

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

An application for writ of certiorari in terms
of Article 154(G) of the Constitution of the
Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No:
CA (PHC) 229/2018
HC Colombo Case No:
HCWA 09/2015 (Writ)

T.R. Chandima Priyangika Bandara,
97/12, Angulana Station Road,
Lakshapathiya,
Moratuwa.

Petitioner-Appellant

-Vs-

1. Seemasahitha Lakshapathiya Uthura
Sakasuruwam ha Naya Ganudenu Pilibanda
Samupakara Naya Dena Samithiya,
30/3, 2nd Lane,
Angulana Station Road,
Lakshapathiya,
Moratuwa.
2. B.N. Dammina Kumara,
Commissioner of Cooperative Development
and Registrar of the Cooperative,
Western Province.

3. W.D. Cristy Wijesooriya (Arbitrator)
No. 378, Paranampalawa,
Uswetakeiyawa.

Respondent-Respondents

Before : A.L. Shiran Gooneratne J.

&

Mahinda Samayawardhena J.

Counsel : Mahinda Nanayakkara with Aruna Jayathilaka and
Ayashka Sirirathna for the Petitioner-Appellant.

Chandana Liyanapatabendi, PC with Mockshi De Silva
instructed by AJS Associates for the 1st Respondent.

Kanishka De Silva, SSC for the 2nd Respondent.

Written Submissions: By the Petitioner-Appellant on 06/12/2019

Argued on : 16/12/2019

Judgment on : 30/01/2020

A.L. Shiran Gooneratne J.

The Petitioner-Appellant (hereinafter referred to as the Appellant) is before this Court seeking to set aside the order of the learned High Court Judge of the Western Province holden in Colombo dated 28/09/2018.

The Appellant was the manager of the 1st Respondent Co-operative Society at all times material to this action. On 03/03/2011, the 1st Respondent sent a letter

demand to the Appellant to recover a sum of Rs. 12,337,222.92 (Vide page 402 of the brief) alleged to have been misappropriated. The Appellant admitted liability, to re-pay a part of the said amount. Since the amount to be recovered was not settled in full, the 1st Respondent referred the dispute to the 2nd Respondent in terms of Section 58(1) of the Co-operative Societies Law No. 5 of 1972, and upon receipt was referred to the 3rd Respondent, Arbitrator. On 26/12/2011, the Arbitrator made award that the Appellant is liable to pay a sum of Rs. 10,185,842.83. The Appellant thereafter sought to quash the arbitral award and the initial order made by the 1st Respondent by invoking the writ jurisdiction of the High Court of the Western Province. It is against that order that the Appellant has filed the instant application.

Section 58 of the Co-operative Societies Law reads as follows: -

(1) (e) ----

A claim by a registered society for any debt, demand or damages due to it from a member, officer or employee, whether past or present, or any nominee, heir or legal representative of a deceased member, officer or employee, whether such debt, demand or damages be admitted or not, shall be deemed to be a dispute touching the business of the society within the meaning of this subsection.

(2) *The Registrar may, on receipt of a reference under subsection (1)-*

(a) decide the dispute himself, or

(b) refer it for disposal to an arbitrator or arbitrators.

- (3) *Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar within such period and in such manner as may be prescribed by rules.*
- (4) *No party to any appeal made to the Registrar under subsection (3) shall be entitled, either by himself or by any representative, to appear before and be heard by the Registrar on such appeal.*
- (5) *A decision of the Registrar under subsection (2) or in appeal under subsection (3) shall be final and shall not be called in question in any civil court.*

The Appellant in this application has challenged the order of the learned High Court Judge primarily on the following grounds.

1. The arbitrator is not properly appointed.
2. No charge sheet or charges issued against the Petitioner.
3. The order dated 26/12/2011, made by the arbitrator marked 'P4', is per se erroneous and it violates the rules of natural justice.

It is observed that prior to the commencement of the arbitration inquiry proceedings as reflected in document marked 'P2', (Vide page 122 of the brief) the Appellant on various instances prior to the commencement and at the time the arbitral proceedings were ongoing has accepted liability to pay the total amount misappropriated. One such instance was by letter dated 08/09/2010, addressed to the 1st Respondent where the Appellant stated;

“(01) ලක්ෂපතිය උතුර සහස සමිතියට අයත් රු. ලක්ෂ විස්සක පමණ මුදලක් (2,000,000) අවස්ථා කීපයකදී මා විසින් අවභාවිතා කර ඇති බැවින් එම මුදල ලබාදීමට පොරොන්දු වෙමි.

(02) යම් හෙයකින් බස්නාහිර සමු. දෙ. මේ. මගින් සිදුකරන විගණන පරීක්ෂණයේදී ඉහත සඳහන් රු. ලක්ෂ විස්සට අමතරව යම් මුදලක් ගෙවීමට සිදුවුවහොත් එයද ගෙවීමට පොරොන්දු වෙමි.

ඉහත සඳහන් ප්‍රකාශය මාගේ කැමැත්තෙන් වගකීමකින් යුතුව ප්‍රකාශ කරන ලද්දක් බව සහතික කරමි.

ලක්ෂ විස්සට අදාළ විස්තර අමුණා ඇත.”

Similar assurances were given by the Appellant to the 1st Respondent by documents marked ‘1V7’, ‘1V8’, ‘1V9’ and ‘1V21’.

When this matter was taken up for argument, the Counsel for the Appellant contended that the facts led in evidence at the inquiry are not disputed. However, the Appellant has challenged the mandate given to the arbitrator marked ‘2V1’, on the basis that there is no reference to a number or the date of the gazette notification pertaining to the appointment of Arbitrator. The Appellant has also challenged document marked ‘2V2’, on the basis that the said document does not state any charge leveled against the Appellant nor has it directed the Appellant to be present at the arbitral proceedings.

It is very clear by document marked ‘2V1’, (Vide page 453 of the brief) the 3rd Respondent commenced arbitration proceedings on 06/07/2011, through a valid

mandate (Vide page 112 of the brief). Prior to the commencement of the proceedings the arbitrator has clearly set out the legislative provisions and the rules and procedure applicable to the arbitration. It is also observed that, on the date of commencement of proceedings the legal representative for the 1st Respondent, in the presence of the Appellant and with the approval of the arbitrator, suggested and carried out amendments to certain documents and statement of accounts tendered by the 1st Respondent. It is also observed that prior to the commencement of the inquiry on 03/09/2011, the Appellant was made fully aware of the charges against her (Vide page 119 of the brief). I also observe that the impugned award comprehensively deals with evidence and the documents submitted before the inquiry. Therefore, the objections raised by the Appellant is devoid of any merit.

In Nagalingam Vs. Luxman de Mel 78 NLR 231 at page 238, Justice Sharvananda, (as he then was) cited with approval, "where nothing more is involved than a mere irregularity of procedure, or (e.g.) non-compliance with statutory conditions precedent to the validity of a step in the litigation of such a character that if one of the parties be allowed to waive the defect, or by conduct or inaction to be estopped from setting it up, no new jurisdiction is thereby impliedly created and no existing jurisdiction impliedly extended beyond its existing boundaries, the estoppel will be maintained and the affirmative answer of

illegality will fail". (Spencer Bower- Estoppel by Representation (2nd Ed.), Section 142 at page 136).

It is noted that, at no time of the proceedings had the Appellant raised objection to the appointment of the arbitrator or to the alleged failure to present a charge sheet. To the contrary, the appellant conceded to all the charges brought against her and consented to pay in full the amount due. It is also noted that on 06/07/2011, the Appellant consented to the commencement of the arbitration inquiry before the arbitrator. No objection was raised regarding the mandate given to the arbitrator or to any irregularity in the service of summons on the Appellant during the said proceedings. Therefore, I do not see any illegality in the decision made by the Arbitrator. It is settled law that a Court exercising judicial review does not concern itself with the correctness of the decision but only with its lawfulness (*Nicholas Vs. Macan Markar Limited (1985) 1 SLR 130*). In the circumstances, I reject the argument of the learned Counsel on issues No. 1 and 2.

In *Nagalingam Vs. Luxman de Mel* 78 NLR 231, (*supra*) an application was made for a writ of *certiorari* to quash the order of the Commissioner of Labour *inter-alia*, on the basis that the 1st Respondent had admittedly made the said order after the expiry of 3 months from the date of the receipt of the application and that the order was in breach of the provisions of the Act, hence its *ultra vires* the powers of the Commissioner of Labour and therefore, null and void. Justice Sharvananda, remarked thus;

"Further the Petitioner, having participated in the proceeding without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of labour to make a valid order after the zero hour. The jurisdictional defect, if any, has been cured by the petitioner's consent and acquiescence."

His Lordship also cited the case of ***Alagappa Chitty Vs. Arumugam Chitty*** (2 C.L. Rep.202), where it was held that;

"Where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party who has invited or allowed the court to exercise it in a wrong way cannot after wards turn round to challenge the legality of proceedings due to his own invitation or negligence"

Therefore, in any event the Appellant is now precluded from raising any of the above objections since *"the right to impugn the proceedings has been lost by his acquiescence"*.

The learned Counsel for the Appellant supports issue No. 3 on the basis that the learned High Court Judge has in his order failed to *"distinguish the nature of an appeal and a writ application"*. It is trite law that the merits of the findings will not be subject to review by way of *certiorari*. Instead the interest would be whether the decision is lawful or not. On the said premise, the learned Counsel for the Appellant submits that *"judicial review is concerned not with the decision but the decision-making process"*. The Appellant's contention on the procedural

irregularity, illegality and/ or irrationality attributable to issues No. 1 and 2, above, was dealt with and rejected. In any event, I do not encounter any illegality, impropriety and/ or irrationality in the purported order given by the learned High Court Judge.

For all the reasons stated above, I see no reason to interfere with the decision of the learned High Court Judge and accordingly, the application of the Appellant is dismissed.

Parties in CA(PHC)APN- 15/2019 have agreed to abide by the order delivered in this case.

Application dismissed.

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JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

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JUDGE OF THE COURT OF APPEAL