

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

Ambawa Thrift Credit Co-operative
Society, Ambawa
Kuliyapitiya
Petitioner-Appellant

C.A.[PHC] NO.168/2011
H.C.KURUNEGALA
CASE NO.HCR 25/2008
MAGISTRATE'S COURT
KULIYAPITIYA CASE NO.20976

Vs

D.M.Sumana Dasanayake
Siripallawatta, Ambawa
Kuliyapitiya
Accused-Respondent-Respondent

Co-operative Development Commissioner
Co-operative Development Department
Kuliyapitiya
Plaintiff-Respondent-Respondent

BEFORE : **K.T.CHITRASIRI, J.**
MALINIE GUNARATNE, J.

COUNSEL : Wijayadasa Rajapakshe P.C. with Nilantha Kumarage
for the Petitioner-Appellant
Upali Jayamanne for the Accused-Respondent-
Respondent
Anoopa de Silva SSC for the Complainant-
Respondent-Respondent

ARGUED ON : 10.11.2014

WRITTEN SUBMISSIONS : 10.11.2014 by the Accused-Respondent-
Respondent
13.11.2014 by the Petitioner-Appellant

DECIDED ON : 16TH JANUARY 2015

CHITRASIRI, J.

Deputy Commissioner of Co-operative Department in Kuliypitiya filed action in terms of Section 59 of the Co-operative Societies Act No.05 of 1972 as amended by the Acts No.32 of 1982 and No.11 of 1992, in the Magistrate's Court of Kuliypitiya in order to recover a sum of Rs.2,277,620.97 from the accused-respondent-respondent. (hereinafter referred to as the accused) It was so filed pursuant to an arbitral award being made in favour of the petitioner-appellant. (hereinafter referred to as the petitioner). Learned Magistrate having given an opportunity for the accused to show cause as to why she is not liable to pay the aforesaid amount referred to in that arbitral award, made order directing the accused to pay the amount claimed, by way of installments amounting it to Rs.100,000/-. The accused failed to make the payment as directed. She did not even come to Court to make the payment. As a result, she was arrested and produced before the learned Magistrate on 20.08.2007. On that date learned Magistrate directed the accused to pay the said sum of money and made order sentencing her to six months rigorous imprisonment in the event she fails to make the said payment. Consequently, she was sentenced to imprisonment for non-payment of the fine. Thereafter she completed serving the sentence and accordingly she was released from jail.

After the accused was released from jail having served the sentence, plaintiff-respondent-respondent made another application by way of a motion in the Magistrate's Court, moving for an order directing the accused to pay the

amount imposed as the fine despite the fact that she had served the jail sentence that was imposed due to the non-payment of the said fine. Learned Magistrate refused the said application on the basis that the accused had already served the sentence that was imposed for non-payment of the fine.

Being aggrieved by the aforesaid decision of the learned Magistrate, petitioner filed a revision application in the High Court of Kurunegala seeking for an order to recover the money referred to in the application made in the Magistrate's Court and to have the order of the learned Magistrate set aside. Learned High Court Judge too refused the aforesaid revision application having affirmed the order of the learned Magistrate.

Being aggrieved by the aforesaid two decisions of the learned judges in the courts below, the petitioner filed this appeal seeking to set aside both the decisions of the learned Judges and also to have an order directing the accused to pay the fine imposed by the learned Magistrate of Kuliypitiya.

Learned President's Counsel for the petitioner-appellant brought to the notice of Court that Section 59 of the Co-operative Societies Act No.5 of 1972 had been amended by Section 28 of the Act No.11 of 1992 enabling the Co-operative Societies to recover the monies due to those societies even though the person from whom the monies are to be collected had served the sentence for non-payment of the fine that had been imposed due to the failure to pay the moneys

due upon an arbitral award. Accordingly, he contended that the appellant-petitioner in this appeal is entitled to recover the monies from the accused due to the society although the accused has served the sentence imposed for non-payment of the fine. In support of the matters contained in the said Section 59(4), learned President's Counsel for the petitioner has also filed the relevant Parliamentary proceedings in order to enlighten the intention of the Parliament when enacting the Act No.11 of 1992.

Accordingly, I will now turn to consider the law referred to in the aforesaid Section 28 of the Co-operative Societies (Amendment) Act No.11 of 1992. It reads thus:-

*“Section 59 of the principal enactment is hereby amended in subsection (4) of that section by the substitution for the words “at the time of imposing such sentence”, of the words and figures “at the time of imposing such sentence. **Any defaulter sentenced to a term of imprisonment in default of the fine imposed in accordance with section 291 of the Code of Criminal Procedure Act, No.15 of 1979, shall not be absolved from the payment of any sum of money mentioned in the certificate specified in section 59 (1) (c)**”.*

(emphasis added)

Upon a plain reading of the aforesaid amendment made to Section 59 of the principal enactment, it is clear that serving of jail sentence imposed due to the failure to pay a fine shall not be a bar to collect the moneys due upon an arbitral award made under the Co-Operative Societies Act. Therefore, the intention of the

Legislature had been to permit the particular co-operative society to recover the monies due from the persons concerned despite the fact that that particular person had served the jail sentence imposed due to the non-payment of the fine that was imposed.

Be that as it may, in this instance it is first necessary to consider the matters contained in Section 291 of the Code of Criminal Procedure Act No.15 Of 1979 upon which provision of law, the learned Magistrate has made order to imprison the accused for non-payment of the fine. It is the provision of law that is available to deal with a person who fails to pay a fine imposed. The said Section 291 stipulates the manner in which a trial judge should act when imposing a default sentence.

At this stage, it is pertinent to refer to sub section 2 in that Section 291 of the Code of Criminal Procedure Act, since it stipulates a method that could be adopted to collect the money that had been imposed as a fine despite the fact that the person who was sentenced to imprisonment has served the sentence. Said Section 291 (2) reads thus:

291(2) *Whenever an offender is sentenced to pay a fine under the authority of any law for the time being in force **the court passing the sentence may in its discretion issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender although the sentence directs that in default of payment of the fine the offender shall be imprisoned.** Such warrant shall be addressed to the Fiscal of the court and may be executed at any place in Sri Lanka but if it is required to be executed*

outside the jurisdiction of the court by which it was issued it shall be endorsed by a Magistrate having jurisdiction where it is to be so executed.

(emphasis added)

The law referred to above empowers a Magistrate to issue a warrant of distress for the levy of the amount that had been imposed as a fine by selling any movable property belonging to the offender although an order had been made to imprison such an offender in default of the payment of a fine. Therefore, the learned Magistrate, upon considering the application made by the applicant respondent in this instance, could have acted under Section 291(2) of the Code of Criminal Procedure Act exercising his discretion, in order to collect the money that had been imposed as a fine. Such a procedure will help implementing the law referred to in the said Co-operative Societies (amendment) Act No.11 of 1992 as well. Such a course of action will not negate the purpose that was intended by the Legislature when it enacted the said Act No.11 of 1992.

Therefore, I make order directing the learned Magistrate to act under Section 291(2) and to make order accordingly, in order to recover the monies referred to in the application made on 28.02.2008 in the Magistrate's Court of Kuliypitiya. However, in order to recover the monies referred to therein, the plaintiff-respondent-respondent should inform the learned Magistrate the available movable properties belonging to the accused for him to issue a warrant of distress under Section 291(2) of the Code of Criminal Procedure Act.

Accordingly, I make order setting aside the order dated 28.02.2008 of the learned Magistrate of Kuliypitiya and the order dated 23.09.2011 of the learned High Court Judge of Kurunegala. For the reasons mentioned herein before, this appeal is allowed subject to the direction referred to in the preceding paragraph in this judgment. Considering the circumstances of the case, I make no order as to the costs of this appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Malinie Gunaratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL