

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

In the matter of an appeal under Article  
154(P)(6) of the Constitution of the  
Democratic Socialist Republic of Sri Lanka

**Case No. CA(PHC) 121/2007**

**H.C. Ratnapura Case No. HCWA 06/2002**

01. M.A.Mahindapala  
Demuwatta  
Horamulla,Rakwana.
02. Dharmasena Yainna  
Yainna,Kahawatta.
03. K.D.Arnolis  
Pahamunupanna,  
Atakalampanna.
04. Shanatha Samaratunga  
Yatagara,Watapatha.
05. S.A.A.Perera  
No.49, Kahawatta.
06. U.L.Balamahaththaya  
Bungiriya,Kahawatta.
07. Wijaratne Ranatunga  
Godakumbura,Gabbela
08. K.Gunasekara  
Madalgama,Kahawatta.

**Petitioners-Appellants**

**Vs.**

01. Pannilapattu Multi Purpose  
Co-operative Society LTD  
Main Street,Kahawatta
02. D.M.A.K.Disnayake  
The Arbitrator  
Dambagahagedara  
Yakwila,Kuliyapitiya.

**03. K.M.G.Bandara**

**Appeal Inquiry Officer**

**Commissioner of Co-operative**

**Development/Registrar of Sabaragamuwa  
Province**

**Co-operative Development**

**Commissioner's Office,**

**Sabaragamuwa Provincial Council,**

**New Town, Ratnapura**

**3A. P.Sunil Premachandra**

**Commissioner of Co-operative**

**Development/Registrar of Sabaragamuwa  
Province**

**Co-operative Development**

**Commissioner's Office,**

**Sabaragamuwa Provincial Council,**

**New Town, Ratnapura**

**3B. Kapila Pathirana Perera**

**Commissioner of Co-operative**

**Development/Registrar of Sabaragamuwa  
Province,**

**Co-operative Development**

**Commissioner's Office,**

**Sabaragamuwa Provincial Council,**

**New Town, Ratnapura**

**Respondents/Respondents**

**Before: K.K. Wickremasinghe J.**

**Janak De Silva J.**

**Counsel:**

**W. Dayaratne P.C. with R. Jayawardena for the Petitioners-Appellants**

**T.M.S. Nanayakkara for 1<sup>st</sup> Respondent-Respondent**

**Zuri Zain State Counsel for 3<sup>rd</sup> Respondent-Respondent**

**Written Submissions tendered on:**

Petitioners-Appellants on 19<sup>th</sup> September 2017

1<sup>st</sup> Respondent-Respondent on 19<sup>th</sup> September 2017

3<sup>rd</sup> Respondent-Respondent on 18<sup>th</sup> September 2017

**Argued on:** 27<sup>th</sup> March 2018

**Decided on:** 8<sup>th</sup> June 2018

**Janak De Silva J.**

This is an appeal made by the Petitioners-Appellants (Appellants) against the judgement of the learned High Court Judge of Ratnapura dated 21.06.2007.

The Appellants were at all material times to this application Directors of the 1<sup>st</sup> Respondent-Respondent (1<sup>st</sup> Respondent). One M. Dayananda (Employee) who was an employee of the 1<sup>st</sup> Respondent was charged for misconduct and his services were terminated by the 1<sup>st</sup> Respondent after an inquiry at which he was found guilty. The Employee appealed to the Co-operative Employees Commission (Commission) against his termination. The Commission by order dated 20.03.2001 (Direction) directed the 1<sup>st</sup> Respondent to reinstate him with effect from the date of his interdiction (01.04.1981) without back wages or any salary increments.

The 1<sup>st</sup> Respondent instead of complying with the Direction appealed to the Commission to vary it purportedly in terms of section 11 of the Co-operative Employees Commission Act No. 12 of 1972 (Act). This was rejected by the Commission by letter dated 20.05.1981. The 1<sup>st</sup> Respondent was informed by the Commission that legal action will be taken against it if the Direction is not implemented.

Since the 1<sup>st</sup> Respondent failed to implement the Direction, the Commission instituted action against the 1<sup>st</sup> Respondent in the Magistrate Court of Pelmadulla in case no. 31125 in terms of section 35 of the Act to obtain an order for enforcement of the Direction. The learned Magistrate by her order dated 03.09.1984 ordered the implementation of the Direction and imposed a fine of Rs. 1000/= and directed the 1<sup>st</sup> Respondent to pay back wages to the Employee from the date of the Direction.

The 1<sup>st</sup> Respondent appealed against the said order to the Court of Appeal in case no. CA 241/84 which was dismissed as the court was of the view that there is no reason to interfere with the conviction and sentence. Thereafter, the 1<sup>st</sup> Respondent reinstated the Employee and paid him Rs. 157,573/= as back wages from the date of the order by the Commission in view of the order of the learned Magistrate.

The Employee after receiving the back wages made an appeal to the Provincial Co-operative Employees Commission for the Sabaragamuwa Province claiming back wages for the period he was under interdiction. According to the Appellants, at the inquiry into this appeal the then Chairman of the 1<sup>st</sup> Respondent had agreed to pay the said back wages whereas the 1<sup>st</sup> Respondent contends that the said back wages were paid according to the order made by the Provincial Co-operative Employees Commission. By this time the Appellants had ceased to be Directors of the 1<sup>st</sup> Respondent.

Thereafter, the Commissioner of Co-operative Development of the Sabaragamuwa Province directed the Chairman of the 1<sup>st</sup> Respondent to act against the Directors who were responsible for not reinstating the Employee without back wages according to the Direction of the Commission and for deciding to contest the M.C. Pelmadulla case and appealing against the said decision.

The Appellants were asked by the 1<sup>st</sup> Respondent to pay the said sum which was declined. This dispute was referred by the Commission to arbitration and the 2<sup>nd</sup> Respondent-Respondent (2<sup>nd</sup> Respondent) was appointed as arbitrator. After inquiry he made his award in terms of which the Appellants were required to pay a sum of Rs. 272,602.50 with 19% interest.

The Appellants appealed to the 3<sup>rd</sup> Respondent to set aside the award which appeal was rejected.

The Appellants thereafter filed the above application in the Provincial High Court of the Sabaragamuwa Province holden in Ratnapura and sought, inter alia, the following relief:

- (a) writ of certiorari quashing the order dated 2002.08.15 of the 3<sup>rd</sup> Respondent;
- (b) writ of certiorari quashing the award dated 2000.12.01 made by the 2<sup>nd</sup> Respondent;
- (c) writ of prohibition that the Appellants are not bound in terms of rule 62 of the by-laws of the 1<sup>st</sup> Respondent or the Sabaragamuwa Province Co-operative Societies Statute

The learned High Court Judge of Ratnapura dismissed the application and hence this appeal.

One ground on which the application of the Appellants was rejected by the learned High Court Judge is that they had not taken steps to challenge the Direction in the Court of Appeal but instead had appealed to the Commission to vary its order which was refused. In any event, it is clear that the Appellants did not thereafter resort to any legal process to impugn the Direction until proceedings were instituted in Magistrate Court of Pelmadulla in case no. 31125 to enforce the Direction.

Where a statutory functionary gives directions to a subordinate body, the subordinate body must consider whether the said directive is intra vires the powers of the statutory functionary. Where it is ultra vires the powers of the statutory functionary, the subordinate body must take steps according to law to impugn the said directive as an act cannot be denuded of legal validity unless and until its invalidity is first established in courts. If an act is not the subject of an authoritative court ruling as to its validity, then the act is presumed to be valid and will be treated as binding and capable of producing legal effects.<sup>1</sup> The principle was eloquently stated by Lord Radcliffe in *Smith v. East Elloe RDC*<sup>2</sup> as follows:

“...bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders”

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<sup>1</sup> Lewis, *Judicial Remedies in Public Law*, 5<sup>th</sup> ed. (2017), page 186

<sup>2</sup> [1956] A.C. 736 at 769

The arbitration proceedings against the Appellants were held in terms of section 62 of the by-laws of the 1<sup>st</sup> Respondent which makes the directors of the 1<sup>st</sup> Respondent liable to any losses suffered by the 1<sup>st</sup> Respondent by their failure to discharge their duties intelligently. The Appellants failed to act intelligently in not impugning the validity of the Direction before a competent court instead of which they sought to unsuccessfully assail the enforcement proceedings before the Magistrates Court. It is pertinent to note that the Direction was only to reinstate the Employee with effect from the date of his interdiction (01.04.1981) without back wages or any salary increments. The refusal of the Appellants to implement the Direction culminated in the Employee obtaining back wages as well.

The Appellants submit that they were not charged for their liability in the Magistrates Court and that if the Appellants are liable for non-compliance of the Order the learned Magistrate could have made them liable in terms of section 35(3) of the Act which reads as follows:

“Where any offence under this Act is committed by a co-operative society, every officer of that society shall be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.”

Accordingly, the Appellants submit that if according to the by-laws of the 1<sup>st</sup> Respondent the loss to the 1<sup>st</sup> Respondent could be recovered from the Directors it would amount to an exoneration of the 1<sup>st</sup> Responsibility from liability which would make section 35 of the Act redundant.

This submission is tenuous and without any basis in law. The purposes of the two provisions are different.

Section 35(3) of the Act is a deeming provision by which the Directors are deemed to be guilty of an offence unless it is established that the offence was committed without their knowledge or they exercised all due diligence to prevent the commission of the offence.

The meaning of the word "deemed" was considered and explained by Ranasinghe, J. (as he then was) in *Jinawathie v. Emalin*<sup>3</sup> in the following words:

"In statutes, the expression deemed is commonly used for the purpose of creating a statutory function so that a meaning of a term is extended to a subject-matter which it properly does not designate. . . Thus, where a person is deemed to be something it only means that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were".

Ranasinghe, J. went onto explain the legal effect and consequences of such a legal fiction in the following terms:

"Thus, where in pursuance of a statutory direction a thing has to be treated as something which in reality it is not or an imaginary state of affairs is to be treated as real, then not only will it have to be treated so during the entire course of the proceedings in which such assumption is made but all attendant consequences and incidents, which if the imagined state of affairs had existed would inevitably have flowed from it have also to be imagined or treated as real".<sup>4</sup>

The deeming provision is there in section 35(3) of the Act as the 1<sup>st</sup> Respondent is a legal entity whereas the directors are natural persons who can be visited with penal sanctions in the form of imprisonment.

The purpose of section 35 of the Act is to impose penal sanctions where an offence is committed whereas rule 62 of the by-laws of the 1<sup>st</sup> Respondent enables the 1<sup>st</sup> Respondent to recover losses it suffers from the Directors where the loss was due to the failure on the part of the Directors to act intelligently or in accordance with law of its by-laws. The fact that the learned Magistrate did not charge the Appellants under section 35(3) of the Act does not preclude action against them in terms of by-law 62 of the 1<sup>st</sup> Respondent.

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<sup>3</sup> (1986) 2 Sri.L.R. 121 at 130,131

<sup>4</sup> Ibid. page 130

The Appellants further submit that the 2<sup>nd</sup> Respondent failed to conduct an impartial inquiry. It is submitted that he totally disregarded the lengthy evidence placed on behalf of the Appellants. The record does not support any such conclusion.

For the foregoing reasons, I am of the view that the learned High Court Judge was correct in dismissing the application of the Appellants.

Accordingly, I see no reason to interfere with the judgement of the learned High Court Judge of Ratnapura dated 21.06.2007.

Appeal is dismissed without costs.

Judge of the Court of Appeal

**K.K. Wickremasinghe J.**

I agree.

Judge of the Court of Appeal