KRISTLEY (PVT) LIMITED
v.
THE STATE TIMBER CORPORATION

SUPREME COURT
FERNANDO, J.,
GUNASEKERA, J. AND
WIGNESWARAN, J.
SC APPEAL NO. 51/99
HC NOS. ARB 50/97 AND 52/98
20 MARCH, 10 APRIL, 20 JUNE AND 12 SEPTEMBER, 2001

Arbitration – Arbitration Act, No. 11 of 1995 – Applications to enforce / set aside award – Failure to file a certified copy of the award – Lack of legal competence of the claimant at the time of reference to arbitration – "Incapacity" as a ground for setting aside the award – Objection to award on the grounds of public policy – Consolidation of Applications – Sections 31 (2) (a), 31 (2) (ii), 32 (1) (a) (i), 32 (1) (b) (ii) and 35 (1) of the Act – Issues in arbitration – Natural justice.

In October, 1993, the appellant an Australian Company (the claimant) and the respondent State Timber Corporation (STC) signed a contract for the supply of 300 cubic metres of sawn pine radiata timber from Australia. When one consignment of goods supplied by the claimant reached Colombo by ship on 09. 12. 1993, the STC terminated the contract for certain stated reasons.

On 24. 10. 1994 the claimant gave notice of arbitration in terms of the contract agreement and submitted its claim on 04. 06. 1996 on the ground that the termination of the contract by the STC was unlawful. On 09. 07. 1996 the terms of reference for arbitration were signed by the parties.

The STC in its statement of defence dated 20. 06. 1996 objected to the jurisdiction of the Arbitral Tribunal and pleaded that the contract had been lawfully terminated. The objection to jurisdiction was later withdrawn.

On 16. 08. 1996 during the cross-examination of the claimant's Managing Director, counsel for the STC stated that the claimant had been de-registered and dissolved on 28. 08. 1995, hence the claimant was non-existent at the date it made its claim; and consequently arbitration proceedings were a nullity. Counsel contended that an issue was unnecessary but the Arbitrators compelled him to raise issues which was followed by counter issues for the claimant. Documents were tendered to prove that the claimant had been restored to the roll with effect from

11. 09. 1996. After inquiries arbitrators held that there was no proof that the claimant had been dissolved and that upon re-registration it was in the same position as if its registration had never been cancelled.

In the course of the arbitration, an allegation was also made that a cetificate supplied by the claimant including on seasoning of timber was a forgery and evidence of one Morrison was led but without raising an issue in that regard. This was in the background of a unanimous ruling by the Arbitrators that forgery should be established beyond reasonable doubt.

On 10. 12. 1997 by a majority decision (the Chairman and another arbitrator) it was held that the termination of the contract was wrongful. In two separate awards they upheld the claimant's award. The third arbitrator disagreed.

The Chairman held (with the other arbitrator agreeing) that the genuineness of the impugned certificate was never put in isssue, that in the absence of a specific issue which would have enabled the claimant to know the case it had to meet, the claimant was not obliged "to counter the conjecture suggested by Bill Morrison". The third Arbitrator held that there was a "preponderance of evidence" that the impugned certificate was a forgery; and that the claimant had not established it genuineness. He opined that whilst the counsel for the STC was remiss in failing to raise a specific issue, it was the duty of the Tribunal to have raised the issues on the evidence of Morrison.

On 29. 12. 1997 the STC applied to the High Court to set aside the award annexing copies of the separate awards. On 21. 10. 1998 the claimant applied for the enforcement of the award annexing copies of the separate awards certified by an attorney-at-law. The applications were consolidated under section 35 (1) of the Arbitration Act (the Act). The High Court Judge by his order dated 09. 02. 1999 refused the application and set aside the majority award on the grounds :

(*a*) that the application for enforcement was not accompanied by a duly certified copy of the award.

(*b*) that the award was based on a forged certificate, hence it was contrary to public policy; and

(*c*) that the claimant had been de-registered and lacked legal capacity at the time of the reference to arbitration.

Held:

(1) On the facts and circumstances of the case, copies of the awards tendered with the claimant's application were duly certified copies within the meaning of section 31 (2) (ii) of the Act.

Obiter

Even in a case where the copy of the award filed with the application is not a duly certified copy the application may not be summarily rejected without giving an opportunity to tender duly certified copies interpreting "accompany" in section 32 (2) purposively and widely.

(2) In the *circumstances of the case, the majority was justified in refusing to* consider the question of forgery without a specific issue. Natural Justice demands such issue to enable each party to know from the beginning what case it has to meet and to afford the affected party an opportunity of meeting the case against it. In any event, the third Arbitrator's finding was on a "preponderance of evidence" contrary to the Tribunal's previous unanimous ruling that forgery required proof beyond reasonable doubt which is a proposition supported by a long line of decisions. Therefore, the High Court was not entitled to review the decision on the ground of public policy, in terms of section 32 (1) (*b*) (ii) of the Act.

(3) "Incapacity" which is a ground for setting aside an award in terms of section 32 (1) (*a*) (i) is established where a party to the arbitration agreement was under some incapacity, i.e. some incapacity to which a party was subject to when the arbitration agreement was entered into. In the instant case, the de-registration of the claimant which was relied upon occurred much later on 28. 08. 1995, but the High Court considered the question of incapacity as at 09. 07. 1996 (the time of reference to arbitration) and not at the date of the arbitration agreement (October, 1993), which contained the arbitration clause. In any event, it was established that the claimant was restored to the roll the legal effect of which was to place it in the same position as if its registration had never been cancelled. As such, the High Court erred in holding that the claimant was under an incapacity within the scope of section 32 (1) (*a*) (i) of the Act.

Cases referred to :

1. *Lanka General Workers' Union v. Samaranayake* – (1996) 2 Sri LR.
2. *Nagappa Chettiar v. Commissioner of Income Tax* – AIR 1995 Madras 162.
3. *Narayan Chettiyar v. Official Assignee* – AIR 1941 PC 93.
4. *Coomaraswamy v. Vinayagamoorthy* – (1945) 46 NLR 246, 249.
5. *Selliah v. Sinnammah* – (1947) 48 NLR 261, 263.
6. *Muthumenika v. Appuhamy* – (1948) 50 NLR 162, 164.
7. *Lakshmanam Chettiar v. Muttiah Chettiar* – (1948) 50 NLR 337, 340.

8. *Yusoof v. Rajaratnam* – (1970) 74 NLR 9, 13.
9. *Soleimany v. Soleimany* – (1998) 3 WLR 811.
10. *Westacre Investments v. Jugimport* – SPDR (1998) 3 WLR 770.
11. *International Brotherhood of Electrical Workers v. Iowa Electric Light and Power Company* – 834, F. 2d, 1424.

APPEAL from the judgment of the High Court.

H. L. de Silva, PC with *S. Mahenthiran*, PC and *A. Athurupana* for claimant-appellant.

S. Marsoof, PC, Additional Solicitor-General with *T. W. Karunaratne*, State Counsel and *Riyad Ameen*, State Counsel for respondent.

Cur. adv. vult.

March 15, 2002

FERNANDO, J.

This is an appeal against a judgment and order of the High Court setting aside an arbitration award. The High Court held that the application for enforcement made by the claimant-appellant (the claimant) was not accompanied by a duly certified copy of the award; that award was based on a forged document produced by the claimant, and therefore that it was contrary to public policy to enforce it; and that at the time the claimant referred the matter to arbitration, it had been deregistered and lacked the legal capacity to do so. Several questions of law arise in regard to the interpretation of sections 17, 26, 31 (2) (*a*), 31 (2) (ii), 32 (1) (*a*) (i) and 32 (1) (*b*) (ii), of the Arbitration Act, No. 11 of 1995.

The claimant is a company incorporated under the laws of Australia, while the respondent-respondent is the State Timber Corporation (STC) a public corporation established under the laws of Sri Lanka.

Pursuant to a tender floated by the STC, the parties entered into a contract in October, 1993, under which the claimant agreed to supply 300 cubic metres of sawn *pine radiata* timber of specified grades and dimensions suitable for building construction. The following specifications are relevant to this appeal : 20

Grade	In accordance with Australian Standard. AS 2858 - 1986 the grades required are as follows : (Stress Grade) (1) Structural Grade 2 F11 (2) Structural Grade 3 F 8
Treatment Condition	Pressure treated timber is not required. But, antistained Sap stained treatment is necessary to prevent any decay or fungal attack in transit. The timber should be antistained Sap treated. 30
Seasoning Condition	. . .
Seasoned Timber	(*a*) [moisture content] of timber should not be more than 15% m.a.

Under the terms of the contract, the claimant was required to furnish a performance bond to the value of 10% of the contract price, within 14 days of the acceptance of its tender; within seven days of the receipt of the performance bond, the STC was obliged to establish an irrevocable letter of credit; and the claimant had to ship the total quantity in one shipment within 45 days of the date of the letter of 40 credit. Other relevant terms were as follows :

MODE OF PAYMENT : Payments will be made by means of Irrevocable Letter of Credit . . . [providing] for payment of 90% of the C&F

value . . . to be made against the relative set of Shipping Documents which shall consist of :

(*a*) Full set of Clean, On Board, Freight pre-paid Marine Bill of Lading in a set of 03 originals . . .

(*b*) Manually signed invoices . . .

(*c*) Certificate of origin . . .

(*d*) Certificate of Grading, Species, Quantity and Quality from Standards Association of Australia or approved Timber Authority of the country of origin [acceptable] to STC . . . 50

(*e*) Manufacturer's certificate of inspection.

(*f*) Packing list . . .

(*g*) Certificate from the beneficiary that he has faxed direct to the Chairman, STC . . . copies of documents listed in (*a*) to (*f*) . . . within 02 days from the date of Bill of Lading . . .

ADVANCE NOTIFICATION : Immediately before the goods are shipped the seller shall send to the buyer a Fax/Telex stating the name of the vessel, ETA of the vessel, the quantity 60 shipped . . .

TERMINATION OF CONTRACT : If the seller violates any of the Terms or Conditions . . . the buyer shall be entitled to forthwith teminate this Tender/Contract.

Should seller anticipate at any time . . . that he will be unable to deliver the goods wtihin the time specified in this contract, he shall at once give notice accordingly in writing to the buyer explaining the cause of the delay. Upon the receipt of such

notification of the seller, the buyer will have the option of either granting extension or termination of this contract . . . 70

There was no requirement of a certificate regarding "treatment" or "seasoning".

The claimant having duly furnished a performance bond on 05. 11. 93, sought permission on 09. 11. 93 to effect a partial shipment of 182.5 cubic metres. Having first refused, the STC later agreed, on 16. 11. 93. The claimant then confirmed that it would notify on 19. 11. 93 the exact amount of the first shipment, to be shipped on the vessel *Fishguard Bay* leaving Melbourne on 23. 11. 93, and that the balance would be shipped on another vessel on 14. 12. 93. The claimant then sent the pro forma invoice on 19. 11. 93; the STC 80 acknowledged receipt by fax dated 22. 11. 93, but pointed out an error, whereupon the claimant sent a corrected invoice the same day. The STC established a letter of credit on 03. 12. 93, which reached the claimant on 06. 12. 93. That called for a certificate different to the stipulation in clause (*d*) above, namely :

> "certificate of grading, species, *seasoning, treatment, quality and quantity from Forestry and Forest Products Industry Council* . . ." [emphasis added].

The letter of credit also required that certain identification marks be placed on each bundle of timber. The vessel had already left 90 Melbourne by then, and the claimant immediately notified STC that it was not possible to fulfil some of these new and/or amended terms. Further, it was admitted that the Assistant General Manager of STC knew that the Forestry (etc) Council had ceased to exist in 1990. The letter of credit also required negotiation within fourteen days of shipment, which period expired on 07. 12. 93.

Naturally, by fax dated 06. 12. 93, the claimant requested several amendments. Although there was evidence, in the arbitration proceedings, that the matter had been discussed by telephone, and that the

Deputy General Manager of the STC had agreed, the letter of credit 100 was never amended. Instead, by fax dated 08. 12. 93 the STC asked the claimant to courier the shipping documents, which it did. These included a certificate (which I will refer to as "the impugned certificate") from the "Timber Promotion Council" (TPC of Victoria, Australia, one entry in which referred to "seasoning" as "green".

The vessel arrived in Colombo on 09. 12. 93. Without any examination of the goods, by letter dated 09. 12. 93 the STC immediately terminated the contract for six stated reasons :

(1) The goods had been shipped before the letter of credit was established. 110

(2) Amendments to the letter of credit could not be made in violation of the tender conditions.

(3) The letter of credit required a certificate from the Forestry (etc) Council, but what was submitted was from the TPC.

(4) The specifications in that certificate did not conform to tender and letter of credit specifications. (The nature of that non-conformity was not then clarified).

(5) There were two bills of lading, and not one; besides, they did not indicate the quantity in cubic metres.

(6) The bill of lading was dated prior to the establishment of the 120 letter of credit.

There was no complaint that the moisture content of the timber exceeded 15% m.a.

The claimant duly gave notice of arbitration by letter dated 24. 01. 94 and submitted its claim on 04. 06. 96. The basis of that

was claim that the STC "had wrongfully and/or illegally and/or maliciously and/or fraudulently terminated the contract".

