

**IN THE COURT OF APPEAL OF THE DEMOCRATIC**

**SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Appeal under  
Article 154P of the Constitution read  
together with the Provisions of the  
High Court of the Provinces (Special  
Provisions) Act No 19 of 1990.

CA. (PHC) Application

No: 20/2004

A. D. Samarasinghe Abeyawardene

Companiwatte,

Gonagamuwa,

Tissamaharamaya

**PETITIONER-APPELLANT**

1. Cooperative Commissioner of  
Southern Province

2. Deputive-Co-operative Commissioner  
of Southern Province and another

**Respondent –Respondents**

Before : P.R.Walgama, J

\_L.T.B.Dehideniya, J

Counsel: P.L. Gunawardena for the Appellant

Nayomi Kahawita for the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents.

Argued on : 21.03.2016

Decided on : 13.09.2016

CASE- NO- CA (PHC)- 20-2004- JUDGMENT- 13.09.2016

**P.R. WALGAMA, J**

The Petitioner- Appellant tendered an application in the nature of a mandate of a writ of Certiorari to quash the decision of\_ the 1<sup>st</sup> Respondent and for a writ of

Mandamus to compel the 1<sup>st</sup> Respondent to accept the appeal marked as P3.

The Petitioner- Appellant was the Treasure of the Cooperative Thrift and Credit Society Ltd of Ilakkapallama, Tissamaharama.

The 3<sup>rd</sup> Respondent after an inquiry, held in terms of Section 44 of Act No. 5 of 1972, has revealed that there is a shortage of Rs. 3,20,118.57, which amount is payable by the Petitioner- Appellant. The said decision was marked as P2.

The Petitioner- Appellant by his letter dated 24.06.1999, has tendered an appeal to the 1<sup>st</sup> Respondent. On 16.09.2000 the Petitioner-Appellant appeared at the inquiry, but the 1<sup>st</sup> Respondent has dismissed the Appeal on the basis that there is no proper appeal in terms of Rule 49(1)(a) of the Co-operative Societies Act.

Being aggrieved by the said order the Petitioner-Appellant moved in revision the Provincial High Court of Hambanthota to quash the said order by issuing a writ of Certiorari and for a writ of Mandamus to compel the 1<sup>st</sup> Respondent to accept his appeal.

It is viewed from of impugned order of the Learned High Court Judge that the purported appeal to the 1<sup>st</sup> Respondent has not been tendered in conformity with the Rule 49(xii)(a) of the Cooperative Societies Rules.

It is contended by the Petitioner- Appellant that the requirement to pay an appeal deposit in terms of the Rule 49(xii)(a) of the Co-operative Societies is ultra vires.

In fact it is the stance of the Petitioner- Appellant that when the Rule 49(xii)(a) stipulates two sums of appeal deposits to be made and if an aggrieved party had deposited either of the two sums of appeal deposit the Registrar of Co operative Societies should accept and hear the appeal.

The Petitioner- Appellant to buttress the above contention basically rely on the case of SEBASTIN FERNANDO .VS. KATANA MULTI PURPOSE COOPERATIVE SOCIETY LTD AND OTHERS 1990 3 SLR 342.

Therefore it is contended by the Petitioner- Appellant that in view of the above case it is unfair and unjust to have rejected on the above ground and thereby had denied the procedural fairness to the Petitioner- Appellant.



For convenience and brevity the above section is reproduced herein below;

“ Every appeal to the Registrar from an award of an arbitrator or a panel of arbitrators shall be made within 30 days from the date of the award by a written statement setting out the grounds of appeal. Every such appeal shall be forwarded to the Registrar with an appeal deposit of Rs. 50 or 10% of the sum awarded where the appeal is made by the party against whom the award has been made and by Rs. 50 or 10% of the sum claimed in dispute where the appeal is made by the party claiming any sum of money, which ever sum is the higher sum in either case.”

The pith and substance of the Appellant's case is that the payment of Rs.50 is a sufficient deposit in respect of the appeal in terms of Rule 49(xi)(a) and the rejection of the same is unlawful and ultra virus.

But it is the contention of the counsel for the Respondents that as per rules it is the highest sum viz. the 10% of the amount has to be deposited with the appeal. It is seen from the judgment of the Learned High Court Judge who has accepted the said position of the Respondents had afforded an opportunity to the appellant to deposit

the balance sum of Rs. 203,234.26 being the 10% of the to be recovered from the Appellant.

The counsel for the Respondents has submitted that the Sebastian Fernando's case was on a different footing, in that it was said that in the above case the appeal was rejected on the basis that the appellant has failed to pay the balance of the 10% of the money due to the Co operative Society. Therefore it is obvious that the ratio is not that the rule 49 (xii)(a) is ultra vires, but it was decided that the Appellant should be given time to pay the balance of 10% of the deposit, and it was observed thus;

".....In the Petition filed in the Court of Appeal, although the Appellant contended that the Registrar (4<sup>th</sup> Respondent) should not have refused to entertain the appeal, he did not contend that the requirement in Rule 49?(xii)(a) of an appeal deposit is ultra vires or that the rejection of the appeal was bad for any reason, nor did he pray for Certiorari and Mandamus against the Registrar to quash the order rejecting the appeal and to direct him to hear and determine the same....."

It is salient to note that their Lordship has not made any remark as to the rule 49 (xii)(a) and the legality of the same, therefore it remains as obiter dicta.

The counsel for the Respondents has also adverted to the case of WEERAKKODY PATHIRENNAHELAGE SOMARATNE .VS. D.D. PREMACHANDRA, COMMISSIONER OF CO OPERATIVE SOCIETIES which was held thus;

“that Rule 49(xii)(a) is not ultra vires and should be mandatory confirmed to when preferring an appeal under Section 58(3).”

As per Ismile J, .....” therefore I am of the view that Rule 49(xii)(a) is not ultra vires the rule making power conferred on the Minister particularly since under section 58(3) provides the period within which the appeal may be filed can be prescribed by the rules..”

It is seen from the above section and it is abundantly clear that the said provision has been made prescribing the time and the manner pertaining to the disposal of an appeal.

Accordingly the Minister by exercising his rule making powers under section 61 (1) read together with 61(2)(y) had formulated the Rule 49 (xii)(a) which deals with the time



limit for making an appeal to the Registrar, and the manner in which the appeal should be lodged.

Therefore it is worthy to note that the above section postulate the payment of the higher amount being the 10% of the money payable.

In the above setting it is ostensible that the Minister will not be acting ultra vires when he formulated the rule 49(xii)(a) in terms of section 58(3) of the said rules.

In the above setting this court see no merits in the application of the Appellant and thus dismiss the appeal

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

JUDGE OF THE COURT OF APPEAL

L.T.B. Dehideniya

I agree

JUDGE OF THE COURT OF APPEAL