LIGHT WEIGHT BODY ARMOUR LTD.
v
SRI LANKA ARMY

SUPREME COURT
TILAKAWARDANE, J.
DISSANAYAKE, J.
SOMAWANSA, J.
SC (HCA) 27A/2006
SCHCLA 69/2005
HC COLOMBO 125/4
OCTOBER 27, 2006
NOVEMBER1, 27, 2006

Arbitration Act – 11 of 1995 – Section 25, Section 26, Section 31, Section 32(1) – Award – Grounds of Challenge? – Award against public policy? Is it a ground? – 1958 New York convention.

A dispute in relation to the payment of a certain sum of money by the respondent to the claimant-appellant was referred for arbitration. The matter

contested at the arbitration focused on the quality of the body armour supplied by the claimant-appellant, as to whether it met the specification as set out in the tender documents.

The award was in favour of the claimant appellant. The respondent preferred an application under section 32(1) of the Arbitration Act seeking to set aside the award to the High Court. The High Court set aside the award.

In appeal, in the Supreme Court, it was contended by the appellant, that there was a valid award in terms of section 25(2) and that the award was not against public policy and merits or findings of the award could not be challenged.

Held:

(1) Section 32 contains the sole grounds upon which an award may be challenged or set aside Courts have no jurisdiction to correct patent and glaring error of law in an award unless the error can be established to be a jurisdictional error or can be shown to be of such a nature as to render the award contrary to public policy.

The Arbitration Act – contemplates that the 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.

Per Shiranee Tilakawardane, J.

"In exercising jurisdiction under section 32 Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal. The Court cannot re-examine the mental process of the Arbitration Tribunal contemplated in its findings nor can it revisit the reasonableness of the deductions given by the arbitrator – since the arbitral tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties – the only issue that needs consideration is whether the purported fundamental flaws of the award in question would tantamount to a violation of public policy."

(2) The doctrine of public policy is somewhat open ended and flexible capable of wide and expansive definition, it is this flexibility leading at times, to inconsistency and unpredictably in application, which has led to judicial censure of the doctrine and earned it the reputation as one of the more controversial exceptions to the enforcement of arbitral awards.

Per Shiranee Tilakawardane, J.

"Public policy is generally those moral social or economic considerations which are applied by courts as grounds for refusing enforcement of the arbitral award, another view would equate public policy with the policy of law, whatever leads to the obstruction of justice or violation of a statue or is against the good morals of a society can be deemed as being against public policy and therefore not susceptible to enforcement, further instances such as corruption, bribery and fraud

and similar serious cases would constitute a ground for setting aside an award."

(3) It is generally understood that the term public policy which was used in 1958 New York Convention and many other treaties covered fundamental principles of law and justice in substantive as well as procedural aspects.

The arbitral award is not in violation of the public policy of Sri Lanka.

APPEAL from a judgment of the Colombo High Court.

Cases referred to:

1. *Richardson* v *Melis* – 1824 Bing 228
2. *D.S.T.* v *Rakoil.*
3. *Deutche Schachtbau – und Triefbohrgesellscraft mbh* v *Ras Al kaimah National Oil Company* 1987 – Lloyds Rep. 246.

Aravinda Rodrigo for claimant respondent-petitioner.
Sanjay Rajaratnam DSG with *Viraj Dayaratne* SSC for respondent-petitioner-respondent.

May 23, 2007
SHIRANEE TILAKAWARDANE, J.

The notice of arbitration dated 17th August 2000 (X7) referred a dispute that had arisen between Light Weight Body Armour Ltd. the Claimant-Respondent-Petitioner and the Sri Lanka Army, the Respondent-Petitioner-Respondent relating to the payment of US$ 549,240/- being the balance sum due for the supply of body Armour by the Claimant-Respondent-Petitioner to the Sri Lanka Army.

The matters contested at the arbitration focused on the quality of the body Armour supplied by the claimant – as to whether it met the specifications set out in the tender documents and whether the requirements as to ballistic suitability had been met in terms of the Agreement.

At the hearing, parties led the evidence of several witnesses and produced several documents. The unanimous decision of the 3 Arbitrators was delivered on 7th 2004, in favour of the claimant-respondent-petitioner (P8). In terms of this Award the petitioner was awarded a sum of US$ 549,240/- together with legal interest thereon (at the rate applicable on the date of the Award) from 1.6.1999 till 19.3.2001 and from 19.3.2001 on the said sum of US$ 549,240/- till 7.7.2004 and from 7.7.2004 with further legal interest at the same rate on the aggregate amount of the Award and costs in a sum of Rs. 250,000/- payable to the claimant by the respondent.

