

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

In the matter of an appeal in terms of Article 154(P),
6 of the Constitution read with the Rule 11 of the
Court of Appeals (Procedure for Appeals from High
Courts) rules 1988.

AND NOW BETWEEN

W. Lionel Marcus Fernando,
No:97/88 Nicholas Marcus Fernando Mawatha,
Negombo.

PETITIONER-APPELLANT

CA (PHC) 197/2016

PHC – Colombo - HC/WP/WA- 15/2013

Vs.

1. Commissioner of Corporative Development and
Registrar of Co-Operative Societies,
(Western Province),
P.O. Box 444, Duke Street, Colombo 01.

2. Negombo Multi-Purpose Co-Operative Society Ltd,
No: 353, Main Street, Negombo

RESPONDENTS-RESPONDENTS

Before: **PRASANTHA DE SILVA, J.**
 K.K.A.V. SWARANADHIPATHI, J.

Counsel: Mahanama De Silva
(For the Petitioner-Appellant)
N. De Zoysa, S.C.
(For the 1st Respondent-Respondent)

Date of Argument: 21.03.2022.

Judgment on: 17.06.2022

K.K.A.V. SWARANADHIPATHI, J.

JUDGMENT

The Petitioner-Appellant had stood surety to one B.M. Joseph Perera in the year 1999. The said Joseph Perera had defaulted payments. However, by the year 2009, the Debtor fully settled the loan.

On 19.11.2011, Appellant was elected to the Committee of the Negombo "A" Pradeshika Society (A pradeshika Society under the 2nd Respondent.) After he was elected, he received a letter requesting him to show cause as to why the 1st Respondent should not act under Section 60(2) of Co-operative Societies Statue No.3 of 1998 of the Western Provincial Council.

In the letter's perusal, the Petitioner-Appellant learned the request to show cause was because Joseph Perera had defaulted payments. The Petitioner-Appellant had sent a letter stating that Joseph Perera had settled the loan through his Attorney-at-Law. In any case, he was only a surety for Joseph Perera.

One day before sending the letter through the Lawyer, the Appellant had filed HCWA/15/2013 to the High Court of the Western Province (Colombo) seeking a writ of prohibition prohibiting the 1st Respondent from declaring that the Appellant was disqualified from being elected to the

Committee. After hearing both parties on 08.12.2016, the application of the Appellant was dismissed by the learned High Court Judge.

Aggrieved by that order, the Appellant had invoked the jurisdiction of this court.

At the argument and in written submissions, the Appellant stressed that the document by which the 1st Respondent had called to show cause he had decided not to appoint the Appellant letter dated 30.11.2013 proves this. On behalf of the 1st Respondent, it was argued that the said letter was not a final decision; therefore, there is no reason to apply for a writ.

Considering the position taken by both parties, it is best to understand what a writ of prohibition means in *R. Vs. Electricity Commissioner* Alkin J. observed, "I can see no difference in principle between certiorari and prohibition, except that letter may be invoked at an earlier stage if the proceedings establish that the body complained of executing its jurisdiction by entertaining matters which would result in its final decision being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction".

In *Dankoluwa Estats Co. Ltd. Vs. The Tea Controller (1941) 42 NLR 197* Soertsz J. observed. "Whenever anybody of persons (firstly) having legal authority, (secondly) to determine questions affecting the rights of subjects, (thirdly) having the duty to act judicially (fourthly) act in excess of the legal authorities, they are subject to the controlling jurisdiction exercised by these writs".

When applying for a writ of prohibition above four conditions must be proved. In the letter marked [X1], the conditions mentioned above were not met. That letter asks to show cause as an issue was discussed in Section 21(c)€ of the Rules made under the Co-operative Societies Law No.95 of 1972. "A member of a registered society shall be disqualified from being elected as a member of the Committee of management or of a regional branch committee.

If he is, in respect of any loan received by him, in default to the society or any other registered society or to a liquidator, for a period exceeding three months or in default in any other respect to that society or to any other society or to any liquidator".

Within this power, the 1st Respondent had asked to show cause by the Appellant.

The Appellant had argued that Section 21(1) (e) refers to a person who had received a loan. As he had not obtained any loan, this section will have no bearing on him.

When someone signs as a surety, he agrees to be bound to pay any money dishonoured by the principle. Therefore, when the principal leaves any money unpaid, the creditor has the right to demand from the surety. Thus, the argument that he did not borrow though technically correct cannot be interpreted for this section. The Appellant must fall into the category of a borrower.

Application made by Appellant before the Provincial High Court in HCWA/15/2013 was for a writ of prohibition prohibiting the 1st Respondent from declaring that the Petitioner has been disqualified from being elected to the Committee. When perusing the letter [X1] on which the Appellant had based his case. There is no such danger to him. The Appellant had taken legal action before sending a reply to [X1].

At the time of sending [X1], the Respondent may not have known that Joseph Perera had settled the loan. The Appellant should have sent his reasons before rushing to court. There was no imminent danger on the face of [X1]. No evidence of imminent danger was shown at the High Court. When praying for a writ, one must satisfy the court; unless the writ is issued, there will be a breach of a right. When perusing the High Court's case record proceedings, nothing of this nature can be seen.

Even though the Appellant tries to show that the High Court Judge had come to a conclusion that the 1st Respondent had already taken a decision, a careful perusal of the order shows no such determination. The Judge had held that the 1st Respondent had acted within his powers to safeguard the institution. The order issued by the 1st Respondent referred to in the judgment is an order calling for show cause. There was no final order in [X1] other than an order calling for show cause. Therefore, one must interpret the order of the learned High Court Judge with the contents of the subject in issue.

For the reasons discussed above, I see no reason to disturb the order made by the learned High Court Judge of Colombo in case No.HCWA/15/13 on 08.12.2016.

The appeal is dismissed subject to a cost of Rs.5000/-.

Judge of the Court of Appeal

PRESANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal