

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.

Bulathsinhala Multi-Purpose Cooperative Society,
Bulathsinhala.

Petitioner

Court of Appeal Case No:
CA/PHC/12/2016

Vs.

1. Kamburuwalage Dona Ranjanie
Kobawaka, Govinna.

Respondent-Respondent

High Court of Kalutara Case No:
Rev/4/2015

2. Commissioner of Cooperative Development & Registrar of Cooperative Societies (Western Province),
Cooperative Department, Duke Street,
Colombo 01.

Complainant-Respondent

AND NOW BETWEEN

Bulathsinhala Multi-Purpose Cooperative Society,
Bulathsinhala.

Petitioner-Appellant

Vs.

1. Kamburuwalage Dona Ranjanie
Kobawaka, Govinna.

Respondent-Respondent-Respondent

2. Commissioner of Cooperative Development & Registrar of Cooperative Societies (Western Province),
Corporate Department, Duke Street,
Colombo 01

Complainant-Respondent-Respondent

Before:

Prasantha De Silva, J.

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

Counsel: Himalee Kularathna AAL for the Appellant
Chanaka Kulathunga AAL for the Respondent-Respondent

Argued on : 11.01.2022

Written Submissions tendered on: 28.03.2022 by the 1st Respondent-Respondent.
10.06.2022 by the Petitioner-Appellant.

Decided on: 31.01.2023

Prasantha De Silva, J.

Judgment

The Petitioner-Appellant has preferred this appeal to canvass the Order dated 21.01.2016 of the learned High Court Judge which dismissed the revision application filed by the Petitioner-Appellant on the basis that no exceptional circumstances exist for the Petitioner-Appellant to invoke the revisionary jurisdiction of the Provincial High Court to exercise its power of revision.

The 1st Respondent had taken up a preliminary objection that no exceptional circumstances were pleaded by the Petitioner-Appellant to exercise the revisionary jurisdiction of Court. The learned High Court Judge upheld the said preliminary objection and dismissed the application of the Petitioner-Appellant *in limine*. Being aggrieved by the said Order of the learned High Court Judge dated 21.01.2016, the Petitioner-Appellant had preferred this appeal to this Court.

When this matter was taken up for argument, the learned Counsel for the 1st Respondent had taken up a preliminary objection that the appeal preferred against the Order of the learned High Court Judge is not a final order and that Petitioner-Appellant has not followed the procedure under Court of Appeal [Procedure for appeals from High Courts] Rules 1988.

“Any person who shall be dissatisfied with any Judgment or final order or sentence pronounced by a High Court in the exercise of the Appellate or revisionary jurisdiction vested in it by Article 154P(3)(b) of the Constitution may prefer an appeal to the Court of Appeal against such Judgment for any error in law or in fact.

By lodging within fourteen days from the time of such judgment or order being passed or made with such High Court, a petition of appeal addressed to the Court of Appeal.”

Hence, it was the contention of the 1st Respondent that Rule 2 is only applicable to final orders and that the impugned order delivered by the learned High Court Judge upholding the preliminary objection is not a final order.

In this respect, it is worthy to note the decision in ***Pathirana Vs. Goonawardene and others [CA PHC 16/2016]***, where it was observed that the Order of the High Court was made upon an application made by the Petitioner to issue notice on the Respondent. It was held that although the Order refusing to issue notice on the Respondents finally determined the matter, if the High Court decided to issue notice, the matter would not have been finally determined. On this basis, the Court regarded an Order refusing to issue notice as an interlocutory order that did not come within the scope of Article 154(6) of the Constitution.

In the instant case, if the learned High Court Judge overruled the preliminary objection taken up by the Respondents, inquiry should proceed and the merits of the application have to be determined.

It was decided in the case of ***S.L.M. Naim Vs. Mohammed Naina Marikkar Haseeb and Others [CA PHC 223/2006 decided on 28.02.2019]*** that there is no right of appeal available against interim orders of the High Court.

The impugned Order of the learned High Court Judge which this appeal is preferred against is an interlocutory order. Thus, the Appellant is not entitled to invoke the appellate jurisdiction of this Court.

Be that as it may, it is relevant to note that the learned High Court Judge upheld the preliminary objection and dismissed the revision application of the Petitioner *in limine*, on the assumption that no exceptional circumstances exist for the Petitioner-Appellant to invoke the revisionary jurisdiction of the Provincial High Court.

It is noteworthy that the Petitioner-Appellant in paragraph 11 of the Petition of Appeal had stated that any one of the following will constitute an exceptional circumstance.

- I. The learned Magistrate has gone completely beyond her power and the order made is *per incuriam*.
- II. The learned Magistrate has completely misunderstood the nature of the proceedings, in that she assumed it to be criminal when it is civil, and the order is manifestly erroneous.
- III. The learned Magistrate has questioned the validity of the award, for which she has no power and if the employee was not satisfied with the award, she should have sought a Writ of Certiorari from the High Court.
- IV. The Order of the Magistrate will shock the conscience of any right-thinking person as the money lawfully due to this public institution is unjustly denied by the unlawful order of the learned Magistrate, here the cooperative society, the Petitioner-Appellant had no opportunity to present its case in the Magistrate's Court, as the parties in the Magistrate's Court are the Registrar of Cooperative Societies and the defaulter (employee). The Petitioner was not a party in the Magistrate's Court (paragraph 3 of the Petition) and the petitioner has no right of appeal. It is a failure of justice.

In view of the aforesaid reasons, Court observes that exceptional circumstances *prima facie* exist for Petitioner-Appellant to invoke the revisionary jurisdiction of the Provincial High Court of Kalutara against the Order of the learned Magistrate.

It is incumbent upon the Court of Appeal to ascertain whether any miscarriage of justice was caused to the Petitioner-Appellant by the Orders of the learned Magistrate and the learned High Court Judge or whether any injustice was caused to the Petitioner-Appellant due to the findings of fact and law of the learned Magistrate.

Moreover, even when there was no right of appeal or no proper appeal made, there are instances where Courts exercised revisionary jurisdiction in circumstances where appeals were preferred.

On this premise, it is to be observed that in the case of ***King Vs. Seeman Alias Semma [9 C.L.W 76]***, it was held that the Supreme Court has power to treat an appeal which is out of time as an application in revision.

Similarly, in the case of *Nissanka Vs. The State [2001] 3 S.L.R 78*, Kulatilake J. emphasized that “revisionary jurisdiction is not faltered by the fact that the Accused-Appellant has not availed the right of appeal within the specified time”.

It is worthy to note that it was held in *Sunil Chandra Kumara Vs. Veloo [2001] 3 S.L.R 91*, that revision is available even where there is no right of appeal, but not as a right and only on the indulgence of Court to remedy a miscarriage of justice.

This power flows from Article 138 of the Constitution which is exercised by the Court of Appeal, on application made by a party aggrieved or *ex mero motu*.

Furthermore, the Court draws the attention to the following Indian authorities which dealt with the question of conversion of an appeal into a revision application.

In *Bahori Vs. Vidya Ram [AIR 1978 Alld. 299]*, the Court opined that though there is no specific provision for conversion of an appeal into revision or vice versa, the Court in the exercise of inherent power under Section 151 of the Indian Civil Procedure Code may permit such conversion in the interest of Justice.

Section 839 of Civil Procedure Code which deals with Inherent Powers, is a verbatim reproduction of Section 151 of the Indian Code of Civil Procedure of 1908.

It has been held in the case of *Reliance Water Supply Service of India Vs. Union of India [1972 (4) SCC 168, AIR 1971 SC 2083]*, that High Court was right in converting the appeal into revision.

Similarly, the Case of *Bar Council of India, New Delhi Vs. Manikant Tiwari [AIR 1983 Allahabad 357]*, held that rejecting the appeal on the ground of maintainability would mean to call upon the Appellant to challenge the impugned Order by means of a revision and this will not serve any purpose and the Court permitted the appeal to be converted into a revision.

In view of the aforesaid decisions, it is apparent that Court in exercising inherent jurisdiction has full authority of law and discretion to convert an appeal to revision, provided the interest of justice so demands.

It is needless to say that revisionary powers of Court are very wide and could be exercised for the correction of errors of fact and law committed by all courts. Its object is due administration of justice and the avoidance of a miscarriage of justice.

The inherent powers of revisionary jurisdiction flow from Article 138 of the Constitution and can be exercised by Court of Appeal, on an application made by a party aggrieved or by Court on its own motion (*ex mere motu*).

Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka states:

“Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of parties or occasioned a failure of justice.”

The above-mentioned provision of the Constitution and legal provisions clearly demonstrate that any failure to adhere to legal provisions can be considered only if such failure prejudices the substantial rights of the parties or occasions a failure of justice.

As such, Court is inclined to see whether this appeal could be converted to revision.

It appears that 1st Respondent-Respondent-Respondent [hereinafter referred to as the 1st Respondent] K.D. Ranjani had been an employee of the Petitioner-Appellant, Bulathsinhala Multi-Purpose Cooperative Society and during her period in service at the said Cooperative Society had caused a loss by way of goods, stamps and a bank overdraft that amounted to Rs. 461,782.92/-.

The Petitioner-Appellant Society [hereinafter referred to as the Appellant] had referred the said matter to the Registrar of Cooperative Societies for arbitration with the aim of recovering the said loss amounting to Rs. 461,782.92/- from the said defaulting employee, the 1st Respondent namely K.D. Ranjani.

Apparently, the Appellant, [the Petitioner-Appellant Society] had obtained an award for Rs. 461,782.92/- in terms of Section 58 of the Co-Operative Statute and filed the relevant certificate in the Magistrate’s Court of Matugama under case bearing No. 99735/13 to recover the said amount.

When the said matter came up before the learned Magistrate, preliminary objection with regard to the maintainability of the Magistrate’s Court case under Section 58 of the Co-Operative Societies Law was taken up. It had been raised by the 1st Respondent that Section 58 of the Corporative Societies Law stipulates a special procedure to recover any sum based on the arbitrator’s award and that Section 58

of the Co-Operative Societies Law is applicable only in relation to the loan, damage and other relevant incidents and not for the alleged investigations.

As such, it was the contention of the 1st Respondent that the Appellant had not followed the proper procedure in terms of Section 58 of the Co-Operative Societies Law and that Co-Operative Society [Appellant] is not entitled to file a certificate in the Magistrate's Court.

However, the learned Magistrate had taken the matter for inquiry and delivered the Order on 05.01.2015 dismissing the application of the Petitioner-Appellant.

It is pertinent to note that the Petitioner-Appellant Society had obtained an award under Section 58 of the Co-Operative Society Statute, a Section which is identical with the provisions of the Co-Operative Societies Law No. 05 of 1972, to recover the dues ordered in the said award. Complainant-Respondent-Respondent in this appeal, the Commissioner of Co-Operative Development and Registrar of Cooperative Societies Western Province had issued a certificate to the Magistrate's Court of Matugama under Section 59 of the Statute to recover the dues as a fine.

The proceedings in the Magistrate's Court pertaining to the instant action has been initiated under Section 59(4) of the Cooperative Societies Law, on a certificate issued by the applicant to the Magistrate in terms of paragraph (c) of subsection (1) of Section 59.

Section 59(4) states:

“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...”

In *Thambiah Seevaratnam Vs. Assistant Commissioner of Cooperative Development Jaffna [79(II) NLR 104,105]* it is stated that the Co-operative Societies Ordinance was repealed by the Cooperative Societies Law No.5 of 1979 and that the latter entered into force from 11.10.1972.

The Supreme Court in *Mohideen Vs. Assistant Commissioner of Cooperative Development Kalmunai [80 NLR 206]* was called upon to interpret Section 53(5) of the Cooperative Societies Ordinance and Pathirana J. held that the only grounds that can be urged before the Magistrate are that -

- (i) The Magistrate has no jurisdiction because the last known place of business or residence does not fall within the local jurisdiction of the Magistrate.
- (ii) That he had paid the amount.
- (iii) That he is not the defaulter in that he is not the person from whom the amount is due.

I am of the view that this is the correct interpretation to be adopted in interpreting Section 59(4) of the Law to ascertain the scope of procedure before the Magistrate's Court. Thus, the Appellant cannot argue before the Magistrate that the Respondent did not have the power to file a certificate.

Apparently, the 1st Respondent had appeared in Court and moved to file legal objections in the first instance and the learned Magistrate had allowed to file the same.

When the proceedings in the Magistrate's Court were initiated by filing a certificate, the learned Magistrate was oblivious of the fact that it was a civil case to recover the amount stated in the certificate from the 1st Respondent under Section 68 of the Co-operative Societies Statute and not under Section 58 and 59.

It was the contention of the 1st Respondent that Complainant-Respondent-Respondent had not initiated proceedings in the Magistrate's Court in terms of Cooperative Societies Law, and that she has not obtained any loan facility from the Cop-Operative Society although the 1st Respondent was an employee of the said Cooperative Society.

It is seen that Arbitrator's award can be obtained in respect of a debt or damage, in terms of Section 58 of the Statute. However, the impugned award has been obtained for a loss caused by way of goods, stamps and a bank overdraft. Therefore, it was contended that initiating proceedings in the Magistrate's Court is irregular, improper or not in accordance with the Cooperative Societies Law.

However, the 1st Respondent has taken up the position that if there is any wrong done by an employee, the Cooperative Society has to initiate proceedings in terms of Section 68 of the Cooperative Societies Law and not under Section 58 of the same.

The 1st Respondent has taken up the position that the instant action cannot be instituted and maintained under Section 59 of the Cooperative Societies Law, since the said amount of money was not alone a liability. As such, the instant action could have been filed under Section 68 of the Cooperative Societies Law as the said amount of money was involved in a fraud, misappropriation or a criminal breach of trust. It is apparent that the money misappropriated by the Respondent is clearly a deposit on the business of this Society as referred to in Section 58.

It is evident that the nature of the dispute referred to in the instant action is not limited to a debt owed to the Society by reason of a monetary loan.

Therefore, it is observable that there is no legal basis for the learned Magistrate to decide that the recovery procedure in Section 59 is limited to recovery of a loan. Hence, the Complainant-Respondent-Respondent is empowered to initiate action in terms of Section 59 of the Cooperative Societies Law with regard to misappropriation of funds.

It is observable that if the instant matter is referred under Section 68 and not in terms of Section 59, it gives rise to a situation where the Petitioner-Appellant Society would not be able to recover the amount of money indicated in the certificate.

It is to be noted that Section 68 [which is identical to Section 67 of the Co-Operative Societies Law No. 05 of 1972] provides for the institution of proceedings in the Magistrate's Court for Criminal Breach of Trust where the Magistrate is empowered to imprison and/or fine any person accused of the same after the summary trial.

Therefore, it is clear that proceedings under Section 68 are designed to hold a person liable for a criminal offence and not designed to allow a complaint to recover the money which has been misappropriated.

On this premise, it clearly manifests that the Law itself is designed to permit two actions in instances where misappropriation is involved. One action can be instituted in terms of Section 59 of the Co-Operative Societies Law to recover the loss or

damage caused to the Society by the acts of misappropriation while the other action could be filed in terms of Section 68 of the Co-Operative Societies Law to hold the 1st Respondent's criminal liability for misappropriation.

It was held in the case of *Kotuwegedara Siripala Ranawaka Vs. Co-Operative Society Ltd., Polonnaruwa-Daya gamage [CA PHC 184/2012 C.A.M 21.07.2015]*;

“It is salient to note that in the above case, the Appellant was indicted in the High Court for criminal charges and it was not to recover the money due to the Society. An Arbitrator held an inquiry into the alleged misappropriation and made a determination that the Appellant is responsible for the said charge and the money should be recovered from him.”

In view of the aforesaid reasons, I hold that the learned Magistrate has misdirected herself and erred in law by deciding the Complainant-Respondent-Respondent should have instituted an action to recover the amount due in terms of Section 68 of the Co-Operative Societies Law instead of Section 58.

Therefore, it is my considered view that Registrar of Corporative Societies [Complainant-Respondent-Respondent] is entitled to make use of the provisions in Penal Law to recover money in terms of Section 59 (1) (c) of the Co-Operative Societies Law as a fine.

It is worthy to note that this position was clearly established by Section 59 (4) of the Principal Act, by amending Act No. 11 of 1992 which stipulates that,

“Any defaulter sentenced to a term of imprisonment in default of the fine imposed in accordance with Section 291 of the Code of Criminal Procedure Act No.15 of 1979, shall not be absolved from the payment of any sum of money mentioned in the certificate specified in Section 59(1) (c)”.

According to the said amended Section 59(4), it is clear that serving of a jail sentence imposed due to the failure to pay a fine shall not be a bar to collect the money due upon an Arbitral award made under the Cooperative Societies Act.

It is interesting to note that in 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.M 16.01.2015]*, K. T. Chitrasiri J. emphasized “In terms of Section 291(2) of the Criminal Procedure Code, the Legislature has permitted the particular Cooperative Society to recover the monies

due from persons concerned despite the fact that the particular person had served the jail sentence imposed due to the non-payment of the fine that was imposed [Emphasis added]”

According to the circumstances of the instant case and considering the judicial decisions mentioned above, it is apparent that Court can exercise Inherent Jurisdiction and also exercise the discretion of Court to convert the impugned appeal into revision, in the interest of justice.

On this premise, it is pertinent to note that if an appeal is preferred where there is no right of appeal or the Order against which the appeal was made is not an appealable Order, Court has discretion to convert the appeal to revision if there is a miscarriage of justice.

In view of the aforesaid reasons, it amply shows that the learned Magistrate of Matugama has erred in law and facts and come to an erroneous conclusion by dismissing the application of the Registrar of Corporative Societies [Complainant-Respondent-Respondent]. It prejudices the substantial rights of the Complainant-Respondent-Respondent which amounts to a miscarriage of justice. In view of the legal maxim '*actus curiae neminem gravabit*', no man would be prejudiced by an act of Court.

Since there is a miscarriage of justice and a great injustice caused to the Petitioner-Appellant in this appeal by the application of the Complainant-Respondent-Respondent being dismissed, I hold that the learned Magistrate's Order dated 05.01.2015 is bad in law. Hence, the said Order of the learned Magistrate and the Order of the learned High Court Judge dated 21.01.2016 should be set aside. Thus, we allow the appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.
I agree.

JUDGE OF THE COURT OF APPEAL