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

In the matter of an Appeal made in terms of Section 9 (b) of the Provincial High Court (Special)Provisions Act No 19 of 1990.

Samarakoon Jayasundera Mudiyanselage Kiri

Banda,

No.248/5, Ranala Road,

Habarakanda.

Case No. CA(PHC) 98/2007 **Petitioner – Appellant**

H.C. Colombo Case No. 03/2003/Writ **Vs.**

01. A.H. Irangani Samaraweera,
    Commissioner of Co-operative Development
    (Western Province)
    Adipada Street,
    Colombo 01.
02. Widana Arachchilage Dhammika Rajapaksha,
    Arbitrator,
    3/49, Wijayamanna Road,
    Kalutara North, Kalutara.
03. Homagama Multi-purpose Corporative Society,
    Homagama.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Rasika Dissanayake for Petitioner-Appellant

Indula Ratnayake S.C. for 1st Respondent-Respondent

Vidura Gunaratne with Godfrey Silva for 3rd Respondent-Respondent

Written Submissions tendered on:

Petitioner-Appellant on 20.07.2018

1st Respondent-Respondent on 05.06.2018

3rd Respondent-Respondent on 19.06.2018

Argued on: 12.03.2018

Decided on: 19.10.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Western Province holden in Colombo dated 24.05.2007.

The Petitioner-Appellant (Appellant) was at all times material to this application the Regional Manager of the Maththegoda Branch of the 3rd Respondent-Respondent (3rd Respondent). On 10.11.1998, the 3rd Respondent sent a letter demand to the Appellant (Vide page 53 of the Appeal Brief) calling upon the Appellant to pay the 3rd Respondent a sum of Rs 1, 918, 796/15 in respect of shortage of goods and money which had occurred during the period the Appellant was the Regional Manager of the Maththegoda Branch of the 3rd Respondent.

As the Appellant refused to comply with the said letter demand, the 3rd Respondent referred the dispute to the 1st Respondent-Respondent (1st Respondent) in terms of section 58(1) of the Cooperative Societies Law No. 5 of 1972 (Cooperative Societies Law). Upon receipt of the reference, the 1st Respondent referred the said dispute for arbitration to the 2nd Respondent-Respondent (2nd Respondent).

The 2nd Respondent made his award on 2000.06.07 in terms of which, the Appellant was ordered to pay the 3rd Respondent a sum of Rs 1, 276, 841.65. Being aggrieved by the said order of the 2nd Respondent, both the Appellant (Vide page 209 of the Appeal Brief) and the 3rd Respondent (Vide page 257 of the Appeal Brief) preferred appeals to the 1st Respondent in terms of section 58(3) of the Cooperative Societies Law. The 1st Respondent by order dated 2002.06.26, revised the sum imposed by the 2nd Respondent and ordered the Appellant to pay the 3rd Respondent a sum of Rs 1, 578,697.88. (Vide page 243 of the Appeal Brief). The Appellant sought to quash both the initial arbitral award and the order of the 1st Respondent by invoking the writ jurisdiction of the High Court of the Western Province holden in Colombo and sought the following relief:

a) A writ of certiorari quashing the arbitral award made in arbitration case no. 12179;
b) A writ of certiorari quashing the order dated 26-06-2002 made by the 1st Respondent in appeal from the said arbitral award.

The learned High Court judge by her order dated 24.05.2007 dismissed the application of the Appellant and hence this appeal.

The Appellant in his petition of appeal (Vide Page 01 of the Appeal Brief) contends that the learned High Court judge has erred by failing to consider that the impugned arbitral award of the 2nd Respondent was;

a) made after the holding of an inquiry which was in violation of the rules of natural justice
b) made in total disregard and failed to evaluate evidence led at the arbitral inquiry.

The Appellant also contends that the 1st Respondent has exceeded her statutory authority by allowing the parties to make oral representations afresh at the appeal inquiry.

I will first assess the arguments adduced by the Appellant to impugn the arbitral award of the 2nd Respondent. The documents on record indicate that the letter demand (Vide page 53 of the Appeal Brief) sent by the 3rd Respondent to the Appellant broke down the total sum of Rs 1, 918,796/15 that was demanded into different headings. The most significant sum of money demanded from the Appellant was Rs 1,612,568.32 under the head of a shortage of goods that occurred between 01.06.1998 to 12.07.1998 due to a fire which broke out at the Maththegoda regional branch of 3rd Respondent on 12.07.1998. The 2nd Respondent concluded that the Appellant was only liable to pay Rs 1,130,965.45 under this head and not the initial Rs 1,612,568.32 demanded (Vide page 212 of the Appeal Brief). The Appellant has nevertheless contended (Vide page 35 of the Appeal Brief) that the imposition of the said sum was unjust for the following reasons:

I. The 2nd Respondent had failed to consider evidence which indicated that the goods were damaged by the fire on 1998.07.12 due to the contributory negligence of the Management and Board of Directors of the 3rd Respondent who had acquiesced in allowing goods in excess of the maximum limit to be stocked in the Maththegoda branch.

II. The 2nd Respondent had failed to consider evidence which indicated that the sum of Rs 1,612,568.32 had been calculated by the officers of the 3rd Respondent in an irregular manner without the presence or participation of the Appellant.

III. The 2nd Respondent had imposed the said sum without ascertaining who was responsible for the fire at the Maththegoda Branch.

IV. The documents relied on by the 2nd Respondent arbitrator in arriving at his decision were not lawful documents.

Correctness versus Lawfulness of the arbitral award

Before dealing with these individual contentions, it is necessary for this court to take cognizance of the contention of the 1st Respondent (Vide sub-section 10 of the 1st Respondent's written submissions) that the Appellant is attempting to challenge the 'correctness' as opposed to the 'lawfulness' of the arbitral award by way of the High Court's writ jurisdiction. It is trite law that a court exercising judicial review does not concern itself with the correctness of the decision but only with its lawfulness. [*Nicholas v. Macan Markar Limited* (1985) 1 Sri.L.R. 130 at 139]. The scheme of the Cooperative Society Law also indicates that the 'correctness' or merits of an arbitral award is left to be determined on appeal by the Registrar of Cooperative Development and not a civil court.

Section 58(3) of the said Law states that;

> *Any party* ***aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar*** *within such period and in such manner as may be prescribed by rules.*

Section 58(5) of the said Law states that;

> ***A decision of the Registrar*** *under subsection (2) or* ***in appeal under subsection (3) shall be final and shall not be called in question in any civil court.***

Section 58(6) of the said Law states that;

> *The award of the arbitrator or arbitrators under subsection (2) shall,* ***if no appeal is preferred to the Registrar under subsection (3) or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court.***

The first question that needs to be answered therefore is whether the grounds of challenge raised by the Appellant are seeking to challenge the 'correctness' of the arbitral award or whether they are alleging that the findings of the arbitral award were made in ignorance of relevant and established evidence on record.

Generally, courts exercising judicial review do not review errors of fact made by administrative bodies/officials, unless those errors of fact are linked to the assumption of the administrative body's jurisdiction i.e. jurisdictional errors of facts.[1] [*R v. Fulham, Hammersmith and Kensington Rent Tribunal* (1951) 2 K. B. 1 at 6; *Walter Leo v Land Commissioner* 57 NLR 178]. One exception to this general principle is the 'no evidence rule'. Wade and Forsythe, *Administrative Law*, 7th Edition at page 312 observes as follows:

> ***"'no evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding, or where, in other words, no tribunal could reasonably reach that conclusion on that evidence".....*** *"It seems clear that this ground of judicial review ought now to be regarded as established on a general basis", and forecasts that 'no evidence' seems destined to take its place as yet a further branch of the principle of ultra vires, so that* ***Acts giving powers of determination will be taken to imply that the determination must be based on some acceptable evidence. If it is not, it will be treated as 'arbitrary, capricious and obviously unauthorised'."***

The observations made by the text writers about this ground of judicial review have been adopted and endorsed by the Supreme Court in *Kiriwanthe v Navaratne* [(1990) 2 Sri LR 393 at 409] and in *Nalini Ellegala* v *Poddalagoda* [(1999) 1 Sri LR 46 at 52]. In *Nicholas* v *Markan Markar* [(1985) 1 Sri. L.R. 130, pp. 140 – 141] the Court of Appeal cited with approval the following dictum about the 'no evidence rule' in the leading English case of *Edwards v. Bairstow* [1956] AC 14:

> *"..it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for*

[1] See Barnett H, Constitutional and Administrative Law, 3rd Edition, Routelege 2014 at page 763 where it is stated that a court will be reluctant to review a non-jurisdictional error of fact because it is presumed that administrative decision makers have all the factual information on hand and are best equipped to make factual determinations

the determination..... ***I do not think that it matters much whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination".***

In effect, the no evidence rule has opened up a very narrow path for courts to review non-jurisdictional errors of facts. In the UK, a finding by an administrative body that has been made in ignorance of established and relevant evidence has been held to be amenable to judicial review. [*Regina v. Criminal Injuries Compensation Board Ex Parte A (A.P.)* [1999] 2 AC 330; *Secretary of State for Education and Science v Tameside MBC* [1976] UKHL 6[2]].

In *Hasseen v Gunasekara and others* [CA Application No. 128/86 C.A.M. 02.10.1995] this court considered an order of the Rent Board of Review, affirming an order of the Rent Board which had been "arrived at without an adequate evaluation of the evidence and **by failing to take into consideration relevant items of evidence which could have influenced the finding" and held the Rent Board as well as the Board of Review had "erred in law by failing to take into account relevant items of evidence in arriving at the finding"** and therefore quashed the orders of the Rent Board as well as of the Board of Review

Therefore, when a factual finding by an administrative body is not supported by the evidence on record, or has been made ignoring relevant and established evidence on record, the court has the ability to exercise judicial review. The first and second grounds for challenging the arbitral award (see above) seem to have been made on this basis viz. that the factual findings of the 2nd Respondent are not supported by or have been made ignoring relevant and

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[2] Per Lord Wilberforce
Sections in this form may. no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. ***If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge***

established evidence on record. Therefore, these two grounds of challenge can be considered by a court exercising judicial review.

Pre-Constitutional Ouster Clauses and the Writ Jurisdiction of the Provincial High Court

Even if a court exercising judicial review is ordinarily competent to examine whether a decision/finding of an administrative body is supported by the evidence on record, a further legal issue which arises is whether section 58(6) of the Cooperative Society Law read with section 22 of the Interpretation Ordinance excludes the Provincial High Court's writ jurisdiction.

However, our courts have in a long line of decisions held that pre-constitutional ouster clauses in legislation read with section 22 of the Interpretation Ordinance do not have the capacity to oust or limit the writ jurisdiction vested in the Court of Appeal by virtue of Article 140 of the Constitution. [*Atapattu v People's Bank* (1997) 1 Sri LR 208, 221 – 222; *Sirisena Cooray v Tissa Dias Bandaranayake* (1999) 1 Sri LR 1, 13- 14; *Wijeypala Mendis v Perera* (1999) 2 Sri LR 110, 119; *Moosajees Ltd v Arthur* (2004) 2 ALR 1, 15)].

The reasoning adopted in the above decisions is that ouster clauses were inoperative in the face of the Court of Appeal's constitutionally enshrined writ jurisdiction. This reasoning is equally applicable to the writ jurisdiction of the Provincial High Court which is also constitutionally enshrined by virtue of Article 154P (4). Therefore, I am of the opinion that the constitutionally enshrined writ jurisdiction of the Provincial High Court cannot be ousted by section 58(6) of the Cooperative Societies Law read with section 22 of the Interpretation Ordinance.

Therefore, the law as it stands in Sri Lanka allows a Provincial High Court to review the decision/findings of an administrative entity exercising power within the Province on <u>any of the accepted grounds of judicial review</u>. This would include judicial review on the basis that a factual finding by that administrative entity is not supported by the evidence on record or that the findings were made ignoring relevant and established evidence on record. The learned High Court judge's order is to that extent erroneous, since it seems to suggest that the High Court's powers of judicial review is limited to the grounds mentioned in section 22(a) and (b) of the Interpretation Ordinance. (Vide page 324 of the Appeal Brief) The learned High Court judge has

also concluded that there is no basis for the court to quash the arbitral award on the limited grounds mentioned. It is therefore incumbent on this court to remedy the learned High Court judge's error and assess whether the arbitral award is liable to be quashed on the basis that its findings have been made ignoring relevant and established evidence on record.

Factual Evaluation

The Appellant's first contention is that the 2nd Respondent had made his determination ordering that the Appellant pay a particular sum of money without considering evidence which indicated that the goods were damaged by the fire on 1998.07.12 due to the contributory negligence of the Management and Board of Directors of the 3rd Respondent who had acquiesced in allowing goods in excess of the maximum limit to be stocked in the Maththegoda branch. A perusal of the arbitral award shows that the 2nd Respondent has in fact taken cognizance of this evidence. The relevant portions of the arbitral award (Vide page 235 and 212) state as follows:

> "හදිසි තොග ගණන් ගැනීම් මෙම ප්‍රාදේශිකය තුල සිදු කර නැති අතර අදීක්ෂණයට හා පරීක්ෂණ වලටද භාජනය කර නැත. එසේ සිදු වුවා නම් චක්‍රලේඛවලට පටහැනිව කලමනාකරකරුවන් සිදුකරනු ලබන කාර්යයන් වලින් මුදවා ගත හැකිව තිබුනා. **මෙම උපරිමය ඉක්මවා තිබූ භාණ්ඩ තොගය විනාශවීයාමට මේ ගැන සොයා නොබැලූ අදාල නිලදාරින්ද දැන හෝ නොදැන දායක වී ඇත.** මෙම කරුණු මත, නිරන්තරයෙන් ප්‍රදේශිකයේ තිබුනා යැයී හැඳිනගත් වැඩිපුර භාණ්ඩ ප්‍රමාණය ලක්ෂ අටක් යැයී තීරනය වේ..... **උපරිම තොග සීමාව ඉක්මවා තිබූ ලක්ෂ අටක බඩු තොගයෙන් හරි අඩක් වගකිව යුතු නිලදාරින්ට පැවරීම අනුව රුපියල් ලක්ෂ හතරක වටිනාකමක් බඩු අඩුවෙන් කැප හැර ඇත."**

The above portion of the arbitral award shows that the evidence alleged to have been ignored by the 2nd Respondent has in fact been a central piece of evidence considered by him to justify reducing the sum demanded from the Appellant by four lakhs. The Appellant's contention that the arbitral award failed to take account of evidence as to the contributory negligence of the officials of the 3rd Respondent is therefore clearly unsustainable.

The next contention of the Appellant is that the 2nd Respondent had failed to consider evidence which indicated that the sum of Rs 1,612,568.32 had been calculated by the officers of the 3rd Respondent in an irregular manner without the presence or participation of the Appellant. Once again, the arbitral award itself is sufficient to show that the said piece of evidence has been considered by the 2nd Respondent. The irregularities in the calculation of the remaining goods by the officers of the 3rd Respondent-Respondent after the fire broke out was in fact used as the basis to reduce the sum payable by Rs 81,622.87. The relevant portion of the evidence (Vide page 235 of the Appeal Brief) is as follows:

"මෙම ගිනිගත් අවස්ථාවේදී ඉතිරි තොග නිවැරදිව ගණන් ගැනීමේදී අඩුපාඩු සිදුවී ඇතැයි සඳහන් කරමින් රුපියල් 81,622.87 ක් මෙම මුදලින් කපා හැර ඇත."

Thus, it can be seen that the Appellant's request to this Court to quash the arbitral award on the grounds that it failed to take account of relevant and essential evidence on record is misconceived. It is only open to this court to ascertain whether the evidence referred to has been given due consideration by the 2nd Respondent. I am of the opinion that the 2nd Respondent has not ignored the said evidence but has given it due consideration.

The order of the 1st Respondent in Appeal

The Appellant has also argued that the 1st Respondent has exceeded his statutory authority by allowing the parties to make oral representations afresh at the appeal inquiry.

Section 58(4) of the Western Province Cooperative Societies Statute No 3 of 1998 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. The wording of that section is identical to the wording of Section 58(4) of the Co-operative Societies Law. Therefore, in ascertaining the scope of section 58(4) of the Statute, it is permissible to consider interpretations given to the scope of section 58(4) of the Cooperative Societies Law, as they are *in pari materia.* In *Crosley v. Arkwright [(1788) 2 T.R. 603, 608, (1788) 100 E.R. 325, 328]* Buller J. held that all Acts relating to one subject must be construed *in pari materia.*

Decisions on the scope of section 58(4) of the Cooperative Societies Law have recognized that the section gives discretion to the Registrar to decide on the procedure to be followed when hearing an appeal. [*Piyadasa v. Sri Jayawardenapura Multi-Purpose Co-operative Society Ltd.* (2002) 3 Sri.L.R. 294; *P.R. Madduma Banda v. Mawanella Hemmathagama Multipurposes Co-operative Society* and others (C.A. (PHC) 68/2010, C.A.M 05.10.2018)] Accordingly, it is open to the Registrar to determine an appeal either without hearing any party to the dispute or by granting such hearing as he thinks fit.

Accordingly, I am unable to agree with the Appellant's contention that the 1st Respondent-Respondent exceeded his statutory authority by giving an opportunity for the parties to make oral representations.

In any event, the record of the proceedings of the appeal hearing (Vide pages 224 -242 of the Appeal Brief) shows that the Appellant has availed himself of the opportunity to make oral representations before the 1st Respondent. It is trite law that an individual who has acquiesced in a decision may not be granted a remedy if he subsequently seeks to challenge it. Therefore, even if it be assumed that the procedure adopted by the 1st Respondent was irregular, the acquiescence on the part of the Appellant would have cured that irregularity, as that irregularity would only have created a latent want of jurisdiction.

For the foregoing reasons I see no reason to interfere with the judgment of the learned High Court judge of the Western Province holden in Colombo dated 24.05.2007.

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

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal