

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

In the of an Appeal under Article 154 of
the Constitution read together with the
Provisions of the High Court of the
Provinces (Special Provisions) Act No:
19 of 1990 to set aside the Orders of
the High Court.

Kotuwegedara Siripala Ranawaka.

Appellant

**Case Nos. PHC-184 -2012,
PHC -186-2012**

Vs.

Cooperative Commissioner,
Multipurpose Cooperative Society Ltd,
Polonnaruwa Daya Gamage.

Respondent

**Before : W.M.M.Malanie Gunarathne, J
: P.R.Walgama, J**

**Counsel : W.A. Fernando for the Respondent - Petitioner Appellant.
: Ms. Nayomi Kahawita SC for the Respondent.**

Argued on : 27.02.2015

Decided on : 21.07.2015

P.R.Walgama, J

The Respondent- Appellant (herein after sometimes called and referred to as the Appellant) preferred the instant appeal challenging the orders of the Learned High Court Judge dated 15.07.2012, in cases bearing Nos. 09/09/REV and 10/09/REV in the High Court of Polonaruwa and the order of the Learned Magistrate dated 28.08.2009. By the said impugned order the Learned High Court Judge has affirmed the order of the Learned Magistrate, dated 20/08/2009, in the cases bearing Nos. 38126 and 38127 in the Magistrate Court of Polonaruwa.

The Applicant- Respondent (herein after sometimes called and referred to as the Respondent) filed a certificate of the Arbitrator in terms Section 59(1) and 59(4) of the Co-operative Societies Act No 5 of 1972, to recover a sum of Rs. 524,717 which was due to the Society from the Appellant, in respect of a financial losses occurred, during which period the Appellant was attached to the Respondent Society. The said Arbitral Award has been marked and tendered to Court as P1.

After filing of the certificate of arbitral award in the Magistrate Court by the Claimant - Respondent, the Appellant has filed the objections and after considering the written submissions filed by the both parties the Learned Magistrate has made the impugned order that the Appellant shall pay a sum of Rs. 524,717/ to the Claimant- Respondent.

Being aggrieved by the said order of the Learned Magistrate the Appellant, made an application by way of Revision, to the High Court to have the said impugned order set aside. The Learned High Court Judge by his order dated 16.07.2012 has affirmed the order of the Learned Magistrate.

It is viewed from the above order that the Learned High Court Judge has dealt with the reasons adduced as exceptional circumstances by the petitioner to invoke the revisionary jurisdiction of the Provincial High Court. But it was the view of the Learned High Court Judge the reasons as stated in the petition do not constitute any exceptional circumstance as claimed by the Petitioner. In the above setting the Learned High Court Judge has dismissed the application of the Petitioner.

The Learned High Court Judge has fortified his order with the following reasons;

The Learned High Court Judge has adverted to the objections raised by the Respondent. The pith and substance of their argument is that the Appellant had the opportunity of challenging the arbitral award under Section 58(3) of the Co-operative Societies Act, and that the failure to exercise that statutory right of appeal would make the award by the Arbitrator final and conclusive, and will not be subject to be called in question in any civil court under section 59(5) and (6) of the above Act. Therefore it is said that the petitioner is estopped from challenging the said Learned Magistrate's order, marked as P5.

Further it is considered in the said order the Arbitral award, marked as P1, dated 30.01.2008, which has been issued by the Assistant Commissioner of Co operatives in terms of Section 59(1) (c) of Co-operative Societies Act No.05 of 1972, and further if the petitioner was dissatisfied with the decision of the Arbitrator, the petitioner should have appealed against the said impugned decision to the Registrar of -Co-operatives, in terms of Section 58(3) of the Co-operatives Societies Act No.5 of 1972.

Therefore the Learned High Court Judge has considered the fact as the petitioner has not appealed against the said impugned decision of the Arbitrator, in terms of Section 58 (3) of the above Act, and now petitioner is barred in challenging the same. Hence in the above setting the Learned High Court Judge was of the view, that since the petitioner has not exercised his statutory right to appeal against the decision of the Arbitrator, it has now become a final order, which cannot be questioned in a court of law in terms of Section 59(6) of the Co operative Societies Act No 5 of 1975.

At this juncture it is pertinent to note that the Learned High Court Judge has drawn his attention to the grounds on which the certificate filed under recovery procedure could be challenged. The said rationale was observed in the case of S.H.L. MOHIDEEN .VS. ASSISTANT COMMISSIONER OF COOPERATIVE DEVELOPMENT KALMUNAI- 80 NLR 206, which has stated thus;

"I am therefore of the view that the only grounds that can be urged before the Magistrate are that,

1. The Magistrate has no jurisdiction because his known place of business or residence does not fall within the local jurisdiction of the Magistrate,
2. That he had paid the amount,
3. That he is not the defaulter, in that he is not the person from whom the amount is due”.

Therefore, it is abundantly clear that the Appellant has sought to challenge the arbitral award for the first time before the Appellate Court. The Appellant has failed to show cause as to why the order to recover the said amount should not be enforced.

It is contended by the Appellant that he was indicted and was charged for misappropriation of funds belonging to the Applicant-Respondent Society, and was acquitted and discharged from the said charges, and as such the Respondent cannot have and maintain this action. It is salient to note that in the above cases the appellant was indicted in the High Court are criminal charges and was not to recovery the money due to the society. An arbitrator held an inquiry in to the alleged misappropriation and made a determination that the Appellant is responsible for the said charge and the money should be recovered from him. But as stated above the Appellant has not appeal against the said arbitral award.

Therefore it is crystal clear that the Appellant cannot now challenge the same in the instant appeal. But the corner stone of the Appellant's argument is that there was no "DISPUTE" postulate by Section 58(3) of the said Act and as such there was no matter to be referred to the Arbitrator. As the Appellant was

charged in the Provincial High Court of Polonaruwa for misappropriating funds was acquitted and discharged by the High Court Judge and hence the matter should have not been referred to an Arbitrator.

The said contention was never in issue at the inquiry held by the Arbitrator and the Appellant has never appealed against the decision of the Arbitrator in terms of section 58(3) to the Registrar.

In the above setting I am of the view that Appellant's application to set aside the order of the Learned Magistrate and the order of the Learned High Court Judge on the afore said dates is devoid of merits and should stand dismissed.

Accordingly the appeal is dismissed subject to a cost of Rs. 10,000/.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malanie Gunarathne, J

I agree.

JUDGE OF THE COURT OF APPEAL