

**TRICO MARITIME (PVT) LIMITED
V. CEYLINCO INSURANCE CO. LIMITED**

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.,
SRIPAVAN J. AND
RATNAYAKE, J.
S. C. APPEAL NO. 101/2005
S. C. (SPL.) L. A. NO. 201/2005
H. C./ARB/NO. 1961/2004
DECEMBER 7TH, 2009

Arbitration Act, No. 11 of 1995 – Application for setting aside Arbitral award – Section 35(1) – Power to consolidate an application to set aside with an application to enforce an award – Actus curiae neminum gravabit – An act of Court should not prejudice any man – Default in appearance – Can the award be set aside?

Trico Maritime (pvt) Limited filed an application in the High Court, Colombo in terms of the Arbitration Act to have the majority award of an Arbitral award enforced. Ceylinco Insurance Co. Limited who was served with notice, filed objections stating *inter alia*, that the arbitration award sought to be enforced has already been set aside by Court. After inquiry, the High Court upheld the said objection and dismissed the application for enforcement of the award. Trico Maritime has filed this appeal to set aside the above-mentioned order of the High Court.

The Supreme Court granted Leave to Appeal against the order of the High Court.

The Petitioner sought to challenge the judgment mainly on the ground that the High Court has failed to consolidate the two applications, HC/ARB/1848/2003 and HC/ARB/1961/2004 made by the Petitioner and the Respondent, in terms of section 35(1) of the Arbitration Act, No. 11 of 1995.

Held

- (1) The law contemplates the consolidation of applications made to set aside the award and to enforce the award. It is an accepted

norm in the jurisprudence of this country that “actus curiae nemium gravabit” meaning, an act of Court should not prejudice any man. If the Court has not consolidated both applications a party should not suffer as a consequence of the Court not doing what it should do in terms of the law. It is the duty of the High Court to consolidate the two applications and take them up together.

- (2) Default in appearance of the Respondent is not a ground on which an arbitral award can be set aside under Section 32(1) of the Arbitration Act, No. 11 of 1995.

Cases referred to:

1. *United Plantation Workers' Union v. The Superintendent Craig Estate Bandarawela* – 74 NLR 499
2. *Madurasinghe v. Madurasinghe* – (1988) 2 Sri L.R. 142
3. *Sili Nona v. Dayalal Silva and Others* – (1992) 1 Sri L.R. 195
4. *The Young men's Buddhist Association v. Azeez and Another* – (1995) 1 Sri L.R. 237

APPEAL from the judgment of the High Court of Colombo.

D. S. Wijesinghe, P.C., with *Kaushalya Molligoda* for the Petitioner.

S. Sivarasa, P.C., with *N. R. Sivendran* for the Respondent.

Cur.adv.vult.

RATNAYAKE. J.

The Petitioner in this appeal is seeking to set aside the judgment of the High Court of Colombo by which its application for enforcement of an Arbitral award was dismissed.

The Petitioner is a Company by the name of Trico Maritime (Pvt) Ltd., (hereinafter referred to as “Trico Maritime”) which

had an insurance policy with the Respondent by the name of Ceylinco Insurance Company Ltd. (hereinafter referred to as the 'Ceylinco Insurance'). The sum insured by the said policy at the relevant date was Rs. 58 million. In April 1999, the Petitioner submitted a claim to the Respondent for a loss that occurred due to the premises going under water. The Ceylinco Insurance paid a sum of Rs. 10 million to Trico Maritime in respect of the claim but Trico Maritime referred the matter for Arbitration in terms of the Arbitration Clause in the policy as Ceylinco Insurance has not met the entire claim. After inquiry two out of the three arbitrators delivered a joint award on 22nd October 2003 granting relief to the Trico Maritime and the other arbitrator delivered a separate award.

The Ceylinco Insurance made an application on 15th December 2003 to the High Court of Colombo in case bearing No. HC/ARB/1848/2003 to set aside the said awards, inter alia on the basis that the arbitrators had no jurisdiction to make the awards. The Ceylinco Insurance supported the application on 19.12.2003 and the Court issued notice on Trico Maritime to show cause as to why the arbitration awards should not be set aside. According to the case record the notice has been served on Trico Maritime but it failed to appear on application of Ceylinco Insurance, the High Court set aside the arbitral award by its Order dated 20th May 2004 and the subsequent decree dated 11th November 2004.

The Petitioner, namely Trico Maritime filed an application on 18th May 2004 in the High Court of Colombo in case bearing No. HC/ARB/1961/2004 under Part VII of the Arbitration Act No. 11 of 1995 to have the majority award enforced. Ceylinco Insurance who was served with notice filed objections and took up the position, inter alia that the arbitration award sought to be enforced has already been set

aside by Court. After inquiry, the High Court upheld the said objection and by its Judgment dated 1st August 2005 dismissed the application. Consequently Trico Maritime has filed this appeal to set aside this judgment of the High Court.

This Court has granted Leave to Appeal on 23rd November 2005 and the proceedings to the said date state as follows:-

“parties agree that the questions of law that have been formulated in the Petition will not arise. However the new question of law was raised;

“Did the Learned High Court Judge err in law in dismissing the Petitioner’s application for enforcement of the arbitral award on the basis of the order dated 20.05.04 and the decree dated 11.11.04 in HC/ARB/1848/2003 of the same High Court”

At the hearing before Court Counsel for the Petitioner sought to challenge the judgment of the High Court on many grounds.

He took up the position inter alia that the High Court has failed to consolidate the two applications i. e. HC/ARB/1848/2003 and HC/ARB/1961/2004, in terms of Section 35(1) of the Arbitration Act No. 11 of 1995.

According to the pleadings before Court, HC/ARB/1961/2004 was filed on 18th May 2004. The Order to enter the judgment as prayed for in HC/ARB/1848/2003 was made only on 20th May 2004. Therefore at the application for enforcement in this case was made to the High Court, the application to set aside the award in HC/ARB/1848/2003 was pending before the same High Court. In the circumstances,

the High Court should have consolidated both applications in terms of Section 35(1) of the Arbitration Act.

Section 35(1) of the Arbitration Act states as follows:-

“Where applications filed in Court to enforce an award and to set aside an award are pending, the Court shall consolidate the applications.”

If the Court consolidated the applications as required by the above provision, there may not have been a default in appearance by the Petitioner Trico Maritime.

An argument was advanced by the Respondent Ceylinco Insurance to the effect that the Court could not have known that an application to enforce the award had been filed prior to the order made on 20th May 2004 as the application to enforce the award was filed only on 18th May 2004. It is a matter for the Administration of the High Court to have procedures in place to ensure that such applications are brought to the notice of Court without delay.

The Ceylinco Insurance has also taken up the position that Trico Maritime should have brought to the notice of Court the pending application to set aside the award when it made its application to enforce the award. The Petitioner Trico Maritime has taken up the position that it has not been served with notice prior to the ex-parte judgment in HC/ARB/1848/2003. Therefore the Court cannot find fault with the Petitioner for not disclosing HC/ARB/1848/2003 when application HC/ARB/1961/2004 was filed.

The law contemplates the consolidation of applications made to set aside the award and to enforce the award. It is

an accepted norm in the jurisprudence of this country that “*actus curiae neminum gravabit*” meaning, an act of Court should not prejudice any man [*United Plantation Workers’ Union vs. The Superintendent Craig Estate Bandarawela*⁽¹⁾, Also – *Madurasinghe vs. Madurasinghe*⁽²⁾ – *Sili Nona vs. Dayalal Silva & Others*⁽³⁾ – *The Young Mens’ Buddhist Association vs. Azeez & Another*⁽⁴⁾]. Therefore, if the Court has not consolidated both applications a party should not suffer as a consequence of the Court not doing what it should do in terms of the law. In the circumstances this Court is of the view that both applications i.e. HC/ARB/1848/2003 and HC/ARB 1961/2004 be consolidated and taken up together.

At this stage it is necessary to consider the merits of the Order of the High Court in HC/ARB/1848/2003 dated 20th May 2004 and the consequent decree dated 11th November 2004 by which the arbitration award was set aside. The proceedings in HC/ARB/1848/2003 of 20th May 2004 as appearing in the document annexed by the Petitioner to its petition dated 12th September 2005 marked as ‘A9’ are as follows:-

**“IN THE HIGH COURT OF THE WESTERN PROVINCE
OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

(holden in Colombo)

Before: S. Srikantharajah Esquire – High Court Judge
Court No. 01

Case No: HC/ARB 1848/2003

Date: 20.05.2004

*Attorney-at-law Mr. R. I. Thambirathnam with
Attorey-at-Law Mr. N. R. Sivendran instructed
by Mala Sabarathnam appear for the Respon-
dent-Petitioner.*

Mr. Sivendran appearing for the Respondent-Petitioner states as follows:-

"I move to support the motion that have been filed by the Respondent-Petitioner dated 17.05.2004. In this case notice was issued on Claimant-respondent returnable on 31.03.2004. According to the fiscal report that have been filed the said notice regarding in this action has been served on the claimant-respondent prior to the 31.03.2004. The notice has been served on the Manager of the claimant-respondent who is the principal officer of the respondent company. In the circumstances I respectfully state that as the claimant-respondent was not present on 31.03.2004 the respondent is in default and the Petitioner entitled to a relief that the petitioner has prayed for in the prayer to the petition filed in Your Honour's Court.

Order

Enter judgment as prayed for in the prayer to the petition.

Enter decree accordingly.

Sgd.

S. Sriskandarajah

High Court Judge of the

Western Province – Colombo"

The decree dated 11th day of November 2004 of the High Court in Application HC/ARB/1848/2003 as appearing in the document annexed marked "A7" to the Petitioner's petition is an follows:-

"HC/ARB/1848/2003

This action coming on for final disposal before Honourable S. Sriskandarajah Esquire High Court Judge of Colombo on

the 20th May 2004 in the presence of Mr. R. E. Thambirathnam Attorney-at-Law with Mr. N. R. Sivendran Attorney-at-Law Instructed by Ms. Mala Sabaratnam on the part of the Respondent-Petitioner and the Claimant-Respondent being absent on the notice returnable dated 31-03-2004, although the notice was served properly on the Manager of the Claimant-Respondent Company requesting them to appear on 31.03.2004 and hearing the submissions of Attorney-at-Law for Respondent-Petitioner.

It is ordered and decreed that the award of the 1st, 2nd & 3rd Arbitrators – Respondents dated 22nd October 2003 is hereby set aside.

It is ordered and decreed that 1st, 2nd & 3rd Arbitrators-Respondents have no jurisdiction to hear and make an award in respect of prayers (a) and (b) of the statement of claim and that the Respondent- Petitioner is entitled to the costs of this action.

Sgd.
High Court Judge of the
Western Province, Colombo

On this 11th day of November 2004

Drawn by: Sgd. Attorneys-at-Law for the Respondent-Petitioner.”

Section 32 (a) of the Arbitration Act of No. 11 of 1995 permits a High Court to set aside an arbitral award only in limited circumstances in the following manner.

Section 32(1)

“An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of the receipt of the award –

(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 cope 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 decision on matters not submitted to arbitration may be set aside; or

- (iv) *The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act; or*

(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.”

Default in appearance of the Respondent is not a ground on which an arbitral award can be set aside under the above provision.

In the decree of 11th November 2004 the Court has *“further ordered and decreed that 1st, 2nd & 3rd arbitrators – Respondents have no jurisdiction to hear and make an award in respect of prayers (a) and (b) of the statements of claim”*.

In accordance with the proceedings of 20th May 2004 as appearing in document ‘A9’ the Petitioner has not made any submission on the question of lack of jurisdiction of the 1st, 2nd & 3rd Arbitrators. His only application has been to grant relief as prayed for solely based on the default in appearance of the Respondent. In fact the Petitioner has only moved “to support the motion that have been filed by the Petitioner dated 17.05.2004”. This motion dated 17.5.2004 is annexed to the Petitioner’s petition marked as ‘A8’. It is observed from the case record that a copy of this motion has not been served on the Claimant-Respondent of the said case. In any event the said motion dated 17.05.2004 annexed to the Petitioner’s petition marked as ‘A8’ states as follows:

“HC/ARB/1848/2003

To: The Honourable High Court Judge of the Democratic Socialist Republic of Sri Lanka sitting at Colombo.

Whereas notice of this action was issued on the Claimant-Respondent by Court and whereas notice was handed over on the Claimant-Respondent’s Manager through the Fiscal of this Court.

And Whereas according to the notice served on the Claimant- Respondent notice returnable was on 31st March, 2004

And Whereas on 31st March, 2004 the Claimant-Respondent was not present and/or was not represented in Court.

And whereas the Claimant-Respondent had not shown any ground as to why the relief claimed for by the Respondent-Petitioner in the Respondent-Petitioner's petition to Your Honour's Court should not be granted.

And whereas in the circumstances the Claimant-Respondent is in default and the relief claimed for by the Respondent-Petitioner in the prayer to the petition should be granted.

We respectfully move that Your Honour's Court be pleased to mention this matter on 20th May 2004 to enable Counsel for the Respondent- Petitioner Mr. R. E. Thambiratnam to support this application.

On this 17th day of May, 2004.

Sgd.

Attorneys-at-Law for the
Respondent-Petitioner"

Accordingly it is clear that there was no application by the Petitioner in this case on 20th May 2004 for an order on the lack of jurisdiction of the 1st, 2nd, & 3rd Arbitrators-Respondents. The only application has been to set aside the arbitration award based on the default in appearance of the Respondent. Submissions have not been made by the Petitioner in terms of the reasons and grounds contained in

the substantive application dated 15th December 2003 filed in the High Court. The proceedings of 20th May 2004 the decree of 11th November 2004 or the motion of 17th May 2004 do not contain any material to show that the reasons and grounds contained in the substantive application dated 15th December 2003 or the aspect of the lack of jurisdiction was considered by Court when making the aforesaid order and decree.

Due to the above reasons, this Court

- (i) sets aside the order dated 20th May 2004 and the decree dated 11th November 2004 in Application bearing No. HC/ARB/1848/2003.
- (ii) Sets aside the judgment of the High Court dated 1st August 2005 in Application bearing No. HC/ARB/1961/2004; and
- (iii) Directs the High Court to consolidate both applications namely HC/ARB/1848/2003 and HC/ARB/1961/2004 and to hear and determine the consolidated application in terms of the law.

In all the circumstances of this case the parties to bear their own costs.

TILAKAWARDANE, J. – I agree.

SRIPAVAN, J. – I agree.

Appeal allowed.

Directions issued.