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

In the matter of an Application under and in terms of Article 154G (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Court of Appeal Case No:
CA/PHC/214/2015

Kandy High Court Case No:
39/2012

Rankoth Gedara Samarasinghe,
19/1, Hatamuna, Piawala.

Petitioner

Vs.

01. Kundasale Co-operative Society Limited,
Menikhinne.

02. W.M.P.K Weerasekara,
Commissioner of Co-operative Development and Registrar (Central Province),
Department of Co-operative Development, (Central Province),
Ehelepola Kumarihamy Mawata, Bogambara, Kandy.

03. B.G. Chandrasena,
No. 1C, Sandun Mawata, Kolokgahawatta, Kengalla, Colombo 07.

Respondents

NOW AND BETWEEN

Rankoth Gedara Samarasinghe,
19/1, Hatamuna, Piawala.

Petitioner-Appellant

Vs.

01. Kundasale Co-operative Society Limited,
Menikhinne.

02. W.M.P.K Weerasekara,
Commissioner of Co-operative Development
and Registrar (Central Province),
Department of Co-operative Development,
(Central Province),
Ehelepola Kumarihamy Mawata, Bogambara,
Kandy.

03. B.G. Chandrasena,
No. 1C, Sandun Mawata, Kolokgahawatta,
Kengalla, Colombo 07.

Respondent-Respondents

Before: **Prasantha De Silva, J.**
S.U.B Karalliyadde, J.

Counsel: Eranjan Athapaththu A.A.L for the Petitioner-Appellant.
Jayathilake Uyanwatte A.A.L for the 1st Respondent-Respondent.
Nayomi Kahawita S.S.C for the 2nd and 3rd Respondent-Respondents.

Written Submissions tendered on: 29.04.2019 by the Petitioner-Appellant.
28.03.2019 by the 1st Respondent-Respondent.
05.10.2020 by the 2nd and 3rd Respondent-Respondents.

Decided on: 11.03.2022.

Prasantha De Silva, J.

Judgment

The Petitioner-Appellant was an employee of the Kundasale Co-operative Society Limited-Menikhinne. He had been working in the said Society in various capacities since 1981 and had become the Store Keeper. It was submitted by the Petitioner-Appellant [hereinafter sometimes

referred to as the Appellant], in 1998 the Appellant was informed by the 1st Respondent-Respondent Society-Menikhinne, that there was a shortage of stocks amounting to Rs. 405,559.65/-.

However, the 1st Respondent-Respondent [hereinafter sometimes referred to as the 1st Respondent-Society] demanded that the Appellant has to pay a sum of Rs. 3,036,137.83 in respect of the shortage of the goods occurred when the Appellant worked in the capacity as the Store Keeper of the 1st Respondent Society.

It appears that the 1st Respondent Society referred the dispute to the 2nd Respondent-Respondent [hereinafter sometimes referred to as the 2nd Respondent-Commissioner] to recover the sum of Rs. 3,036,137.83 from the Appellant.

On 19.12.2007, the Appellant was informed that he had to pay Rs. 962,223.82 forthwith for the shortage of goods in the stores No.1 and No.2 before 15.01.2008. He was also informed that in the event of failure to pay the said sum, his services would be terminated and the matter to be referred to an Arbitrator. Since the Appellant did not pay the said sum, the matter was referred for arbitration.

Accordingly, the Arbitrator inquired into the matter and held that the Appellant should pay a sum of Rs. 2,982,593.13 to the 1st Respondent Society. Being aggrieved by the said Arbitrator's award, the Appellant preferred an appeal on 17.11.2011 to the 2nd Respondent-Commissioner against the said award.

The inquiry regarding the said appeal was held on 21.01.2012, and according to the proceedings of the Inquiry [ඵ_2], it appears that the Appellant was represented by a legal representative at the Inquiry.

Apparently, the Appellant has specifically mentioned in the said Inquiry that submissions on behalf of the Appellant are tendered in writing for convenience and to save time. At the Inquiry, the Appellant was allowed to reply the submissions advanced on behalf of the 1st Respondent Society. After filing of written submissions of both the Appellant and the 1st Respondent Society, the 2nd Respondent-Commissioner had made the appeal decision [P_{27}]. It is seen that the said decision

[P_{27}] was made after considering the evidence placed before the 3rd Respondent Arbitrator, both verbally and documentary, at the Inquiry.

It is observable that the 2nd Respondent-Commissioner had described the grounds of appeal enunciated in paragraphs 11, 12, 13, and 14 of the petition of appeal [P_{24}] to the 2nd Respondent-Commissioner on the basis that the Arbitrator has considered the issues relevant thereto when delivering the Arbitrator's award.

The said grounds of appeal relate to non-accounting for the shortages of goods and non-accounting for destroyed goods. Apparently, the charges levelled against the Appellant relate to a shortage of goods from 1998 to 2008 as per paragraph No.06 of the arbitral award.

It was submitted by the Respondents that arbitral award [P_{19}] provides that the accounting entries contained on its 07th paragraph have adjusted for the shortages, excesses and other set-offs.

So that, the burden of proving any accounts defects entirely rest upon the Appellant, which the Appellant could not discharge the same by adduced evidence in establishing such defects.

It is pertinent to note that the Appellant admitted at the Inquiry that receiving and issuing of goods were not documented for, at the time of issuing and receiving of goods. Further, it was admitted that the goods might not have been stored in the storage in which they were to be stored.

Moreover, the Appellant admitted that he failed to make necessary entries in the records maintained by him. As such, in view of the aforesaid reason, it is imperative to note that the 2nd Respondent-Commissioner has come to the conclusive findings of facts and considering the merits of the appeal had adjusted the arbitral award [P_{19}] directing the Appellant to pay only a sum of Rs. 2,683,001.48. Further, it was ordered to release 25% from the appeal deposit to the Appellant.

Being aggrieved by the Order of the 2nd Respondent-Commissioner, Appellant has invoked the writ jurisdiction of the Provincial High Court of Kandy by filing a writ application bearing No. 39/2012, praying for a writ of Certiorari to quash the decision of the 2nd Respondent-Commissioner and for a writ of Mandamus to re-inquire the said appeal, appealed to the 2nd Respondent-Commissioner.

The Respondents filed objections to the said writ application of the Appellant and after filing written submissions by both parties, the learned High Court Judge made an Order dismissing the said writ application on the basis that no irregularity, irrationality or procedural impropriety committed in the course of arbitration.

Being aggrieved by the said Order dated 08.12.2015 by the learned High Court Judge, the Appellant preferred this appeal on the following grounds.

a) The Order dated 08.12.2015 is unjust and contrary to Law.
b) The learned High Court Judge has not drawn the attention to the legislative provisions of Section 22 of the Interpretation Ordinance.
c) The Arbitrator has not fairly analyzed the evidence.

It was submitted by the Appellant that the amount of Rs. 3,036,137.83 based on the arbitration was calculated by the retired Officer of the Co-operative Department named R.M.Punchibanda. At that time an Officer of the Department of Co-operative Development was deployed in service for the 1st Respondent Society under the control of the 2nd Respondent-Commissioner.

It was further submitted that the said Officer, R.M.Punchibanda had prepared an investigation report referring to the books and records of the 1st Respondent Society without the participation of the Appellant. Thus, this is completely against the provisions of Sections 3-1 of the Co-operative Societies Circular No. 208 of 1982 and a violation of *audi alteram partem*.

Since the Inquiry before the 3rd Respondent Arbitrator and also the appeal Inquiry before the 2nd Respondent-Commissioner, the Appellant was present and had been represented by a legal representative. Similarly, the 3rd Respondent and the 2nd Respondent apart from the evidence placed before them allowed both parties to file written submissions. Thus, it does not seem that the Appellant had taken up the said position before the 3rd Respondent Arbitrator or the 2nd Respondent-Commissioner.

In this respect, it is noteworthy that the Respondents had taken up the position that the correctness of the arbitral award is evident from the documents submitted by the Petitioner along with the

petition. For example, the value of total shortage of goods as mentioned in document P_{20} is an entry contained under heading No. 7(6) of P_{19}-the arbitral award.

According to paragraph No. 6 of P_{19}, which relates to a shortage of goods from 1998 to 2008, it appears that the arbitral award provides that the accounting entries contained in its 7th paragraph had adjusted for the shortages, excesses, and other set-offs.

Since the burden of proof rests upon the Appellant to establish any accounting defects and failure to discharge the burden of proof by adducing evidence to establish such defects, the Appellant cannot resort to a violation of *audi alteram partem*.

Although the Appellant has taken up the position that the writ jurisdiction can be exercised only when illegality, irrationality or a procedural impropriety has taken place, the Appellant could not point out the same in his submissions.

Nevertheless, the learned High Court Judge held that according to the documents available and the submissions made by both parties, Court sees no such irregularity, irrationality or procedural impropriety committed, because there was a shortage of goods in the stores which the Appellant had been in charge of and the Appellant had not discharged his burden to prove that he was not responsible for the same.

Therefore, we see no reason for us to interfere with the Order of the learned High Court Judge. Hence, the appeal is dismissed with costs fixed at Rs.25,000/-.

JUDGE OF THE COURT OF APPEAL.

S.U.B Karalliyadde, J.
I agree.

JUDGE OF THE COURT OF APPEAL.