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

In the Appeal against the Judgment dated 13/06.2016 by the High Court of Kurunegala in case number HCW/ 11/2014.

Court of Appeal Case No:
CA (PHC) 115/2016

PHC of North-Western Province
holden in Kurunegala Case No:
HCW/11 /2014

W.A.D. Shantha Upul Kumara,
Halmillagaswewa,
Wilpatha, Chilaw.

PETITIONER

Vs

1. Commissioner of Cooperative Development, (North Western Province) Department of Co-operative Development,
   1st Floor, Office Complex of the North Western Provincial Council, Kurunegala.

2. Assistant Commissioner of Co-operative Development, Office of Assistant Commissioner of Co-operative Development,
   Chilaw.

3. A. Geeman Appuhami,
   Arbitrator, Pattiyagama,
   Madampe.

4. Arachchikattuwa Multi-purpose Co-operative Society Ltd.

RESPONDENTS

AND NOW BETWEEN

W.A.D. Shantha Upul Kumara,
Halmillagaswewa, Wilpatha,
Chilaw.

PETITIONER-APPELLANT

Vs

1. Commissioner of Cooperative Development, (North Western Province) Department of Co-operative Development,
1st Floor, Office Complex of the North Western Provincial Council, Kurunegala.

2. Assistant Commissioner of Co-operative Development, Office of Assistant Commissioner of Co-operative Development,
Chilaw.

3. A. Geeman Appuhami,
Arbitrator, Pattiyagama,
Madampe.

4. Arachchikattuwa Multi-purpose Co-operative Society Ltd.

RESPONDENT-RESPONDENTS

Before:	**Prasantha De Silva, J.**
	K.K.A.V. Swarnadhipathi, J.
Counsel:	Chandana Wijesooriya AAL, for the Petitioner-Appellant.
	Shemanthi Dunuwila, SC for the Respondent – Respondent.
Written Submissions: filed on	Written submissions filed on 10/07/2023 and 16/06/2020 by Petitioner-Appellant.
	Written submissions filed on 30/11/2022 by 1st and 2nd Respondent-Respondent.
Delivered on:	02.08.2023

Prasantha De Silva J.,

Judgment

This appeal from the Order/Judgment of the Provincial High Court of the Provincial High Court of the North-Western Province holden at Kurunegala exercising Writ Jurisdiction in Application bearing No. HCW/11/2014.

It appears that the said application was made by W.A.D Shantha Upul Kumara, against the 1st, 2nd,3rd, and 4th Respondents seeking to set aside the Order/Judgment dated 13.06.2016 by the learned Provincial High Court Judge and had sought a Writ of Certiorari to quash the decision and award made by the Commissioner of co-operative societies (North-Western) dated 22.01.2014.

The Petitioner-Appellant was employed as the Manager of the Distribution Division of the products of 'Swadesh section' at the Arachchikattuwa Multipurpose Cooperative Society Limited, during the period of 16.09.2055 to 02.08.2010. The Petitioner-Appellant [hereinafter sometimes referred to as the Appellant] was interdicted on 02.08.2010 due to an alleged shortage of goods worth of Rs. 2,418,793.00.

Thereafter, the 4th Respondent-Respondent [hereinafter referred to as the 4th respondent] sent a letter of demand [P2] on 14.09.2010 requesting Petitioner-Appellant to pay Rs. 2779196.20 on 05.10.2010 before 12 noon, which is due to the 1st Respondent society.

Since the Petitioner-Appellant had refused to pay the said sum, the matter was referred to an arbitrator by the 1st Respondent. Subsequently, the said arbitration proceedings were terminated on the application of the 4th Respondent to withdraw the plaint for the purpose of amending it with the permission of the Arbitrator. Thereafter, the 4th Respondent sent the 2nd letter of demand on 22.07.2011 claiming a sum of Rs. 2649694.09 to be recovered from the Appellant. Since the Appellant had refused to pay the said amount the matter was referred to an Arbitrator to initiate proceedings in case no. Halawatha/7423.

The arbitration commenced on 07.12.2011 before the 3rd Respondent-Respondent [hereinafter referred to as the 3rd Respondent]. Apparently, the 4th Respondent society led evidence of 7 witnesses and each of them were subjected to lengthy cross-examination.

According to the document marked "P5", the Co-operative Society sought to recover the following amounts from the Appellant.

	Rs.
Stock arrears for the period between 23-11-2009 and 30-4-2010	1,743,010.76

Stock arrears for the period between 5-1-2010 and 28-6-2010	600,516.85
Returned cheques between 16-9-2005 and 28-6-2010	181,257.50
Uncollected Debt for the period between 16-9-2005 and 28-6-2010	121.408.98
Festival Advance arrears as of 28.06.2010	3500.00
Total amount to be recovered	2,649,694.09

It appears that according to the aforesaid amounts, the most disputed amount was Rs. 1,743,010.76 – stock arrears for the period between 23.11.2009 and 30.04.2010.

The Appellant contended that the actual amount due for that period is Rs. 29, 502.11 according to the documents produced by the Appellant marked "V8","V16" and "V 17", which were the first batch of accounts prepared for the said period.

As argued by the Appellant the document marked 'V 8' only reflect a shortage of Rs. 29,502. 11. It was the position of the Appellant that he has already paid the said amount in two installments on 06.05.2010 and 31-05-2010.

However, it was submitted on behalf of the 1st and 2nd Respondents that several witnesses categorically and constantly stated that accounts reflected in 'V-8, V-16, V-17' are erroneous as they were prepared solely based on the documents/accounts maintained by the Appellant, which had been grossly erroneous themselves. Upon discovering the same, the forms were rectified to reflect an arrears worth Rs. 1,743,010.76. The updated accounts were marked as 'P10' by the Co-operative society- 4th Respondent at the arbitration.

The Arbitrator-3rd Respondent in the first instance had held that the Appellant was liable to pay a sum of Rs. 2, 407, 048. 52 and 20% interest per annum until the amount has been paid in full by judgment dated 20.06.2013. Subsequently, the Arbitrator has held that the Appellant is not liable to pay the entire amount pertaining to 'returned cheques' and further deducted Rs. 46, 885. 94 from uncollected debt owed to the society.

Being aggrieved by the said Arbitral Award, the Appellant preferred an appeal dated 18.07.2013 to the Commissioner of Co-operative Development (1st Respondent) to set aside the Arbitral Award on the grounds specified in the Appeal Petition dated 18.07.2013.

Pursuant to which the Co-operative Society – 4th Respondent had provided their detailed explanations in respect of each allegation mentioned above, by a Statement dated 30.11.2013. Both

Parties made representations before the commissioner and the 1st Respondent dismissed the Appellant's appeal on 23.01.2014.

Being dissatisfied with the said dismissal of the Appeal by the 1st Respondent Commissioner, the Appellant filed a Writ Application bearing no HCW/11/2014 dated 16.05.2014 in the Provincial High Court of North-Western Province holden in Kurunegala seeking to quash the decision of the 1st Respondent.

The learned Provincial High Court Judge allowed parties to file written submissions and having considered all the grounds raised by the Appellant and the position maintained by both parties, dismissed the Petitioner's application for Writ of Certiorari.

It is relevant to note that the learned Provincial High Court Judge has observed that a Writ of Certiorari will lie when it is demonstrated that there was an act of *ultra vires,* or a failure to observe natural justice. Following this observation, the learned High Court Judge had dismissed the appeal of the Petitioner as the Petitioner has failed to prove '*ultra vires'* on the part of the Commissioner-1st Respondent.

The Petitioner being dissatisfied with the said judgement of the learned High Court Judge the Petitioner-Appellant [hereinafter sometimes referred to as the 'Appellant'] has preferred the instant appeal dated 01.08.2016 to the Court of Appeal.

It is primarily noted that the instant appeal is against the judgement of the learned Provincial High Court judge dated 13.06.2016 exercising writ jurisdiction and not an appeal in a true sense against the award given by the Arbitration tribunal in case number Halawatha/7423 awarding damages worth of LKR 2,649,694.09.

Appellant has preferred this appeal on the grounds that,

- the learned Provincial High Court has failed to analyse the evidence in exhibits marked, and
- the learned High Court judge has violated principles of natural justice.

It seems that the appeal of the Appellant is mostly on factual grounds, based on the analysis of the facts by the Arbitrator.

In general, as substantiated by the Respondents where an appeal concerns a question of fact, the High Court is vested with jurisdiction to review the factual considerations only if there is a glaring perversity on the face of the record or if there is a failure to apply the law to the facts presented if it is a question of both law and facts.

In the case of ***Arther v Ameen [2014] 1 SLR 59 at page 60*** it was held by H.N.J. Perera J. that,

> *"Court will set aside inferences drawn by the trial Judge only if they amount to findings based on –*
>
> *[a] inadmissible evidence or*
>
> *[b] after rejecting admissible evidence and relevant evidence or*
>
> *[c] if the inferences are unsupported by evidence or*
>
> *[d] if the inferences or conclusions are not rationally possible or perverse."*

Furthermore, in the case of ***M.P. Munasinghe V.C.P. Vidanage 69 NLR 98*** it was held that

> *"the jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon evidence should stand has to be exercised with caution*."

In light of above judicial dictums, I will briefly consider the evidence placed before the Arbitrator and the conclusion of the Arbitrator on the evidence which was affirmed by the Commissioner-1st Respondent and the learned Provincial High Court Judge.

The Appellant's position is that the shortage of stocks only amounts to Rs. 29,402.11 as indicated by documents 'V8', 'V16' and V17'. However, multiple witnesses made statements indicating that the amounts reflected in the above marked documents were prepared solely by the Appellant and that such documents are erroneous.

Subsequently, the Respondent has rectified such accounts and stated that the arrears to be paid is Rs. 1,743,010.76 as indicated on record marked 'P10'.

The Appellants contention that the discrepancy is only Rs. 29,402.11 has been refused by the 1st 2nd and 3rd Respondents and the learned Provincial High Court Judge. I too see no reason to agree with this position considering the evidence placed before the Arbitrator and the lack of evidence other than the initial incorrect accounts placed before this court in documents marked V8, V16 and V17 which has been made by the Appellant himself.

The Appellant's position is that the corrected accounts, marked P10 which was based on the annual audit for year ending 30.04.2010 is not reliable for the correction of errors in the accounts and that such audit was carried out several months after the suspension of the Appellant. This court cannot give credence to this position as the Appellant has not challenged the validity of the audit based on the errors in the audit itself and has done so on the timing of the audit. As audits are by

nature periodical, this position cannot stand by itself unless the Appellant establishes a considerable delay in carrying out such an audit.

Furthermore, Appellant was given ample opportunity to cross-examine the witnesses on behalf of the 4th Respondent in order to challenge the veracity of the rectified accounts presented by the 4th Respondent. Appellant had failed to raise such doubts regarding the accuracy of such accounts during cross-examination.

Appellant has further contested the shortages of goods appearing in documents marked වි9/ පෙ11 based on,

- two different amounts appearing in different places in the accounts;
- the signature of the Appellant being different;

However, is noteworthy that the 'different amount' that is identified by the Appellant has been duly stricken off and has been signed in the exhibit marked පෙ11 and cannot be considered as an error on the face of the accounts creating doubts as to the veracity of the accounts.

As for the validity of the signatures, the Appellant has not adduced evidence regarding the validity of the signatures before the Arbitrator and hence cannot come before this court and urge this court to carry out a fresh inquiry into the findings of the Arbitrator.

In fact, it seems to this court that the Appellant had failed to provide a proper explanation for the shortage of stocks during the period mentioned above. Appellant was given ample opportunity to challenge the evidence of the 4th Respondent before the Arbitrator and therefore, the Appellant cannot come before this court and attempt to challenge such evidence in an appeal against an application for a writ of certiorari.

Appellant has further contested that the 4th Respondent has failed to establish the shortage of goods, item wise and has contended that, due to such failure the Arbitrator's decision should be invalidated. It is the considered opinion of this court that the Appellant cannot raise such an objection against the *uberima fide* of the 1st and 2nd Respondents and the Arbitrator-3rd Respondent if such an issue has not been raised before the Arbitrator or the Commissioner.

The learned Provincial High Court Judge has rightfully stated the following regarding this,

> *"එමෙන්ම පෙත්සම්කරු [Appellant] කියා සිටින පරිදි තොග ගණන් ගැනීමේදී අඩු වූ බඩු මොනවද යන්න නීරක විභාගයේදී සනාථ වී නැති බවයි. F-21 තොග පොත පෙත්සම්කරු [Appellant] භාරයේ තිබිය යුතු බවත් ඒ අනුව සුභ ගණන් කිරීමේදී F-22 අනුව එක් එක් ද්‍රව්‍ය පවතින ප්‍රමාණය ද නියමිත ව*

ඔප්පු කළ යුතු බවයි. එබැවින් මෙවැනි තහවුරුවක් නොමැතිව ගෙන ඇති තීරක තීරණය නීත්‍යානුකූල නොවන බවද කියා සිටී.