The STC in its statement of defence dated 20. 06. 96 objected to the jurisdiction of the arbitral tribunal, and pleaded that the STC had lawfully terminated the contract. 130

On 09. 07. 96, "the terms of reference for the arbitration" were signed by the parties. Thereafter, fourteen admissions were recorded, and 39 issues were framed by the parties : nine by the claimant, 26 by the STC, and a further four consequential issues by the the claimant. Counsel for the STC withdrew his objection to jurisdiction. Evidence was led on 16. 07. 96, 18. 07. 96, 23. 07. 96, 31. 07. 96, 08. 08. 96 and 16. 08. 96.

On 16. 08. 96, in the course of his cross-examination of the claimant's Managing Director, Counsel for the STC stated that the claimant-company had been deregistered and dissolved on 140 28. 08. 95; that, therefore, the claimant was not in existence at the time the statement of claim was filed; and consquently that the arbitration proceedings were a nullity. On 29. 08. 96, although Counsel for the STC contended that "actually an issue is not really necessary", all three Arbitrators insisted that an issue must be raised in regard to that matter. Counsel then raised five issues, which were allowed. On a subsequent day, 12. 11. 96, Counsel for the claimant raised four consequential issues, and tendered certain documents in proof of the fact that the company had been restored to the roll with effect from 11. 09. 96. On 18. 11. 96, both Counsel stated that they did 150 not intend to lead any evidence as to the Australian law. Having heard Counsel on 29. 08. 96, 12. 11. 96 and 18. 11. 96, the arbitral tribunal ruled against the STC on 28. 11. 96. One Arbitrator held that – assuming, on the basis of the admissions, that the claimant-company had been *deregistered* – it had not been proved that it had been *dissolved*. The other two Arbitrators held that the claimant-company had been restored to the roll, and was thereupon in the same position as if its registration had never been cancelled.

On 16. 08. 96, before that question of deregistration arose, the claimant's Managing Director had testified that the impugned certificate 160 had been received from the supplier of the timber, "Thompson Saw Mills", who had obtained it from TPC. Counsel for the STC then tendered an affidavit dated 06. 08. 96 from Bill Morrison (described as Quality Assurance Manager of TPC) to the effect that the impugned certificate tendered by the claimant was a forgery. Counsel for the claimant objected, submitting that the impugned certificate had already been produced without objection, that forgery must be established by the best evidence, and that the maker of the affidavit should give evidence and be cross-examined. Counsel for the STC then said he would get down Morrison only if the affidavit was rejected. The 170 Chairman of the arbitral tribunal then asked him to make up his mind whether he was calling Morrison, to which Counsel's response was "provided the claimant deposits the costs incurred in the tribunal". The Chairman then ruled that :

> "According to Morrison this document which is a vital document produced by the claimant is a forgery. *The issue of forgery has been raised, and in our view forgery should be established beyond reasonable doubt by positive evidence.* It is not sufficient to base our conclusion that an important document such as [this] is a forgery on the belated affidavit of one Mr. Morrison purported to 180 be from Australia. We know that Mr. Morrison has been listed as a witness for the [STC], but [its Counsel] states that he is not calling Mr. Morrison. The position of the tribunal is that we cannot accept a series of allegations on forgery without the person testifying and subjecting himself to cross-examination . . . Therefore, we reject the affidavit." [emphasis added].

This ruling, and in particular the observation "*the issue of forgery has been raised*" did not mean that the question of forgery had been duly put in issue. In the context, it only meant that an *allegation* of forgery had been made, and that the arbitral tribunal was not 190 [illegible] to hold it *proved* on the basis of an untested affidavit.

No issue was framed, the affidavit was rejected, and the matter was – for the time being at least – closed. The fact that immediately thereafter, on the same day, the tribunal insisted on formal issues (in regard to deregistration) serves to emphasise that that was the procedure which the tribunal chose to adopt.

The question of forgery was reverted to on 12. 11. 96. After counsel for the claimant had raised four more issues regarding deregistration, counsel for the STC stated that he would be calling Morrison to testify in regard to forgery. Although by then counsel had, between them, raised 48 issues on a very wide range of matters, and despite the arbitral tribunal's previous insistence on issues on 29. 08. 96, counsel for the STC did not raise any issue regarding forgery. 200

One other matter merits mention. The claimant's Managing Director also testified that in January, 1994, the Chairman of the STC had induced him to hand over an undated letter, dictated by the latter, containing an admission that the timber had been shipped contrary to the tender conditions and the letter of credit, upon the latter's assurance that "if you give me a letter like this with these words, we will cancel the L. C. and take your timber". Although listed as a witness, the Chairman of the STC did not give evidence to contradict that accusation. An issue on that point was answered in favour of the claimant by the majority of the tribunal. 210

On 10. 12. 97 the Chairman and one Arbitrator held that the timber shipped was in conformity with the contract specifications (including moisture content), that partial shipment was with the consent of the STC, and that the termination of the contract was wrongful. In two separate awards, they upheld the claimant's claim. The third Arbitrator disagreed. Their findings in regard to the allegation that the impugned certificate was a forgery are most relevant to this appeal. 220

The Chairman held that the genuineness of the impugned certificate was never put in issue; that a specific issue would have enabled the

claimant to know what case it had to meet; and that, therefore, the claimant was not obliged "to counter the conjecture suggested by Bill Morrison". The Arbitrator who agreed with him did not add anything on that point. However, in his previous ruling on the question of deregistration, he had cited with approval the following passage from *The Law and Practice of Commercial Arbitration* (Mustill & Boyd, 2nd edition, page 317) :

> "In many arbitrations, the issues lie within a narrow compass, 230 and it is plain from the outset what points the arbitrator must decide, and what case each party will have to meet. In other instances, the dispute opens up a wide field of issues, or potential issues; *and in these cases* it is desirable to carry out, in one form or another, a process whereby the issues are defined in writing."

The third Arbitrator held that there was "a preponderance of evidence" that the impugned certificate was a forgery, and that the claimant had not established its genuineness. In considering such "preponderance" to be sufficient, he overlooked the tribunal's previous unanimous ruling that *"forgery should be established beyond reasonable doubt by positive evidence"*. As for the lack of an issue, he 240 observed :

> "The concept of framing of issues of matters in contest between the parties is a concept in the Civil Procedure Code. There is no provision for the framing of issues in the Arbitration Act. However, as a matter of convenience to spotlight the case presented by each party, *and where there is no agreement issues are framed* . . .[citing certain decisions]. The parties are entitled to suggest issues but it is the ultimate responsibility of the Court to frame the issues . . . 250
>
> I have adverted [to] the question of framing of issues since it can be contended that no issues had been raised regarding the [impugned] certificate being a forgery. *Undoubtedly, this is a serious lapse on the part of the counsel for the [STC].* He should have

specifically raised this issue after the evidence of Bill Morrison was led. However, in view of the expenses incurred and the time taken to have his evidence recorded and the substance of what has transpired in evidence, both in examination-in-chief and in cross-examination, I am of the view that the placing of the evidence of Morrison in these proceedings was not meant to be an exercise 260 in futility. This evidence was specifically led because of [*sic*] the impact of the facts deposed to by him was of vital importance. Though counsel for [STC] had failed to do so, *I think it was the duty of this tribunal to have raised the issues on this evidence.* The issue that would arise therefore would read : Is the [impugned] certificate a forgery? The answer of which would be in the affirmative. The consequential issue to this would be : If so had the claimant failed to furnish a valid certificate as required by . . . the tender documents? The next issue would then be : If so can the claimant claim relief in these proceedings? The answer 270 of which would be no." [emphasis added].

The STC made application dated 29. 12. 97 to the High Court to set aside the majority award, annexing copies of the three awards. The claimant made an application dated 21. 01. 98 for the enforcement of the award, annexing copies of the three awards. Those copies were certified by an attorney-at-law, and were described in paragraph 13 of the application as "duly certified" copies. The STC, in its objections dated 27. 02. 98, admitted paragraph 13. The two applications were consolidated in terms of section 35 (1) of the Arbitration Act, and after inquiry the learned High Court Judge made one order dated 280 09. 02. 99, delaing with both applications together. He refused the application for enforcement and set aside the majority award, on the ground that the application for enforcement was not accompanied by a duly certified copy of the award; that the award was based on a forged certificate, and therefore that it was contrary to public policy to enforce it; and that the claimant-company had been deregistered and lacked legal capacity at the time of the reference to arbitration. The claimant appealed to this Court with leave on those questions.

Both counsel made extensive oral and written submissions which have helped me greatly in reaching a decision. 290

DULY CERTIFIED COPY OF THE AWARD :

Section 31 (2) (*a*) requires an application to enforce an award to be accompanied by "a duly certified copy of such award", and that :

". . . a copy of an award . . . shall be deemed to have been duly certified if –

(*i*) it purports to have been certified by the arbitral tribunal or by a member of that tribunal; or

(ii) it has been otherwise certified to the satisfaction of the Court." 300

The learned High Court Judge held :

" I am afraid that the *certification by an attorney-at-law cannot be accepted as duly certified under the second limb of that section.* What is envisaged as "duly certified" in that section is certification by the Arbitral Tribunal or by a member of the Tribunal or *by the Registrar of the Arbitration Tribunal* and certainly not an attorney-at-law representing a party. However, in this case [subesquently claimant's counsel] had filed the certified copies of the Arbitral Agreement and the Arbitration awards duly certified by the Registrar of the National Arbitration Centre. 310

Section 31 (2) . . . is a mandatory provision. It provides that the application to enforce the award shall be accompanied by the original of the Arbitration Agreement and the original of the award or duly certified copies to the satisfaction of the Court . . .[if not] the application will have to be dismissed *in limine. The defect cannot be cured by submitting the said duly certified documents at a subequent stage.*

An award made by an arbitrator is equivalent to the judgment of a civil court. The Arbitration Act provides that on application being made to enforce the award, by the High Court, the award is made a decree of the High Court. For the High Court to enter decree on 320 the same lines as the award either the original of the award or a duly certified copy certified either by the Arbitral Tribunal or a member of the Arbitral Tribunal or *by the Registrar of the Arbitration Centre* has to be tendered with the application. This is to ensure that the decree that will be entered by Court will be only on the lines of the arbitral award. Otherwise there can be abuse of process. If, for example, an unscrupulous person files a copy of a fictitious award in the High Court falsely certified by a dishonest attorney-at-law, on such application being made, the High Court is required to enter decree on the lines of the fictitious award and enforce the 330 same . . .To prevent such abuse of the process of Court, the Legislature in its wisdom had made it mandatory for a party seeking enforcement to produce the original or a duly certified copy along with the application to enforce the award at the time the application is filed to Court *and not thereafter.*" [emphasis added].

The learned High Court Judge failed to give full effect to clause (ii) of section 31 (2). That clause unambiguously provides for a mode of certification additional to that prescribed by clause (i). But, for that clause certification by the Registrar of the Arbitration Centre would not have been acceptable. Clause (ii) requires the High Court in each 340 case, having regard to the facts of the case, to decide whether the document is certified to its satisfaction. The learned Judge erred in laying down a general rule – founded on a virtual presumption of dishonesty – which totally excludes certification by an attorney-at-law regardless of the circumstances. The position might have been different if the application for enforcement had been rejected promptly on presentation, for then there might well have been insufficient reason to be satisfied that the copy was indeed a true copy : and that would have caused no injustice, as the claimant could have filed a fresh application. But, I incline to the view that even at that stage the 350

application should not have been summarily rejected. The claimant should have been given an opportunity to tender duly certified copies, interpreting "accompany" in section 31 (2) purposively and widely (as in *Sri Lanka General Workers' Union v. Samaranayake*[1] and *Nagappa Chettiar v. Commissioner of Income Tax.*[2]) Undoubtedly, section 31 (2) is mandatory, but not to the extent that one opportunity, and one opportunity only, will be allowed for compliance. In the present case, however, the order was not made immediately, but only after the lapse of the period of one year and fourteen days allowed for an application for enforcement. By that time, the learned Judge had 360 consolidated the proceedings : hence he could not have ignored the certified copies filed in the STC's application, which admittedly, were identical in all material respects to the copies tendered with the claimant's application. He had also to consider (even if he was not bound by it) the admission in the STC's statement of objections that those copies were "duly certified", as well as the fact that, by then, the claimant had also tendered copies certified in terms of clause (i). It was on all that material that the learned Judge had to decide whether the copies had been certified to his satisfaction. In deciding that issue, he was perfectly correct in noting that the Court had to ensure that 370 it "gave judgment according to the award" (*cf* section 31 (6)) : the object of section 31 (2) was to ensure that the High Court did have true copies of the award. It was not reasonable, on the facts of this case, to conclude that the copies initially filed were anything but true copies of the originals. There was not even the faintest suspicion or suggestion that they were inaccurate.

I hold that the learned High Court Judge erred in law in rejecting the copies of the award filed by the claimant.

DEREGISTRATION OF CLAIMANT :

The learned High Court Judge held that the claimant : 380

"was suffering from an incapacity at the time [it] filed the letter [referring] the matter for arbitration . . . on the 9th of July, 1996,

when [the claimant] was deregistered. Therefore, when [the Managing Director] signed [that letter] the company was legally a non-existent entity. Hence, there was no valid reference to arbitration."

