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

In the matter of an application made under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Article 154P (4) against the judgment dated 20.01.2014 made in Central Provincial High Court Case No. Writ 31/2012

Weegaswatta Dissanayaka
Mudiyanselage Lokubanda
Dissanayaka,
Hellarawa,
Idampitiya,
Padiyapalalla.

Case No. CA(PHC) 12/2014

H.C. Kandy Case No. 31/2012 (Writ)

Petitioner-Appellant

Vs.

01. G.Weerasekera
Co-operative Development,
Commissioner and Registrar,
Co-operative Development Department,
Central Province,
P.O.Box No.2,
Ehelepola Kumarihami Mawatha,
Bogambara,
Kandy.

02. Assistant Co-operative Development
Commissioner,
Office of the Assistant Co-operative
Development Commissioner,
Nuwaraeliya

03. S.A.W.Samaraweera,
Rampukpitiya,
Nawalapitiya,

04. Rikillagaskada Multipurposes
Co-operative Society,
Rikillagaskada.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Gamini Hettiarachchi for Petitioner-Appellant

Nuwan Pieris S.C. for 1st and 2nd Respondents-Respondents

Written Submissions tendered on:

Petitioner-Appellant on 23.07.2018

1st and 2nd Respondents-Respondents on 26.06.2018

Argued on: 02.08.2018

Decided on: 05.10.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Central Province holden in Kandy dated 20.01.2014.

The Petitioner-Appellant (Appellant) was at all times material to this application employed as a store keeper by the 4th Respondent-Respondent (4th Respondent). The 4th Respondent demanded a sum of Rs. 1,269,902.48 from the Appellant for shortage of stocks from his custody which demand was rejected by the Appellant.

The 4th Respondent then referred the dispute to the 2nd Respondent-Respondent (2nd Respondent) who then referred it to the 3rd Respondent-Respondent (3rd Respondent) as arbitrator. After an inquiry, the 3rd Respondent made his award by which the Appellant was held liable to pay the 4th Respondent a sum of Rs. 442,686.51.

The Appellant then submitted an appeal to the 1st Respondent-Respondent (1st Respondent) against the award and deposited Rs.50/=. However, he failed to deposit 10% of the value of the award as required by Rule 49(xii)(a) of the Rules made under section 61 of the Co-operative Societies Law No. 5 of 1972 [Rule 49(xii)(a)]. The 1st Respondent then called upon the Appellant to deposit the required amount of Rs. 44,218.65 within 14 days which the Appellant failed to do. The 1st Respondent by letter dated 04.02.2012 (අ.6) informed the Appellant that his appeal was rejected as he failed to deposit the required amount.

The Appellant then made an application to the High Court of the Central Province holden in Kandy seeking a writ of certiorari to quash the said decision of the 1st Respondent. The learned High Court Judge dismissed the application by following the decision of the Supreme Court in *Somaratne v. Premachandra, Commissioner of Co-operative Societies and others* [S.C. Appeal 58/80; S.C.M. 28.07.1981] and hence this appeal.

The Appellant contends that Rule 49(xii)(a) is *ultra vires* to the rule making power of the Minister under section 61 of the Co-operative Societies Law No. 5 of 1972 and as such අ.6 must be quashed.

The learned counsel for the Appellant relied strongly on the Supreme Court decision in *Sebastian Fernando v. Katana Multi-Purpose Co-operative Society Ltd., and others* [(1990) 1 Sri.L.R. 342] and submitted that the Supreme Court had "analyzed the legality of Rule 49(xii)(a) exhaustively and held said rule is *ultra vires*". It is true that the Supreme Court did make a detailed analysis of Rule 49(xii)(a). However, the Supreme Court did not declare it to be *ultra vires*.

In *Sebastian Fernando's* case (supra) Fernando J. stated (at page 349):

> "Thus a serious question arises as to the vires of Rule 49 (X11) (a) that the requirement of an appeal deposit is not authorised by sections 58 (3), 61 (1) or 61(2) (y). However, as that question was not placed before the Court of Appeal for consideration, and as the Respondents were not heard in that Court (nor in this Court, though duly noticed) it is only proper that it should be determined by that Court, after such amendment of the petition as that Court may permit in its discretion, and after hearing the Respondents."

