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

In the matter of an appeal under High Court Special Provision Act No: 19 of 1990 read with Article 154 (P) (6) of the constitution of the Democratic Socialist Republic of Sri Lanka.

Case No. C.A. (PHC) 68/2010

High Court of Civil Appeals Kegalle

Case No: 90/2009/Writ

P.R.Madduma Banda

Palliyaporuwa,Hemmathagama.

Petitioner-Appellant

Vs.

1. Mawanella Hemmathagama
   Multipurposes Co-operative Society,
   Mawanella.
2. W.Karunathilake
   Doranuwa,Ruwanwella.
3. P.Sunil Premachandra
   Commissioner/Registrar for Co-operative
   Development
   Sabaragamuwa Provincial Council,
   New Town,Rathnapura.

3A. Commissioner/Registrar,
Co-operative Development,
Sabaradamuwa Provincial Council,
New Town,Rathnapura.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Sunil Abeyratne with T. Gunathilaka for Petitioner-Appellant

Nuwan Pieris S.S.C. for 3rd Respondent-Respondent

T.M.S. Nanayakkara for 1st Respondent-Respondent

Written Submissions tendered on:

None of the parties tendered although the opportunity was given.

Argued on: 17.05.2018

Decided on: 05.10.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden in Kegalle dated 02.08.2010.

The Petitioner-Appellant (Appellant) was at all times material to this application the Manager of the Mawanella fuel station maintained by the 1st Respondent-Respondent (1st Respondent).

On or about 10.04.2007 the Appellant received a letter demand from the 1st Respondent calling upon him to pay a sum of Rs. 3,29,007.69 being the value of the shortage of fuel at the Mawanella fuel station. The Appellant denied liability and the 3rd Respondent-Respondent (3rd Respondent) thereafter appointed the 2nd Respondent-Respondent (2nd Respondent) as arbitrator to hear and determine the said dispute between the Appellant and the 1st Respondent.

After an inquiry, the 2nd Respondent made his award on or about 30.08.2008 (එ.6) by which he held that the Appellant should pay the 1st Respondent a sum of Rs. 1,15,472.39 for the shortage

of fuel. Both the Appellant and the 1st Respondent preferred two appeals to the 3rd Respondent. The position of the Appellant was that there was a defect in the two pumps and the meters.

The 3rd Respondent held that there was a defect in only one diesel pump and the 2nd Respondent erred in cutting off the complete loss on that basis. He further held that both the management of the 1st Respondent and the Appellant knew of the defect in the pump and meter but yet continued to issue diesel. Therefore, he made order (එ.8) apportioning the loss between the parties and hence made final order directing the Appellant to pay the 1st Respondent a sum of Rs. 2,25,496.34 for the fuel shortage. The Appellant invoked the jurisdiction of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden in Kegalle seeking writs of certiorari to quash එ.6 and එ.8. The High Court refused the application and hence this appeal.

The Appellant sought to assail the decision of the 2nd Respondent එ.6 on the basis that his findings are inconsistent with the evidence led before him. However, as Seneviratne J. held in *Nicholas v. Macan Markar Limited* [(1985) 1 Sri.L.R. 130 at 139]:

> "There is a fine distinction between, "appeal" and "judicial review". When hearing an appeal, the court is concerned with the merits of the decision in appeal. The question before court is whether the decision subject matter of the appeal is right or wrong. In the case of judicial review, the question before the court is whether the decision or order is lawful, that is, according to law."

The common law grounds heads of judicial review are illegality, irrationality and procedural impropriety [*Council of Civil Service Union v. Minister for the Civil Service* (1985) AC 374(HL)]. There Lord Diplock went on to state:

> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

The Appellant's attack on the lack of evidence may have been successful if that amounted to a "jurisdictional fact" bringing it within the head illegality. In my view it is not and at the most the attack is on facts that goes to the merits of the case. Thus, for the Appellant to succeed he must establish that there was a "total lack of evidence" or "no evidence" which he has failed to do.

The Appellant sought to assail the order made by the 3rd Respondent in appeal ඔබ.8 on the basis that it was made without hearing the Appellant. Section 58(4) of the Co-operative Societies Law No. 5 of 1972 states that no party to an appeal made to the Registrar under subsection 3 shall be entitled either by himself or by any representative to appear before or be heard by the Registrar on such appeal. This excludes both oral and written hearing [*Piyadasa v. Sri Jayawardenapura Multi-Purpose Co-operative Society Ltd.* (2002) 3 Sri.L.R. 294]. This issue is put beyond doubt by Rule 49(xii)(c) of the Rules made under section 61 of Co-operative Societies Law No. 5 of 1972 which states that the Registrar has the power to determine the appeal without hearing any party to the dispute. Accordingly, the 3rd Respondent acted within his powers in determining the appeal without hearing any party to the dispute. There is no procedural impropriety in that decision.

The decision of the 3rd Respondent to apportion the loss between the parties and hence the final order directing the Appellant to pay the 1st Respondent a sum of Rs. 2,25,496.34 for the fuel shortage is not illegal or irrational.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden in Kegalle dated 02.08.2010.

The appeal is dismissed with costs fixed at Rs. 25,000/=.

In conclusion, I am compelled to observe that none of the parties filed any written submissions although court invited them to do so. This has occurred in several other cases as well. Written submissions of the parties play an important role in assisting court to dispense justice as well as looking after the interest of the client. Counsel must ensure that the duty they owe both to court and client are duly performed.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal