

1977 Present: Pathirana, J. and Gunasekera, J.

S. H. L. MOHIDEEN, Petitioner *and* ASSISTANT COMMISSIONER OF CO-OPERATIVE DEVELOPMENT, KALMUNAI, Respondent.

*S.C. 642/75 – M.C. Kalmunai 53971*

*Co-operative Societies Ordinance – Certificate under section 53A (5) – Recovery of money due on arbitrator's award – Show cause clause – Limits.*

The petitioner sought to show cause urging that the inquiry before the arbitrator was conducted without the petitioner being informed of the specific matters in dispute or the charges alleged against him and therefore the award was *ex-facie* bad in law and that the amount due on the award was not recoverable as a fine. The Magistrate held that the award cannot be questioned in a Court of Law and imposed the sum stated in the certificate as a fine.

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.

The Magistrate's order was upheld.

**A**PPPLICATION to revise an order made by the Magistrate's Court of Kalmunai.

*H. W. Jayewardene* for defendant-petitioner.

*K. M. M. B. Kulatunga, D.S.G.* with *D. B. Gunasekera, S.S.C.* and *C. Sithamparapillai, S.C.* for the complainant-respondent.

*Cur. adv. vult.*

May 13, 1977. PATHIRANA, J. —

This is an application by the petitioner to revise the order made against him by the Magistrate imposing as a fine the amount due from him on an award under the Co-operative Societies Ordinance on a certificate filed in Court for its recovery under section 53A (5) of the Co-operative Societies Ordinance. The respondent to this application is the Assistant Commissioner of Co-operative Development, Kalmunai, on whom the powers of the Registrar of Co-operative Societies had been conferred. He had issued a certificate under section 53A (5) for the recovery of a sum of Rs. 88,965/77 and costs Rs. 150/- as due to the Nintavur Division 3, Multi-Purpose Co-operative Society Limited, and not paid by the petitioner, its former manager, as an award by an arbitrator.

Purporting to show cause under section 53A (5) why further proceedings for the recovery of the amount should not be taken against him, the petitioner among other grounds had urged before the Magistrate that the inquiry before the arbitrator was conducted without the petitioner being informed of the specific matters in dispute and or the charges alleged against him. The award therefore was *ex facie* bad in law and the amount due on the award was not recoverable as a fine.

At the first inquiry before the Magistrate Mr. Suntharalingam, State Counsel appearing for the respondent objected to the petitioner showing cause as the grounds urged were not within the competence of the Magistrate to inquire into under section 53A (5).

The learned Magistrate overruled the objection and permitted the petitioner to show cause. The petitioner then gave evidence and produced a number of documents. The inquiry was resumed on a subsequent adjourned date before another Magistrate as the former Magistrate was transferred. State Counsel once again renewed his objection to the petitioner showing cause for the recovery of the amount. The Magistrate, Mr. Abeynayake, overruled the objection and proceeded with the inquiry at which the petitioner and the arbitrator gave evidence. Further inquiry was put off for another date. On this day Mr. Abeynayake ceased to hold judicial office. Before the new Magistrate Mr. Palakidnar, State Counsel once again renewed his objection as the grounds urged were not those that could be permitted under section 53A (5) and again objected to the petitioner showing cause. The learned Magistrate, Mr. Palakidnar, held that the award could not be questioned in a Court of Law and imposed the sum stated in the certificate as a fine under section 53A (5). He took the view that the petitioner could not challenge the correctness of the award, as the petitioner did not challenge the award on the ground that he was not the defaulter or that he paid the money or that he lived outside the jurisdiction of the Court. Section 53A (5) therefore precluded him from showing cause for the recovery of the amount mentioned in the certificate.

The petitioner has been summoned to appear before the arbitrator first by summons dated 13th July, 1970 and thereafter by summons dated 18th July, 1970. He was asked to appear before the arbitrator for an inquiry "to settle the dispute between you and the Nintavur Division 3, Multi-Purpose Co-operative Society." He was requested to appear on 27th July, 1970 and bring with him witnesses and documents, if any. He was told that if he failed to appear *ex parte* inquiry will be held and a decision made. Each summons, further gave particulars of the dispute aforementioned as follows :

"As stated in the letter dated 29.4.69 sent to you by the Society."

By letter dated 22.7.70, the petitioner acknowledged receipt of the two summonses. Referring, however, to the letter dated 29.4.69 sent to him by the Society which was alleged to contain the particulars of the dispute, the petitioner stated. "This letter does not appear to have been received by me."

He further requested that a copy of this letter be sent to him and that the inquiry be fixed for a date convenient to him. The arbitrator by his letter dated 24.7.70 informed the petitioner that it was wrong for him to conduct the inquiry by correspondence and he was requested to appear before him and make his submissions and ask "Questions."

