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

Dinamithra Gedara Upali Jayakoddy,

No. 2/12, Liyangawathura,

Paniwila.

Case No. CA (PHC) 150/15.

H.C Kandy Case No. 25/2013 (Writ) **PETITIONER.**

V.

01. W.M.P.K. Weerasekara,
Commissioner of Cooperative Development and Registrar (Central Province),
Department Cooperative Development of Central Province,
Ehelepola Kumarihamy Mawatha,
Bogambara,
Kandy.

02. Kundasale Multi-Purpose Cooperative Society Limited,
Menikhinne.

03. R.K. Chandrakanthi,
Arbitrator,
28, Dambawela Road,
Ampitiya.

RESPONDENTS

-NOW AND BETWEEN.-

Dinamithra Gedara Upali Jayakoddy,

No. 2/12, Liyangawathura,

Paniwila.

PETITIONER- APPELLANT.

V.

01. W.M.P.K. Weerasekara,

Commissioner of Cooperative
Development and Registrar (Central
Province),
Department Cooperative Development of
Central Province,
Ehelepola Kumarihamy Mawatha,
Bogambara,
Kandy.

A.M.K.C.K. Atapattu,
Commissioner of Cooperative
Development and Registrar (Central
Province),
Department Cooperative Development of
Central Province,
Ehelepola Kumarihamy Mawatha,
Bogambara,
Kandy.

1A SUBSTITUTED-RESPONDENT.

02. Kundasale Multi-Purpose Cooperative
Society Limited,
Menikhinne.

03. R.K. Chandrakanthi,
Arbitrator,
28, Dambawela Road,
Ampitiya.

RESPONDENT-RESPONDENTS

Before: **Prasantha De Silva J.**

&

S.U.B Karaliyadde J.

Counsel: Mr. I. M Bandara A.A.L for the Petitioner-Appellant

Mr. Sri Metta S.C for the 1st Respondent-Respondent

Mr. H Amarasinghe A.A.L for the 2nd Respondent-Respondent

Written Submissions

tendered on: By the Petitioner-Appellant – 09.01.2019.

1st Respondent – Respondent – 23.10.2018.

2nd Respondent – Respondent – 10.09.2019.

Argued: 18.01.2021.

Judgment delivered on: 25.02.2021.

Prasantha De Silva J.

JUDGMENT

The Petitioner- Appellant was employed as a store manager at the 2nd Respondent-Respondent, Kundasale Multipurpose Co-Operative Society Limited. Apparently, there was a dispute between the Petitioner-Appellant and the 2nd Respondent-Respondent Society over an alleged shortage of goods worth of Rs. 973,762.45 during the period of 1.03.1984 - 21.12.2010.

The said dispute was referred to the 1st Respondent-Respondent Commissioner by the 2nd Respondent society to recover sum of Rs. 973,762.45 from the Petitioner-Appellant.

The 1st Respondent-Respondent Commissioner has referred the said dispute to an arbitration before the 3rd Respondent-Respondent Arbitrator in terms of Section 58 (2) (b) of the Co-operative Societies Law No. 05 of 1972.

Thereafter, the 3rd Respondent-Arbitrator had inquired into the matter and held that the Petitioner-Appellant should pay a sum of Rs. 765,512.42 to the 2nd Respondent Society.

Being aggrieved by the said award of the Arbitrator, the Petitioner-Appellant has preferred an Appeal to the 1st Respondent-Commissioner in terms of Section 58 (2) of the Co-operative Convention of No. 04 of 1993 of the Central Province.

It appears that the 1st Respondent-Respondent Commissioner had rejected the said Appeal in terms of Rule 49 (xii) (b) of the Co-operative Rules 1973, published in the Extra Ordinary Gazette No 93/5 dated 10.01.1974 made under Section 61 of the Co-operative Societies Law No. 05 of 1972, for failing to submit the Appeal deposit as prescribed by Rule 49 (xii) (a) of the Co-operative Rules 1973.

Subsequently, the Petitioner-Appellant has invoked the Jurisdiction of the High Court of the Central Province holden in Kandy seeking to quash the 1st Respondent Commissioner's said decision – by way of a Writ Application bearing No 25/2013 seeking a Writ of Certiorari to quash the decision of the 1st Respondent Commissioner and also a Writ of Mandamus to compel the 1st Respondent Commissioner to consider the Appeal.

However, on the basis for failing to submit the Appeal deposit as prescribed by Rule 49 (xii) (a) of the Co-operative society rules of 1993. The Provincial High Court of the Central Province dismissed the Petitioner's said application.

It was the position taken up by the Petitioner-Appellant before us that the only ground for the dismissal of the Writ application of the Petitioner-Appellant by the Provincial High Court is that it is bound by the decisions of the Supreme Court in S.C Appeal bearing No. 58/80 in re ***Somaratne Vs. Premachandra*** and the Court of Appeal decision in C.A Application bearing No. 889/2000 in ***Jayasuriya Vs. Seemasahitha Mitipola Sakasuruwamkarana and Naya ganudenu Pilibanda samupakara samithiya***.

Nevertheless, the Petitioner-Appellant urged Court that the Provincial High Court has not drawn any attention to the Supreme Court Judgment in S.C Appeal bearing No. 57/1988 in ***Sebastian Fernando vs. Multi-purpose Co-operative Society Ltd. and others*** reported in 1990 (1) S.L.R 342.

It was submitted on behalf of the Petitioner-Appellant that when deciding ***Sebastian Fernando's*** Case, the Supreme Court also considered the S.C Appeal 58/80 S.C.M 28.07.1981 ***Somaratne Vs. Premachandra's*** Case.

It was stated in ***Sebastian Fernando's*** case that there is a serious question that arises as to the *ultra vires* of Rule 49 (xii) (a) that the requirement of an Appeal deposit is not authorised by Section 58 (3), 61 (1), 61 (2) (y). Their Lordships further stated that the said question is to be determined by the Court of Appeal itself.

Therefore, it was submitted that without considering the said vital position, it is unjust to dismiss the Petition of the Appellant by the Provincial High Court just only depending on the Judgments of **Somaratne Vs. Premachandra** and the Court of Appeal Judgment of *Jayasuriya Vs.* ***Seemasahitha Mitipola Sakasuruwamkarana and Naya ganudenu Pilibanda samupakara samithiya*** (supra) as *Ratio Decedendi.*

The Petitioner-Appellant urged Court that in view of the ***Sebastian Fernando's*** Case, the Court of Appeal has the duty to consider the serious question arising as to the *vires* of Rule 49 (xii) (a) that the requirement of an appeal deposit is not authorised by Section 58 (3), 61 (1), 61 (2) (y). Invariably, this decision is also relevant to the Provincial High Court. Nevertheless, the Provincial High Court had not considered the said position and just depended on the difference of *Ratio Decidendi* and "*Obiter Dicta*."

Furthermore, it was submitted by the Petitioner-Appellant that it is extremely unjust to impose a 10% of the award as a pre-requisite for the exercise of the right of Appeal and forfeit the said 10% and credit to the consolidated fund if the Registrar satisfied that the Appellant had no reasonable grounds to Appeal. Thus, this is a complete deprivation of the right of Appeal for an aggrieved party prejudiced by an arbitrary decision of the Registrar.

As such, it was contended that Rule 49 (xii) (b) of the Co-operative societies Law is ultra *vires* and sought relief prayed in the Petition of Appeal.

It is worthy to note that the Petitioner-Appellant has preferred this Appeal against the award of the 3rd Respondent-Arbitrator, who inquired into the dispute that arose between the Petitioner-Appellant and the 2nd Respondent- Society with regard to the shortage of goods worth of Rs. 973,762.45. After the inquiry, the 3rd Respondent- Arbitrator has made an award for Rs. 765,512.42 to be recovered from the Petitioner-Appellant.

However, the 1st Respondent Commissioner rejected the said Appeal of the Petitioner - Appellant under Rule 49 (xii) (b) of the Co-operative Societies Rules 1973, published in the Extraordinary Government Gazette No. 93/5 dated 10.01.1974 made under Section 61 of the Co-operative Societies Law No. 05 of 1972.

Rule 49 (xii) (a) and (b) reads as follows;

"(a) 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 the dispute where the appeal is made by the 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."

It is noteworthy that in terms of the said Rule, a person preferring an Appeal against an award of an Arbitrator is mandated to deposit an amount of Rs. 50 or 10% of the Arbitrators award, which is higher.

Apparently, the Petitioner-Appellant has failed to deposit the required amount as stipulated by the said rule when he was preferring the Appeal to the 1st Respondent-Commissioner.

In this respect, it was submitted on behalf of the 2nd Respondent-Society that in the case of ***Sebastian Fernando Vs. Multi-purpose Co-operative Society Ltd. and others***, the Supreme Court only made certain observations as to the legality of the Rule 49 (xii) thus their observations merely constitute an "*Obiter*" and do not have any binding authority on lower Courts.

However, it was argued on behalf of the Petitioner-Appellant that in ***Sebastian Fernando's*** case, the Supreme Court very clearly stated that there is a serious question that

arises as to the *vires* of Rule 49 (xii) (a) that the requirement of an Appeal, deposit is not authorised by Section 58 (3), 61 (1), 61 (2) (y). Furthermore, it was stated that the question is to be determined by the Court of Appeal itself.

As such, the Petitioner-Appellant submitted that without considering the said position, it is unjust to dismiss the Petition of the Petitioner-Appellant by the Provincial High Court just only depending on the Judgments of S.C Appeal 50/1980 – ***Somaratne Vs. Premachandra*** and the Judgment by the Court of Appeal C.A. Application No. 889/2000 – ***Jayasuriya Vs. Seemasahitha Mitipola Sakasuruwamkarana and Naya ganudenu Pilibanda samupakara samithiya*** as *Ratio Decedendi*.

This aspect of Law has been properly analysed and emphasized in the case of CA PHC 12/2014 – ***W.D.M Lokbanda Dissanayake Vs. G. Weerasekere and three others***, by *His Lordship Janak De Silva* as follows;

> In ***Sebastian's Fernando's*** case (Supra) *Fernando J* stated (at page 349):
>
> "Thus, a serious question arises as to the *vires* of Rules 49 (xii) (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 Rules 49 (xii) (a). This question as 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. It was observed by *His Lordship Justice Janak De Silva* 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 Rules 49 (xii) (a) as directed by the Supreme Court.

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 S.L.R. 342] and submitted that the Supreme Court had "analysed the legality of Rule 49 (xii) (a) exhaustively and held that the 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."*

Rule 49 (xii) (a) was made under the Co-operative Societies Law No. 05 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 [*Lex Non Cogit Ad Imposibilia]*. Therefore, His Lordship emphasized 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).

In this respect, it is worthy to note the decision of the Supreme Court in ***Somaratne Vs. Premachandra, Commissioner of Co-operative Societies and others*** (supra) where *Ismail J.* (with *Wanasundera J.* and *Ratwatte J.* agreeing) held, I quote;

> "I am therefore of the view that Rule 49 (xii) (a) is the rule that has been framed under Section 61 (2) 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."

In view of ***Sebastian Fernando's*** case (supra) Fernando J. and Kulatunga J. had considered the ruling in ***Somaratne's case*** (supra) as to the *vires* of Rule 49 (xii) (a) as *Obiter*.

In this instance, it is worthy to note the distinction between the "*Ratio Decidendi"* and the "*Obiter Dicta"* of a Judgment.

The Black's Law Dictionary 10th Edition defines, *Obiter dictum* as a Judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be not considered persuasive).

"Strictly speaking an "*Obiter dictum"* is a remark made or opinion expressed by a Judge, in his decision upon a cause, 'by the way' – that is, incidentally or collaterally, and not directly upon the question before the Court; or it is any statement of Law enunciated by the Judge or Court merely by way of illustration, argument, analogy or suggestion… In the common speech of Lawyers, all such extrajudicial expressions of legal opinion are referred to as '*dicta*' or '*Obiter dicta*' these two terms being used interchangeably".

According to the Black's Law Dictionary 10th Edition, *Ratio Decendi* is defined as follows; "The phrase 'the Ratio Decidendi of a case' is slightly ambiguous. It may mean either (1) the rule that the Judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a latter Court conceded him to have had the power to lay down."

His Lordship Justice Janak De Silva cited Rupert Cross in precedents in the English Law (3rd ed-1977) in the ***W.D.M Lokbanda's Case*** and has observed that distinction can be drawn between a different kind of *dicta*;

a. *Dicta* which are irrelevant to the case in which they occur [which he identifies as *obiter dicta.*]
b. *Dicta* which relate to some collateral issue in the case although not forming part of the *ratio decidendi* [which identifies as *Judicial dicta*.' Page 85.

Apparently, this classification suggests that *Judicial dicta* have a higher level of authority than mere *obiter dicta*.

As such, His Lordship that *dicta* in ***Somaratne's case*** (supra) amounts to *Judicial dicta* – and further held that the *Judicial dicta* in ***Somaratne's case*** (supra) and held that to be *intra vires* and not *ultra vires.*

It is pertinent to note that in S.C Appeal 58/80 [***Somaratne's case*** (supra)], delivered on 28.07.1981, where *Justice Ismail* emphasized that;

"I am of the view that Rule 49 (xii) (a) is not ultra *vires* the rule making powers conferred on the Minister, particularly since under Section 58 (3) provides the period within which an appeal may be filed can be prescribed by the rules."

In terms of the said Rule 49 (xii) (a) and (b), a person appealing against an award of an Arbitrator is mandated to deposit an amount of Rs. 50 or 10% of the Arbitrator's award, whichever is higher. In ***Fernando's Case,*** it was emphasized by *Kulatunge J.* agreeing with *Fernando J.* that, this rule may discourage and even prevent appeals made bona fide and upon good grounds solely because an Appellant does not have the means of making the required appeal deposit. However, the Appellant when submitting the Appeal to the 1st Respondent has failed to deposit the required amount as stipulated by the said rule.

Therefore, the 1st Respondent by letter marked P7, rejected the Appellants appeal on the basis that the Appellant has failed to deposit 10% of the value of the award of the Arbitrator under Rule 49 (xii) (b) of the Co-operative rules, made under Section 72 (2) of the Co-operative Statutes of the Central Provincial Council No. 10 of 1990, as amended by statute No. 04 of 1993, which is not *ultra vires*.

Hence, in the circumstances, it is my considered view that the application of the Petitioner-Appellant for a Writ of Certiorari and Mandamus is without merit.

In view of the foregoing reasons, we see no reason for us to interfere with the Order of the Learned High Court Judge of the Central Province holden in Kandy dated 11.09.2015.

Thus, the Appeal is dismissed with costs.

JUDGE OF THE COURT OF APPEAL

I agree.

S.U.B Karaliyadde J.

JUDGE OF THE COURT OF APPEAL