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

In the matter of an Application for Orders in the nature of Writs of Certiorari, Prohibition and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S Potencia L.L.C-FZ
Meydan Grandstand,
6th Floor, Meydan Road,
Nad Al Sheba Dubai, U.A.E.

CA (Writ) App. No. 1104/2025

PETITIONER

Vs.

1. Lanka Coal Company (Pvt) Ltd.
   No. 51/3, Suranimala Place
   Off Dutugemunu Street
   Kohuwela, Dehiwala.

2. Prof. K.T.M. Udayanga Hemapala
   Secretary to the Ministry of Energy
   Ministry of Energy
   No. 437, Galle Road, Colombo 03.

3. Hon. Eng. Kumara Jayakody
   Minister of Energy Ministry of Energy
   No. 437, Galle Road, Colombo 03.

4. Hon. Attorney General
   Attorney-General's Department
   Hulftsdorp
   Colombo 12.

5. Hon. (Dr.) Harini Amarasuriya
   Prime Minister and Minister of
   Education,
   Higher Education and Vocational
   Education.

6. Hon. Vijitha Herath
   Minister of Foreign Affairs,
   Foreign Employment and Tourism.

7. Hon. K.D. Lal Kantha
   Minister of Agriculture, Livestock,
   Land and Irrigation.

8. Hon. Bimal Rathnayaka
   Minister of Transport,
   Highways and Urban Development.

9. Hon. Sunil Handunneththi
   Minister of Industry and
   Entrepreneurship Development.

10. Hon. Ramalingam Chandrasekar
    Minister of Fisheries,
    Aquatic and Ocean Resources

11. Hon. (Prof.) Anil Jayantha Fernando
    Minister of Labour.

12. Hon. Samantha Viddyarathna
    Minister of Plantation and Community
    Infrastructure.

13. Hon. Anura Karunathilaka
    Minister of Ports and Civil Aviation.

14. Hon. (Dr).Nalinda Jayatissa
    Minister of Health and Mass Media.

15. Hon. (Dr.) A.H.M.H.Abayarathna
    Minister of Public Administration, Provincial Councils and Local Government.

16. Hon. Wasantha Samarasinghe
    Minister of Trade, Commerce, Food Security and Cooperative Development.

17. Hon. Harshana Nanayakkara
    Attorney-at-law
    Minister of Justice and National Integration.

18. Hon. (Mrs.) Saroja Savithri Paulraj
    Minister of Women and Child Affairs.

19. Hon. (Dr.) Upali Pannilage
    Minister of Rural Development, Social Security and Community Empowerment.

20. Hon. K.M. Ananda Wijepala
    Minister of Public Security and Parliamentary Affairs.

21. Hon. (Dr.) Hiniduma Sunil Senevi
    Minister of Buddhasasana, Religious and Cultural Affairs.

22. Hon. Sunil Kumara Gamage
    Minister of Youth Affairs and Sports.

23. Hon. (Dr.) Chrishantha Abeysena
Minister of Science and Technology.

24. Hon. (Dr.) Dammika Patabendi
Minister of Environment.

25. Hon. (Dr.) Susil Ranasinghe
Minister of Housing, Construction and Water Supply.

The 4th to the 25th Respondents above named together with the 3rd Respondent above named, all
Members of the Cabinet of Ministers of the Republic of Sri Lanka
Office of the Cabinet of Ministers
Loyd's Building,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

26. W.M.D.J. Fernando
Secretary to the Cabinet of Ministers
Office of the Cabinet of Ministers
Loyd's Building, Sir Baron Jayathilaka Mawatha, Colombo 01.

27. Eng. Wasantha Edussuriya
General Manager
Ceylon Electricity Board
3rd Floor, No. 50, Sir Chittampalam A. Gardiner Mawatha, Colombo 02.

RESPONDENTS

Before: K.P. Fernando J.

Dr. D. F. H. Gunawardhana, J.

