

IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C A (PHC) APN / 49 / 2017

High Court of Colombo

Case No. HC/ARB 31 / 2017

SLNAC No. 44/05/2009

Vithana Kuruppu Arachchige Anura,

Municipal Commissioner,

Colombo Municipal Council,

Town Hall,

Colombo 07.

PETIONER - PETITIONER

-Vs-

1. Burns Trading Company (Pvt) Ltd.,

2. Burns Environmental Technologies (Pvt)

Ltd.,

Both of:

No. 811/1,

Sirimavo Bandaranaike Mawatha,

Colombo 14.

3. Hon. Dudley Karunaratna,

92/25,

Judges Housing Scheme,

Thalpathpitiya Road,

Udahamulla,

Nugegoda.

4. Geethaka Gunawardena,

No. 10,

Police Park Place,

Colombo 05.

5. Mahinda Lokuge,

5A,

9th Lane,

Rawathawaththa,

Moratuwa.

RESPONDENT - RESPONDENTS

Before: K K Wickremasinghe J

P. Padman Surasena J

Counsel : Faisz Musthapha PC with Senani Dayarathne

for the Petitioner - Petitioner.

Sunil Abeyrathne with T Gunathilake

for the 1st and 2nd Respondent - Respondents

Inquiry on: 2017-07-11.

Decided on : 2017 - 10 - 31

ORDER**P Padman Surasena J**

The Petitioner – Petitioner (hereinafter sometimes referred to as the Petitioner) has filed this revision application seeking to set aside the order dated 2017-03-08 made by the High Court holden in Colombo. This order has been produced marked '**A**'.

Upon the Petitioner supporting this case ex Parte, this Court had issued an interim order staying the proceedings of the Arbitral Tribunal as has been prayed for in prayer (f) of the petition.

As the Respondent - Respondents (hereinafter sometimes referred to as the Respondent) had objected to the extension of the said stay order this Court heard submissions of learned counsel for both parties and concluded the inquiry pertaining to the said issue.

This Court reserved its order affording an opportunity for both parties to tender written submissions in support of their respective positions.

Learned President's Counsel for the Petitioner sought to argue that the jurisdiction to call for, inspect and examine any record of any Court of first

Instance conferred on the Court of Appeal by Article 145 of the Constitution is not subject to any law and hence has conferred an unfettered jurisdiction. It was on that basis that he submitted that Article 145 is an entrenched provision in the Constitution.

Although the Petitioner has made this application under Article 145 of the Constitution, it is by Article 138 that the Constitution confers revisionary jurisdiction on this Court. A closer look at Article 138 shows that this Court is required to exercise its revisionary jurisdiction subject to the provisions of the Constitution or of any law. This position is rather clear in the Sinhala version of the Constitution.

Indeed when the 13th Amendment to the Constitution was promulgated it was Article 138 which the legislature amended to make it possible for the Court of appeal to assume revisionary and appellate jurisdiction in respect of orders pronounced by the Provincial High Court in its exercise of new jurisdiction which the 13th Amendment conferred on it. It is to be noted that 13th Amendment never amended Article 145. Therefore, it is the view of this Court that Article 145 merely sets out yet another step that this

Court can take when it exercises revisionary jurisdiction vested in it under Article 138. Indeed any order that the Court of Appeal may make when it invokes its power to call for, inspect and examine any record will be in the exercise of its revisionary jurisdiction. This is manifest by the word 'and' contained in Article 145 itself. It would be helpful to reproduce Article 145 which is as follows;

"...The Court of Appeal may, *ex mero motu* or on any application made, call for, inspect and examine any record of any Court of First Instance **and** in the exercise of its revisionary powers may make any order thereon as the interests of justice may require. ..." *(I have highlighted the word 'and')*

Therefore this Court is unable to accept the argument of the learned President's Counsel for the Petitioner that Article 145 confers an unfettered jurisdiction which is independent of Article 138.

The Supreme Court in the case of Atapattu and others Vs. People's Bank and others¹, having considered the provisions in several relevant Articles in the Constitution, held that the powers vested in Court of Appeal under Article 140 is not diminished by a provision in the ordinary law because the

¹ 1997 (1) S L R 208.

said Article 140 is couched in such a way that it would only be (unlike Article 126) "subject to the provisions of the Constitution". This is because the Constitution has not subjected Article 140 to other ordinary laws.

However wordings appear in Article 138 is not the same and is couched in a way that the constitution itself has subjected the provisions in Article 138 to 'any law'. Article 170 of the Constitution interprets "law" as any Act of Parliament, and any law enacted by any legislation at any time prior to the commencement of the Constitution and includes an Order in Council.

The Supreme Court in the case of Weragama V Eksath Lanka Wathu Kamkaru Samithiya² stated as follows; "However, the jurisdiction of the Court of Appeal under Article 138 is not an entrenched jurisdiction, because Article 138 provides that it is subject to the provisions "of any law"; hence it was always constitutionally permissible for that jurisdiction to be reduced or transferred by ordinary law (of course, to a body entitled to exercise judicial power). "

Therefore, to ascertain whether this Court can exercise its revisionary jurisdiction in the instant case, one needs to turn to the relevant law

² 1984 (1) Sri. L.R. 293.

applicable to arbitration proceedings. That is found in section 37(1) of the Arbitration Act No. 11 of 1995. For convenience it is reproduced below;

section 37(1)

Subject to sub section (2) of this section, no appeal or revision shall lie in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under this Act except from an order, judgment or decree of the High Court, under this part of this Act.

(2) An appeal shall lie from an order, judgment or decree of the High Court referred to in subsection (1) to the Supreme Court only on a question of law and with the leave of the Supreme Court first obtained.

The above provisions show that one can lodge an appeal to the Supreme Court with leave only against the orders made under the provisions in part VII of the Act. Thus, it is to be observed that an appeal is only possible in respect of the orders pertaining to applications for the enforcements of arbitral awards.

The above provision is dealing with the appeals and revisions against orders made by the High Court. The only Court, which has revisionary jurisdiction in respect of orders made by the High Court, is the Court of

Appeal. This means that section 37 (1) has taken away the revisionary jurisdiction of Court of Appeal in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under the Arbitration Act No. 11 of 1995 other than those made under part VII of the said Act.

The application made by the Petitioner to the High Court is under the provisions of section 11 of the Arbitration Act seeking a determination by the High Court on the question whether the arbitral tribunal has jurisdiction to conduct the instant arbitration. The Petitioners had also sought an interim relief to stay the proceedings of the arbitral tribunal until final determination of the said question by the High Court. Learned High Court Judge by the impugned order dated 2017-03-08 had refused the said interim relief. It is that order that is being canvassed before this Court by the Petitioner in the instant revision application.

It is common ground that what the interim order issued by this Court has stayed is the proceedings of the Arbitral Tribunal.

Thus, it is clear that this revision application has been filed to revise an order of the High Court in respect of which the revisionary jurisdiction of this Court has been taken away by section 37 (1) of the Arbitration Act.

The Supreme Court had taken the view that the involvement of Courts in arbitration proceedings should be limited only to those provided for in the Arbitration Act. This is clear from the following passage quoted below from the judgment of the Supreme Court in the case of Light Weight Body Armour Ltd. V Sri Lanka Army.³

"... Arbitration is an alternate means of dispute resolution which has been introduced and developed in order to reduce the amount of time spent in litigation. In this light, the Arbitration Act contemplates that the arbitral award is not susceptible and not vulnerable to any challenge except that permitted under the Act. This is on the basis that it is conclusive as a judgment between the two parties and could only be set aside on the grounds explicitly set out in section 32 of the Act. The onus of proving that, if fell within the ambit of the said provision lies on the party making such an application. The legislative intend behind the Act is clearly that a degree of finality attaches to the decision of the Arbitral Tribunal, which is the judge of both, questions of fact and law referred to it."

³ 2007 Bar Association Law Reports 10.

For the foregoing reasons, this Court is of the view that it does not have jurisdiction to entertain the instant revision application.

Therefore, this Court decides not to extend the stay order it had earlier granted as an interim relief. As this issue has been raised as a preliminary objection with regard to jurisdiction and since this Court has held that it has no jurisdiction to entertain this application, this Court decides to dismiss this application. No costs ordered.

This revision application must therefore stand dismissed without costs.

JUDGE OF THE COURT OF APPEAL

K K Wickremasinghe J

I agree,

JUDGE OF THE COURT OF APPEAL