

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

K.H.Nanadani,
Madangaha Watta, Pamburana, Matara.

Petitioner Appellant

Vs.

**Court of appeal case no.
CA/PHC 146/2004**

**H.C. Matara case no.
writ/142/2002**

1. Matara District Cooperative society Ltd.
2. Assistant Commissioner of Cooperative
Development,
Matara District Cooperative society Ltd.
3. K.A.P.Sugathadasa,
Arbitrator,
Assistant Commissioner of Cooperative
Development,
Matara District Cooperative society Ltd.
4. Commissioner of Cooperative
Development and Registrar of
Cooperative Societies,
Department of Cooperative
Development, Southern Province,
Abeysekara Building, Galle.

Respondents Respondents.

Before : P.R.Walgama J.
: L.T.B. Dehideniya J.

Counsel : Kaminde Alwis for the Petitioner Appellant.

: Savithra Wijerathne for the 1st Respondent.

: M.Jayasinghe SC for the 2nd, 3rd and 4th Respondents.

Written submissions filed on 18.03.2016 and 05.05.2016

Decided on : 0.10.2016

L.T.B. Dehideniya J.

The Petitioner Appellant was an employee of the 1st Respondent Cooperative Society. After an arbitral inquiry held by the 3rd Respondent, she was called upon to pay Rs. 465501.75 on account of cash shortage during her service as a manager in the said Society. Being aggrieved by the said award, she appealed to the 4th Respondent who is the Registrar of the Cooperative Societies Southern Province under section 58(3) of the Cooperative Societies Law No.5 of 1972. The 4th Respondent rejected the appeal on the ground that the Appellant has failed to comply with the pre requisite of depositing the 10% of the award sum to accept the appeal. The appellant instituted an action in the Provincial High Court of Southern Province at Matara seeking a mandamus in the nature of a writs of certiorari to quash the award granted by the 3rd Respondent and to quash the decision rejecting the appeal by the 4th Respondent. The learned High Court Judge, after inquiry, dismissed the application. This appeal is from the said order of dismissal.

At the argument both parties agreed that this matter be disposed by way of written submissions since the issue is only a question of law. The question is whether it is mandatory for the 4th Respondent to reject the appeal in a case where the appellant has failed to deposit the appeal

deposit of 10% of the award sum with the 4th Respondent under Rule 49 (xii) (a) of the Cooperative Society Regulations of 1973. It is a common fact that the Appellant has not deposited the appeal deposit.

The Cooperative Society Regulations of 1973 (hereinafter sometime called as Rules) were made pursuant to section 61 of the Cooperative Societies Law. The minister is empowered to make regulations under this section. The section reads;

61. (1) The Minister may make all such rules as may be necessary for the purpose of carrying out or giving effect to the principles and provisions of this Law.

(2) In particular, and without prejudice to the generality of the powers conferred by subsection (1), such rules may-

(a) to (x) not relevant to this case

(y) prescribe the forms to be used, the fees to be paid, the procedure to be observed, and all other matters connected with or incidental to the presentation, hearing and disposal of appeals under this Law or the rules made thereunder.

(3) No rule shall have effect unless it has been approved by Parliament. Notification of such approval shall be published in the Gazette.

(4) Every rule shall, upon the publication in the Gazette of the Notification referred to in subsection (3), be as valid and effectual as though it were herein enacted.

The Rules were published in the Gazette Extra Ordinary No. 93/5 dated 10th January 1974. The Gazette says that the rules have been approved by the National State Assembly (the Parliament was named as

the National State Assembly under Constitution promulgated in 1972) on the 20th November 1973. Under section 61(4) of the Cooperative Societies Law the rules are valid and effectual as they were enacted in the said law.

The Rule 49 (xii) (a) of the said Rules provides the procedure for appeal. The Rule 49 (xii) reads;

(a) Every appeal to the Registrar from an award of an arbitrator or 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 Rs. 50 or 10% of the sum claimed in the dispute where the appeal is made by a party claiming any sum of money, whichever sum is the higher sum in either case.

(b) An appeal not made in conformity with the above shall be rejected by the Registrar.

(c) & (d) not relevant at this stage.

This Rule has made it mandatory for the party appealing against the award to deposit the appeal deposit. The words used in the Rule are “*Every such appeal shall be forwarded to the Registrar with an appeal deposit.....*”. The appeal deposit is a compulsory pre requisite. The Rule (b) stipulates the result of non compliance of the rule (a). Under this Rule, the Registrar has no option but to reject the appeal if the Rule (a) is not complied with. The words “*shall be forwarded*” used in Rule (a) have been given a solid meaning by providing the compulsory rejection of appeal for non compliance in Rule (b). The appeal deposit is a mandatory pre requisite to entertain an appeal by the Registrar.

The Counsel for the Respondent has submitted that it had been held in the unreported case of CA Application 889/2000 dated 12.02.2014 that the appeal deposit is mandatory, but not tendered a readable copy of the judgment.

The Counsel for the Appellant relied on the case of Sebastian Fernando v. Katana M.P.C.S. Ltd. and others [1990] 1 Sri L R 342. The issue in this case was the rejection of the application for a writ without issuing notice. In this case Fernando J. held at page 345 that;

Although the Court has a discretion, in appropriate circumstances, to refuse Certiorari and Mandamus on the ground of delay, that plea involves equitable considerations ; the conduct of both parties should have been taken into account, and it was relevant that there was a delay of 18 months on the part of the Registrar in informing the Appellant of the rejection of his appeal, as well as a failure to reply to the Appellant's subsequent letters; the fact that no steps were taken to enforce the award might in these circumstances have led the Appellant to believe that such steps would not be taken ; that such delay caused no prejudice to other parties. Further, if the Appellant's contention is right, the rejection of his appeal would have been patently erroneous and without jurisdiction. In those circumstances, delay would not have justified summary dismissal (Rajakaruna v. Minister of Finance (1) ; Biso Menike v. de Alwis (2) ; Ramasamy v. State Mortgage Bank (3) ; the Respondents should have been noticed, and had delay been pleaded the Appellant may have been able to furnish other explanatory material.

Their Lordships have discussed the vires of the Rule 49 (xii) and observed that there is a serious question to be decided in the Court of

Appeal and the case has been remitted to the Court of Appeal. Their Lordships have not held that the Rule 49 (xii) is ultra vires. In the present case the Appellant is not challenging the Rule 49(xii) on the basis of ultra vires. Therefore Sebastian Fernando case has no application to this case.

Accordingly I dismiss the appeal without cost.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal