruits of its labour. This concept of fairness further justifies the principle of minimal curial intervention, which has become common as a matter of international practice.

As highlighted by the Court of Appeal of Singapore in **Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd** [2007] 3 SLR(R) 86; at paragraph 65(c)], the principle of minimal curial intervention is underpinned by two principle considerations, namely (a) the need to recognise the autonomy of the arbitral process by encouraging finality, and (b) having opted for arbitration, parties must be taken to have accepted the attendant risks of having only a *very limited right of recourse to the courts*.

This *very limited right of recourse to the courts* must be confined to the circumstances statutorily recognised by the legislature. Section 26 of the Act recognizes the finality of an arbitral award by providing that an award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement. The limited space that has been allowed for the intervention by Courts in relation to a domestic arbitral award is through (a) Section 32 in Part VII of the Act which lays down an exhaustive set of grounds in terms of which an award may be set aside, and (b) the provisions of Section 31. I shall advert to these provisions in detail later in this judgment.

What is important is that the grounds set out in Section 32 does not extend to the merits of the matter being reviewed or revisited by the Court. As held by Tillekewardena, J in **Lightweight Body Armour Limited v Sri Lanka Army** [(2007) 1 Sri LR 411], "*the Arbitral Award is not open to challenge on the ground that the arbitral tribunal has reached a wrong or erroneous conclusion . . . or has failed to appreciate or conclude on the findings. The parties have constituted the tribunal as the sole and final judge on the facts concerning their dispute and bind themselves as a rule to accept the arbitral award as final and conclusive. The arbitral tribunal is the sole judge of the quality as well as the quantity of evidence as it is not open for the court to take upon itself the task of being a judge of the evidence before the tribunal. It is not open to the court, in terms of the arbitration act to probe the mental process of the decision contained in the award and to even speculate or query the reasoning that impelled the decision*."

This position was echoed by Amarasekara, J in his dissenting opinion in **Sri Lanka Ports Authority v Sathsindu Forwarding & Security (Pvt) Limited and another** [SC Appeal No. 119/2017; SC minutes of 22nd March 2022] when he stated that, "*the High Court has no jurisdiction to decide on the facts relating to the dispute, other than what is necessary to decide the existence of any ground / grounds for setting aside the award mentioned in the section itself. Thus, in my view, this court sitting in appeal over the decision of the High Court is also circumscribed in deciding on facts other than what is necessary to decide the existence of any ground / grounds for setting aside the award mentioned in the said section itself.*"

One such instance where the merits were considered is the case of **Ceylon Electricity Board v Heladhanavi Limited** [SC Appeal No. 155/2023; SC Minutes of 12th November 2024] where this Court was called upon to set aside an award on the basis that the said award is contrary to the public policy of Sri Lanka. Chief Justice Jayantha Jayasuriya, PC, having recognised that in order to consider the argument of public policy the Court may have to revisit some of the factual matters raised before the arbitral tribunal, stated that:

> *" … it is noteworthy to observe at this stage, that the re-examination of some of the facts, circumstances and issues by the High Court or by this Court per se cannot be construed as a process that undermines the party autonomy in arbitral proceedings. The Act which governs the conduct of arbitration proceedings itself recognises the jurisdiction of the High Court to set aside an arbitral award on the ground "that the arbitral award is in conflict with the public policy of Sri Lanka". In exercising this jurisdiction, the High Court and / or the Supreme Court may have to examine certain issues that had already been determined by the Arbitral Tribunal. Such examination will have to be limited to the extent that is necessary to determine the issue whether the award is in conflict with public policy. However, when exercising the jurisdiction in such an instance it is important to be mindful that* ***the law does not make provision for a judicial review of the arbitral award, by way of exercising the appellate or revisionary jurisdiction of the court****. The examination should be limited to the extent necessary to determine whether the award is in conflict with the public policy of Sri Lanka****. The Court has no jurisdiction to set aside the arbitral award merely on the ground that the Arbitral Tribunal has committed errors of fact and / or law in making the award***." [emphasis added]

Similarly, the Court of Appeal of Singapore in the case of **BLC and others v BLB and another** [(2014) SGCA 40] referring to a "generous approach" which the Court ought to take in reviewing arbitral awards for breaches, held that "….*the court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written. Nor should the court approach an award with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, with the objective of upsetting or frustrating the process of arbitration. Rather, the award should be read in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it*."

A similar view was taken by Prasanna Jayawardena, PC, J in **Lanka Orix Leasing Company Limited v Weeratunga** [SC Appeal No. 113/2014; SC minutes of 5th April 2019] when he observed that, "*It should be mentioned here that the resolution of disputes by arbitration is a result of parties to a contract deciding that any disputes between them arising out of the contract must be resolved by arbitral proceedings and by their choosing to be bound by an arbitral award entered in the course of such arbitral proceedings.* ***In these circumstances, the power of the High Court to set aside an arbitral award is necessarily confined to the power vested in the High Court within the four corners of the Act. The High Court cannot go on a voyage of its own and purport to set aside an arbitral award other than in the exercise of the powers expressly conferred on the Court by the Act***." [emphasis added]

Therefore, it is clear that court's intervention with the arbitral award combines it with the salutary reminder that the substantive merits of the dispute are beyond the remit of the court. Courts must be extremely careful not to do more than is necessary in giving effect to the principle of minimal curial intervention. Aggressive judicial intervention encourages a multitude of unmeritorious challenges to arbitral awards by dissatisfied parties, resulting in the prolonging of the arbitral process, causing indeterminate costs to the parties and destroying the golden thread.

Setting aside and enforcement of arbitral awards - the Model Law

The Act is based on the 1985 UNCITRAL Model Law on Arbitration, subject to several deviations therefrom, and has drawn inspiration from the arbitration statute of Sweden. Chapter VII of the Model Law contains the provisions that a party dissatisfied with an award can have recourse to. Accordingly, Article 34(1) specifies that, "*Recourse to a court against an arbitral award may be made* ***only by an application for setting aside in accordance with*** *paragraphs (2) and (3) of this article*."

Article 34(2)(a) goes on to state that, "*An arbitral award may be set aside by the court specified in article 6 only if (a) the party making the application furnishes proof*" of the grounds set out in paragraphs (i) – (iv) thereof, while Article 34(2)(b) provides further that an arbitral award may be set aside where the Court finds that the subject-matter of the

dispute is not capable of settlement by arbitration under the law of the State where enforcement is sought, or the award is in conflict with the public policy of that State.

Recognition and enforcement of arbitral awards is provided for in Chapter VIII of the Model Law. In terms of Article 35(1), "*An arbitral award**, irrespective of the country in which it was made**, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36*." In terms of Article 36(1)(a), "*Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, **may be refused only at the request of the party against whom it is invoked**, if that party furnishes to the competent court where recognition or enforcement is sought proof*" of the grounds set out in paragraphs (i) – (v) thereof. Of these five paragraphs, the first four paragraphs are identical to the paragraphs in Article 34(2)(a). Article 36(1)(b) contains two further grounds which are identical to those set out in Article 34(2)(b) referred to above.

Thus, on a plain reading of Articles 34 and 36 of the Model Law, it appears that an award can be set aside as well as its enforcement refused, at the request of the party against whom the award has been made, with the grounds for doing so being almost identical. What is important is that the Model Law does not appear to provide for Court acting *ex mero motu* and setting aside or refusing enforcement of an award.

<u>Enforcement of an arbitral award – the Act</u>

The provisions in the Act relating to enforcement of an award are found *inter alia* in three sections, namely Sections 31, 33 and 34.

Section 31(1) of the Act provides that, *"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*". The said Section does not draw a distinction between an award made in Sri Lanka or a foreign arbitral award, and therefore whether it be a foreign arbitral award or otherwise, the procedure for making an application for enforcement, and the applicability of the provisions of Section 31(1)-(4) to such application are the same.

An application under Section 31(1) must be supported by an affidavit and shall be accompanied by (a) the original of the award or a duly certified copy of the award that is sought to be enforced, and (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement – vide Section 31(2). An applicant is not required to annex any other documents, not even the evidence led before the arbitral tribunal, although as a matter of practice, parties do so.

Section 33 provides that, "*A foreign arbitral award irrespective of the country in which it was made, shall subject to the provisions of Section 34 be recognised as binding and, upon application by a party under Section 31 to the High Court, be enforced by filing the award in accordance with the provisions of that section.*"

In terms of Section 34(1), recognition and enforcement of a **foreign arbitral award**, irrespective of the country in which it was made, may be refused only on the grounds set out in Section 34(1). Thus, unlike under the Model Law, when it comes to the refusal of the enforcement of an award, the Act draws a distinction between a foreign arbitral award and a non-foreign arbitral award. Even though the grounds in Article 36(1)(a) and (b) of the Model Law have been re-produced in its entirety in Section 34(1)(a) and (b) of the Act, the provisions thereof and *afortiori* the grounds referred to in Section 34(1) on which an award can be refused enforcement apply only to a foreign arbitral award. That to my mind, is the scope of Section 34(1).

I shall discuss later in this judgment with reference to Section 31(6), the manner in which the High Court must proceed in determining an application made under Section 31(1) with regard to awards delivered in an arbitration conducted in Sri Lanka.

<u>Setting aside of an award – the Act</u>

The Act does not provide for the setting aside of foreign arbitral awards in the High Court for the reason that any application to do so must be made to the relevant Court in the country chosen by the parties as the seat of arbitration. Section 32 of the Act however provides that 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.

With the impugned Award having been made in Colombo, it was open for the Respondent to have made an application in terms of Section 32(1) of the Act within sixty days of the receipt of the award seeking to set aside the Award on the following grounds contained in Section 32(1)(a), provided proof of such ground/s was furnished in such application:

(a) 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;

(b) The party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(c) 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,

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;

(d) 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 the Act, or in the absence of such agreement, was not in accordance with the provisions of the Act.

Section 32(1)(b) provides two further grounds on which an award may be set aside upon an application filed under Section 32(1), that is where the High Court finds that:

(a) The subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or

(b) The arbitral award is in conflict with the **public policy** of Sri Lanka.

The above six grounds are a re-production of the grounds contained in Article 34(2) of the Model Law, and are the only grounds on which an award may be set aside. Might I add that had the award before the High Court been a foreign arbitral award, the enforcement could have been refused as provided by Section 34(1) of the Act, which contains the same grounds as those set out in Section 32(1).

In view of the nebulous nature of the concept of public policy and it having been referred to as a *very unruly horse, and when you get astride, you never know where it will carry you [Richardson v. Mellish (1824 2 Bing. 229 at 252],* I must perhaps reiterate the caution expressed by this Court in **Ceylon Electricity Board v Heladhanavi Limited** [supra] when it stated that, "*Our Courts have consistently taken into account the core principles governing the arbitration proceedings including the concept of party autonomy in determining the scope of Section 32(1)(b)(ii) of the Arbitration Act. It is pertinent to note that the opportunity to set aside an arbitral award on the ground that the impugned award is in conflict with public policy of Sri Lanka should not lead to an abuse of the whole process by an unsuccessful party or the State at the final stage of arbitration process - the enforcement of the award. If such abuse takes place the credibility of the arbitration process itself would be at peril creating a serious impact on the efficient and effective alternate dispute resolution mechanism the commercial world has embraced*."

Application is mandatory

It is mandatory that a party who wishes to set aside an award make an application in terms of Section 32 and furnish the necessary material to establish the ground/s upon which the award is sought to be set aside [i.e. those set out in Section 32(1)]. In **Southern Group Civil Construction Pvt Limited v Ocean Lanka Pvt Limited** [(2002) 1 Sri LR 190], Shirani Bandaranayake, J [as she then was] held that:

> "*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***." [pages 193-194; emphasis added]
>
> "*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).***

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 mero motu to set aside an award on the grounds stated in sub paragraph (6) of section 32(1) even in the absence of material supporting such a finding being contained in the application*." [page 195; emphasis added]

A similar conclusion was reached in **Lanka Orix Leasing Company Limited v Weeratunga** [supra], where this Court "*…mentioned that the High Court is entitled to set aside an arbitral award made in Sri Lanka in terms of section 32 (1)(b)(i) and/or section 32(1)(b)(ii) of the Act either acting on an application made under section 32 (1) claiming that the arbitral award should be set aside in terms of section 32 (1) (b) (i) and/or section 32 (1) (b) (ii) of the Act or acting ex mero motu,* ***but based strictly upon the material placed before the Court****.*"[emphasis added]

The position therefore is that a party dissatisfied with an award delivered in an arbitration conducted in Sri Lanka may move to set aside the said award on the grounds set out in Section 32(1) **by way of an application filed under Section 32** and **in no other manner**. Where an application for setting aside has been made, and irrespective of whether an application for enforcement has been made, the High Court shall afford the party in whose favour the award was made an opportunity of filing objections to the setting aside application – vide Section 40(2), and thereafter act either in terms of Section 32(1)(a), or

on its own as provided for in Section 32(1)(b), but its findings will be circumscribed by what is set out in the application for setting aside and the material attached thereto. I must also state that if an application for enforcement has been made, the High Court shall consolidate the two applications.

I may also add that a party in whose favour an award has been made but who does not file an application for enforcement in terms of Section 31(1) cannot move to enforce such award through the objections filed in an application for setting aside an award. This was the position that arose in **Sri Lanka Ports Authority v Daya Constructions (Private) Limited** [supra] where Janak De Silva, J held that, "*the jurisdiction of the High Court in an application made under Section 32(1) of the Act is limited to considering whether an arbitral award should be set aside. There is a patent lack of jurisdiction which prevents a High Court from considering whether the award should be enforced in an application made pursuant to Section 32(1) to set aside that award*."

The scope of Section 31 of the Act

While it is mandatory for a party who wishes to set aside an award to file an application under Section 32(1) and furnish the material relied upon by such party, what rights does the Act confer on a party who has not filed an application for setting aside within sixty days of the receipt of the award, at the time enforcement of such award is sought by the successful party? That brings me to the core issue in this appeal, that being the extent to which a party who has not filed a setting aside application can participate in enforcement proceedings before the High Court.

The starting point to finding an answer to this issue is Section 31(1) which requires a party who wishes to enforce an award to make an application by way of a petition supported by an affidavit – vide Section 40(1). In terms of Section 31(2), the said application shall be accompanied by the original or a duly certified copy of (a) the award, and (b) the arbitration agreement under which the award has been made. Section 40(1) requires the respondent to be issued notice of such application. As provided by Section 40(2), Court shall appoint a day for the determination of the matter in the petition and grant the respondent a date to state their objections, if any, in writing, supported by an affidavit.

The next step is for Court to be satisfied that the provisions of Section 31(1) - (4) have been complied with.

The answer to the core issue is found in Section 31(6) which reads as follows:

> "*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*."

Sections 33 and 34 deal with foreign arbitral awards and has no relevance to this appeal.

On a plain reading of Section 31(6), once an application is filed to enforce an arbitral award which is not a foreign arbitral award, the High Court shall issue notice on the respondent. If, by then, an application to set aside the award has already been filed, the High Court shall proceed to consolidate both applications and hear them together, as required by Section 35(1) of the Act. In that scenario, while the grounds set out in Section 32(1)(a) and (b) which are pleaded in the application for setting aside can be urged by the party who is seeking to set aside the award, the Court must also be satisfied that the provisions of Section 31(1)-(4) have been complied with.

If there is no application pending before the High Court for the setting aside of the said award or the period of sixty days as contemplated by Section 32(1) has lapsed, the High Court shall proceed to file the said award and give judgment according to the award. Thus, on the face of Section 31(6), in such a situation, the party against whom enforcement is sought is entitled only to notice of such application for enforcement, but such party shall not have the right to object to enforcement on the grounds set out in Section 32(1). This was the view taken in **Hatton National Bank v Sella Hennadige Chandrasiri** [SC Appeal No. 63/2013; SC minutes of 15th October 2015], and in **A. R. Wimalasiri and Another v. Property Finance and Investments Kandy (Private) Limited** [SC Appeal No. 100/2008; SC minutes of 9th November 2015].

In the latter case, Sisira De Abrew, J stated that:

> *"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 an 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*."

Thus, this Court has adopted a strict approach in dealing with the right of a party who does not file an application for the setting aside of an award to object to enforcement. One must, however, give effect to the stipulation in Section 40(2) that a party against whom an application has been made has a right to object to such application. In these circumstances, I am of the view that in an application under Section 31(1), such right to object shall be limited to raising an objection relating to the non-fulfilment of any of the grounds set out in Section 31(1) – (4), and no more. In other words, resort cannot be had in the objections filed to an application under Section 31 to any of the grounds in Section 32(1), with the only objection that can be raised being that the petition, affidavit and the documents attached thereto are not in terms of Section 31(1) – (4), or that what is before Court is not an original or a duly certified copy of the agreement to arbitrate or the award.

Although no reference was made to Section 40(2), a similar view was expressed in **Lanka Orix Leasing Company Limited v Weeratunga** [supra]. In that case too, the party against whom the award had been made had not filed an application to set aside the award. Having considered the provisions of Section 31(6) of the Act, Prasanna Jayawardena, PC, J stated that:

"*Thus, it is clear that, where an applicant who seeks to enforce an arbitral award [either an arbitral award made in Sri Lanka or a foreign arbitral award] has filed an application under section 31 (1) and* ***the Court is satisfied the applicant has complied with the requirements of section 31 (2) to section 31(5) of the Act****, section 31 (6) of the Act requires the Court to file the arbitral award and give judgment and enter decree according to the arbitral award. It is also clear from section 31 (6) that the only instances in which the Court may refrain from recognizing and enforcing the arbitral award are:*

(i) Where there is an application made by another party to the arbitration to set aside the arbitral award under section 32 of the Act and pending its determination; or

(ii) The Court sees cause to refuse the recognition and enforcement of the arbitral award under the provisions contained in section 33 and section 34 of the Act.

However, in the present case, the respondent has not made an application under section 32 of the Act to set aside the arbitral award and, therefore, ground (i) stated above will not apply. Section 33 and section 34 of the Act are irrelevant to the present case since they relate only to foreign arbitral awards and the arbitral award in the present case was made in Sri Lanka. Therefore, ground (ii) stated above will not apply either. " [emphasis added]

In **Orient Financial Services Corporation Limited v Ranepuradewage Upathissa** [SC Appeal No. 46/2015; SC minutes of 25th September 2023] Priyantha Jayawardena, PC, J stated that, "*However, prior to allowing an application for enforcement of an arbitral award, the court is required to satisfy that there is no cause to refuse the recognition and enforcement of the award, and the application is in conformity with the mandatory requirements set out in section 31(2) of the said Act. Further, a party who has been made a respondent to such an application is not precluded from drawing the attention of the court, if the petitioner has not complied with the mandatory requirements stipulated in the said section notwithstanding the fact that such a party has not filed an application to set aside the award in terms of section 32 of the said Act. In such instances, the court is*

required to take such matters into consideration when deciding the application for enforcement."

Thus, it is the duty of the Court to be satisfied that the requirements of Section 31(1) – (4) have been complied with, prior to proceeding to Section 31(6).

I must, perhaps for the sake of completeness, refer to Section 35(2) which provides that, "*Where an application to set aside the award under Section 32 has been refused, the Court shall not permit a party to an arbitration to object to the enforcement of the award on any of the grounds specified in Section 34.*" One could therefore argue that Section 35(2) appears to suggest that the grounds in Section 34 are available to a party who makes an application under Section 32, and therefore the reference in Section 31(6) to Section 34 is not limited to applications for enforcement of foreign arbitral awards but extends to domestic awards, which then means the party against whom an award is sought to be enforced can invoke the grounds set out in Section 34(1), even though he has not made an application for setting aside. Section 34 however is clearly limited to foreign arbitral awards, and adopting a holistic view of the Act , to extend it to domestic awards is to do violence to the scheme in the Act relating to the enforcement of a domestic arbitral award.

I must also reiterate that the award is final and binding in terms of Section 26 and that Court must desist from expanding the basis on which an award can be set aside, whether it be on grounds procedural or substantive. Just as much as the Act providing the successful party an avenue to enforce such award, the Act has provided a party against whom an award has been made the opportunity of setting aside such award. It is up to such person to be vigilant and exercise the right conferred on him by law, if he so desires. If he fails to do so, he cannot thereafter try and enter through the back door and frustrate the very object that was sought to be achieved by the parties at the time they selected arbitration as their preferred mode of dispute resolution.

Thus, I am of the view that a person who has had an arbitral award made against such person in an arbitration conducted in Sri Lanka, and who has not filed an application to set aside such award is only entitled to notice of the application for enforcement, and the opportunity to file a statement of objections limited to non-compliance with the provisions of Section 31(1) – (4). Such person shall not have the right to object to the

enforcement of such application on any other ground including those grounds set out in Section 32(1), and/or participate in any other manner in such application. Thus, where an application has not been filed for the setting aside of an award, the power of the High Court has been circumscribed by Section 31 and the High Court shall proceed to file the award in terms of Section 31(6) provided it is satisfied that the requirements in Section 31(1) – (4) have been complied with.

The power of the High Court to call for documents

This brings me to the next question, that being the power of the High Court to call for documents over and above what has been stipulated in Section 31(2) of the Act when called upon to enforce an award.

I have already stated that in terms of Section 31(2), a party seeking the enforcement of the award is only required to file the original or a duly certified copy of the award and the original or a duly certified copy of the arbitration agreement under which the award purports to have been made. No further documents are required to be filed by the party seeking enforcement. Section 31(5) provides that "*A document produced to the court in accordance with this section may upon its production be received by the Court as sufficient evidence of the matters to which it relates.*", thereby giving sanctity to the agreement and the award that have been filed.

Thus, where the High Court is satisfied upon an examination of the arbitration agreement that the parties had agreed to submit their disputes for arbitration, and that an award has been made, and has no reason to doubt the authenticity of the said documents, the High Court must proceed to file the award and give judgment accordingly. The two situations for not doing so at that stage are those set out in Section 31(6). To that extent, I must acknowledge that Section 31 is clear, and the High Court cannot call for any further documents, especially since its power is circumscribed by Section 31(6).

If however, the High Court has a clear suspicion about the authenticity of the agreement and/or the award, I am of the view that the High Court shall have the power to call for further material. I say so for the reason that the entire jurisdiction to enforce rests on there being an arbitration agreement and an award, and if these documents are not authentic, the question of judgment being entered in terms of such an agreement or

award does not arise. Rare as it may be, I am mindful that in **Contax Partners Inc BVI v Kuwait Finance House and others** [[2024] EWHC 436 (Comm)] enforcement was sought of an award which later transpired was a complete fabrication.

In **Kristley (Pvt) Limited v The State Timber Corporation** [(2002) 1 Sri LR 225], an objection was taken that a duly certified copy of the award had not been tendered and that Section 31(2) has therefore not been complied with. While the High Court upheld the said objection, Mark Fernando, J took the view that the claimant should have been given an opportunity to tender duly certified copies, interpreting "accompanied" in section 31 (2) purposively and widely, a view which has been cited with approval in **Orient Financial Services Corporation Limited v Ranepuradewage Upathissa** [supra]. Drawing from the reasoning adopted by Mark Fernando, J, I take the view that Section 31(2) only lays down the minimum requirement, and that where the High Court entertains a clear suspicion regarding the authenticity of the agreement to arbitrate or the award itself, the High Court shall have the power to call for material to clear its mind in that regard.

However, I must state that I have no intention of opening the flood gates and encouraging frivolous challenges to the enforcement of arbitral awards but I am leaving the door slightly ajar for the High Court to call for further material in only those very rare and exceptional situations where it has a clear suspicion founded upon the material before it that the agreement and/or the award are not authentic. I am confident that Judges of the High Court shall exercise such power very carefully, and bearing in mind the role of the High Court set out in Section 31 and the principal of minimal curial intervention.

The judgment of the High Court

Having identified the scope and extent of the jurisdiction of the High Court in considering an application under Section 31(1) of the Act, I shall now consider the judgment of the High Court.

By its judgment delivered on 4th December 2020, the High Court held as follows:

(a) The application of the Appellant is in compliance with the provisions of Section 31(1) and (2) of the Act;

(b) No application has been made by the Respondent to set aside the award as provided for in Section 32 of the Award;

(c) When the Petitioner has complied with Section 31(1) and (2) of the Act and there is no application under Section 32, the Arbitral Award ought to be filed and enforced in terms of Section 31(6) unless the Court sees a good cause to refuse the recognition and enforcement of the award under Sections 33 and 34, which in this case has no application as the award before the High Court was not a foreign arbitral award.

Thus, up to this point in its judgment, the application of the law by the High Court is correct. The High Court fell into grave error thereafter. Knowing well that it must proceed to file the award, the High Court nonetheless referred to the aforementioned position taken up by the Respondent in her Objections relating to the settlement and proceeded to state as follows:

> "*The Respondent has contended that she had participated in the arbitration proceedings dated 26th January 2016 and 3rd February 2016.*
>
> *On perusal of the arbitration proceedings marked 'F' and 'G', it is obvious that the parties have informed the Arbitrator that they are seeking a settlement.*
>
> *On 3rd February 2016 the Arbitrator had fixed the case finally for 1st March 2016 at 3pm and directed the Centre to issue notices to the parties.*
>
> *Proceedings dated 1st March 2016 and/or the notices given to the parties to appear on 1st March 2016 is not available.*
>
> *When this case was fixed for judgment on 27th March 2020, as the said documents were not available the Petitioner had undertaken to produce the said documents;*
>
> *As per journal entry No. 14 the Petitioner had submitted a motion with documents. However, on perusal of the said documents the proceedings relevant to 1st March 2016 and/or the notices had not been tendered to enter into a settlement.*
>
> *After giving the opportunity for the Petitioner to submit the aforesaid vital documents the Petitioner had failed to tender the said relevant documents.*

In the said circumstances, ***Court is unable to enforce the award made by the Arbitrator without perusing the relevant documents****.*

For the foregoing reasons, I dismiss the petition dated 26th March 2018 subject to tax costs. "

The judgment does not divulge the necessity for the High Court to peruse the proceedings of 1st March, 2016, nor has the High Court expressed any concerns that it would be contrary to the public policy of Sri Lanka to enforce the Award.

It however appears from the above reasoning that the High Court was influenced by the unsubstantiated averments in the Objections that, (a) the matter had been settled, (b) the Appellant had acted fraudulently by suppressing this fact from the Tribunal, and (c) the Award has been obtained by fraud. The High Court has lost sight of the fact that the Respondent (a) has admitted that she received the notice of arbitration and the notice served by the Centre informing her to be present before the Tribunal on 26th January 2016, and (b) appeared before the Tribunal on that date and having submitted herself to the jurisdiction of the Tribunal, participated at the hearing held on 26th January 2016, and the next two dates to which the hearing was adjourned, that being 3rd February 2016 and 1st March 2016. Having been present on 26th January 2016, there was no further necessity for the Respondent to be informed by the Centre of the date for which the hearing has been adjourned, although the Centre has done so as a matter of courtesy. It was the responsibility of the Respondent to act diligently and participate in the proceedings before the Tribunal or else face the risk of the matter proceeding *ex parte*.

The proceedings of 1st March 2016 and the proceedings of 9th March 2016 have in fact been tendered by the Appellant to the High Court and is available in the original case record. The proceedings of 1st March 2016 bear out the fact that, (a) the Respondent was present before the Tribunal on 1st March 2016, (b) the Tribunal was informed that the "*parties have agreed to the terms of settlement*", and (c) the matter was adjourned to 9th March 2016 to enter terms of settlement.

The proceedings of 9th March 2016, which have been sent by the Centre to the Respondent by registered post, reads as follows:

"*This matter has been fixed several times for settlement* ***however no settlement has been entered into between the parties****, and the Respondent is absent and unrepresented in today's proceedings, although this date was fixed taking into account of the Respondent's convenience. In the circumstances, the Claimant's application that the matter proceed ex parte is allowed. The affidavit evidence shall be filed by 10th June 2016.* "

This position has been reiterated in the Award, as well.

Thus, if it was the position of the Respondent that she had reached a settlement with the Appellant and it was fraudulent for the Appellant to nonetheless proceed with the arbitration, it was the responsibility of the Respondent to have brought that matter to the attention of the Arbitral Tribunal or the Centre, upon the receipt of the proceedings of 9th March 2016. She did not do so. In the alternative, it was open for the Respondent to have filed an application for setting aside in terms of Section 32(1), or else at the time she filed objections to the application for enforcement, to have tendered the proceedings before the Arbitrator held on 1st and 9th March 2016 to substantiate the allegations.

In the absence of an application to set aside the award, the Respondent does not have any right in terms of the Act to present any objection to enforcement outside the ambit of Section 31(1) – (4). Although the Respondent has attempted to mischievously insinuate that the Award has been obtained by fraud, the Respondent has failed to discharge the burden of proving so. I am of the view that the application for enforcement, the agreement to arbitrate, the Award and the facts of this case could not have given rise to any suspicion regarding the authenticity of the Award. Thus, there was no basis for the High Court to have acted on the averments in the objections filed by the Respondent, and to have called for the proceedings of 1st March 2016.

In these circumstances, I am of the view that:

(a) the High Court erred when it called for the transcript of the proceedings held before the Arbitrator;

(b) the High Court could only have proceeded to enforce the Award, and hence, erred when it refused to do so.

Questions of Law raised by the Respondent

This brings me to the three questions of law raised by the learned Counsel for the Respondent. He submitted that the Respondent did not receive a copy of the award from the Centre, and hence did not have the opportunity of making an application for setting aside the said Award. It was submitted further that the Respondent received the Award for the first time when she was served a copy thereof together with the application for enforcement and that the only way that the Respondent could have objected to the enforcement is through a statement of objections opposing the application for enforcement.

The Respondent has admitted that she received the notice of arbitration and the notice requesting her to be present at the hearing. Thus, her version that she did not receive any other correspondence including the award sent by the Centre through registered post to the same address cannot be accepted. In any event, the requirement in Section 32(1) is to file an application for setting aside within sixty days of the receipt of the award.

Thus, if it was the position of the Respondent that she received the award only with the application for enforcement, that would be the date of the receipt of the Award, and the Respondent ought to have filed an application for setting aside within sixty days thereof. I must reiterate that the Respondent could not have moved for the setting aside of the Award through the statement of objections filed in response to the application for enforcement. The simple point here is that if a party wishes to set aside a domestic award, that can only be done by way of an application filed in terms of Section 32(1) of the Act, and in no other manner.

This issue was considered in **Lanka Orix Leasing Company Limited v Weeratunga** [supra], where it was held that:

> "*… the requirement in section 32(1) that an application made thereunder to set aside an arbitral award must be made within sixty days of the receipt of the arbitral award, necessarily means that a party who claims that he did not receive a copy of the arbitral award until he was served with notice of the other party's application under section 31(1) to enforce the arbitral award, will be entitled to make an application under section 32(1) to set aside the arbitral award* ***within sixty days of being served with notice of the application to enforce the arbitral award****.*

In this connection, it may be mentioned that section 40 of the Act requires that an application under section 31(1) to enforce an arbitral award must be by way of a petition with, inter alia, the arbitral award or a duly certified copy annexed thereto and that these documents must be served on the other party. Needless to say, in cases where an application under section 32(1) to set aside an arbitral award is made only upon service of notice of an application for enforcement, the party who has made the application under section 32(1) to set aside the arbitral award will have to satisfy the High Court that he had not received a copy of the arbitral award prior to service of that notice and that his application to set aside the arbitral award is made within sixty days of service of that notice." [emphasis added]

Thus, even if the position of the Respondent that she did not receive a copy of the arbitral award is accepted, the correct course of action that the Respondent should have adopted upon receipt of the application for enforcement is to have filed an application in terms of Section 32(1) within sixty days of the receipt of such enforcement application moving for the setting aside of the award, which the Respondent failed to do.

Summary

In the above circumstances, I am of the following view:

(1) A party who is dissatisfied with an arbitral award and who wishes to challenge such award **must make an application** to set aside such award in terms of Section 32(1) of the Act;

(2) Such application must be made within sixty days of the receipt of the award;

(3) If an application for setting aside has been made, the burden of proving the existence of the grounds set out in Section 32(1) is with the party seeking to set aside the award;

(4) Where an application for setting aside and an application for enforcement have been made, Court shall consolidate the two applications, consider the grounds pleaded by the party seeking to set aside provided they are within Section 32, as well as consider whether the provisions of Section 31 have been complied with;

(5) A party who has not made an application for the setting aside of an award is only entitled to receive notice of an application made to enforce such award, and the opportunity to file a statement of objections, with the contents of such objections being limited to non-compliance with the requirements of Section 31(1) – (4), and the burden of proving such matters being with the party claiming such non-compliance;

(6) Other than the aforesaid, a party who is dissatisfied with an arbitral award has no right to participate in the enforcement application;

(7) In considering an application under Section 31(1), the High Court may call for further material if it has any doubt regarding the authenticity of the agreement to arbitrate and/or the award but that must be done only in extremely exceptional situations, and for good reason.

Conclusion

Taking into consideration the facts and circumstances of this case, I answer the first and second questions of law in the affirmative, and the third, fourth and fifth questions of law in the negative. The judgment of the High Court is set aside and this appeal is allowed. The High Court is directed to act in terms of Section 31(6) of the Act and proceed to file the award dated 21st March 2017 and give judgment according to the award. The Appellant shall be entitled to the costs before this Court and the High Court, fixed at Rs. Five Hundred Thousand.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, PC, CJ
I agree

CHIEF JUSTICE

Janak De Silva, J
I agree.

JUDGE OF THE SUPREME COURT