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

CA (PHC): 72/2017

Panadura HC: 20/2017 (Rev)

Assistant Commissioner of Cooperative Development,
Department of Cooperative Development (WP),
Colombo 01.

Petitioner

Vs.

Piyal Ranjith Thambawita,

No. 143/16, Sripura Batahena Road,

Thimbiriya, Kalapugama, Moranthuduwa.

Respondent

NOW

Piyal Ranjith Thambawita,
No. 143/16, Sripura Batahena Road,
Thimbiriya, Kalapugama, Moranthuduwa.

Respondent-Petitioner

Vs.

1. Assistant Commissioner of Cooperative Development,
   Department of Cooperative Development (WP),
   Colombo 01.

   Petitioner-Respondent

2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

   Respondent

AND NOW BY AND BETWEEN

Piyal Ranjith Thambawita,
No. 143/16, Sripura Batahena Road,
Thimbiriya, Kalapugama, Moranthuduwa.

Respondent-Petitioner-Appellant

Vs.

1. Assistant Commissioner of Cooperative Development,
   Department of Cooperative Development (WP),
   Colombo 01.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondent-Respondents

Before: **Prasantha De Silva, J.**

K.K.A.V. Swarnadhipathi, J.

Counsel: Chandrasiri Wanigapura A.A.L for the Respondent-Petitioner-Appellant.

Rajin Gunaratne S.C for the Respondent-Respondent.

Written Submissions tendered on: 10.11.2021 by the Respondent-Petitioner-Appellant.

07.10.2021 by the 1st and 2nd Respondent-Respondents.

Argued on: 11.10.2021

Decided on: 06.05.2022

Prasantha De Silva, J.

Judgment

This is an appeal made by Respondent-Petitioner-Appellant which emanates from the Order made by the learned High Court Judge of Panadura exercising revisionary jurisdiction and seeks to set aside the Order of the learned Magistrate dated 27.04.2017. Further, an Order directing the 1st Respondent-Respondent-Respondent [hereinafter referred to as the 1st Respondent] to hold a proper inquiry as per the direction of the minister for Cooperative development [Western Province] was sought.

It appears that the Respondent-Petitioner-Appellant [hereinafter referred to as the Appellant] was an employee employed in the Panadura Multipurpose Cooperative Society as a storekeeper. The Appellant being the storekeeper, was in charge of a store of the said Cooperative Society. During his tenure as storekeeper, a shortage of items in the said store was revealed and the Cooperative Society had taken steps to recover the loss discovered from the shortage. However, the Appellant disputed the said shortage and disagreed to pay the said loss. Hence, the 1st Respondent Society had referred the matter for Arbitration in terms of Section 58 (2) of the Cooperative Societies Act No. 05 of 1972 as amended.

It was submitted by the 1st and 2nd Respondent-Respondents [hereinafter referred to as the Respondents] that an audit was conducted to assess the losses that had taken place from 20.09.2007 to 31.01.2008 under which an Arbitration was held, and the certificate of enforcement was filed in the Magistrate's Court of Panadura where the sum referred in the said certificate was paid by the Appellant. A further audit to assess the losses that had taken place from 01.02.2008 to 01.04.2008 was conducted and a further enforcement certificate to recover the due amount awarded at the Arbitration was filed in the Magistrate's Court of Panadura. It was further submitted that the Cooperative Society first sent a letter of demand and thereafter the Arbitrator had informed the Appellant about the Arbitration inquiry, sending a notice by registered post twice. However, the Appellant had failed to mark his appearance at the Arbitration inquiry.

Consequent to the Arbitration, the Arbitration award was communicated to the Appellant, further informing that he may prefer an appeal against the Arbitration award in terms of Section 58 (3) of the Cooperative Societies Act. However, the Appellant had failed to prefer an appeal in terms of Section 58 (3) of the Cooperative Societies Act and the 1st Respondent Commissioner had taken steps to enforce the Arbitration award in terms of Section 59 (1) (c) of the said Act by filing a certificate in the Magistrate's Court.

The Appellant before the learned Magistrate, had taken the position that the said certificate is not legal and that the amount to be recovered had been paid in some other matter. However, this position had not been proved by the Appellant.

Although the Appellant had contended that the impugned Arbitration was done *ex-parte* without notice to him, the 1st Respondent denied the said contention of the Appellant and submitted that the Arbitrator had informed of the Arbitration proceedings to the Appellant by registered post. Moreover, after the Arbitration concluded, 1st Respondent had communicated the Arbitration award to the Appellant by registered post, informing that the Appellant is entitled to prefer an appeal against the Arbitration award within 60 days from the date of award in terms of Section 58(3) of the Act.

It is seen that the Appellant had negligently acted without due diligence as the Appellant had failed to participate in the Arbitration proceedings and had not preferred an appeal against the Arbitration award.

It was submitted in the Petition of Appeal that the Appellant had made an appeal to the Minister of Cooperative Development in Western Province to interfere with the enforcement of the Arbitration award initiated by the Commissioner of Cooperative Development [Western Province].

Subsequent to the events above, the Minister had directed the Commissioner of Cooperative Development to withdraw the Magistrate's Court case bearing No. 33940 and to hold an inquiry afresh. Although, the said ministerial direction was brought to the notice of the learned Magistrate, Court made an Order on 27.04.2017 stating that the 1st Respondent is entitled to claim the award of Rs. 1,031,298.72/- specified in the Arbitration award and that the Appellant has to pay the said amount to the 1st Respondent Society.

Being aggrieved by the said Order of the learned Magistrate, the Appellant had invoked the revisionary jurisdiction of the Provincial High Court of Panadura. It is noteworthy that the learned High Court Judge had considered the findings of the learned Magistrate and had affirmed the Order of the learned Magistrate.

It appears that the Appellant had challenged the validity of the certificate filed before the learned Magistrate.

The Appellant had taken up the position that without invoking jurisdiction in terms of Section 59 (1) (a) and/or (b) of the Act, the 1st Respondent is not entitled to seek relief in terms of Section 59 (1) (c), hence not entitled to claim interest and cost.

This Court has dealt with the aforementioned situation in ***Sri Lanka Consumer Corporative Society's Federation Ltd. Vs. Deputy Commissioner of Corporative Development [Southern Province] CA (PHC) 137/2013 [CA Minutes 14.10.2021]***.

In view of Section 59 (1) (a), (b) and (c), it clearly manifests that Section 59 (1) (a) and 59 (1) (b) deal with the recovery process within a civil jurisdiction and therefore permits the recovery interest along with the capital due. Section 59 (1) (c) is capable of imposing a criminal liability upon the defaulter and by its very nature, being fined does not permit the inclusion of the interest due in the certificate.

However, it is relevant to note that Section 59 (1) (a) and 59 (1) (b) use the words "such sum together with cost and interest". However, Section 59 (1) (c) does not use the very words "such sum together with cost and interest", instead, uses the words "amount due", which includes the cost and interest to be recovered as a fine.

The said position is further substantiated in view of Section 59 (4) of the Act which says that a defaulter serving a jail sentence imposed due to the failure to pay a fine shall not be a bar to collect the money due upon an Arbitration award made under the Act.

In this respect, it is interesting to note the case of ***Ambawa Thrift Credit Co-operative Society Vs. D. M. Sumana Dissanayake and Co-operative Development Commissioner [C.A (PHC) 168/2011-C.A Minutes 16.01.2015],*** in which *K. T. Chitrasiri J.* emphasized that in terms of Section 291(2) of the Criminal Procedure Code, the Legislature has permitted the particular Co-operative Society to recover the money due from persons concerned despite the fact that the particular person has served a jail sentence imposed due to the non-payment of the fine that was imposed [Emphasis added].

Therefore, it is clear that in terms of Section 59(1) (c), the amount due can be recovered as a fine in the manner stated in Sections 59(1) (a) and (b).

It is worthy to note that the Appellant had not preferred an appeal in terms of Section 58 (3) of the said Act to the Commissioner against the Arbitration award. According to Section 58 (6) of the said Act, if an appeal is not made, the award of the Arbitrator is final and conclusive.

It is observable that the learned Magistrate has held that in terms of Section 59 (6) of the Act, the learned Magistrate is not empowered to consider the correctness of any statement contained in the certificate filed by the Registrar.

In this respect, the case ***Bandahamy Vs. Senanayake [1960] 62 NLR 313*** was cited on behalf of the Appellant, and it held that it is open to the party against whom the award is sought to be enforced to question the validity of the award, even if the award is *ex-facie* regular. It is seen that the said case was decided in 1960 and the principle enactment of the Cooperative Societies Law was introduced in 1972 by Act No. 05 of 1972. Thus, the said provision enacted in Section 59 (6) of the Act and the corresponding Section in Act No. 03 of 1998 of Western Provincial Council were not in existence during the period when the said dissenting Judgment ***Bandahamy Vs. Senanayake [supra]*** was pronounced. Hence, at present the said position taken up by the Appellant is not avail in Law.

However, the Appellant contended that a similar provision to the said Section 59 (6) was enacted in Section 38 (3) of the Employees' Provident Fund Act No. 15 of 1958 where it states;

> "The correctness of any statement in a certificate issued by the Commissioner for the purposes of this Section shall not be called in question or examined by the Court in any proceeding under this Section, and accordingly nothing in this Section shall authorise the Court to consider or decide the correctness of any statement in such certificate, and the Commissioner's certificate shall be sufficient evidence that the amount due under this Act from the defaulting employer has been duly calculated and that such amount is in default."

On behalf of the Appellant, the case ***Mohamed Ameer and Another Vs. Yapa, Assistant Commissioner of Labour [1998] 1 SLR 156*** was cited, which emphasized a contrary view to Section 38 (3) of the Employees' Provident Fund Act, that the certificate filed by the Commissioner of Cooperative Societies can be challenged in Court.

A certificate can be issued under Section 38 (2) of the said Act only where an employer defaults in the payment of any sum which he is liable to pay under the Act. The issue of a certificate does not compel the Magistrate's Court to proceed automatically to recover the sum stated. The Court must first give the alleged defaulter an opportunity to show cause, why further proceedings for the recovery of sum claimed should not be taken. The Law thus expressly incorporates the rule of "*Audi alteram partem*". Fairness requires that when a certificate mentions a sum allegedly due, it must also give adequate details of how it was made up to enable the alleged defaulter to show cause.

It further held that, a certificate issued by the Commissioner in the context of an alleged default in payment of any sum which the defaulter is liable to pay under the Act : the Law allows the alleged defaulter an opportunity to show cause and the certificate must contain the particulars known to the Commissioner in relation to which he must show cause, i.e. that he is not in default, or that the default is less than what is alleged. The opportunity that he is entitled to is, to show cause in respect of the alleged default and is not an opportunity to prove payment of dues in other causes, in which the Commissioner has not alleged any default.

The Court draws the attention to the case of ***K.A. Dayawathi Vs. D.S. Edirisinghe [S.C. (FR) No. 241/2008]*** decided by the Supreme Court on 01.06.2009, which held that the Commissioner of Labour has no jurisdiction or power under the Employees' Provident Fund Act to file a certificate in the Magistrate's Court in terms of Section 38 (2) of the Employees' Provident Fund Act without first proceeding under Section 17 and thereafter, under Section 38 (1) of the said Act.

In ***Dayawathi***'s case, the decision was based on the wordings in Section 38 (2) of the Employees' Provident Fund Act, which states that the Commissioner may issue a certificate containing particulars of the sum due from the employer as Employees' Provident Fund, if in his opinion it is impracticable or inexpedient to recover that some under Section 17 or under Section 38 (1). It is relevant to note that Cooperative Societies Law No. 05 of 1972 does not use such a set of wordings. Thus, such a requirement under Section 38 (2) does not arise in Section 59 of the Cooperative Societies Law No. 05 of 1972 or the corresponding Act enacted by the Provincial Council of the Western Province.

Therefore, it is apparent that the said ***Dayawathi***'s case has no application to the instant case. As such, it is open to the Registrar of Cooperative Development [Western Province] to file a certificate in the Magistrate's Court at his own discretion since there is no mention in Section 59 that such a requirement like in Section 38 (2) of the Employees' Provident Fund Act exists.

It was the main contention of the Appellant that, the Provincial High Court has failed to consider the letter of the Minister for Cooperative Development [Western Province] sent to the Commissioner of Cooperative Development informing to withdraw the certificate filed in the Magistrate's Court of Panadura and to re-inquire into the award of the Arbitrator and thereby has erred in Law. Since there is no other alternative left to the Appellant to seek redress in terms of the Cooperative Societies Law, it was contended by the Appellant that the Provincial High Court has erroneously decided the decision of the Minister for Cooperative Development as defective.

It is relevant to note that there is no provisions enacted in the Cooperative Societies Act No. 05 of 1972 or in Cooperative Societies Statute bearing No. 03 of 1998 of Western Provincial Council empowering the Minister for Cooperative Development in the Western Province to intervene into an Arbitration award made under Section 58 of the Act or enforcement proceedings initiated by the Cooperative Commissioner under Section 59 (1) of the Act.

In this respect, it is observable that the learned High Court Judge by Order of the High Court had correctly and clearly demonstrated that the letter of the Minister for Cooperative Development [Western Province] is untenable in Law and there was no valid legal basis for the issuance of such a letter to the 1st Respondent to invalidate the Arbitration award and to withdraw the certificate filed in the Magistrate's Court.

It appears that the Appellant had relied upon the Minister's intervention in the impugned award without exercising his statuary right under Section 58 (3) of the Act by preferring an appeal to the Registrar of Cooperative Societies against the Arbitration award.

In the event of failure to make an appeal against the Arbitration award in terms of Section 58 (3) of the Act, it would make the award by the Arbitrator final and conclusive, and will not be subject to be called into question in any civil court under Sections 59 (5) and 59 (6) of the Act.

In this instance, it is pertinent to note that the learned High Court Judge has drawn his attention to the grounds on which the certificate filed under recovery procedure could be challenged. The said rationale was observed in the case of ***S.H.L. Mohideen Vs. Assistant Commissioner of Cooperative Development Kalmunai [80 NLR 206]***, which has stated

"I am therefore of the view that the only grounds that can be urged before the Magistrate are that,

1. The Magistrate has no jurisdiction because his known place of business or residence does not fall within the local jurisdiction of the Magistrate,
2. That he had paid the amount,
3. That he is not the defaulter, in that he is not the person from whom the amount is due."

This Court observes according to the finding of the learned Magistrate as well as the learned High Court Judge, it is imperative to note that the Appellant had failed to show cause as to why the Arbitration award to recover the said amount should not be enforced.

In view of the aforesaid reasons, we see no reason for us to interfere with the Order of the learned High Court Judge dated 26.05.2017 and the Order of the learned Magistrate dated 27.04.2017. Hence, the appeal is dismissed with costs fixed at Rs. 50,000/-.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL