

In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

In the matter of an Appeal in terms of Articles 154(P)(4) and 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 and the Co-operative Societies Law, No. 5 of 1972 (as amended)

**C. A. Case No.
CA (PHC) APN 170/2010**

**P.H.C. Kandy Case No:
67/2009**

**M.C. Nawalapitiya Case No:
59504**

H.S. Fonseka,
Assistant Commissioner (Administration)
Department of Co-operative Development,
P.O. Box 149, No. 27, Vauxhall Street,
Colombo 02

Applicant

1. Muthumadinage Ranjith Perera,
No. 4/42, Devaraja Mawatha,
Kahatapitiya,
Gampola
2. Muthumadinage Wilson Perera,
Sri Bodhiraja Mawatha,
Ethgala,
Gampola

1st and 2nd Accused

And

Muthumadinage Ranjith Perera,
No. 4/42, Devaraja Mawatha,
Kahatapitiya,
Gampola

1st Accused -Appellant

1. H.S. Fonseka,
Assistant Commissioner (Administration)
Department of Co-operative Development,
P.O. Box 149, No. 27, Vauxhall Street,
Colombo 02

Applicant-Respondent

2. Muthumadinage Wilson Perera,
Sri Bodhiraja Mawatha,
Ethgala,
Gampola

2nd Accused -Respondent

And now between

Muthumadinage Ranjith Perera,
No. 4/42, Devaraja Mawatha,
Kahatapitiya,
Gampola

1st Accused -Appellant-Appellant

Vs.

1. H.S. Fonseka,
Assistant Commissioner (Administration)
Department of Co-operative Development,
P.O. Box 149, No. 27, Vauxhall Street,
Colombo 02

Applicant-Respondent-Respondent

2. Muthumadinage Wilson Perera,
Sri Bodhiraja Mawatha,
Ethgala,
Gampola

2nd Accused -Respondent-Respondent

Before: Prasantha De Silva, J.

S.U.B. Karalliyadde, J.

Counsel: Mr. R. Chula Bandara for the 1st Accused -Appellant-Appellant

Ms. Nayomi Kahavita S.C. for the Applicant-Respondent-Respondent

Written Submissions tendered:

on 16.12.2019 by the Applicant-Respondent-Respondent

on 18.09.2020 by the 1st Accused -Appellant-Appellant

Argued: on 30.03.2021 by way of written submissions

Decided: on 21.10.2021.

S.U.B. Karalliyadde, J.

This Appeal emanates from the judgement dated 16.06.2010 of the learned High Court Judge of the Provincial High Court of the Central Province holden in Kandy in the Appeal bearing No. Appeal 67/2009. The facts pertaining to the Appeal were as briefly as follows;

The Applicant-Respondent-Respondent (hereinafter referred to as the Applicant) initiated proceedings in the Magistrate's Court of Nawalapitiya by a Certificate (hereinafter referred to as the Certificate) filed under section 59 (1) (c) of the Co-operative Societies Law, No. 5 of 1972 (as amended) (hereinafter referred to as the Co-operative Law) against the 1st Accused-Appellant-Appellant and the 2nd Accused-Respondent-Respondent (hereinafter referred to as the 1st and 2nd Accused respectively) seeking to enforce an Arbitral Award made under section 58 (2) of the Co-operative Law. After the summons were served on the 1st and 2nd Accused, they appeared before the Magistrate's Court and in terms of section 59 (4) (c) of the Co-operative Law, the learned Magistrate has granted them an opportunity to show cause against the Certificate. Being dissatisfied with the cause shown by the 1st Accused, the learned Magistrate, in terms of section 59 (4) of the Co-operative Law has ordered to recover the sum mentioned in the Certificate from the 1st and the 2nd Accused as a fine. Against that Order dated 29.05.2009, the 1st Accused preferred an Appeal to the Provincial High Court of the Central Province holden in Kandy. On 16.06.2010, the learned High Court Judge has dismissed the Appeal on the basis that the Co-operative Law does not provide Appeal rights. By this Appeal, the 1st Accused seeks to set aside the Order of the learned High Court Judge dismissing the appeal.

When the matter was taken up for Argument, the parties consented to abide by a judgment delivered on their Written Submissions, dispensing with their rights to make Oral Submissions. The contention of the learned Counsel for the 1st Accused is that in terms of section 4 (2) of the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 (hereinafter referred to as the ICCPR Act) the 1st Accused has the right of Appeal against the Order of the learned Magistrate. To strengthen his position, the learned Counsel has cited the Supreme Court decision in *Mallarachhige Kanishka Gunawardhana Vs. H.K. Sumanasena and the Hon. Attorney General* (S.C. Appeal No. 201/2014 decided on 15.03.2018). The contention of the learned State Counsel for the Applicant is that the Co-operative Societies Law, does not provide appeal rights and since the legal position considered in the case cited by the learned Counsel for the 1st Accused has no relevance to the case in hand, that decision does not make a binding effect for the facts of the instant action.

There is no specific provision in the Co-operative Societies Law, which the appeal rights are conferred on the parties and it is a trite law that the right of appeal is a statutory right and unless the statute provides that right parties are not entitled to the reliefs by way of appeal.

The proceedings in the Magistrate's Court pertaining to the instant action has been initiated under section 59 (4) of the Co-operative Law, on a Certificate issued by the Applicant to the Magistrate in terms of Paragraph (c) of subsection (1) of section 59.

Subsection (4) of section 59 states thus;

“Where a certificate is issued to a Magistrate under paragraph (c) of subsection (1), the Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of the amount should not be taken against him, and in default of sufficient cause being shown, the amount shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with fine only or not punishable with imprisonment”

Therefore, when considering the above stated provisions of section 59 (4) it is clear that it stipulates the procedure which the Magistrate should follow when a certificate is issued seeking to enforce the Arbitral Award and recover the sum mentioned in the certificate from the defaulter. The defaulter is not burdened with a criminal liability under that subsection and therefore, the Magistrate does not invoke criminal jurisdiction vested in him in recovering the sum mentioned in the certificate.

The Supreme Court has considered in the case cited by the learned Counsel for the 1st Accused a situation where the appellant was convicted and sentenced for a charge punishable under section 64 (a) of the Foreign Employment Bureau Act, No. 21 of 1985. That Act does not provide appeal rights to the parties. Nevertheless, His Lordship, Justice Aluwihare has concluded in that authority that even though, the appeal rights are not conferred on the parties by the Foreign Employment Bureau Act, No. 21 of 1985, in terms of section 4 (2) of the ICCPR Act the appellant is entitled to lodge an appeal against the conviction and the sentence.

Section 64 (a) of the Foreign Employment Bureau Act, No. 21 of 1985 provides that;

“Any person who,

a) being a licensee charges any fee otherwise than as provided in section 51 for the purposes of providing or securing employment outside Sri Lanka for any other person;

b) not being a licensee, demands or receives or attempts to receive for himself or any other person, any money for the purpose of providing or securing employment for any person outside Sri Lanka,

shall be guilty of an offence under this Act and shall be liable on conviction after summary trial by a Magistrate to a fine not less than one thousand rupees and not exceeding one thousand five hundred rupees and to imprisonment of either description for a term not less than twelve months and not exceeding two years. The Magistrate shall, in addition, order the offender to refund the fee or

money which is the subject of the offence, to the person from whom the offender received such fee or money.”

When considering the above statutory provisions, it is clear that under section 64 (a) of the Foreign Employment Bureau Act, a Magistrate is vested with powers to convict a person and sentence only after having a summary trial against the alleged perpetrator.

Section 4 (2) of the ICCPR Act, provides thus;

“Every person convicted of a criminal offence under written law, shall have the right to appeal to a higher court against such conviction and any sentence imposed.”

Therefore, it is clear that as provided by sub-section 2 of section 4 of the ICCPR Act, the appealable right of a person who is convicted and sentenced after a summary trial is guaranteed if, he is convicted and sentenced for a criminal offence under any written law. Nevertheless, in the action in hand the 1st and 2nd Accused were neither charged before the Magistrate’s Court for a criminal offence under any written law nor had been tried nor convicted or sentenced. The action had been filed against them in the Magistrate’s Court to recover the Arbitral Award. After giving them an opportunity to show cause as to why further proceedings for recovery the Arbitral Award should not be taken and in default of sufficient cause being shown the learned Magistrate performing an administrative duty has decided to recover the amount mentioned in the Certificate as a fine imposed on the 1st and 2nd Accused. Therefore, the duty performed by the learned Magistrate in the action filed under the Co-operative Law and the function of a Magistrate in a summary trial against a person who has allegedly committed a criminal offence could be clearly distinguished as above mentioned. Under those circumstances, I hold that the provisions of section 4 (2) of the ICCPR Act do not apply to the case in hand and since the appealable rights are not conferred under the Co-operative Law, the 1st Accused has no right to appeal against the Order of the learned Magistrate.

Therefore, I hold that the impugned judgment of the learned High Court Judge affirming the Order of the learned Magistrate is according to law. I affirm the impugned judgment of the learned High Court Judge and dismiss the appeal. 1st Accused should pay Rs. 30,000/- to the Applicant as costs of this appeal.

It is important to draw the attention to the following provisions of the ICCPR Act and the International Covenant on Civil and Political Rights (the Covenant). Sub-section 2 of section 4 of the ICCPR Act is based on the Article 41 of the Covenant. Article 41.5 of the Covenant states thus;

*‘Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal **according to law**’* (emphasis added).

Therefore, it appears that the appealable right of a person is guaranteed by the Convention subject to the law of the land in the particular country. If the statute under which a person is convicted and sentenced does not provide appealable rights, he has no right to appeal against his conviction and the sentence. Nevertheless, when drafting the ICCPR Act, the words ‘according to law’ has been omitted and as a result, even though, the appealable rights have not been given by the statute an appeal could be preferred under sub-section 2 of section 4 of the ICCPR Act against a conviction and a sentence.

JUDGE OF THE COURT OF APPEAL

I agree.

Prasantha De Silva J.

JUDGE OF THE COURT OF APPEAL