මෙහිදී එවැනි තොග පොත් පැමිණිල්ල විසින් බේරුම්කරුට [Arbitrator-3rd Respondent] ඉදිරිපත් කර නොතිබුණේ නම්, පැහැදිලිවම පෙත්සම්කරුට බේරුම්කරු මගින් එවැනි පොත් පැමිණිල්ල මගින් ඉදිරිපත් කරවා ඒ සම්බන්ධව කරුණු පැහැදිලි කිරීමට තිබූ ඇති අවස්ථාව ඔහු මඟ හැර ඇත. බේරුම් පරීක්ෂණයේදී මුලින්ම කර ඇති පරීක්ෂණ සම්බන්ධව නැවත වෙනම සොයා බැලීම් නොකරන අතර, ඉදිරිපත් පිළිගත හැකි කරුණු මත පිහිටා කටයුතු කිරීමට එවැන්නෙකුට බාධාවක් නැත. ඒ අනුව සෑහීමකට පත්වන පරිදි කරුණු ඉදිරිපත්ව ඇති විට ඒ මත නිගමන වලට පැමිණීම නීත්‍යානුකූල කාර්යපටිපාටියකි. එ බැවින් ඒ සම්බන්ධව පෙත්සම්කරු විසින් කර ඇති අභියෝග පිළිගත නොහැකිය."

As such, it would be a gross misrepresentation of facts to come before this court an allege that the Arbitrator has acted in an unreasonable manner on the basis of the Arbitrator not considering the F-22 form, without the Appellant bringing such evidence to the attention of the Arbitrator in the first instance.

In light of the above, this court is of the opinion that the corrected accounts placed before the Arbitrator by the 4th Respondent is valid and we see no reason to question the findings of the Arbitrator regarding this matter.

It is submitted on behalf of the 1st Respondent that as the decision of the Commissioner is not *ultra-vire*s, the learned High Court Judge cannot exercise writ jurisdiction over such a decision in an application for a writ of certiorari.

The attention of the court was drawn to the case of ***Sangaralingam v The Colombo Municipal Council [78 NLR 501]*** where it was held that,

> *"This Court, on application for a writ of certiorari cannot exercise appellate jurisdiction over the Minister's decision. What is complained of is an instance of erroneous exercise of jurisdiction and not excess of jurisdiction which can be corrected by this Court in the exercise of its supervisory jurisdiction. The finding as to the kind of remedy went to the merits of the determination only and not collateral to the merit of the decision. The statutory power vested in the Council and in the Minister by Sec. 102(1) and (4) has been exercised bona fide and on material available to them. There is no allegation of abuse of power. The power has been validly exercised and no question of excess of jurisdiction is involved."*

In contrast, the Appellant had submitted that court has jurisdiction to quash a decision even if a decision is *intra vires* if there is an error of law on the face of record.

In this regard, the attention of court was drawn to the case of ***R v Northumberland Compensation Appeal Tribunal*** where it was held that,

> *"Writ of certiorari would issue to quash the decision of a statutory administration tribunal for an error of law on the face of the record, even though that tribunal was not a court of record and although that error did not go to the jurisdiction of the tribunal."*

It is noteworthy that, Mahinda Samayawardhena J. citing the above judgment has held in the case of ***Anura Abeysinghe v Galle Co-operative Hospital Limited, CA Case No: CA (PHC) APN 104/2016 [C.A.M. 20.06.2019]*** held that,

> *I must straightaway state that "error of law on the face of the record", which is a well-accepted ground for certiorari, can be made use of to quash erroneous administrative or judicial decisions notwithstanding the decision-making process was flawless. For example, if the deciding authority has manifestly failed to properly evaluate the evidence led before him, the decision can be quashed on the ground of "error of law on the face of the record".*

That being said, while I agree with this position that a writ of certiorari can be issued if there is an error of law on the face of the record. However, the Appellant has failed to establish such an error in terms of the facts presented in Arbitration or the explanations given to the Commissioner regarding the dispute.

Therefore, it is the opinion of this court that the learned Provincial High Court Judge has followed a correct approach in considering the evidence that was placed before the Arbitrator and has reached a correct conclusion on law and facts.

Moreover, the Appellant has also contended that the learned Provincial High Court Judge has failed to consider document marked 'V19' as stated in appeal ground marked 'ඊ' in the Petition of Appeal,

> *"ඊ": එකී තීරක ප්‍රදානයට එළඹීමේදී තීරක විභාගයේ දී පෙත්සම්කරු විසින් වී19 ලෙස ලකුණු කොට ඉදිරිපත් කොට ඇති විකුණුම් සාරාංශය සඳහන් වන වෝදනා වලට අදාළ කාලයේ විකුණුම් සාරාංශය විකුණුම් අගය සහ පෙත්සම්කරු වෙත වගකීම පවරා ඇති බඩු අඩුව නිසි පරිදි සංසන්දනය කිරීමක් නොකිරීමෙන් උගත් විනිසුරු තුමා නීතිය හමුවේ නොමඟ ගොස් ඇත."*

The Appellant has not raised the issue of non-comparison of the Sales summary with the shortage of goods before the learned Provincial high Court judge as a ground for exercising its writ

jurisdiction. Therefore, Appellant is precluded by laches from relying on such a contention as a ground of appeal before this court.

Furthermore, contrary to Appellant's assertion, mere fact that the plaint filed before the Arbitrator-3rd Respondent by the 4th Respondent was amended to change the value of the action does not amount to a withdrawal of the action by the 4th Respondent leading to a case of *res judicata* as rightfully recognized by the learned Provincial High Court Judge.

Move over, Appellant has claimed violation of principle of natural justice as one of the grounds for the writ application before the learned Provincial High Court Judge.

The concept of natural justice has been elucidated by Mahinda Samayawardhena, J. ***Bowattegedara Don Isabella Sriyantha Theja Wijeratne v N. S. Premawansha, and Others CA/WRIT/44/2014 [CAM 18.02.2020],*** in the following manner particularly with regards to 'hearing both sides',

> *"Public law remedies such as writs of certiorari and mandamus are largely, if not solely, based on principles of natural justice. The first principle of natural justice is: Hear both sides before taking a decision. This is known as the audi alteram partem rule, which runs across-the-board in the whole spectrum of the decision-making process as a golden thread, irrespective of whether it is a regular Court, quasi-judicial body, administrative tribunal and the like. Hearing both sides does not end the matter. After the hearing, the deciding authority shall give reasons for the decision made, for otherwise nobody would know why the said decision was taken."*

In the instant case the learned Provincial High Court Judge has noted the following regarding this issue,

> *"පෙත්සම්කරු කියා සිටින පරිදි තීරක වරයා දෙපාර්ශ්වයටම සවන් දීමක් කර ඇතිද යන්න බැලීමේදී, මුළු විමසීම පුරාම කැඳවන ලද සාක්ෂිකරුවන් හරස් ප්‍රශ්නවලට භාජන කර ඇති අතර, පෙත්සම්කරුට ද සාක්ෂි කැඳවීමට අවස්ථාවක් ලබා දී ඇත. එබැවින් ස්වභාවික යුක්ති මූලධර්ම කඩ කිරීමක් කර ඇති බව නොපෙනේ."*

As such, it is evident from the face of the record that the Arbitrator-3rd Respondent has given ample opportunities for the Appellant to cross-examine the witnesses and to adduce evidence on its behalf and the 1st and 2nd Respondents have provided ample opportunity for the Appellant to explain its case before the Commissioner. Failure of the Appellant to do so in a proper manner is not a violation of principles of natural justice.

Appellant had further contended that the 3rd Respondent Arbitrator was biased in favour of the 3rd Respondent. However, Appellant had failed to adduce any evidence to establish such bias.

In the case of ***Captain Nawarathna vs Major General Sarath Fonseka and Six Others (2009)1 SLR 190, at 191*** it was held that,

> *"When an allegation of bias is made the test is whether the facts, as assessed by Court, give rise to a real likelihood of bias."*

In the instant case, the Appellant had failed to establish a *'real likelihood of bias'* by the 3rd Respondent-Arbitrator. Mere fact that arbitrator has given a judgement in favour of one party and against another based on the believability of the evidence adduced, does not amount to bias and to suggest so would collapse the entire system of arbitration.

In view of the above, it is our opinion that the 1st and 2nd Respondents have not acted in an unreasonable and an arbitrary manner warranting the intervention of the court by way of a writ of certiorari or a mandamus. Accordingly, we are of the view that the Learned Provincial High Court Judge has correctly considered the law and we see no reason to interfere with the Judgment dated 13.06.2016. Therefore, we affirm the Judgment of the Learned Provincial High Court Judge.

The Appeal dismissed without costs.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL