

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

1. Dambadeniya Multi-purpose
Co-operative Society Ltd.
Dambadeniya
2. Chairman
Dambadeniya Multi-purpose
Co-operative Society Ltd.
Dambadeniya

Accused-Respondent-Appellants

C.A.[PHC] NO.274/2003

P.H.C.KURUNEGALA

CASE NO.HCA 169/98

MAGISTRATE'S COURT

KULIYAPITIYA CASE NO.96042

Vs

1. B. R. Somawathie
Sirigala, Dembadeniya

Petitioner-Respondent

2. Co-operative Employees Commission
[North Western Province]
Negombo Road, Kurunegala

Respondent-Respondent

3. Secretary
Co-operative Employees Commission
[North Western Province]
Negombo Road, Kurunegala

Complainant-Respondent-Respondent

4. Hon.Attorney General
Attorney General's Department
Colombo 12.

Respondent-Respondent

BEFORE : **K.T.CHITRASIRI, J.**
MALINIE GUNARATNE, J.

COUNSEL : Amila Palliyage with Erande Sinharage
for the Accused-Respondent-Appellants
Nayomi Kahavita S.C for the 2nd, 3rd and 4th Respondent-
Respondents

ARGUED ON : 01.12.2014

WRITTEN SUBMISSIONS : 01.12.2014 by the Accused-Respondent-Appellants
02.12.2014 by the 2nd to 4th Respondent-Respondents

DECIDED ON : 16. 02. 2015

CHITRASIRI, J.

1st and the 2nd accused-respondent-appellants sought to set aside the order dated 18.10.2003 of the learned High Court Judge of Kurunegala, wherein the learned Judge made order to have a re-trial in respect of the charge mentioned in the charge sheet which was signed by the learned Magistrate on 27.09.1996. [vide at pages 233 and 234 in the appeal brief] The aforesaid action was filed in the Magistrate's Court of Kuliypitiya against the two accused-appellants namely Dambadeniya Multi-purpose Co-operative Society Ltd and the Chairman of that Society. The charge upon which the trial was proceeded in the Magistrate Court was under Section 35(1) (b) read with Section 35(2) of the Co-operative Employees Commission Act No.12 of 1972. The aforesaid charge is as follows:

වෝදනා පත්‍රය

මෙම අධිකරණයේ අධිකරණ බල ප්‍රදේශය තුළ පිහිටි දඹදෙණිය යන ස්ථානයෙහි ව්‍යාපාරික කටයුතු සහ කාර්යාලය පවත්වාගෙන යනු ලබන 1992 අංක 11 දරණ සමුපකාරසමිති (සංශෝධන) පනත සහ 1983 අංක 32 දරණ සමුපකාර සමිති (සංශෝධන) පනත යන පනත් මගින් සංශෝධිත ජාතික රාජ්‍ය සභාවේ 1972 අංක 05 දරණ සමුපකාර සමිති පනත යටතේ ලියා පදිංචි කරන ලදැයි සැලකිය යුතු ලියා පදිංචි කිරීමේ අංකය : කු/1454 සහ 1971.01.28 දිනැතිව ලියා පදිංචි කරන ලද සමුපකාර සමිතියක් වූ සීමාසහිත දඹදෙණිය විවිධ සේවා සමුපකාර සමිතිය සහ එකී සමිතියේ සභාපති විසින් 1989 අංක 12 දරණ පළාත් සභා (ආනුශංගික විධිවිධාන) පනත සමඟ කියවිය යුතු 1972 අංක 12 දරණ සමුපකාර සේවක කොමිෂන් සභා පනත යටතේ සංස්ථාපිත වයඹ පළාත් සමුපකාර සේවක කොමිෂන් සභාව විසින් ඉහත කී සමුපකාර සේවක කොමිෂන් සභා පනතේ 11(1) (අයි) දරන වගන්තිය ප්‍රකාර අංක. කු/ 1/ 6/ 1/ 3 හා 1993.07.15, උක්ත අංක සහ 1993.09.15 සහ උක්ත අංක සහ 1993. 11. 25 දිනැති ලිපි මගින් දැනුම් දුන් පරිදි 1993. 06. 24 දිනැතිව ඉහත කී සීමාසහිත දඹදෙණිය විවිධ සේවා සමුපකාර සමිතියට දෙන ලද නියෝගය පරිදි එනම් දඹදෙණිය (තැපැල්) , සිරිගල පදිංචි බස්නායක රාලලාගේ සෝමාවතී යන අය හිඟ වැටුප් රහිතව නවක සේවකයකු වශයෙන් ඇ දැරූ තනතුරේ නැවත සේවයේ පිහිටුවන ලෙස කරන ලද නියෝගය විත්තිකරුවන් විසින් නිතා මතාම නොසලකා හැරීම හෝ ප්‍රතික්ෂේප කිරීම හෝ පැහැර හැරීම හෝ මගින් ඉහත කී සමුපකාර සේවක කොමිෂන් සභා පනතේ 35(2) 35(3) හා 35(4) වගන්තිය සමඟ කියවිය යුතු එකී පනතේ 35(1) (බී) වැනි වගන්තිය ප්‍රකාර දඬුවම් ලැබිය යුතු වරදක් කර ඇති බැව් මෙයින් ඔබට වෝදනා කරනු ලැබේ.

අ/ක.

මහේස්ත්‍රාත්
කුලියාපිටිය මහේස්ත්‍රාත් අධිකරණය
කුලියාපිටිය

1996.07 මස 27 වන දින දිය [vide at pages 233 and 234 of the appeal brief]

Learned Magistrate by his judgment dated 26.10.1998, acquitted the appellants of the said charge after a full scale trial. Being aggrieved by the said acquittal, the 1st petitioner-respondent-respondent, namely B.R.Somawathie filed a revision application in the High Court having made the two appellants in this appeal as the first two respondents. The other respondents to the said revision application filed in the High Court are the 2nd to 4th respondents in this appeal. However, the petitioner in that application who is the 1st respondent to this appeal did not participate at the argument stage in this Court even though she is the person who filed the revision application in the High Court.

Be that as it may, the issue in this case is to determine the correctness of the decision of the learned High Court Judge *i e* to have a re-trial on the charges levelled against the two appellants of which they were acquitted by the learned Magistrate.

As mentioned in the charge sheet referred to above, the two appellants were charged for having willfully neglected to comply with the order made on 24.06.1993 by the Co-operative Employees Commission directing the appellants to re-instate the petitioner-respondent namely, B.R.Somawathie. Admittedly, the Secretary of the North Western Province Co-operative Employees Commission, by the letter dated 25.11.1993 had directed the 1st Appellant, namely the Chairman, Dambadeniya Multi-purpose Co-operative Society Ltd to implement the decision of the Commission made on 24.06.1993. It is alleged that the two appellants have failed to do so. As a result, the aforesaid action was filed in the Magistrate Court having charged the two appellants under the aforesaid Section 35(1)(b) read with

Section 35(2) of the Co-operative Employees Act No.12 of 1972. Learned Magistrate having held a full scale trial, acquitted the two appellants. Learned High Court Judge having set aside the aforesaid acquittal of the two appellants made order to have a *trial de novo*.

Basically, the reason assigned by the learned High Court Judge to have a re-trial is the failure on the part of the plaintiff-respondent-respondent to mark the letter dated 25.11.1993. The said letter had been tendered with their submissions in the Magistrate's Court having marked the same as P7. Admittedly, it had not been produced in evidence. Learned Magistrate in his judgment has referred to the said letter in the following manner:

“සාක්ෂි මෙහෙයවමින් පැමිණිල්ල ඉදිරිපත් කළ පැ.1, සහ පැ.2 ලේඛණ නැවත සේවයේ පිහිටුවීම දැනුම් දීමට අදාළ ලේඛණයි. පැ.3 යනු, විත්තිකාර පාර්ශ්වය විසින් එකී කොමිෂන් සභා නියෝගයට විරුද්ධව කළ අභියාචනය ප්‍රතික්ෂේප කළ බව දැන්වූ ලිපියයි. නමුත් එම ලිපිය එවීමෙන් පසුව කොමිෂන් සභා නියෝගය පිළිබඳ නැවත සලකා බලන ලෙසට වි 1 දරණ අභියාචනයක් ඉදිරිපත් කළ බව විත්තිය සාක්ෂි දෙමින් ප්‍රකාශ කර ඇත. එම අභියාචනය සම්බන්ධයෙන් යම් පිළිතුරක් විත්තිකාර සමුපකාර සමිතියට එවූ බවට විත්තිය සාක්ෂි ඉදිරිපත් කර නැත. 93.11.25 දිනැති ලිපියක් ගැන චෝදනා පත්‍රයෙන් සඳහන් වෙතත් නඩු විභාග අවස්ථාවේ එවැනි ලිපියක් ඉදිරිපත් වී නැත. නඩු විභාගය අවසානයේ විත්තිය ලිඛිත දේශණ ඉදිරිපත් කිරීමෙන් පසුව ඊට ලිඛිතව පිළිතුරු සපයමින් පැමිණිල්ල විසින් පැ.7 වශයෙන් ලකුණු කළ 93.11.25 දිනැති ලිපියක් ඉදිරිපත් කර ඇත. සාක්ෂි විභාග වන අවස්ථාවේ එම දිනැති ලිපියක් ගැන ප්‍රකාශ වූවත් එම ලිපිය කිසිම අවස්ථාවක ඉදිරිපත් වී නැත. එසේ නිබ්බිදි ලිඛිත දේශණ සමඟ නඩුවේ ඉදිරිපත් නොකළ ලේඛණයක් ඉදිරිපත් කළ පසු ඒ ගැන අධිකරණයට සලකා බැලිය නොහැක.” [vide at page 184 in the appeal brief].

As mentioned hereinbefore, the two appellants have already faced a trial before the Magistrate on the same charge and the decision thereof was an acquittal of that charge. In that trial, the person on whose favour the decision of the Commission was made has given evidence. She is the petitioner in the revision application filed in the High Court. Administrative officer of the Co-Operative Employees Commission also has testified in that trial. General Manager of the Multipurpose Co-Operative Society of Dambadeniya too has given evidence. Complainant-respondent has failed to produce the letter P7 in evidence through any one of those witnesses.

The said letter (P7) indicates the outcome of the second appeal preferred by the appellants and that appeal by them had been marked as V1 in evidence in the Magistrate's Court. Therefore, it is necessary to note that the learned High Court Judge by his decision to have a *trial de novo*, seems to have afforded a second chance for the complainant-respondent to produce in evidence, the letter dated 25.11.1993 (P7) tendered with the submissions which he has failed to produce in evidence for the reasons best known to him.

Moreover, the circumstances of the case show that the non-production of the aforesaid letter P7 in evidence, by which the Commission has informed its decision on the second appeal, has prevented the learned Magistrate considering the same when he wrote the judgment. In an adversarial system such as ours, courts should not help a prosecutor to rectify his/her infirmities occurred due to his/her fault.

Hence, it is my opinion that the two appellants cannot be directed to face another trial to help the complainant to rectify his shortcomings.

Furthermore, it is pertinent to note that a similar appeal had been lodged by the appellants prior to the appeal marked V1 was preferred and the said first appeal had been rejected by the Commission. The decision so made had been informed to the appellants by letter dated 15.09.1993 by the Secretary, Co-Operative Employees Commission and it was marked in evidence as P3. [vide at page 239 in the appeal brief] Therefore, it is seen that the failure to mark the letter P7 would not have prejudiced the case of the complainant-respondent since the learned Magistrate has already considered a similar position by looking at the result of the first appeal (P3/Y4 at page 235 in the appeal brief] preferred by the appellants. Therefore, failure to produce the letter marked P7 by which the decision made on the subsequent appeal was informed to the appellants, cannot be considered as a reason to have a re-trial on the same charge.

The circumstances referred to above also show that the learned High Court Judge seems to have afforded a second chance for the plaintiff-respondent-respondent to proceed with the trial against the two appellants. Therefore, if the impugned order is to be implemented, then the accused-appellants will have to stand for another trial even though an order for acquittal had been entered on them for the same charge after a full scale trial. Hence, such a cause of action may lead to put the appellants into a position described as double jeopardy.

Moreover, the learned Magistrate when he acquitted the two accused-appellants has given cogent reasons supporting the acquittal. That decision had been made, not only on the question of unavailability of the letter P7 tendered with the submissions but also having looked at the totality of the evidence led before him. Hence, it is clear that the decision of the learned Magistrate would not have been different even if he had considered the contents of the letter P7 which is the outcome of the subsequent appeal marked V1.

For the aforesaid reasons, I set aside the order dated 18.10.2003 of the learned High Court Judge of Kurunegala allowing the appeal filed by the two appellants. Judgment dated 26.10.1998 of the learned Magistrate of Kuliypitiya shall prevail. No costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATNE, J

I agree

JUDGE OF THE COURT OF APPEAL