

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

In the matter of an Application for orders in the nature of Writ of Prohibition and Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Jayawardane Liyanage Karunathilaka alias Karunathilake Jayawardane  
“Samagi”,  
Morawakkanda,  
Morawaka.

CA/WRIT/103/2022

2. Widanagamage Sumith Ananda  
No. 55A,  
Banagala.

3. Nissanka Vitanage  
Polhindiya goda Road,  
Godagama,  
Matara.

4. Roshan P. Rupasinghe  
Near the Health Centre,  
Temple Road,  
Diyadawa.

5. Mahesh Lakmal Ranathunga  
“Madumal”  
Kosmodara,  
Kotapola.

6. Dias Ambepitiyage alias Dias Ambepitiya  
Derangala stage 2,  
Kiriwelkele,  
Pitabeddara.

7. Ampagoda Liyanage Kelum Pushpakumara  
No. 6 C,  
Pahala Millawa,  
Morawaka.
8. Palitha Sirinath Ranawaka alias Palitha Srinath  
Ranawaka  
No. 240,  
Welegewaththa,  
Pallegama South,  
Kolawenigama.

**Petitioners**

**Vs.**

1. Commissioner/ Registrar of Co-operative  
Development – Southern Province  
Department of Co-operative Development –  
Southern Province  
147/3,  
Pettigalawatta,  
Galle,
2. T. D. K. Ariyawansa  
Co-operative Development officer  
Assistant Co-operative Development office,  
Matara.
3. D. Abegunawardane  
Co-operative Development officer  
Assistant Co-operative Development office,  
Matara.
4. K. H. Piyasena  
Co-operative Development officer  
Assistant Co-operative Development office,

Matara.

5. J. Ranjith Silva  
Co-operative Development officer  
Assistant Co-operative Development office,  
Matara.
6. Kotapola Multi-Purpose Co-operative Society  
Ltd  
Deniyaya Road,  
Warella.

**Respondents**

**Before** : Sobhitha Rajakaruna, J.  
Dhammika Ganepola, J.

**Counsel** : Rasika Dissanayake for the Petitioners.  
Thusitha Wijekoon for the 6<sup>th</sup> Respondents.  
Amasara Gajadeera, S.C. for the 1<sup>st</sup> to 5<sup>th</sup> Respondents.

**Argued On** : 07.07.2023

**Written Submission** : Petitioners: 02.10.2023  
**tendered On**

**Decided On** : 20.10.2023

Dhammika Ganepola, J.

***Factual matrixes of the application***

The factual matrixes of the application are as follows. The Petitioners were members of the Board of Directors of the 6<sup>th</sup> Respondent Kotapola Multi-Purpose Co-operative Society Ltd. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents have been appointed by the 1<sup>st</sup> Respondent to hold an investigation into the affairs of the 6<sup>th</sup> Respondent Society under Section 46(1) of the Co-operative Societies Law and submit a report within 3 months as shown in document marked P5 to the Petition. While the investigations were pending, the Petitioners were given the opportunity to explain the irregularities revealed during the investigation, by making a statement, prior to assigning any liability upon the Petitioner anyone. Accordingly, the statements were recorded. However, the Petitioners state that they were not informed of the outcome of the said fact-finding inquiry under Section 46(1) of the Co-operative Societies Law.

While the matters remained as such, the Petitioners had been informed to show cause in respect of the charges set out in the letter marked P8 and as to why any order under Sections 66(1) and 67 of the Co-operative Societies Law should not be made in respect of the financial damages/losses caused by the Petitioners to the 6<sup>th</sup> Respondent Society upon their failure to fulfil duties. By the said letter P8, it is alleged that it has been revealed that the Petitioners have acted contrary to the said Law, rules and the regulations made there under at the inquiry held under Section 46(1) of the said Law. The Petitioners state that they have submitted their respective explanations and further have requested to allow a Representative or an Attorney-at-Law to represent themselves at the inquiry. However, the Petitioners claim that their request for legal representation was refused by the 1<sup>st</sup> Respondent. The Petitioners state that subsequently, the inquiry was held and that at its conclusion 2<sup>nd</sup> to 5<sup>th</sup> Respondents imposed punishments on five different occasions as evidenced by the Orders marked P14 to P18 on the Petitioners, in terms of Section 66(1)(a) of the said Law in respect of the charges contained in the P8 without allowing them to properly defend themselves at a formal inquiry to be held under Section 60B of the Co-operative Societies Law.

Thereafter, the 1<sup>st</sup> Respondent has instituted actions, bearing No.49427/19, No.02596, No.05950 and No.8494 before the Magistrate's Court of Morawaka under Section 66(2) of the Co-operative Societies Law to recover the sum of money referred to in the documents marked P14, P15, P16, P17 and P18. The Learned Magistrate allowed the Application in Case no.02596 and said order was challenged by way of Revision Application before the Provincial High Court of Matara which was dismissed. The Petitioners state that the decisions reflected in the Orders marked P14, P15, P16, P17 and P18 are bad in law as set out in the Petition. Accordingly, the Petitioners seek a *writ* of prohibition preventing the 1<sup>st</sup> Respondent from taking any further action in terms of Section 66 of the Co-operative Societies Law purportedly on the basis that the Petitioners have already been found guilty for any of the charges contained in the document marked P8 and a *writ* of certiorari to quash the decisions of the 1<sup>st</sup> Respondent as reflected in the documents marked P14, P15, P16, P17 and P18.

### ***Section 46(1) inquiry***

In terms of Section 46(1) of the Co-operative Societies Law, the Registrar of Corporative Development is empowered to hold an inquiry into the constitution, working, and financial condition of a registered society or an inspection into the books of the registered society. Said Section 46(1) is as follows:

*46 (1) The Register may of his own motion and shall on the application of a majority of the committee or of not less than one-third of the members of a registered society hold an inquiry or inspection or direct some person authorized by him by orders in writing in that behalf to hold an inquiry into the constitution, working, and financial condition, or an inspection into the books of the registered society.*

The Petitioners state that they were asked to provide explanations regarding irregularities uncovered while the Section 46(1) inquiry was going on, as indicated in the letter marked P6. However, the Petitioners claim that their repeated requests to obtain documents pertaining to the relevant irregularities have not been considered by the 1<sup>st</sup> Respondent and their statements were recorded under duress. Nevertheless, the Petitioners have not provided any evidence to support their said stance that they made such requests during the inquiry under Section 46(1) and that they made such statements under duress. Hence, it is viewed that the Petitioners have failed to support such allegations with substantive material before this court. This court is not in possession rely upon a mere statement made by the Petitioners.

At this juncture it is noteworthy to observe the procedure to be adopted in conducting a similar investigation has been considered by **Lord Denning MR in R v. Race Relations Board ex p Selvarajan [1975] 1 WLR 1686**. Lord Denning MR in discussing has summed up the procedure in the case of an investigating body such as the Commission for Racial Equality which is under a duty to act fairly:

*“The investigating body is, however, the master of its own procedure. In it need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the board grounds are given. It need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decisions and make its own report.”*[Wade & Forsyth, ADMINISTRATIVE LAW eleventh edition page 440]

### ***Examination under Section 66***

Section 66 of said Law empowers the Registrar to examine the conduct of directors of a co-operative society and make an order requiring him/them to repay an amount misappropriated, to

restore such other property or part thereof or to contribute such sum as the Registrar thinks fit to the assets of the society by way of compensation, where in the course of an inquiry under section 46, it appears that any sum of money or other property is due to the society from such director or it appears that such director has utilized the funds of the society contrary to the provisions of this Law or any other law or rules or regulations. Said Section 66(1) as follows,

*66(1) Where in the course of an audit under section 44 or an inquiry under section 46, or inspection of books of a registered society, or in the course of the liquidation of a registered society, it appears that any sum of money or other property is due to the society from any person or group of persons who or which has taken part in the organization or management of the society or from any past or present officer or employee of the society, who has utilized the funds of the society contrary to the provisions of this Law or any other law or rules or regulations made thereunder or the by-laws or the working rules of the society or financial procedure approved by the Registrar or any general directions issued by the Registrar or the Co-operative Employees' Commission, the Registrar may, of his own motion or upon the application of the committee or the liquidator or any creditor or contributor of the society, as the case may be, examine the conduct of such person or group of persons or officer or employee and make an order requiring him or such group-*

- (a) to repay with such interest as the Registrar thinks fit such money or part thereof,*
- (b) to restore such other property or part thereof, or*
- (c) to contribute such sum as the Registrar thinks fit to the assets of the society by way of compensation.*

*Before making any such order against any person or group of persons the Registrar shall give that person or group of persons an opportunity of being heard and of showing cause why such order should not be made.*

Accordingly, pursuant to the inquiry conducted under Section 46(1) of the Co-operative Societies Law, the Petitioners have been presented with a charge sheet (paragraph 3 of P8) that exposes the uncovered information and directed to show cause why an order under Sections 66(1)/67 of the aforementioned Law should not be made. The Petitioners have responded to the letter marked P8 by giving explanations for every charge contained therein. It needs to observe the nature of the charges which are mainly based on the intelligence of the Respondents and that need to be dealt with cautiously at the inquiry.

### ***Failure to provide documents***

However, the Petitioners state that their request for a copy of the investigation report, and material information pertinent to the inquiry under Section 66 (1) request has been unreasonably denied without any valid reason. However, it is evident from a letter (P9) that the application for

an investigation report was rejected solely because it implicated others. It seems that the report would be administratively inconvenient if it was provided. In the event that an individual alleges that they were not afforded the opportunity to obtain and present particular documents during an investigation, it is imperative that they elucidate to the Court precisely how said documents would have had a substantial bearing on their case during the review process. Mere allegations of being denied an opportunity do not hold enough weight for courts to exert its review powers. It is important to note that the Court carefully considers both the facts and the law when making a decision. In this case, the Petitioners have not specified how the alleged documents that the Respondents failed to provide strongly influenced the 1st Respondent's decision or how it had caused any prejudice to the Petitioners during the inquiry. Therefore, I am of the view that the Petitioner's right to a fair hearing had not been violated merely because they were denied access to the investigation report.

### ***Right to representation***

The Petitioners further contend that the 1<sup>st</sup> Respondent's failure to authorize to submission of supplementary materials through a Representative or Attorney at Law by the 1<sup>st</sup> Respondent is a violation of natural justice which amounts to *ultra virus*. Although an application has been made for representation by the 3<sup>rd</sup> Petitioner to the 1<sup>st</sup> Respondent for further submissions by letter P12, the opportunity has only been given to make submission of supplementary materials on his own by letter P13. Therefore, it appears that the request for representation of the 3<sup>rd</sup> Petitioner has been disallowed by said letter P13. It is observed that only the 3<sup>rd</sup> Petitioner has made such a request (p12) for representation and that the other Petitioners have opted not to make such a request as there is no proof.

Then a question arises whether the 3<sup>rd</sup> Petitioner is entitled to representation in an examination under Section 66(1). Section 66(1) of the Co-operative Societies Law does not make any provision specifying the procedure to be adopted in conducting the investigations thereunder. There are no specific guidelines laid down for the conduct of investigation under Section 66 nor does the Section provide as to whether a person should be afforded the right to exercise the right to representation. However, Section 66 of the Co-operative Societies Law provides that a person should be afforded the opportunity to be heard and show cause before making an order under Section 66(1). In such circumstances, I am of the view that the 1<sup>st</sup> Respondent was at their discretion to choose the procedure to be adopted in conducting the impugned inquiry and that a person under Section 66 has no mandatory right to representation. However, ***Wade & Forsyth in ADMINISTRATIVE LAW (eleventh edition)*** at page 782 has discussed the legal position in this regard as follows:

*In practice, the proceedings in many tribunals are inexpensive and informal, so that legal representation is often not a necessary, But difficult problems of law and facts are always prone to occur, particularly under complicated regulations.*

In the case of ***R. V. Secretary of State for the Home Department and others ex parte Tarrant and Another; R. K. Wormwood Scrubs Prison Board of Visitors, ex pane Anderson and Others. [ 1984] 1 All ER 799***, the applicants who were convicted prisoners were charged with grave offences against prison discipline. Inquiries were held by the Prison Board of Visitors into the charges against the applicants. Some of the applicants requested legal representation while some requested assistance of a friend at the hearing. The Board of Visitors refused the requests in each case. The applicants applied to the Court by way of a writ of certiorari on the ground that a prisoner was entitled as of right to legal representation or assistance of a friend or advisor. The Court held that although a prisoner appearing before the Board of Visitors on a disciplinary charge was not entitled as of right to have legal representation or the assistance of a friend or, advisor, as a matter of natural justice a Board of Visitors had a discretion to allow such representation. The Court held that it was wrong for such a Board to take the firm view that the applicant had no right to legal representation or assistance and that it had no power to grant it. **Webster, J.** who delivered the main judgment set out the considerations which every Board should take into account when exercising its discretion on whether to allow legal representation or to allow the assistance of a friend or adviser as follows:

- (1) The seriousness of the charge and the potential penalty,
- (2) Whether any points of law are likely to arise,
- (3) The capacity of a particular prisoner to present his own case.

The above stance was upheld in the case of ***Culasubadhra vs. University of Colombo and Others (1985 1 SLR 244)*** as well. I am of the view that the case in point is a fit and proper case to apply the above principle.

Accordingly, in arriving at a decision as to whether the 3<sup>rd</sup> Petitioner should have been afforded the opportunity to represent himself, this Court has to take into consideration the seriousness of the charge referred to in the instant application and the potential penalty, whether any points of law are likely to arise and the capacity of a particular person to present his own case. When the matters under the instant case are taken into consideration, it appears that the charges levelled against the Petitioners were in respect of utilization of the funds of the society contrary to the provisions of this Law. As such, it is observed that the charges levelled against the Petitioner at the inquiry were serious of nature. In considering the potential penalty in this respect, it has to be noted that based on the inquiry under Section 66 of the Law, the Registrar may institute proceedings before the Magistrates Court to recover such unlawfully utilized money from the alleged persons.



Further, Section 66(2) of the Law provides that *“Nothing in this section shall authorize or require the Magistrate in any proceedings thereunder to consider, examine or decide the correctness of any order made by the Registrar”*. Since the proceedings before the Magistrate’s Court takes the nature of execution simpliciter, the inquiry under Section 66 of the Law shall be the last forum before which the Petitioners could defend themselves. Hence, it appears that the potential penalty that may be imposed upon the Petitioners pursuant to Section 66 inquiry is serious and grave in nature. It should also be noted that the Petitioners have made a request for legal representation which implies that the Petitioners believed that they lacked the capacity to present their own case. In the said backdrop, I am of the view that even though there was no mandatory requirement to grant Petitioners the right to represent themselves, in view of the Petitioners’ request they should have been afforded such right to representation. Therefore, the failure of the Registrar to grant representation breached the principles of natural justice and invalidated the decision.

Further, the Petitioners state that the decisions of the members of the Board of Directors of the Co-operative Society do not fall into the scope of Sections 46, 60B and 66 of the Co-operative Society Law and thus the charges against them cannot be maintained. As per the interpretation Section 75 of the said Law "Committee" means the governing body of a registered society to whom the management of its affairs is entrusted and includes the Board of Directors of a registered society and "officer" includes a member of the committee of a society. Therefore, it is imperative to note that the members of the Board of Directors are bound by the provisions of Sections 46, 60B, and 66 of the Cooperative Society Law.

The Petitioners further contend that as the Respondents have failed to hold an inquiry under Section 60B of the Cooperative Society Law, the purported decisions contained in P14, P15, P16, P17 and P18 are bad in law as the said decisions are contrary to the provisions of the Sections 46 and 60B of the said law. The said decisions contained in the Orders P14, P15, P16, P17 and P18 have been arrived under Section 66(1). It is imperative to note that Section 66(1) inquiries stand apart from Section 60B inquiries, and they are completely independent of each other. This distinction must be acknowledged and respected at all times. Inquiry under Section 60B is not a statutory prerequisite for making orders under Section 66(1). Therefore, I am unable to accept the Petitioners’ argument.

### ***Estoppel***

The Respondents have taken up the preliminary objection of estoppel based on the payment of the full amount due by the Petitioners under the case bearing No. 02596 before the Magistrate’s Court Morawaka. The said action before the Magistrate’s Court of Morawaka was based on the Order of the 1<sup>st</sup> Respondent reflected in P17. The Petitioners have already paid the entire amount owed in the said case. Therefore, the Respondents contend that the Petitioners have acquiesced with the liability and are also estopped from denying the liability in respect of the other decisions. Although the payment of dues by the Petitioners in the said case is a necessary legal obligation, the said order P17 is in reference to a particular transaction(charge). Nevertheless, the Petitioners

should have an opportunity to challenge the other impugned decisions (P14, P15, P16 and P18) in respect of the several other transactions(charges) where they have not admitted liability by making payments in the respective cases in the Magistrate's Court. Therefore, payment of due in the case bearing No. 02596 in respect of order P17 does not give rise to an estoppel as claimed by the Respondents. I make this observation based on the overall circumstances of this case. Hence, the acceptance of liability in the case bearing No. 02596 in the Magistrate's Court Morawaka has no impediment to challenge the Petitioners the decisions reflected in the P14, P15, P16 and P18.

Anyhow it is noted that the Petitioners are estopped from making any claims based on the reasons given in this judgment for the monies already paid in case bearing No. 02596 as such aspect is never subjected to within the adjudication of this case and there is no specific relief sought by the Petitioners in that regard. Therefore, it establishes the element of waiver.

### ***Conclusion***

Based on the said circumstances, and the reasons given above I am inclined to issue a writ of certiorari to quash the decisions of the 1<sup>st</sup> Respondent reflected in the P14, P15, P16 and P18. However, this order shall not stand as an impediment for the 1<sup>st</sup> Respondent to hold a fresh inquiry in terms of Section 66 of the Cooperative Societies Law against the Petitioners based on the findings of the said inquiry held in terms of Section 46(1) of the Cooperative Societies Law. I order no cost.

*Application is partly allowed.*

**Judge of the Court of Appeal**

**Sobhitha Rajakaruna J.**

**I agree.**

**Judge of the Court of Appeal**