Even assuming that the petitioner did not receive the particulars relating to the dispute alleged to be sent by the Society by his letter dated 29.4.69, the fact remains that he did not choose to be present on any date for which the arbitrator had fixed the matter for inquiry of which he was duly informed. If he chose to, he might have obtained the particulars from the arbitrator who by his letter dated 24.7.70 had informed him that while it was improper for him to conduct the inquiry through correspondence the petitioner could however appear, make his submissions and ask questions. What happened eventually was that the petitioner was absent on the date on which the inquiry was held of which he was informed and after *ex parte* inquiry an award was made against him. One cannot therefore say that the petitioner was not given an opportunity of ascertaining the particulars of the charges against him.

Mr. Jayewardene, who appeared for the petitioner before us, confined his case to only one ground namely that the inquiry was conducted without the petitioner being informed of the specific matters in dispute and or the charges alleged against the petitioner. I shall for the purpose of this case assume that the arbitrator in fact failed to inform the petitioner of the specific matters or details of the charges against him, and although the defendant was summoned for the inquiry he was absent and the award was made against him after *ex parte* inquiry. The question for decision is whether at the late stage when execution proceedings were taken under section 53A (5) the petitioner was entitled to raise this matter before the Magistrate as a ground "why further proceedings for the recovery of the amount should not be taken against him."

I shall, firstly, set out the scheme under the Co-operative Societies Ordinance for the recovery of the amount due from an individual on an award by an arbitrator.

There are three methods of recovery. Section 53A (5) sets out the first method. Under this section the Magistrate may issue a certificate to specified officers who are empowered and required to cause such sum, together with costs and interest, to be recovered from the defaulter by seizure and sale of his movable property. This section is similar to section 110(2) of the Inland Revenue Act and section 84(2) of the Income Tax Ordinance. The second method is under section 53A (4) where the Registrar is of opinion that the recovery of the amount due by means provided by the former method, that is section 53A (1) is impracticable or inexpedient or that the full amount has not been recovered by such means, he may issue a certificate to the District Court having jurisdiction and the Court shall thereupon direct a writ of execution to the Fiscal authorising and *requiring* him to seize and sell the movable and immovable property of the defaulter for the recovery of such sum. This method is similar to that provided for the recovery of tax due under section 110(3) of the Inland Revenue Act and section 84(3) of the former Income Tax Ordinance.

The third method is under section 53A (5) where the Registrar is of opinion for the same reasons as set out in section 53A (4) namely that the recovery of the amount due by seizure and sale is impracticable or inexpedient or that the full amount has not been recovered by seizure and sale, he may issue a certificate to a Magistrate having the jurisdiction set out in this section. The procedure to be followed by the Magistrate is also set out in the section which I shall quote in full as submissions made in this case turn on the construction that is sought to be put on the scope and ambit of the relevant words:

“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. . .”

This section corresponds to the recovery of tax under section 112 of the Inland Revenue Act and section 58(1) of the former Income Tax Ordinance. It is significant that the words I have quoted on which reliance is placed for showing cause in this case do not occur in the other two methods set out in section 53A (1) and 53A (4) and in the corresponding sections of the Inland Revenue Act and the former Income Tax Ordinance.

The other important section for consideration is section 53A (7) of the Co-operative Societies Ordinance which states:

“Nothing in this section shall authorise or require a District Court or Magistrate in any proceedings thereunder to consider, examine or decide the correctness of any statement in the certificate of the Registrar.”

Although not in exact phraseology this section is substantially similar to section 112(1)A of the Inland Revenue Act and the proviso to section 85(1) of the former Income Tax Ordinance.

Mr. Jayewardene's argument is that the content and scope of section 53A(5) are wide enough to accommodate the grounds the petitioner had urged before the Magistrate in this case. It is a necessary corollary to this submission that the absence of the relevant words "to show cause why further proceedings for the recovery of the amount should not be taken against him" in section 53A(1) and section 53A(4) can only mean that if it is sought to recover the amount under section 53A(1) and section 53A(4) this objection could not have been raised. This appears to be so as under section 53A(1) the specified officer is "required" to cause such sum to be recovered from the defaulter by seizure and sale of the movable property and under section 53A(4) the District Court shall direct a writ of execution to issue to the Fiscal "requiring" him to seize and sell the movable and immovable property. Mr. Jayewardene sought to justify the show cause clause in section 53A(5) on the ground that the method of recovery under this section may result in the defaulter being sent to prison if the fine is not paid and for this specific reason where the amount is sought to be recovered before the Magistrate the defaulter was permitted to show cause. Mr. Kulatunga, the Deputy Solicitor-General, appearing for the respondent on the other hand contended that the ground urged could not be taken cognizance of by the Magistrate. He relied on the decisions of this Court interpreting the relevant corresponding provisions under taxing statutes that the only grounds that could be urged why the amount should not be recovered are as follows:

- (1) The Magistrate has no jurisdiction because the last known place of business or residence does not fall within the local jurisdiction of the Magistrate.
- (2) That he has paid the tax.
- (3) That he is not a defaulter in that he is not the person assessed.

*M. E. de Silva v. 'Commissioner of Income Tax'* and *Guillain v. Commissioner of Income Tax*,<sup>2</sup> The learned Magistrate has relied on these decisions and on section 53A(7) to overrule the objection raised on behalf of the petitioner. He states that he is precluded under section 53A(7) from considering, examining or deciding the correctness of any statement of the certificate of the Registrar.

<sup>1</sup> (1951) 53 N.L.R. 280.

<sup>2</sup> (1953) 55 N.L.R. 473.

Mr. Jayewardene's case, however, is that he is not challenging in any way the correctness of the amount awarded as stated in the certificate. His objection is of a fundamental character. He submits that as the petitioner was entitled to have more details and particulars of the charges against him, the failure on the part of the arbitrator to give these details etc. was a denial of the principles of natural justice which rendered the award a nullity *ab initio*.

I shall firstly deal with the question whether section 53A(7) by itself is sufficient to justify overruling the objection. As I remarked earlier under our taxing statutes similar provisions exist. Section 53A(7) precludes the Court from considering, examining or deciding the correctness of any statement of the certificate of the Registrar. As to what should be contained in the statement of the certificate of the Registrar is found in section 53A(5) which states that the Registrar may issue a certificate.

“containing particulars of the amount due and the name and last known place of business or residence of the defaulter”.

Beyond this there is no statutory obligation to state anything more. In this connection it may be mentioned that the decisions of this Court in considering the corresponding provision of the Income Tax statutes have taken the view that this provision refers only to the correctness of the assessment made, i.e. the correctness of the amount specified in the certificate. See *Mendis v. Commissioner of Income Tax*<sup>3</sup> and *Nilaweera v. Commissioner of Inland Revenue*.<sup>4</sup> Section 53A(7) therefore restricts the petitioner from questioning the correctness of the amount due which is set out in the certificate. In order to decide whether the objection raised by the petitioner can be entertained by the Magistrate I have to go outside section 53A(7) and construe the words ‘to show cause why further proceedings for the recovery of the amount should not be taken against him,’ in relation to the entire scheme of the section relating to the recovery of the amount due.

The jurisdiction of the District Court or the Magistrate's Court is a jurisdiction of an execution *simpliciter* and not that of an appellate tribunal. See *M. S. de Silva v. Commissioner of Income Tax* (*supra*). The petitioner in this case had a right of appeal against the award of the arbitrator under section 53A(3) of the Co-operative Societies Ordinance but he had chosen not to appeal against this order. When the award was made by the arbitrator the petitioner could have come before this Court to have the award quashed by way of an appropriate writ if he could have satisfied this court that there had been a failure to observe the rules of natural justice on the part of the

<sup>3</sup> (1959) N.L.R. 95.

(1962) 63 N.L.R. 485.

arbitrator. This too the petitioner had not chosen to do. It cannot therefore be said that the petitioner was not without a remedy to have his contention examined by an appropriate tribunal. He waits till the execution jurisdiction of the Magistrate's Court is invoked to take up this point. As I remarked earlier, if recourse was had to the other two methods namely, section 53A(1) and 54A(4), the award was beyond challenge even on the ground urged by the petitioner even assuming it to be a valid ground. It must therefore follow that had the Registrar sought to recover the amount under section 53A(1) or 53A(4), this same award was beyond challenge and could have been enforced and the amount recovered. If I were to accept Mr. Jayewardene's argument we have the paradoxical situation that if the award was sought to be enforced in the Magistrate's Court this same award may turn out to be on Mr. Jayewardene's contention a nullity. Or take another situation. Under section 53A(5) the amount could be recovered in the Magistrate's Court if the full amount has not been recovered by seizure and sale under the two other methods. If the submission of Mr. Jayewardene was upheld it would result in a situation where a part of the amount due on the award could have been recovered under section 53A(1) or under section 53A(4) as the award was valid and beyond challenge, while when it comes for the recovery of the balance amount under the same award under section 53A(5) by resort to the Magistrate the award could be challenged and if the grounds urged are valid the award could be declared a nullity. If this construction is accepted to use the words of H. N. G. Fernando, C.J. in another context in *Arnolis v. Hendrick*:<sup>5</sup>—

“It will lead to absurdities which Parliament could not have intended or tolerated.”

There is therefore much significance in the use of the words “further proceedings” in the phrase “to show cause why further proceedings for the recovery of the amount should not be taken against him” in section 53A(5). By necessary implication these words shut out showing cause in relation to proceedings prior to that before the Magistrate for recovery of the amount due.

I am therefore, of the view that the only grounds that can be urged before the magistrate are that,

(1) the Magistrate has no jurisdiction because his last known place of business or residence does not fall within the local jurisdiction of the Magistrate.

(2) that he had paid the amount.

<sup>5</sup> (1972) 75 N.L.R. 532 at 533.

(3) that he is not the defaulter in that he is not the person from whom the amount is due.

The learned Magistrate was right in refusing to hear the petitioner on the ground that adequate details of the allegations against him were not made available to the petitioner by the arbitrator so that he could have met the charges against him.

The application is, therefore, dismissed.

GUNASEKERA, J. — I agree.

*Application dismissed.*

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