Counsel:

Dr. Romesh De Silva, P.C. with Navin Marapana, P.C., Kaushalya Molligoda and Sahan Ginige instructed by Sanath Wijewardane Associates for the Petitioner.

Vikum de Abrew, A.S.G. with Rajin Gunaratne, S.C. for the 1st to 26th Respondents.

Argued on: 12.01.2026

Delivered on: 08.06.2026

Dr. D. F. H. Gunawardhana, J.,

Judgement

Introduction

Electricity has now become a part of life; it is not a luxury item anymore; it is recognised as an essential item of life. Initially, Sri Lanka's electricity was supplied by gas. The power supply underwent an evolution; in the course, at one point in time, the main source of electricity generation was hydro-generated electricity. Later, it became fossil fuel-based generated electricity; namely, electricity generated by diesel and other petroleum by-products, which counts for forty to forty-five percent of Sri Lanka's daily contribution to the generation of electricity to the national grid.

For that purpose, the Government has set up coal powerplant projects in three units in the rural area of Norochcholai, a village situated off Puttalum in the Kalpitiya Island. The 1st Respondent was incorporated as a body corporate to manage the same, and so far, it is provided that the 1st Respondent is a 100% government-owned entity. Once the power plant was commissioned, from time-to-time for the purpose of generating electricity, the 1st Respondent procured coal through various agents or suppliers. By 2022 and 2023, the supplier of coal was a foreign-based company. However, during the year 2022, Sri Lanka faced its worst foreign exchange crisis due to the shortage of foreign exchange. As such, then the supplier decided to withdraw from supplying.

In 2023, the Minister-in-charge submitted a Cabinet Memorandum to obtain approval of the Cabinet to enter into a new contract with a new supplier. Accordingly, a procurement committee was setup by the Cabinet, and through them, a new supplier was selected in the form of "*Black Sand Commodities FZ-LLC Limited*" (hereinafter referred to as the "Black Sands Ltd").

Accordingly, Black Sands Ltd, the 1st Respondent, who is the Managing Corporation of the said powerplant, entered into an agreement which is marked as **1R1** and is part of the record. However, after the supply of fifteen shipments, due to a certain crisis that Black Sands Ltd faced, resulting it being blacklisted. Then, with the consent of the 1st Respondent and the approval of the Cabinet, on the recommendation of the Honourable Attorney General, it had assigned its balance supply of coal shipment to the Petitioner. Accordingly, the Petitioner came into the picture. Thus, the Petitioner and the 1st Respondent entered into the agreement marked as **P2(a)**.

After the supply of the balance consignment of coal during the season which is pertinent to **P2(a)**, the parties have entered into the subsequent agreement **P3(c)** dated 12.09.2024 for the following seasons. After the fulfilment of the obligations of the parties, the 1st Respondent had requested a further additional supply of ten percent (10%) by **P4**, which is provided for in the agreement regarding any exigencies; this was confirmed by **P5**. However, suddenly with the change of the Government, the 1st Respondent had decided to rescind its request and cancel the agreement by **P6**. Then the dispute has arisen between the parties, and the Petitioner seeks to quash the cancellation of the agreement by the documents marked as **P6** and **P7** through these proceedings.

After issuance of formal notice, the Respondents have filed their respective Objections, and they have raised certain *inter alia* preliminary matters in their Objections as to the jurisdiction of this Court and sought the dismissal of this Application.

This was argued before Honourable Priyantha Fernando J., and me, on 12.01.2026; hence, this judgement.

The Petitioner's position

The Petitioner is a body corporate incorporated in the United Arab Emirates, and it has license to carry on its business, in proof of which it has annexed the document marked as **P1** to the Petition.

According to the Petition, the Petitioner and the 1st Respondent have entered into an agreement to supply coal from 2023/2024. The relevant agreement is marked as **P2(a)** annexed to the Petition, which is also a part of **P2(b)**. Once the parties fulfilled their obligations under **P2(b)**, the parties entered into another contract for the following year (2024/2025 season) as well, which is marked and annexed to the Petition as **P3(c**); this is also an addendum. Further, the Petitioner asserts that the according to **P3(c)**, in addition to the undertaking by the Petitioner to supply the relevant metric tonnes of coal for the relevant years of 2024/2025, if the Petitioner is required to supply a further ten percent (10%) of additional supply of coal, amounting to about 225,000 metric tonnes (MT), the Petitioner has to supply it in terms of the said agreement.

Accordingly, the Chairman of the 1st Respondent, by his letter marked as **P4**, dated 18.07.2025, has requested and informed the Petitioner to supply the additional 10% of the quantity of coal for the purpose of generating electricity without a break till the new contract is entered into between the 1st Respondent and a new party (coal supplier).

However, to the Petitioner's surprise and shock, the Petitioner has received the letter dated 24.10.2025, which is marked as **P6**, informing the Petitioner that the said balance of additional 10% consignment of coal is cancelled, and therefore, the Petitioner was requested not to supply the same. Thereafter, the Petitioner has sent a letter of protest by 27.10.2025 marked as **P6(a)**. In response to **P6(a)**, the Chairman of the 1st Respondent has sent the letter dated 28.10.2025, marked as **P7** stating that the agreement marked as **P3(c)**, between the Petitioner and the 1st Respondent to

supply coal, is revised and therefore, the additional 10% of the supply of coal is not necessary and the said decision has been taken pursuant to a Cabinet decision; as such, to cancel the supply of the additional 10% of the supply of coal.

Thereafter, the Petitioner has sought the intervention of the Court by instituting this Application.

Objections

The Respondents' have raised several objections to this Application. In the forefront of their objections, they have raised objections to the jurisdiction of this court. It is their position that the Petitioner has failed to place before Court, the entirety of the said contract entered into between the 1st Respondent and the Black Sands Ltd., where a separate agreement of arbitration is also entered into by and between the parties; as such, any dispute arising out of the said contract has to be resolved by referring to arbitration. Therefore, it is the Respondents' position that this Court does not have the jurisdiction.

Furthermore, the 1st Respondent has strongly taken up the position that the Petitioner has failed to place before Court, the entirety of the said agreement which is also part and parcel of the agreement entered into between the Petitioner and the 1st Respondent, though only the addendum is before this Court.

Further elaborating their position in the year 2023, the 1st Respondent and a company called "Black Sands Ltd" had entered into a contract for the supply of the necessary consignment of coal; however, after October of 2023, the said company declined to supply the same and showed their willingness to assign its part of the contract to the present Petitioner. Thereafter, on the advice of the Honourable Attorney General, the 1st Respondent and the Petitioner company have entered

into the present agreement, which is marked as **P2(a)**, which is an addendum to the original contract entered into between the 1st Respondent and Black Sands Ltd. It is also the position of the 1st Respondent that the document marked as **P2(b)** stands as an addendum of the original contract which is also marked as **1R1** annexed to the Statement of Objections. It is their position that after the obligations under **P2(b)** were fulfilled, the parties have entered into **P3(c)** for the supply of coal for the years 2024/2025, as an addendum to **1R1**.

In addition to that, it is their position that therefore, the Petitioner is guilty of non-disclosure of the relevant facts, and as such, is not entitled to maintain this Application.

Arguments

It is argued on behalf of the Petitioner that electricity is an essential item for day-to-day life. Similar to the right to life, right to education, right to equality, and the right to food and shelter, electricity has become an essential intangible commodity for human life. The generation and supply of electricity is now entirely undertaken by the Government; therefore, there is a monopoly over the generation, supply, and distribution of electricity. When a monopoly exists on the part of the Government, correspondently, it bears a duty to ensure uninterrupted supply of electricity to the sovereign people who elect the Government. Further, by virtue of the said duty cast upon the Government, there is a right for the people to obtain electricity by the State. Thus, by the letters marked as **P4** and **P5**, the 1st Respondent itself has triggered the consignment of 10% of the additional coal supply to ensure that the electricity is generated and supplied uninterrupted until the next contract is entered into for the purchase and supply of coal. Then the shipments and date of unloading were also agreed upon by the parties.

Suddenly, by **P6**, the 1st Respondent has cancelled the same *ex parte*. Therefore, the cancellation of the said contract by the stronger party (the Government) amounts to the violation of the rules of natural justice, and the said decision particularly contained in **P7** is irrational, *mala fide*, and capricious. As such, a *Writ of Certiorari* lies to quash **P6** and **P7** in addition to other writs.

On the other hand, it was argued for and on behalf of the Respondents that the entire agreement is not before Court as the Petitioner has failed to file the agreement in its entirety.

In addition to that, since there is an arbitration clause in the said agreement, the parties should have first referred the matter in dispute to arbitration, which the Petitioner has failed to do in this case.

When considering the above matters, including the pleadings of the parties and the arguments advanced before us, it is my view that the following issues arise for the consideration of the Court;

(i) Whether the document marked as **P2(a)** is part of the main agreement;

(ii) Whether the agreement entered into between the Petitioner and the 1st Respondent, for the supply of coal, is a part of the agreement marked as **1R1** which is entered into between the 1st Respondent and the Black Sands Ltd.;

(iii) Whether there is an arbitral agreement contained in the main agreement;

(iv) If so, can the Petitioner have and maintain this Application;

(v) Even if there is an arbitral agreement, is the 1st Respondent guilty of violation of natural justice in issuing letters marked as **P6** and **P7**;

(vi) Whether the letters **P6** and **P7** irrational, illegal, and in violation of the contract entered between the Petitioner and the 1st Respondent;

Now I will consider them as follows.

On a perusal of the record, it appears that the Petitioner has failed to submit the relevant documents. However, quite opposed to that, the Respondents have filed more relevant documents than the Petitioner. The 1st Respondent has filed the document marked as **1R1**, which is the same document marked as **P3(c)**; along with **1R1**, Addendum No. 1 which is marked as **P2(a)** is annexed to the Statement of Objections. In addition to that, I found that the Attorney General's opinion given to the Secretary of the Ministry of Power and Energy prior to the execution of the documents marked as **P2(a)** and **P3(c)** and annexed to the Petition, and correspondence between the 1st Respondent and the Black Sands Ltd, who is the predecessor of the Petitioner. In addition to that, the original agreement entered into between the Black Sands Ltd and the 1st Respondent, and the two Cabinet Memoranda.

It must be noted that by the Cabinet Memorandum dated 05.10.2023, the Minister-in-charge has informed the Cabinet that the supply of coal to the 1st Respondent at that time was by "Coral Energy Limited"; however, due to certain outstanding payment on the part of the Lanka Coral Company, they were unable to supply further shipments; as such, he submitted the said memorandum to the Cabinet to enter into a new agreement after a proper procurement process, which has been granted.

Thereafter, the Black Sands Ltd has entered into the agreement annexed to the said document which is the main contract bearing No. LLC/23/PROP/1, for the supply of coal for the seasons 2023 to 2025. However, after the fifteenth shipment, due to the inability to collect or receive payment in US Dollars by the Black Sands Ltd, it opted to assign its duties to a third party, and for that purpose it has written to the Chairman of the 1st Respondent, and accordingly, the 1st Respondent has sought the advice of the Attorney General, to which the Attorney General has responded.

As per the Attorney General's advice, both the 1st Respondent and the Black Sands Ltd had obtained Board resolutions and thereafter, as nominated by Black Sands Ltd, the third party who came into the picture was the Petitioner, Potentia. Accordingly, for the purpose of supplying the balance shipment of 1,390,342 MT, the addendum to the original contract was entered into which appears to novate the original contract, part of which the Petitioner has marked as **P2(a)**.

The said **P2(a)** has been entered into for the supply of coal of the balance shipment for the relevant period for which the Black Sands Ltd had obliged and undertook to supply. However, for the purpose of continuity of the generation of electricity, the 1st Respondent needed the additional supply to be continued, and thus, entered into a contract for the next year, which was also supplied after entering into a contract marked as **P3(c)** (**1R1**), the second addendum to the original contract.

However, the dispute arose between the parties when the 1st Respondent suddenly decided to cancel the further additional 10% of the total supply (2.25 million MT) for the 2025-2026 season, which had been requested by the 1st Respondent to supply by the document marked as **P4**; even the ships have been agreed by the parties by **P5**. However, suddenly by **P6**, the 1st Respondent has cancelled the same, and then the Petitioner protested by **P6(a)**, and the 1st Respondent stood its ground pursuant to a Cabinet decision dated 24.10.2025. Therefore, the Petitioner has come before this Court.

On a perusal of the two addendums marked as **P2(a)** and **P3(c)**, it appears to be an extension of the original contract between the 1st Respondent and Black Sands Ltd dated 19.03.2024 and 20.09.2024. On a perusal of the addendums marked as **P2(a)** and **P3(c)**, it reads thus;

"ADDENDUM NO: 01

Amendment to the Original Coal Supply Agreement (LLC/23/PROP/1) Dated October 20, 2023, and the Supplementary Agreement Signed on 19th March 2024 for the Supply of 1.39 Mn MT (±10%) for the 2023-2025 coal Seasons to the LakVijaya Power Plant, Sri Lanka."

"ADDEDUM NO: 02

Amendment to the Original Coal Supply Agreement of LLC/23/PROP/1 made and entered into on 20th Day of October 2023, and Addendum No: 01 for the Supply of 2.25 Mn MT ±10% of the coal seasons 2023-2024 and 2024-2025 for the LakVijaya Power Plant in Sri Lanka."

Therefore, it clearly denotes and connotes that it is part of the original agreement entered between the 1st Respondent and Black Sands Ltd which is filed along with the Statement of Objections.

Now I will consider the second question that I raised above, on whether there is an arbitral agreement in the main agreement **1R1**.

Existence of an arbitral clause

On a perusal thereof, I found Section 3.22 which contains an arbitration clause in the following terms;

"3.22 DISPUTES AND ARBITRATION

If a dispute of any kind whatsoever arises between the buyer and the seller, then every effort will be made by the parties to settle such dispute amicably before the commencement of Arbitration.

If amicable settlement has not been reached, then all such disputes arising out of the contract agreement shall be dealt in accordance with the provisions of Arbitration Act No. 11, 1995 of Sri Lanka. The language for the Arbitration shall be English and the place of arbitration shall be Sri Lanka. The following procedure shall be followed:

(a) Any dispute, controversy or claim arising out of or relating to this Contract, or the breach termination or invalidity thereof ["Dispute"] may be submitted by either Party to arbitration for final settlement. Each of the Parties submits to arbitration under this Clause before a panel of three arbitrators under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as then in force (the "Rules"), as modified by this Clause. The proceedings shall be conducted, and the award shall be rendered, in the English language. The seat and place of arbitration shall be Colombo, Sri Lanka unless any other location is agreed to by the Parties.

(b) Each Party shall appoint one arbitrator, and the two arbitrators, so appointed shall appoint a third arbitrator. The third arbitrator shall be the chairman of the arbitral tribunal. If either Party fails to appoint an arbitrator or if the two Party-appointed arbitrators fail to agree upon a third arbitrator, then such arbitrator shall be appointed in terms of the Arbitration Act No. 11 of 1995 or such other law that governs Arbitration proceedings as in force in Sri Lanka.

(c) Any award rendered by a majority of the arbitral tribunal shall be final and binding and judgment thereon may be entered and may be enforced in any court of competent jurisdiction. Any monetary award shall be made in reasonable time and

as the arbitral tribunal may consider appropriate. The arbitral tribunal shall be authorized in its discretion to grant pre-award and or post-award interest as the case may be. Any costs, fees, or taxes incidental to enforcing the award shall, to the maximum extent permitted by law, be charged against the Party resisting such enforcement.

(d) Subject to right of any Party to obtain any appropriate interim relief from any court of competent jurisdiction, an arbitration award under this Clause shall be a condition precedent to the commencement of action, suit, or claim in any court or other judicial forum.

(e) Except, as expressly provided in this Contract, pending the award in any arbitration proceeding hereunder (i) this Contract and the rights and obligations of the Parties shall remain in full force and effect and (ii) each of the Parties shall continue to perform their respective obligations, including payment obligations, under this Contract. The termination of this Contract shall not result in the termination of any arbitration proceeding pending at the time of such termination nor otherwise affect the rights and obligations of the Parties under or with respect to such pending arbitration.

3.23 GOVERNING LAW

The Agreement shall be governed by and construed in accordance with the laws of Sri Lanka."

According to the above arbitral agreement, it is very clear that whenever or whatever dispute that arises between the Petitioner and the 1st Respondent with regard to the supply of coal, quality of coal, or payment thereof, they have to be resolved by referring to arbitration. Therefore, the arbitral clause that is part of the main agreement should be treated as independent of the underlying agreement.

As such, it is my view that when there is an arbitral agreement, it goes to the root of the jurisdiction of the courts of the country. Since the parties have agreed to refer any dispute to arbitration with regard to the performance of the agreement on their part or any matters connected thereto, that agreement must first be adhered to. This has been held in the case of *Elgitread Lanka (Private) Limited v. Bino Tyres (Private) Limited*[1]. Particularly, the parties have agreed upon the seat of arbitration and the substantive law and procedural law applicable to the said arbitral proceedings as well.

To further buttress my view, I wish to rely on the following passages from the well-recognised treatise on arbitration by Redfern and Hunter, "*Law and Practice of International Commercial Arbitration*"[2];

> *"The agreement to arbitrate:*
>
> *An agreement by the parties to submit to arbitration any disputes or differences between them is the foundation stone of modern international commercial arbitration. If there is to be a valid arbitration, there must first be a valid agreement to arbitrate. This is recognised*

[1] SC (Appeal) No. 106/08 (SC Minutes 27.10.2010).
[2] A. Redfern, M. Hunter, N. Blackaby, & C. Partasides, *Law and Practice of International Commercial Arbitration* (4th Edition, Sweet & Maxwell 2004).

both by national laws and by international treaties. For example, under both the New York Convention and the Model Law, recognition and enforcement of an arbitral award may be refused if the treaties. For example, under both the New York Convention and the Model parties to the arbitration agreement were under some incapacity, or if the agreement was not valid under its own governing law.

An arbitration agreement is usually spelt out in the main contract, as an "arbitration clause"; or it may be set down in a separate "submission to arbitration". Exceptionally, however, there may be what might be called a "standing offer" to arbitrate disputes, as with the bi-lateral investment treaties that are discussed later; a claimant may then take advantage of this offer by commencing arbitral proceedings.

Whichever way it is done, there must be an agreement. If there is no agreement, there can be no valid arbitration. Moreover, for all practical purposes, and in particular for the purposes of enforcement internationally, there must be written evidence of the agreement to arbitrate. The requirement of writing is to be found both in international treaties and in domestic law. The New York Convention, for example, will only give recognition and enforcement to an arbitration agreement if it is "in writing". The Convention defines this by stating:

> *'The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'"*[3]

[3] A. Redfern, M. Hunter, N. Blackaby, & C. Partasides, *Law and Practice of International Commercial Arbitration* (4th Edition, Sweet & Maxwell 2004), Chapter I, 5-6.

In addition to that, they further state;

"(c) The autonomy (or separability) of the arbitration clause:

Closely linked to the question of who decides a total jurisdiction challenge is another issue, namely, whether the arbitration clause can be regarded as having an independent existence of its own, or only as a part of the transactional contract in which it is contained.

The link may not seem to be immediately obvious, but where the body deciding the arbitral tribunal's jurisdiction is the arbitral tribunal itself, the first issue often depends on the second. This issue concerns a challenge to an arbitration clause based on an allegation that the contract in which it is contained is invalid There are many possible reasons for this. Perhaps the contract was not signed by both parties; perhaps one of the parties did not have legal capacity to sign it; perhaps it was entered into in reliance on a false representation; or perhaps the contract was illegal in the country in which it was made. Moreover, the contract may have simply come to an end by performance or total repudiation. Whatever the reason, this situation creates a major conceptual problem for an arbitral tribunal ruling on the validity of an arbitration clause. If the contract (and hence the arbitration clause) is not valid or is non-existent, then the basis for the tribunal to convene to decide whether or not the clause is valid is not immediately apparent.

The solution usually adopted is known as the doctrine of separability. As discussed earlier, this doctrine is shorthand for regarding an arbitration clause as constituting a separate and autonomous contract. It means that the validity of the arbitration clause does not depend on the validity of the contract as a whole. By surviving termination of the main contract, the clause constitutes the necessary agreement of the parties that any disputes

between them (even concerning the validity or termination of the contract in which it is contained) should be referred to arbitration. In this way it provides a legal basis for the appointment of an arbitral tribunal."[4]

In Sri Lanka, with the expansion of commercial agreements, particularly international agreements similar to which the parties in the instant Application have entered into, the arbitration agreement is such an agreement included to support such an international agreement. By creating a legal regime for that purpose, the Arbitration Act, No. 11 of 1995 was introduced. Until then, arbitration agreements and arbitral awards were conducted under the Civil Procedure Code.

After 1995, with the new enactment introduced, the Legislature's intention was to create a new regime for the arbitrations. Pursuant to that, we have created arbitration centres as well to facilitate arbitration within Sri Lanka as the seat of arbitration. In addition to that, the Arbitration Act itself provides how arbitrators are to be appointed when there is no provision in the arbitration agreement, and how the courts of the Judicial structure should assist arbitration and how they should conform to the arbitration been conducted.

In the case of *Elgitread Lanka (Private) Limited v. Bino Tyres (Private) Limited*, a question arose on when the parties have agreed to arbitration but before an non-existing arbitral tribunal, still the Court held that when there is an arbitral agreement, the matter has to be referred to arbitration, and to appoint an arbitral tribunal, they can resort to the Court as provided in terms of Act No. 11 of 1995. The following was held by Justice Saleem Marsoof in the aforementioned case;

[4] A. Redfern, M. Hunter, N. Blackaby, & C. Partasides, *Law and Practice of International Commercial Arbitration* (4th Edition, Sweet & Maxwell 2004), Chapter 5, 251.

"It is at this stage convenient to deal with the submission that Clause 14 of the Franchise Agreement is not a Scott v Avery clause. Scott v Avery (1836) 5 HL Cas 811 was a decision of a bygone era in which it was trite law that the parties cannot by contract oust the jurisdiction of the court (See, Thompson v Charmock (1799) 8 Term Rep 139). The refinement to that rule introduced by the House of Lords in Scott v Avery, was that the stipulation in an arbitration clause in a contract that the award of an arbitrator is a condition precedent to the enforcement of any rights under the contract, effectively prevented a cause of action arising to enable a party to sue under the contract until and unless a favourable award has been obtained, or the other party has by his conduct forfeited the right to rely on it. In Hotel Galaxy (Pvt) Ltd., v. Mercantile Hotels [1987] 1 Sri LR 5 at page 10, Sharvananda, C.J., compared the then existing statutory provisions in England with those that existed in Sri Lanka and observed that....

Although the point does not directly arise in this appeal, and no post-1995 pronouncement has been cited in the course of argument, it appears to me that the distinction between a bare arbitration clause and a Scott v Avery clause which was drawn in the Hotel Galaxy judgement is altogether obliterated by Section 5 of the Arbitration Act of 1995, which expressly lays down that where legal proceedings are instituted in a court by a party to an agreement to submit any matter for arbitration against another party to such an agreement, the Court shall have no jurisdiction to hear and determine such matter if the party against whom proceedings are instituted objects to the court exercising jurisdiction in respect of such matter. This is because Section 5 does not purport to maintain the said distinction, and on the contrary, seeks to extend the Scott v Avery refinement that a court would not exercise its jurisdiction to determine the case on its merits even to a mere arbitration clause

which is not couched in the Scott v Avery format. Hence, in my view, it does not matter whether Clause 14 of the Franchise Agreement is a Scott v Avery clause or not..."

Accordingly, it is my view that when there is an arbitration agreement, the Court does not have the jurisdiction to look into the matter. As such, the argument advanced in that behalf by the Respondents holds more water.

It was argued on behalf of the Petitioner that despite the arbitration agreement, the 1st Respondent and other Respondents have violated the rules of natural justice by not giving any opportunity to present their stand. Further it is further argued that the Respondents have so violated the rules of natural justice in so far when the first letter was sent by them triggering the procedure to occur to place an order for the shipments of coal of the additional supply of 10% consignment of coal by **P4**. However, by **P6**, the Respondents have cancelled the same, on the basis that pursuant to a Cabinet decision they have cancelled the same. However, as held by the Court in similar cases that when there is an arbitral agreement, such an agreement should be complied with.

I wish to consider another argument advanced by and on behalf of the Petitioner on the footing of citizens' right to uninterrupted supply of electricity.

Electricity is basic need and essential item like food, shelter, air and water for any living human, and since the Government exercises the monopoly of generating and distributing of electricity, it is true that it is under a duty to supply uninterrupted electricity.[5] However, if there is a failure on

[5] K.N. Raveendranadhan v. The Kerala State Electricity Board [No. 34061 of 2014 (G)]; Madan Lal v. State of Himachal Pradesh and Others [Appeal (Crl.) 786 of 2002]; T.M. Prakash v. The District Collector [1996] AIR 1051.

the part of the Government, such complaint should not come from a company based in Dubai; it should come from a member of the citizenry.

In addition to that, if a government fails to supply electricity without any interruption, then a citizen of this country who is affected and is entitled to receive electricity, can make an application to a relevant court, complaining against the Government for not supplying uninterrupted electricity. It is true that there is no allegation against the Petitioner for not supplying coal within the time stipulated or coal of the required standard.

Therefore, procuring standard coal is entirely within the purview of the Government, which it has entrusted to the 1st Respondent, but the procurement process is done through a Cabinet committee. As such, if such substandard coal is procured fraudulently or such procurement is not done within the time stipulated, then the responsibility is with the Government, and anyone can trigger different types of actions against the Government and its responsible officers.

However, in this case, the Petitioner is not entitled to raise such an issue because it is not a citizen or a registered personality within the territorial municipality of Sri Lanka.

In addition to that, if the officers responsible for procuring coal, procures sub-standard coal, and if the Government needs to purchase coal from an outside third party, then the extra money incurred by the Government should not be collected by the people; it should be recovered directly from the officers responsible for such mistake.

However, I do not need to make an order on that as that is for a complainant to make a proper complaint before the proper court when such rights are affected. In this case, the question arises

whether the Petitioner has followed what is stipulated in the contract as everything depends on the contract.

Conclusion

For the reasons adumbrated above, it is my view that the Petitioner has an alternative remedy already provided for in the contract itself; thus, the writs sought by the Petitioner do not lie; as such, this Application is dismissed, without costs.

JUDGE OF THE COURT OF APPEAL

K.P. Fernando J.,

I agree.

JUDGE OF THE COURT OF APPEAL