The question of incapacity depended upon Australian law relating to the effect of deregistration and registration and restoration to the roll. Upon the invitation of the parties, the arbitral tribunal decided that question, as a preliminary issue, against the STC. Such a decision, made in the course of arbitral proceedings, is binding by virtue of section 19 of the Act, which – unlike section 26 – has not been made expressly subject to any other provision of the Act. 390

Let me assume, however, that section 19 **is** subject to Part VII of the Act, and that section 32 (1) (*a*) (i) gives the High Court a discretionary power to set aside the award. However, that provision is applicable only upon proof that "a party to the *arbitration agreement* **was** *under some incapacity*", i.e. that there was an incapacity to which the party **was** subject when that arbitration agreement was entered into. Such incapacity would vitiate that agreement. That provision, however, does not apply to a valid arbirtration agreement, where a party later **became** subject to some incapacity. 400

Further, what is relevant is the arbitration *agreement,* and not other steps in the arbitration proceedings. The *arbitration agreement* means the agreement to refer to arbitration – and here that means the arbitration clause contained in the contract entered into in October, 1993. At that time, there was no question of deregistration.

The learned High Court Judge has considered the question of incapacity as at 09. 07. 96. Any incapacity on that date was not in respect of the arbitration agreement, and was, therefore, irrelevant. In any event, he has given no reason whatever for the view that the claimant was legally non-existent on 09. 07. 96. The legal effect of restoration to the roll has not even been mentioned. No reference 410

has been made to the findings of the Arbitrators, let alone any discussion of their reasons.

I hold that the learned High Court Judge erred in holding that the claimant was under an incapacity falling within the scope of section 32 (1) (*a*) (i).

PUBLIC POLICY :

Section 17 of the Act gives the parties the freedom to agree on 420 the procedure to be followed by the arbitral tribunal. Section 19 makes any decision made in the course of arbitral proceedings binding. Section 26 provides :

"Subject to the provisions of Part VII . . . the award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement."

Part VII contains section 32 (1) (*b*) (ii), which empowers the High Court to set aside an arbitral award where "the arbitral award is in conflict with the public policy of Sri Lanka".

The learned High Court Judge held (after referring very briefly to 430 Morrison's evidence) that the impugned certificate had been proved to be a forgery. He then added that there was a finding by one Arbitrator that the impugned certificate was a forgery. He noted that "although the Chairman . . . had faulted the STC for not framing an issue on . . . forgery", in terms of section 17 "the parties have apparently followed the Civil Procedure Code and have framed issues", that under section 146 of the Code "it is the duty of the Court to frame issues and that duty is not cast on the parties"; and that at least after Morrison had testified that the impugned certificate was a forgery, it was the duty of the arbitral tribunal to have framed an 440 issue on the question of forgery. He observed that no such issue was framed, and that the majority had accepted that certificate as a genuine

certificate "and proceeded to make awards based on this forged document". He concluded that forgery is an offence under the laws of Sri Lanka and Australia, and that it is against public policy to act on a forged document, and to enforce an award based on a forged document.

It would be an oversimplification to describe the question for determination as being "Is it contrary to public policy to enforce the majority award on the ground that it was based on a forged 450 document?"

Several questions arise. Did the majority err in refusing to consider the question of forgery in the absence of a specific issue? Could the question of forgery have been raised in the High Court? Was the High Court right in concluding that the impugned certificate was forgery?

It is very clear that the arbitral tribunal and the parties adopted the procedure of framing issues. There were numerous disputes and potential disputes, including several matters not raised in the letter of termination dated 09. 12. 93. All these had to be identified with 460 sufficient precision for several reasons. The arbitral tribunal needed to know what exactly it had to decide in its award – deciding all the matters, and **only** the matters, which it was required to decide, and not deciding any others. Each party needed to know from the beginning what case it had to meet, so as to ensure an orderly presentation of evidence and submissions. Since parties sometimes change positions, or adopt new positions, in the course of an arbitration, the questions which then arise need to be recorded with clarity and certainty. Issues were, therefore, necessary. Thus, when at one point counsel for the STC submitted that an issue on deregistration was 470 not really necessary, the arbitral tribunal insisted that it was. Indeed, the learned High Court Judge rightly observed that "the parties have apparently followed the Civil Procedure Code and have framed issues". While it is certainly not desirable that Arbitrators should mechanically

copy court procedure and practice in every respect, this was a case in which issues were essential, and that was accepted by all three Arbitrators.

The learned High Court Judge erred in holding that it was the duty of the arbitral tribunal to have framed an issue on the question of forgery. A party and its legal advisers are presumed to know best what its case is, and what matters it should urge – and what matters it should not. It is true that section 146 (2) of the Civil Procedure Code expressly imposes a duty on a trial Judge to frame issues, where the parties are not agreed as to the issues. It is unnecessary to decide whether that same duty is cast upon an arbitral tribunal because this was not a case where the parties were *not agreed* as to an issue; it was, rather, a case where the STC *failed to suggest* an issue. It was not even an issue which arose from the pleadings. The tribunal was not obliged to frame an issue as to forgery. 480

The third Arbitrator ventured to frame, and to answer, what he considered to be the issues relevant to forgery. Even if I were to assume that, in the circumstances, the arbitral tribunal did have a power to frame such issues, natural justice required that the affected party should have been informed of those issues, and given an opportunity to suggest consequential issues and to lead further evidence – particularly, because the standard of proof of forgery proposed to be applied was lower than that notified to the parties. 490

I hold that, in the circumstances, the majority was justified in refusing to consider the question of forgery without a specific issue, and the High Court was not entitled to review that decision on the ground of public policy or otherwise, under section 32 (1) of the Act. 500

Even if the question of forgery could have been raised in the High Court, I hold that the learned High Court Judge's conclusion that the impugned certificate was a forgery is unsustainable. That conclusion was based partly on his own evaluation of the evidence and partly

on the third Arbitrator's finding. Not only did he fail to consider the burden of proof required, but he overlooked the fact that the third Arbitrator's finding was on a mere "preponderance of evidence" contrary to the arbitral tribunal's previous unanimous ruling that forgery required proof beyond reasonable doubt – a proposition amply supported by 510 a long line of decisions delaling with proof of fraud, forgery and other criminal conduct in civil cases (*Narayanan Chettyar v. Official Assignee,*[3] *Coomaraswamy v. Vinayagamoorthy,*[4] *Selliah v. Sinnammah,*[5] *Muthumenika v. Appuhamy,*[6] *Lakshmanan Chettiar v. Muttiah Chettiar,*[7] *Yusoof v. Rajaratnam.*[8]) Finally, that conclusion was reached without appreciating that it involved a denial of natural justice to the claimant.

I must now refer to some of the decisions cited by learned counsel for the STC.

In *Soleimany v. Soleimany,*[9] it was apparent on the face of an 520 arbitration award that the arbitrator was dealing with an illicit enterprise under which it was the joint intention of the parties that carpets would be smuggled out of Iran illegally. The arbitrator considered that illegality to be of no relevance since he was applying Jewish law under which it would have no effect on the rights of parties. It was held that that illegality did not invalidate the arbitration agreement; that the arbitrator had jurisdiction to consider the question of illegality; that a claimant seeking to enforce the award in England could do so only subject to English law; that the interposition of an arbitration award did not isolate the successful party's claim from the illegality which 530 gave rise to that claim; and that, therefore, enforcement of the award would be contrary to public policy.

In *Westacre Investments v. Jugoimport-SPDR,*[10] it was held that a party resisting enforcement of an arbitral award would not normally be permitted to adduce evidence that the award had been obtained by perjury, unless that evidence was so cogent and weighty as to be likely to have materially influenced the arbitrators' conclusions had it been adduced before them but was not available or reasonably

obtainable either at the time of the arbitration proceedings or in the relevant court of supervisory jurisdiction. 540

Another decision cited was *International Brotherhood of Electrical Workers v. Iowa Electric Light and Power Company.*[11] An arbitrator ordered reinstatement of a nuclear power plant employee who had been dismissed for deliberately violating important federally mandated safety regulations for no better reason than that he wanted to get an early start for lunch. That order was set aside, the Court holding that "once the public policy question is raised, we must answer it by taking the facts as found by the arbitrator, but reviewing his conclusions *de novo*".

In view of my conclusion that forgery was not duly put in issue 550 and proved, none of those decisions assist the STC. A finding of forgery was not among the facts found by the majority of the arbitral tribunal, and such a finding was not apparent on the face of the award. The STC despite having had evidence of the alleged forgery at least midway through the proceedings, nevertheless failed to raise the relevant issue.

ORDER :

For the above reasons, I allow the appeal, and set aside the order dated 09. 02. 99 of the High Court. The application made by the STC to set aside the arbitral award is refused. The claimant's application 560 for the enforcement of that award is allowed, and the High Court is directed to file the award, give judgment according to the award, and to enter decree accordingly. The claimant will be entitled to costs of appeal in this Court, and to costs in respect of both applications in the High Court, in a sum of Rs. 100,000.

GUNASEKERA, J. – I agree.

WIGNESWARAN, J. – I agree.

Appeal allowed.