The respondent did not comply with the Award. The respondent thereupon preferred an application in terms of section 32(1) of the Arbitration Act No. 11 of 1995 seeking to set aside the Award dated 7th July 2004. After hearing both parties, the High Court Judge Colombo, in his judgment dated 21.09.2005 set aside the aforesaid Arbitral Award (X19). The said judgment incisively considered the merits of the case and the evaluation of the facts pertaining to all the issues canvassed during the Arbitration, including matters pertaining to the burden of proof on the litigating parties and the ballistic suitability of the body Armour.

On 25.04.06 Leave to Appeal was granted against the said High Court Judgment on the questions of law set out in paragraphs 22(a) to (e) of the petition.

The only two matters urged by the petitioners and the respondents during the hearing of this case and in the written submissions were confined to-

3. Whether it was a "valid Award" in terms of section 25(2) of the Arbitration Act in as much as the determination that had been made with regard to the ballistic capability, was wrong only because it was "abrupt", meaning that such could not have been reached logically and inferring thereby that it was a perverse determination.
4. Whether the Award was against public policy?

Counsel for the respondent-petitioner-respondent has submitted that the Award is analogous to an Award that had no reasons and therefore was in contravention of the statutory form and content of an Award as set out in section25(2) of the Arbitration Act. According to the respondent-petitioner-respondent, the award was fundamentally flawed as it had not dealt adequately with the question of "ballistic capability" and did not contain "valid reasons" for the findings contained therein and it contained internal contradictions on the question of misrepresentation.

The claimant-respondent-petitioners contended that the Arbitral Award was not against public policy and that the merits or findings of the Award could not be challenged as the Award which ran into several pages had set out reasons, which logically led to the findings and

therefore the conclusions could not be challenged. The claimant-respondent-petitioner also submitted that the merits of an Arbitral Award could not be considered in an Appeal, which takes the pattern of a regular Appeal. It was contended that an Award could only be set aside in terms of the statutory provisions contained in section 32(1) of the Arbitration Act.

It was considered by all Counsel at the inception of the hearing that the only grounds on which an Award could be set aside were contained in section 32(1) of the Arbitration Act No. 11 of 1995. Indeed the application for setting aside the Award before the High Court was made only in terms of section 32(1) of the Arbitration Act. Parties also conceded that it was an immutable fact that section 26 of the Arbitration Act provides clearly that an Arbitral Award is final and binding on the parties to the Arbitration Agreement.

Section 32 of the Arbitration Act sets out the grounds upon which an application could be made to the High Court by a party to the arbitration seeking to set aside an arbitral Award section 32(1) stipulates that -

"*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 subject it or, failing any indication on that question under the law of Sri Lanka; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the Arbitral proceedings or was otherwise unable to present his case; or

(iii) the Award deals with a dispute not contemplated by or not falling within the terms of the submission to Arbitration, or contains decisions on matters beyond the scope of the submission to Arbitration.

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; 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."

On a bare reading of section 32(1), it is clear that the opening paragraph applies to both sub-paragraphs (a) and (b) of the section. 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 *ex mero muto* on the facts pleaded, in order to determine whether an Award should be set aside on these grounds.

Section 32(1) contemplates that a party wishing to have an arbitral Award set aside must satisfy the Court that his allegations are true. The onus of proving grounds under section 32(1)(a) rests solely on the party who makes the application to set aside the Award.

On the other hand, section 32(1)(b) permits the High Court to come to a finding as to whether the subject matter of the dispute is incapable of being settled under Sri Lankan law or whether the Award is in conflict with public policy of Sri Lanka – such consideration only confined to the pleadings placed before it by an application made to Court within the stipulated time period. Though it does not require the party to furnish proof in order to have the Award set aside, it is imperative under section 32(1)(b) that there should be sufficient material in the application for the High Court to come to a finding or determination that the Award should be set aside on the ground set out in that section.

It is important to remember that when parties choose Arbitration as a means of dispute settlement, they do so to the exclusion of all other forms of settlement. Parties who wish to take advantage of the opportunity to decide and resolve the important issues relating to the dispute by themselves are aware that the Award is final and binding between the parties as provided under section 26 of the Arbitration Act. The only exception to this rule is provided in the ground enumerated in Part VII of the Arbitration Act. Section 32 of the Act contains the grounds and the time period within which an Arbitral Award may be challenged.

Considering the respondent-petitioner-respondent's challenge that the award is fundamentally flawed and liable to be set aside based on the alleged flaws in the arbitrators approach to the question of fraud and innocent misrepresentation, and the proof thereof, I find this contention to be untenable in law,since error of law on the face of the record is not a valid ground of challenge of an arbitral award under section 32 of the arbitration Act. As section 32 contains the sole grounds upon which an Award may be challenged or set aside, courts have no jurisdiction to correct patent and glaring errors of law in an Award unless the error can be established to be a jurisdictional error or can be shown to be of such a nature as to render the Award contrary to public policy.

In India prior to enactment of the Indian Arbitration Act of 1996 an error of law apparent on the face of the record was recognized as a valid ground upon which an arbitral Award could be challenged. Earlier the position under the Act of 1940 was that an arbitral Award is susceptible to challenge if an erroneous proposition of law is stated as a basis of the Award. With the enactment of the Arbitration Act in 1996 the present Indian position is similar to that of Sri Lanka and the grounds of challenges are restricted to those specified in section 34 of the Indian Arbitration Act.

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 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.

Thus in exercising jurisdiction under section 32 of the Act, the Court cannot sit in appeal over the conclusions of the arbitral Tribunal by re-scrutinizing and re-appraising the evidence considered by the arbitral Tribunal. A plain reading of section 32 precludes judicial demolition of an Award on the facts elicited therein. The Court cannot re-examine the mental process of the Arbitral Tribunal contemplated in its findings, nor can it revisit the "reasonableness" of the deductions given by the arbitrator, since the Arbitral Tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties.

Therefore in light of section 32, the contention of the respondent-petitioner-respondent that the Award should be set aside on the basis that it is fundamentally flawed on fact and law is of no merit. The only issue that needs consideration is whether the purported fundamental flaws of the award in question would amount to a violation of public policy in Sri Lanka.

In their written submissions, the respondent-petitioner-respondents focused on section 32 of the Arbitration Act, and contended that since the award was fundamentally flawed, an ordinary, reasonable and fully informed member of the public would find it offence that the Award was to be enforced by a Court of law. In support of this position, it was also suggested by the respondent-petitioner-respondent that the concept of public policy should be expanded beyond that of illegality and immorality.

The doctrine of public policy is somewhat open ended and flexible, capable of wide and expansive definition. It is this flexibility leading at times, to inconsistency and unpredictability in application, which has led to judicial censure of the doctrine and earned it the reputation as one of the more controversial exceptions to the enforcement of Arbitral awards. In *Richardson* v *Mellis*[1], the Court succinctly observed that public policy is "....a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail. The Court in *D.S.T.* v

Rakoil,[2] *Deutsche Schachtbau-und Tiefbohrgesellscraft mbh* v *Ras Al Kaimah National Oil Company*,[3] state that "considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution .... It has to be shown that there is some element of illegality or that the enforcement of the award, would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary responsible and fully informed members of the public on whose behalf of the powers of the state are exercised."

The concept of public policy is not immutable. Rules which rest on the foundation of public policy, not being rules of fixed customary law, are capable on proper occasion of expansion or modification depending on the circumstances. Public policy is generally those moral, social or economic considerations which are applied by Courts as grounds for refusing enforcement of an arbitral Award. The House of Lords in 1853 described the public policy as "that principle of law which holds that no subject can lawfully do that which has the tendency to be injurious to the public or against public good."

Another view would equate public policy with the "policy of law". Whatever leads to the obstruction of justice or violation of a statute or is against the good morals of a society can be deemed as being against public policy and therefore not susceptible to enforcement. (Vide, Dr. B.P. Saraf, J.&S.M. Jhunjhunuwala, J., on The Law of Arbitration and Conciliation at page 361).

It is generally understood that the term public policy which was used in 1958 New York Convention and many other treaties covered fundamental principles of law and justice in substantive as well as procedural aspects. Thus instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside. However, the facts of this case do not bear out any such incident of illegality, fraud or corruption in order to validate a challenge on the ground of public policy.

It is also important that a Court considering a challenge on the basis of public policy bear in mind the possibility of the misuse of this doctrine by a defendant in order to avoid the consequences of the arbitral award. Certainly the uncertainty and inconsistencies concerning the interpretation and application of public policy could encourage the

losing party to rely on the doctrine of public policy to resist, or at the very least delay enforcement of the arbitral award. Therefore the Court must also bear in mind the very legitimate concern that it may afford an unsuccessful defendant and/or the state a second 'bite' at frustrating enforcement.

In this case clearly the decision had been taken on the basis of the facts that were on record. Therefore the inadequacy, inadmissibility or impropriety of the evidence, particularly when both parties were represented, had the full opportunity to argue and present their respective cases and adduce any evidence they pleased, cannot be canvassed before the enforcing Court. In light of the evidence on record and the submissions of the parties, I find that the arbitral award is not in violation of the public policy of Sri Lanka.

Having considered the merits of the contentions raised by the parties in their legal context, I find that the Arbitral Award is not open to challenge on the ground that the arbitral Tribunal has reached a wrong or erroneous conclusion on the ballistic capability of the Armour, 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 and 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. Therefore an Award is not as a rule vulnerable to challenge except to the process and ambit contained in section 31 of the Act.

In these circumstances we see no merit in the arguments of the respondent-petitioner-respondent and find that the learned High Court Judge erred in deciding to set aside the award of the Arbitrators. The Judgment of the High Court is set aside. The appeal of the claimant-respondent-petitioner is allowed. No costs.

DISSANAYAKE, J. - I agree.

SOMAWANSA, J. - I agree.

Appeal allowed.