SEBASTIAN FERNANDO

v.

KATANA MULTI - PURPOSE CO-OPERATIVE SOCIETY LTD., AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J., FERNANDO, J., AND KULATUNGA, J.
S. C. APPEAL No. 57 of 1988 — C.A. No. 1344/87,
JANUARY 31, 1990.

Co-operative Societies Law - Appeal from award of Arbitrator under s. 58(3) of the Co-operative Societies Law, No. 5 of 1972 - Rule 49 (XII) (a) of the Rules made under s. 61 of Law No. 5 of 1972 - Vires of Rule 49 (XII) (a) is requirement of appeal deposit under Rule 49 (XII) (a) ultra vires? – Delay in preferring Appeal — Notice.

The plea of delay involves equitable considerations. The conduct of both parties should be taken into account. Unless it is a clear case for rejecting the application, the Court ought to issue notice and leave it to the respondent to take the objection on the facts and circumstances of the case. Delay by itself will not defeat an application. It is only a discretionary bar to be applied having regard to the conduct of parties, the issues involved and the substantial prejudice which may result in varying the impugned order.

A serious question arises as to the vires of Rule 49 (XII) (*a*) and the requirement of an appeal deposit.

Cases referred to :

(1) *Rajakaruna v. Minister of Finance [1985] 1 Sri LR 391.*
(2) *Biso Menike v. De Alwis [1982]1 Sri LR 368, 379.*
(3) *Ramasamy v. State Mortgage Bank 78 NLR 510, 517.*
(4) *Somaratne v. Premachandra SC 58/80 S. C. Minutes of 28.7.81*
(5) *Tuck & Sons v. Prester (1887) 19 QBD 629, 638.*
(6) *Hotel & Catering Industry Training Board v. Automobile Proprietary Ltd. 1968 3 All ER 399, 406.*
(7) *Hall v. Nixon (1875) 32 LT 87.*
(8) *Dyson v. London & N. W. Railway Co. 1881 7 QBD 32.*
(9) *Everton v. Walker 137 LT 594.*
(10) *A. G. v. Wilts United Dairies 1922 LJKB 897.*
(11) *Thomasz v. Junis Lebbe 5 SCC/6.*
(12) *A. G. v. Fernando 79 (1) NLR 39.*
(13) *Ceylon Workers Congress v. Superintendent Beragala Estate 76 NLR 1,5.*
(14) *Kruse v. Johnson (1898) 2 QB 91, 99, 100.*
(15) *Carltone Ltd. v. Commissioners of Works 1943 2 All ER 560, 564.*
(16) *Commissioner of Custom and Excise v. Cure and Deeley Ltd. 1962 1 QB 34.*
(17) *Kalutara Co-operative Distilleries Society Ltd. v. Arsekularatne 71 NLR 324, 331.*
(18) *Attorney-General of the Gambia v. Hi Jie 1961 A C 617.*
(19) *Manawadu v. Attorney-General [1987]2 Sri LR 30, 43.*

APPEAL from Judgment of the Court of Appeal.

M. Y. M. Faiz for the appellant,

No appearance for the respondent.

Cur. adv. vult.

January 31, 1990.

FERNANDO, J.

The Appellant was employed as a storekeeper by the 1st Respondent, the Katana M. P. C. S. Ltd., Demanhandiya, on 13.6.71, and served at various places thereafter. In 1982 it was alleged that between 13.6.71 and 30.1.81 there were shortages amounting to Rs. 100,262/41, which the Appellant denied; the 2nd Respondent was appointed to arbitrate in respect of this dispute, and made his award dated 19.3.83, holding that the Appellant was liable to pay the 1st Respondent a sum of Rs. 42,899/57 and costs. The Appellant lodged an appeal dated 21.3.83, and deposited Rs 4,289/95 (being 10% of the amount of the award) in two instalments - a sum of Rs. 100/= on 21.3.83 and a further sum of Rs.4,189/95 on 14.11.83. By letter dated 1.10.84, the Appellant was informed that the sum of Rs 100/= deposited on 21.3.83 was less than the required amount, and that his appeal was rejected under Rule 49 (X11) (*b*) ; a similar letter dated 21.11.84 was sent in respect of the sum of Rs. 4,189/95 deposited on 14.11.83.

Section 58 (3) of the Co-operative Societies Law, No 5 of 1972, entitles any party aggrieved by the award of an arbitrator to appeal to the Registrar "within such period and in such manner as may be prescribed by Rules." Section 61 provides that –

"(1) The Minister may make all such rules as may be necessary for the purpose of carrying out or giving effect to the principles and provisions of this Law ;

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (i) , such rules may –

(Y) prescribe the forms to be used, the fees to be paid, the procedure to be observed, and all other matters connected with or incidental to the presentation, hearing and disposal of appeals under this Law or the rules made thereunder."

Paragraphs (*a*) to (*x*) are not relevant to the questions before us.

Rule 49 (xii) provides –

"(*a*) Every appeal to the Registrar from an award of an arbitrator or a panel of arbitrators shall be made within 30 days from the date of the award by a written statement setting out the grounds of appeal. Every such appeal shall be forwarded to the Registrar *with an appeal deposit* of Rs. 50 or 10% of the sum awarded where the appeal is made by the party against whom the award has been made and by Rs. 50 or 10% of the sum claimed in the dispute where the appeal is made by the party claiming any sum of money, whichever sum is the higher sum in either case.

(*b*) An appeal not made in conformity with the above shall be rejected by the Registrar.

(*c*) The Registrar may make a decision on the appeal without hearing any of the parties to the dispute.

(*d*) Where the Registrar is satisfied that the appellant had reasonable grounds to appeal, the sum deposited by him shall be returned to the appellant.

(*e*) Where the Registrar is satisfied that the appellant had no reasonable grounds to appeal, *the appeal deposit shall be forfeited* and credited to the Consolidated Fund."

The appeal was filed on 21.3.83, and it was nearly eleven months after the Appellant had made an appeal deposit of 10% of the sum awarded that he was informed that his appeal had been rejected for failure to make the deposit within the stipulated time. He states that he made representations in respect of this rejection by his letter dated 26.11.84, and through his Attorney-at-law, by letter dated 7.6.85, that in other cases appeals had been entertained without the requisite deposits, and that the award was bad in law, and, if sought to be enforced in an appropriate court, its validity was liable to be questioned ; he received no reply to these letters. In June 1987, the 1st Respondent commenced taking disciplinary action against him in connection with his failure to pay the sum awarded. On 15.12.87 he applied for Certiorari to quash the award, but the Court of Appeal refused to issue notice and dismissed that application on the ground that the appeal had been disposed of in 1984, and that no reasonable excuse had been given for the delay of three years. In the petition filed in the

Court of Appeal, although the Appellant contended that the Registrar (the 4th Respondent) should not have refused to entertain the appeal, he did not contend that the requirement, in Rule 49 (X11) (*a*) , of an appeal deposit is *ultra vires* or that the rejection of the appeal was bad for any reason ; nor did he pray for *Certiorari* and *Mandamus* against the Registrar to quash the order rejecting the appeal and to direct him to hear and determine the same.

Although the Court has a discretion, in appropriate circumstances, to refuse *Certiorari and Mandamus* on the ground of delay, that plea involves equitable considerations ; the conduct of both parties should have been taken into account, and it was relevant that there was a delay of 18 months on the part of the Registrar in informing the Appellant of the rejection of his appeal, as well as a failure to reply to the Appellant's subsequent letters ; the fact that no steps were taken to enforce the award might in these circumstances have led the Appellant to believe that such steps would not be taken ; that such delay caused no prejudice to other parties. Further, if the Appellant's contention is right, the rejection of his appeal would have been patently erroneous and without jurisdiction. In those circumstances, delay would not have justified summary dismissal (*Rajakaruna v. Minister of Finance (1)* ; *Biso Menike v. de Alwis (2)* ; *Ramasamy v. State Mortgage Bank (3)* ; the Respondents should have been noticed, and had delay been pleaded the Appellant may have been able to furnish other explanatory material.

In this appeal, the Appellant contends that the requirement of an appeal deposit is *ultra vires* and unreasonable ; if so, it would follow that the rejection of the appeal by the Registrar was illegal ; if not, the questions do arise whether (1) the Rule is mandatory, especially if, as the Appellant alleges, the Registrar had entertained other appeals without the stipulated appeal deposit, and (2) the Registrar was under an obligation to consider the reasons for the default prior to rejecting an appeal on this ground. Further, if the Appellant's contention that Rule 49 (X11) (*a*) is *ultra vires* is correct, it may well be open to him to resist any attempt to enforce the award, on the basis that the purported rejection of his appeal is a nullity, and that his appeal is yet pending. However, as these matters were not placed before the Court of Appeal for consideration, I will only consider them in order to ascertain whether they raise a serious question. Counsel for the Appellant quite properly drew our attention to the decision of this Court in *Somaratne v. Premachandra, (4)* ; (s.c.)

where it was held, on the facts, that a petition of appeal had not been forwarded to the Registrar ; it was held that the rule prescribing the time limit of 30 days was *intra vires* ; observations to the effect that the requirement of an appeal deposit was *intra vires* appear to be *obiter*.

The requirements set out in Rule 49 (XII), as to the period within which an appeal should be lodged, and the manner in which the appeal should be made, are clearly referable to section 58(3), but this section does not authorise the rest of Rule 49 (XII). That Rule leaves the Registrar with no option but to forfeit the appeal deposit if he is satisfied that the appellant had no reasonable grounds to appeal, and enables him to make that decision without hearing the parties. It appeared to us that paragraphs (*a*) and (*e*) taken together seem to subject the appellant to a penalty for the improper exercise of the right of appeal, and (by requiring a deposit to be made in advance) compel the appellant to give security in respect of a possible penalty, without even a prima facie view being formed by the Registrar as to the reasonableness of grounds of his appeal. The sum to be deposited is not nominal, and is arbitrary to the extent that it is unrelated to the seriousness of the "impropriety" committed by the appellant. The Registrar has no discretion, after considering the circumstances, to dispense with, or to reduce the quantum of the deposit (where he considers that the appellant appears to have reasonable grounds of appeal), or to mitigate the penalty by ordering the forfeiture of only a part of the appeal deposit. Counsel for the Appellant contended that Rule 49 (XII) (*a*), insofar as it requires that such an appeal deposit be made, is *ultra vires*, as it is neither a fee nor a matter of procedure, and is not authorised by sections 61 (1) or 61 (2) (*y*) . Although we invited Counsel to make submissions, both oral and written, on the question whether the appeal deposit was in the nature of a penalty, and whether the Minister was empowered to impose such a penalty, we have not had the benefit of any assistance on this aspect of the case, and what follows is the result of my own researches.

The imposition of a mandatory and inflexible penalty, as well as the deposit of security therefor, appears to be quite different in character from the deposit of security for costs. (e.g. the costs of appeal of the Respondent), or security for the due performance of judgment in appeal. It seems doubtful whether even the imposition of a penalty, *simpliciter*, or the provision of security for costs or for due performance of the final order on appeal, would be permissible under paragraph (*y*) . The general policy of

our Law on such matters is exemplified by the Civil Procedure Code : which contains express provision for security for costs of appeal (section 757) , sequestration before judgment (section 653) , and security for whole or part of the sum claimed by a plaintiff (section 704). These provisions require the prior exercise of a judicial discretion as to the need for an order for sequestration before judgment, or for security as a condition of leave to appear and defend, and as to the amount of security. Though expressly authorised by legislation, safeguards have been provided. Rule 49 seems to go very much further, by providing for a penalty, and by requiring security to be given without even a provision for waiver upon a determination that there appears to be, prima facie, reasonable grounds for appeal. This appears to be outside the scope of Section 61(2)(*y*) . Such a deposit seems to be neither a "fee" nor a matter of "procedure" ; nor a matter "connected with or incidental to " either the presentation, hearing or disposal of an appeal, or the Rules. It does not seem to be "necessary" for the purpose of carrying out or giving effect to the principles or provisions of the Law. To discourage frivolous and vexatious appeals by the imposition of a penalty, and the deposit of security therefor, may be a laudable object, but is an objective to be achieved either directly by Parliament or by delegated legislation made in the exercise of powers conferred expressly or by necessary implication. Consideration of section 59 tends to suggest that Parliament did not contemplate the imposition of a penalty, but only authorised an order for interest and costs.

Statutes which encroach upon the rights of the citizen have to be "strictly" construed : they should be interpreted, if possible, to respect such rights, and if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted. Statutes which impose pecuniary burdens or penalties are subject to the same rule. If there are two reasonable constructions, one of which will avoid the penalty, that construction must be preferred. Where an Act of Parliament imposes burdens on members of the public, those burdens must be shown in clear language to be imposed before effect can be given to them. (Maxwell, Interpretation of Statutes, 12th Edition, pp. 239, 251, 256; *Tuck & Sons v Prester, (5)* 638; *Hotel & Catering Industry Training Board v. Automobile Proprietary Ltd., (6)* 406). If that rule of strict construction applies in determining whether Parliament has itself imposed a burden or a penalty, it would seem to follow that no less strict a rule must apply in determining whether Parliament has authorised another body or person to impose such a burden or a penalty.

An authority empowered to make by- laws may have an implied Common Law power to prescribe a penalty for disobedience, *Hall v. Nixon, (7)* ; but where the power is given to impose a penalty in respect of an act done in contravention of a by-law with a specified intention, the imposition of a penalty for such an act, regardless of intention, is *ultra vires. Dyson v. London & N.W. Railway Co., (8).* Apart from penalties for contravention of by-laws, it would seem that the power to impose a tax, penalty or fee will not lightly be implied *Everton v. Walker (9) , A.G. v. Wilts United Dairies, (10).*, Thus a local authority having extensive powers of making by-laws, for the preservation of public health and other public purposes, cannot require the payment of a tax or fee as a condition of the issue of a licence for the sale of fish, *Thomasz v.Junis Lebbe, (11)* . Where power is granted to impose a tax, such tax cannot be imposed retrospectively ,*A.G. v. Fernando, (12).*

In *Ceylon Workers Congress v. Superintendent, Beragala Estate (13)* the *vires* of a regulation made under the Industrial Disputes Act was considered. The Act conferred upon a dismissed workman the right to apply for certain reliefs to a Labour Tribunal, but did not impose a time limit within which such an application could be made, nor did it expressly authorise the imposition of such a time limit by regulation. A regulation was made proving that any such application shall be made within three months of dismissal. Section 39 (1) of that Act (omitting those provisions which had no possible relevance to the *vires* of that regulation) empowered the Minister to make regulations in respect of -

(*a*) all matters which are stated or required by the Act to be prescribed;

(*b*) all matters for which regulations are required or authorised to be made by or under the Act;

(*ff*) the procedure to be observed by a labour tribunal in any proceedings before it; and

(*g*) all matters necessary for carrying out the provisions of the Act or giving effect to the principles thereof.

It was not contended that paragraphs *(a)* , *(b)* or *(ff)* authorised the imposition of a time limit, and the validity of the regulation depended on paragraph *(g)*. It was pointed out that the regulation would prevent a

workman after the expiry of a period of three months from exercising the right given to him under the Act to apply for relief, whether or not he had good grounds for his inability or failure to apply in time, and was thus "an arbitrary limitation on a right granted by the Act". Having regard to the principles of the Act, relating to Labour Tribunals, the former Court of Appeal held that "a regulation which restricts generally a workman's right to apply for relief, irrespective of the facts and circumstances..... far from giving effect to the principles of the Act, will go counter to those principles by precluding a Tribunal from making a just and equitable order in cases where there may be some delay, but such delay, is excusable or justifiable". By a parity of reasoning, it is arguable that Rule 49 (X11) is an arbitrary restriction or limitation of a right of appeal vested by the Co-operative Societies Law, in that an appellant is precluded from applying for (and the Registrar from granting) relief in a case where the appellant is unable, for excusable or justifiable reasons, to deposit one-tenth of the amount awarded by him; it also seems arbitrary in that such deposit is required even where there is reasonable ground for such appeal or where it is not frivolous or vexatious or brought for the purpose of delay; no degrees of culpability are recognised, the forfeiture being automatic upon the Registrar forming the view that there was no reasonable ground for appeal, there being no discretion to mitigate the severity of the penalty upon considerations such as the costs, delays, and inconvenience occasioned by the appeal. This Rule may discourage, and even prevent, appeals made *bona fide* and upon good grounds, solely because an appellant does not have the means of making the required appeal deposit. The Law confers a right of appeal, recognising that human judgments are fallible: a Rule the necessary consequence of which is to prevent a good and valid appeal, solely by reason of financial incapacity to make the appeal deposit, does not seem "necessary for the purpose of carrying out or giving effect to the principles and provisions of the Law", but seems to conflict therewith. The requirement that an appeal deposit be made in advance seems quite different to the conferment of a power or discretion on the Registrar, when dismissing an appeal, to require the appellant to pay an additional sum determined by him where he held that such appeal had been made without any reasonable ground, and was frivolous and vexatious.

Thus a serious question arises as to the *vires* of Rule 49 (X11) *(a)* : that the requirement of an appeal deposit is not authorised by sections 58 (3), 61 (1) or 61(2) *(y)* . However, as that question was not placed before

the Court of Appeal for consideration, and as the Respondents were not heard in that Court (nor in this Court, though duly noticed) it is only proper that it should be determined by that Court, after such amendment of the petition as that Court may permit in its discretion, and after hearing the Respondents. I allow the appeal, and set aside the order of the Court of Appeal refusing to issue notice and dismissing the application, and substitute in its place an order that notice be issued on the Respondents. The Court of Appeal is directed to issue notice on the Respondents, after considering any application for amendment of the Petition as the Appellant may make within one month after the record is received in the Court of Appeal. The Appellant will not be entitled to the costs of this appeal.

BANDARANAYAKE, J. - I agree.

KULATUNGA, J.

The appellant had been employed as the storekeeper of the 1st respondent Co-operative Society since 1971. A dispute between the Society and the Appellant in respect of an alleged shortage of goods and cash to the value of Rs. 100,162.41 for the period 13.6.71 to 31.1.81 was referred for decision under Section 59 (1) *(e)* of the Co- operative Societies Law, No. 5 of 1972; it was then referred to the 2nd respondent, an Assistant Commissioner of Co-operative Development for disposal in his capacity of an arbitrator under Section 59 (2) of the said Law. At the inquiry, the appellant was represented by a pleader. After hearing the evidence and submissions the 2nd respondent pronounced his award dated 19.3.83 in the presence of the parties. At the same time, the appellant was also informed of his right to appeal therefrom to the 4th respondent, the Registrar of Co-operative Societies within 30 days, with an appeal deposit of Rs. 4,289.95 in terms of Section 58(3) of the Law read with Rule 49 (X11) *(a)* of the Co-operative Societies Rules, 1973.

The Appellant forwarded his appeal dated 21.3.83 to the 4th respondent with a deposit of Rs.100/=; on 14.11.83. Appellant paid a further sum of Rs. 4,189.95 being the balance amount to complete the required appeal deposit. The 4th respondent by his letters dated 1.10.84 and 21.11.84 rejected the appellant's appeal in terms of Rule 49 (X11) *(b)* ; for failure to pay the full amount of the appeal deposit with the appeal and requested the appellant to forward a signed voucher to refund the sums deposited by him. By his letter dated 26.11.84, the appellant requested the 4th

respondent to reconsider accepting his appeal to which he received no reply. On 7.6.85 an Attorney-at-law addressed a letter to the 4th respondent on behalf of the appellant wherein he contended that the award was bad in law; that the 4th respondent erred in rejecting the appellant's appeal on a strict compliance with Rule 49 (X11) *(b)*; and that the award, if executed in an appropriate Court upon a certificate issued under Sections 59 (1) *(a)* or 59 (1) *(c)* , jurisdiction to question the validity of the award or the correctness of the statement contained in the certificate will lie under section 59 (6) of the Co-operative Societies Law.

There is no evidence of any response by the 4th respondent to the above representations by the appellant; thereafter the 1st respondent society by its letter dated 1.6.87 placed the appellant on compulsory leave for failure to pay the amount of the shortage due to the Society. This was followed by the 1st respondent's letter dated 1.9.87 interdicting the petitioner from service on account of alleged shortages of goods; whereupon on 15.12.87 the appellant filed an application in the Court of Appeal for a writ of *certiorari* to quash the award made by the 2nd respondent on the following grounds :-

(a) The 2nd respondent had been selected by the 3rd respondent, who is a fellow officer of comparable status in the same department for disposal of the dispute by arbitration; as such the 2nd respondent acted without jurisdiction. (This appears to be in effect an allegation of bias. No such issue was raised during the arbitration inquiry).

(b) The failure to give reasons for the award, in breach of the principles of natural justice.

(c) The existence of another award dated 10.10.78 against the appellant for Rs. 4,071.69 which amount had been adjudicated a second time and included in the impugned award, in breach of the principles of natural justice.

(d) Unjustified rejection of the appellant's appeal to the 4th respondent for failure to make the full appeal deposit to accompany the appeal.

The appellant did not pray for any relief by way of *certiorari/mandamus* for quashing the 4th respondent's decision to reject his appeal and for a direction on the 4th respondent to entertain his appeal.

The Court of Appeal by its order dated 4.1.88 refused to issue notice and dismissed the application on the ground of delay, observing that the award sought to be quashed was made in 1983 and the matter had been disposed of in 1984 and that no reasonable excuse had been given for the delay. The petitioner has appealed to this Court from the order of the Court of Appeal. His application for special leave to appeal was based substantially on the same grounds contained in his application made to the Court of Appeal. However, in his amended application for special leave to appeal, he raised the issue of the vires of Rule 49(XII) *(a)*, and prayed inter alia, for the following reliefs:

(a) to set aside the order of the Court of Appeal;
(b) to direct the Court of Appeal to notice the respondents and to permit the appellant to present his application with any suitable *amendments;*
(c) to quash the award of the 2nd respondent;
(d) to quash the decisions by which the 1st respondent Society placed him on compulsory leave and interdicted him.

It is observed that even in his amended application the appellant does not pray for or indicate a clear intention to seek a writ of *certiorari/ mandamus* to quash the decision of the 4th respondent rejecting his appeal dated 21.3.83 and for a direction on the 4th respondent to entertain that appeal. After considering the amended application, this Court granted special leave to appeal in respect of the grounds relating to the vires of Rule 49(XII)*(a)*.

The explanation contained in the Appellant's application to the Court of Appeal for his delay is that such delay was due to the conduct of the 4th respondent in failing to consider the appellant's request to entertain his appeal against the award, even after representations were made through an Attorney-at-Law. The short order of the Court of Appeal rejecting the appellant's application does not indicate that it considered this explanation in the light of the facts and circumstances and the relevant principles of law. Even where (as in England) time for making an application is provided by rules, delay by itself would not defeat an application. It is only a discretionary bar to be applied having regard to the conduct of parties, the issues involved and substantial prejudice which may result in varying the impugned order. *S.A. de Smith Judicial Review of Administrative Action 4th Ed. p. 423-424.* In *Ramasamy v. Ceylon State Mortgage Bank (3)*.

Wanasundera, J. said -

"The principles of laches must, in my view, be applied carefully and discriminatingly and not automatically and as a mere mechanical device".

Even though under our law there is no statutory time limit within which a writ application may be filed, such an application must be brought within a reasonable time. As Sharvananda, J. (as he then was) said in *Biso Menike v. Cyril de Alwis (2)* ;

"What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case".

In the instant case, perhaps the lack of any serious ground of challenge to the award on the face of the application may have influenced the Court to reject it summarily on the ground of laches; but the strength of the case is by itself not decisive at the initial stage when it comes up for notice; the Court must carefully consider the explanation adduced for delay; and unless it is a clear case for rejecting the application the Court ought to issue notice and leave it to the respondent to take the objection on the facts and circumstances of the case. I am of the view that this is the course that the Court of Appeal should have adopted. In any event, in view of the issue as to the validity of Rule 49(XII) *(a)* which has since been raised, the matter is now beyond doubt; it is an issue which if left undetermined, might be pleaded as a bar to the execution of the award; as such the Court of Appeal would have to consider it as the primary issue in the case. The other grounds urged against the award would really arise for determination thereafter and possibly (in a separate application) after the 4th respondent has considered the appellant's appeal and made his decision, if the present rejection of his appeal under Rule 49(XII) (b) is determined to be illegal.

The appellant pleads that Rule 49(XII) *(a)* is *ultra vires* in that -

(a) it requires the making of an appeal deposit which is not authorised by the provisions of Section 61 of the Co-operative Societies Law under which the rule has been made;
(b) the said rule is unfair and arbitrary and is contrary to the provisions and principles of the said law.

(c) in any event, the said rule which requires an appeal deposit of 10% of the sum of the award with the appeal to the Registrar is unreasonable and hence ultra vires the said law.

Despite several notices issued to the respondents they did not enter any appearance or oppose this appeal at the hearing. We only heard the submissions of the learned Counsel for the appellant orally and in writing. We therefore have to decide this appeal, in particular on the question of the validity of Rule 49(XII) (a) without the benefit of a full argument, inter partes. As such, in determining this appeal, I shall only consider whether there is a serious issue for the decision of the Court of Appeal, without considering the merits of the writ petition or in any manner prejudicing the rights of the parties yet to be adjudicated in the Court of Appeal, including on the issue as to whether Rule 49(XII) *(a)* is *ultra vires.*

Section 58(3) of the Co-operative Societies Law reads -

"Any party aggrieved by the award of the arbitrator may appeal therefrom to the Registrar within such period and in such manner as may be prescribed by rules".

Rules may be made under section 61 the relevant part of which provides -

"61(1). The Minister may make all such rules as may be necessary for the purpose of carrying out or giving effect to the principles and provisions of this law.

(2) In particular and without prejudice to the generality of the powers conferred by subsection (1), such rules may -

(y) prescribe the forms to be used, the fees to be paid, the procedure to be observed, and all other matters connected with or incidental to the presentation, hearing and disposal of appeals under this law or the rules made thereunder".

Rule 49(XII) *(a)* of the Rules published in *Gazette (Extraordinary)* No. 93/5 dated 10th January, 1974 is as follows :-

"Every appeal to the Registrar from an award of an arbitrator or a panel of arbitrators shall be made within 30 days from the date of the award by a written statement setting out the grounds of appeal. Every

such appeal shall be forwarded to the Registrar with an appeal deposit of Rs. 50 or 10% of the sum awarded where the appeal is made by the party against whom the award has been made and by Rs. 50 or 10% of the sum claimed in the dispute where the appeal is made by the party claiming any sum of money, whichever sum is the higher sum in either case".

Rule 49(XII)*(b)* provides that an appeal not made in conformity with the above shall be rejected by the Registrar.

Paragraph *(d)* of this rule reads -

"Where the Registrar is satisfied that the appellant had reasonable grounds to appeal, the sum deposited by him shall be returned to the appellant".

Paragraph *(e)* reads -

"Where the Registrar is satisfied that the appellant had no reasonable grounds to appeal, the appeal deposit shall be forfeited and credited to the Consolidated Fund".

The Counsel for the appellant very properly drew our attention to the decision in *Somaratne v. Premachandra, Commissioner of Co-operative Societies and Others (4)* in which this Court expressed the view that Rule 49(XII)(*a*) is not *ultra viras* the provisions of Section 59(3) read with Section 61(2)(*y*) of the Co-operative Societies Law. In considering the question, the Court distinguished the decision of the former Court of Appeal, in *Ceylon Workers Congress v. Superintendent, Beragala Estate (13)* which held that Regulation 16 made by the Minister under Section 39 of the Industrial Disputes Act was *ultra vires*. That regulation imposed a time limit of six months within which an application may be made by a workman under section 31(*b*)(1).

The Act itself did not contain any provision which limited the time of making such an application;

Siva Subramaniam, J. said -

"No instance has been cited of an unlimited right granted by a statute being validly limited by a regulation without an express power conferred for that purpose by the Act". (76 NLR 1, 5).

The ruling in *Somaratne's* case as to the validity of Rule 49(XII)(a) appears to be obiter in that the appeal under section 59(3) of the Co-operative Societies Law which came up for consideration therein, though made within 30 days from the date of the award, but without the required appeal deposit, had been delivered to the 5th respondent i.e. the Co-operative Society and had not been forwarded to the Registrar at any time. As such, the Court itself observed that consideration of the validity of Rule 49(XII) *(a)* appears to be superfluous as there has been no petition of appeal in terms of the law.

Counsel for the appellant submits that the requirement in Rule 49(XII) *(a)* for an appeal deposit of Rs. 50 or 10% of the sum awarded whichever sum is the higher sum is not authorised by Section 61(1) read with Section 61(2) *(y)* of the Co-operative Societies Law; that Section 61(2) *(y)* particularly empowers the Minister, inter alia, to prescribe fees to be paid in respect of an appeal; Rule 49(XII)(a) which provides for the payment of an appeal deposit is in excess of the power conferred by Section 61 (2) *(y)*; that the Minister is not competent by recourse to his general power under section 61(1) to introduce the concept of an appeal deposit; that such a deposit is not a matter connected with or incidental to the presentation, hearing and disposal of an appeal or necessary for the carrying out or giving effect to the principles and provisions of the law; that it is an unfair and arbitrary impediment to the exercise of the right of appeal conferred by section 58(3). I am of the view that the plain meaning of the language of the relevant provisions tends to support the Counsel's submissions.

It is further submitted that in any event the requirement of an appeal deposit of 10% of the sum awarded is manifestly unreasonable, irrational and unjust in that it would make it impossible for an aggrieved party to exercise his right of appeal, if he is without means; it is a total deprivation of the right of appeal, for under Rule 49(XII)*(b)* upon the failure to comply with such requirement the Registrar is enjoined to reject the appeal; that the so called deposit is really a penalty recovered in advance; that this is borne out by Rule 49(XII)*(e)* which declares that the deposit shall be forfeited and credited to the Consolidated Fund if the Registrar is satisfied that the appellant had no reasonable ground to appeal; that in the absence of express provision in the law the imposition of such penalty is ultra vires. I am of the view that these submissions have force.

The principles relating to the exercise of the power to make subordinate legislation are well settled. Such power is conferred by Parliament subject to express or implied limitations.

Wade 'Administrative Law ' 5th Ed. P. 748 states -

> "Acts of Parliament have sovereign force, but legislation made under delegated power can be valid only if it conforms exactly to the powers granted. "

As regards the Court's power to review subordinate legislation on the ground of unreasonableness, *S.A. de Smith ' Judicial Review of Administrative Action' 4th Ed. P. 355* comments thus :

> "Judicial review of the validity of by - laws has always encompassed review for manifest unreasonableness".

De Smith proceeds to cite the following passage from the judgment of Lord Russell of Killowen, C.J. in *Kruse* v. *Johnson (14).*

> " If for instance, they were found to be partial and un-equal in their operation between different classes ; if they were manifestly unjust; if they disclosed bad faith ; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say " Parliament never intended to give authority to make such rules ; they are unreasonable and *ultra vires*".

In the light of the relevant legal principles and the context of the Co-operative Societies Law, the Court of Appeal should decide whether Rule 49 (XII) (*a*) is *ultra vires* or whether the view expressed (obiter) in *Somaratne's case* (supra) that it is valid is tenable. It seems to me that any decisions upholding this rule can only be made on the basis -

(*a*) that in its application the several provisions contained therein are capable of such construction as would be most agreeable to justice and reason ;

(*b*) that this rule would not circumscribe the right of appeal under section 58 (3) of the law.

It also appears that this rule can only be upheld if the relevant provisions of the law are fairly capable of a wider construction that would permit the concept of an appeal deposit, On the other hand, if the language adopted is plain and admits of no such construction the rule must be struck down. The following guidelines would assist the Court in making a decision:-

> "The acts of a competent authority must fall within the four corners of the powers given by the legislature. The Court must examine the nature, objects and scheme of the legislation, and in the light of that examination must consider what is the exact area over which powers are given by the section under which the competent authority purports to act".

Hood Phillips' 'Constitutional and Administrative Law' 6th Ed.p.596; Carltone Ltd. v. Commissioners of Works (15); Commissioners of Custom and Excise v. Cure and Deeley Ltd.(16).

Section 58 of the Co-operative Societies Law provides that disputes touching the business of a registered Society shall be referred to the Registrar for decision by himself or by an arbitrator or arbitrators, to the exclusion of the jurisdiction of the District Court. *Kalutara Co-operative Distilleries Society Ltd. v ..Arsekularatne (17).* In that case Wijayatilake, J. considering the corresponding Section 53 in the Co-operative Societies Ordinance said —

> "In a welfare State such as Ceylon the Co-operative Societies Ordinance has been enacted by the legislature with a view to promoting inter alia particular industries for the benefit of the public and special machinery has been provided for the settlement of disputes touching the business of registered societies for the smooth working of societies.....".

An appeal from an award lies to the Registrar whose decision shall be final and shall not be called in question in any civil court. Section 59 provides for a special procedure for the expeditious enforcement of a decision of the Registrar or an award.

These provisions indicate that the legislature intended expeditious disposal of disputes touching the business of a registered society including proceedings in appeal against an award or by a party claiming

a sum of money. The proper utilisation of goods and moneys entrusted to a registered society and the recovery of sums due to it are matters of public concern; as such the concept of an appeal deposit intended to discourage an unreasonable appeal by a person against whom an award has been made may be conceptually defendable as being a matter connected with or incidental to the presentation of an appeal within the ambit of section 61(2)(*y*). To the extent that the appeal deposit has to be paid even by a party claiming a sum of money, it also protects a party who has been adjudged not liable on a claim against an unreasonable appeal by a registered society.

However, the challenge to Rule 49(XII)(a) on account of the appeal deposit arises mainly in view of the severity of its provisions. As regards the time of payment of the deposit, it may be possible to construe the provision to permit payment even after the lodging of the appeal but before the date of the hearing. Maxwell, Interpretation of Statutes 12th Ed. p. 203 states —

> "..... it appears to be an assumption (often unspoken) of the Courts that where two possible constructions present themselves, the more reasonable one is to be chosen".

Thus in *Attorney-General of the Gambia v. Hi Jie (18)*, the West African (Appeal to Privy Council) Order in Council provided that "an application to the Court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application", it was held that although on a literal construction notice to the opposite party should be given within 21 days, the more reasonable construction should be adopted namely that notice of the application on the opposite party may be served as soon as possible and in any case a reasonable time before the date of hearing. If this construction is adopted in the instant case, the appeal deposit though paid in two instalments had been duly made and the appellant's appeal could not have been rejected for non-compliance with Rule 49(XII)(*a*).

I agree with my brother Fernando, J. that the deposit under consideration is penal in character, encroaches on the rights of subjects as regards property and imposes a pecuniary burden over and above what is

recoverable on the award against the appellant ; as such the provisions for its forfeiture should be strictly construed in favour of the appellant : accordingly, I am of the view that —

(*a*) the Registrar should afford to the appellant an opportunity of being heard before the amount of the deposit is forfeited. The words "shall be forfeited" in Rule 49 (XII) (*a*) should be interpreted as "liable to be forfeited". (*Vide Manavadu v. Attorney-General (19).*

(*b*) the Registrar would not be competent to treat the appeal deposit as forfeited on the ground that the appellant had no reasonable grounds to appeal unless the appeal is frivolous or vexatious. The words "no reasonable grounds" in Rule 49 (XII) *(e)* should be interpreted accordingly. In this view of the matter, a bona fide appellant would not become liable to the forfeiture of his appeal deposit.

Thus far it seems possible to defend the impugned rule ; but the most formidable challenge to it, namely the objection to the requirement that the appellant should deposit 10% of the sum awarded or claimed has to be met. There is no provision for relaxing this requirement ; in default of such payment the Registrar is enjoined by Rule 49 (XII) (*b*) to reject the appeal. Having regard to the language of the Rule and the subject matter under consideration it does not seem possible to exempt an appellant from the liability to pay the required appeal deposit even by the application of the maxim *"lex non cogit ad impossibilia"*. I therefore agree with my brother Fernando, J. that this rule may discourage and even prevent appeals made bona fide and upon good grounds solely because an appellant does not have the means of making the required appeal deposit.

For the above reasons, I am of the view that a serious question arises as to the *vires* of Rule 49 (XII) (*a*). This question was not raised in the appellant's application to the Court of Appeal but only in this Court ; leave was allowed on that ground and the question was argued without the respondents being heard. As such; it is only proper that a determination on that ground should be made by the Court of Appeal after such amendment of the petition as that Court may permit in its discretion. Accordingly, I allow the appeal on that ground and set aside the order of the Court of Appeal refusing to issue notice and dismissing the application. The Court of Appeal is directed to issue notice on the respondents after

considering any amendment to the petition (including the prayer for relief) which the appellant may make having regard to the ground on which we have allowed this appeal and within one month after the record is received in the Court of Appeal. The appellant will not be entitled to the costs of this appeal.

Appeal allowed.

Case sent back to Court of Appeal.