Kulatunga J. echoed similar sentiments and held (at page 360):

> "For the above reasons, I am of the view that a serious question arises as to the vires of Rule 49 (XII) (a). This question was not raised in the appellant's application to the Court of Appeal but only in this Court; leave was allowed on that ground and the question was argued without the respondents being heard. As such, it is only proper that a determination on that ground should be made by the Court of Appeal after such amendment of the petition as that Court may permit in its discretion."

Clearly, the Supreme Court left the *vires* of Rule 49(xii)(a) to be considered by the Court of Appeal. My research revealed that when the matter was sent back to the Court of Appeal, the State had given an undertaking to court that the Registrar of Co-operative Development notwithstanding the insufficiency of fees will entertain the petition of appeal dated 21.03.1983. In view of this undertaking the petitioner withdrew his application and hence the Court of Appeal did not make a finding on the *vires* of Rule 49(xii)(a) as directed by the Supreme Court.

The learned State Counsel in response to the attack on the *vires* of Rule 49(xii)(a) submitted that the Appellant has not sought a quashing of it in the High Court and as such it is not possible for him to raise the *vires* of Rule 49(xii)(a) in these proceedings. In effect it was his submission that Rule 49(xii)(a) was not open to collateral attack.

It is not clear whether it is a similar issue that troubled the minds of their Lordships in *Sebastian Fernando's* case (supra) when Fernando J. (at page 350) and Kulatunga J. (at page 360) stated that the question of *vires* of Rule 49(xii)(a) was not placed before the Court of Appeal and therefore directed the Court of Appeal to determine the issue after such amendment to the petition as the court may permit in its discretion.

Article 140 of the Constitution states that the jurisdiction of the Court of Appeal is "Subject to the provisions of the Constitution" and in issuing any of the writs referred to therein, it must be "according to law". Similarly, Article 154P (4) of the Constitution which gives jurisdiction to the Provincial High Court to issue writs mandates that it must be "according to law". The phrase "according to law" has been interpreted to mean English common law. [*Wijesekera v. Assistant Government Agent, Matara* (44 NLR 533 at 538), *Abdul Thassim v. Edmund Rodrigo (Controller of Textiles)* (48 NLR 121); *Nakkuda Ali v. Jayaratne (Controller of Textiles)* (51 NLR 457 at 461); *Colombo Commercial Co. Ltd. v. Shanmugalingam et al* (66 NLR 26, 32); *Mendis, Fowzie and others v. Goonewardena, G.P.A Silva* ((1978-79) 2 Sri.L.R. 322 at 356, 363); M.K *Mohideen v. I.S.W Goonawardene* ((1986) 2 CALR 487; *Sirisena Cooray v. Tissa Dias Bandaranaike* (1999) 1 Sri. L. R. 1 at 14-15)].

The general principle in English common law is that any defect that could be treated as jurisdictional in direct proceedings is equally available in collateral proceedings. In *Chief Adjudication Officer and another v. Foster* [(1993) A.C. 754] it was held that Social Security Commissioners hearing appeals under the Social Security Act 1975 had jurisdiction to determine any challenge to the vires of a provision in regulations made by the Secretary of State, on the ground that it was beyond the scope of the enabling power, whenever this was necessary in order to decide whether a decision under appeal was erroneous in point of law. In *Boddington v. British Transport Police* [(1999) 2 A.C. 143] the House of Lords held that it was open to a defendant in

criminal proceedings to challenge subordinate legislation, or an administrative decision made thereunder, where the prosecution was premised on its validity, unless there was a clear legislative intent to the contrary. However, court may interpret a particular statute to preclude or limit collateral attack [*The Queen v. Davey and others* (1899) 2 Q.B. 301, *Regina. v. Wicks* (1998) A.C. 92].

That being the general principle in English common law, the question is whether it can be accepted without any reservations as part of our law. In my view one fundamental issue which stands in the way of such a course of action is the constitutional limitation on the jurisdiction of the Provincial High Court. Article 154P (4) of the Constitution gives jurisdiction to the Provincial High Court to issue, according to law, writs specified writs specified therein **against any person exercising within the Province**, any power under (i) any law or (ii) statutes made by a Provincial Council established for that Province, in respect of any matter set out in the Provincial Council List.

In applying these constitutional provisions, it important to bear in mind the interpretation the Supreme Court made to these provisions in *Wijesuriya v. Wanigasinghe and others* [(2011) 2 Sri.L.R. 231 at 240] where Tilakawardena J. held:

> "If, in terms of the arguments presented, it were to be held that the High Court of Hambantota had sole jurisdiction to pronounce upon the Commissioner General's order, then it necessarily follows that an identical order in another Province would rest solely under the purview of that Province's High Court, and so on. Judicial disparity in such a scenario is inevitable with the passage of time, resulting in disparate rulings upon otherwise identical orders. If the goal of the judicial system is to provide justice, such judicial disparity cannot be permitted and was clearly not the intention of the legislature. The Commissioner General's Order though acting upon a matter occurring in a Province (as it must, since all matters arise in some Province or another), is merely an exercise of Power in relation to such Province Such "island-wide" powers are appropriately the domain of the jurisdiction of the Appellant Courts with "island-wide" jurisdiction."

Rule 49(xii)(a) was made under the Co-operative Societies Law No. 5 of 1972 by the relevant Minister of the central government. He was exercising a power given under a law in the whole country and not only within the Central Province. Hence it could not have been the subject matter of a direct attack as to its *vires* in the Provincial High Court of the Central Province by way of judicial review. **There is a general rule in the construction of Statutes that what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner** [*Bandaranaike v. Weeraratne and Others* (1981) 1 Sri.L.R. 10 at page 16]. Therefore, I am of the view that the *vires* of Rule 49(xii)(a) is not open for collateral attack in proceedings before the Provincial High Court. This finding is sufficient to reject the argument made by the learned counsel for the Appellant on the *vires* of Rule 49(xii)(a).

However, I wish to refer to the previous decision of the Supreme Court in *Somaratne v. Premachandra, Commissioner of Co-operative Societies and others* (supra) where Ismail J. (with Wanasundera J. and Ratwatte J. agreeing) held:

> "I am therefore of the view that Rule 49(xii)(a) is the rule that has been framed under Section 61(2)(y) by the Minister and does not circumscribe the right of appeal granted under section 58(3) of the Law as the rule making powers of the Minister entitles the Minister in terms of the law to prescribe forms, fees to be paid and procedure to be observed."

But in *Sebastian Fernando's* case (supra) Fernando J. (at page 346) and Kulatunga J. (at page 356) appears to consider the ruling in *Somaratne's* case (supra) as to the *vires* of Rule 49(xii)(a) as *obiter*.

In addressing this observation, it is important to bear in mind the distinction between the *ratio decidendi* and the *obiter dicta* of a judgement.

Rupert Cross in *Precedents in the English Law* (3rd Ed., 1977) offers the following formulations for the two terms:

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury" (page 76)
>
> "*Obiter dictum* is a proposition of law which does not form part of the ratio decidendi" (page 79)

Thamotheram J. in *Walker Sons and Co. (UK) Ltd. v. Gunatilake and others* [(1978-79-80) 1 Sri. L. R. 231 at 232] explicitly held that the *ratio decidendi* of a Superior Court is binding for all inferior Courts:

> "The ratio decidendi of cases decided by the Court becomes a rule for the future binding all courts which the courts of last resort are not whether it be under the same system or under a different system."

Rupert Cross in *Precedents in the English Law* (Oxford University Press, 1961 at p. 75) states that in order to discover what the *ratio decidendi* of a particular case is one must have regard to the facts of that case, the issues raised by the pleadings and arguments and subsequent cases that have considered the case under review.

In *Somaratne's* case (supra) although the petition of appeal was not sent to the Registrar of Co-operative Development, the appeal deposit was also not paid and it is in this context that the Court had the benefit of a full argument on the *vires* of Rule 49(xii)(a) and held that it to be *intra vires*.

Rupert Cross in *Precedents in the English Law* (3rd Ed., 1977) observes that a distinction can be drawn between different kinds of dicta. This would be:

(a) dicta which are irrelevant to the case in which they occur (which he identifies as *obiter dicta*) and

(b) dicta **which relate to some collateral issue in the case** although not forming part of the *ratio decidendi* (which he identifies as *judicial dicta*). (page 85) (emphasis added)

This classification seems to suggest that *judicial dicta* have a higher level of authority than mere *obiter dicta*. I am of the view that the dicta in *Somaratne's* case (supra) amounts to *judicial dicta*. Accordingly, if there was a need for a determination on the *vires* of Rule 49(xii)(a), I would have followed the *judicial dicta* in *Somaratne's* case (supra) and held it to be *intra vires*.

For the forgoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Central Province holden in Kandy dated 20.01.2014.

The appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal