COLOMBO SOUTH MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD.

V.

CO-OPERATIVE EMPLOYEES' COMMISSION

SUPREME COURT.
FERNANDO, J.,
DHEERARATNE, J. AND
WIJETUNGE, J.
S.C. 126/94.
C.A.53/90.
M.C. COLOMBO 50459/3.
C.A. 92/90.
M.C. COLOMBO 65117.
C.A. 93/93.
M.C. COLOMBO 60205.
FEBRUARY 6, 1996.

Co-operative Employees Commission Act, No. 12 of 1972 – Sections 35, 11(1) (e), 32(1) (2) of the Act – Disciplinary proceedings – Appeals – Rules 135, 136, 137 of Regulations – Ultra Vires – Fair Hearing – Complaint by Commission to the Magistrate's Court against the Society.

Disciplinary proceedings were taken by the Committee of the Society against an employee V who was interdicted without pay pending a decision at an inquiry. At the inquiry the principal witness failed to turn up. The Employee was acquitted. However, the Committee reinstated V without back wages for the period of interdiction. V appealed to the Co-operative Employees Commission (CEC) on the question of back wages. The CEC dismissed the said appeal. On a second appeal the CEC varied its earlier order and decided that arrears of salary should be paid to V. The CEC had on the second appeal examined the record of the disciplinary proceedings held against V and the file relating to N who had been paid back wages after being acquitted on similar charges (identical). The case of N was that new material was provided to the CEC at the second appeal. The Society refused to pay the arrears of salary to V though directed by CEC.

On a complaint made by CEC to the Magistrate's Court against the Society for wilfully neglecting or refusing or failing to implement the order given by CEC to the Society, the Society was convicted.

An appeal made to the Court of Appeal was dismissed. On appeal, it was the Petitioner's contention that –

(1) the Rules 135, 136, 137 are *ultra vires* the CEC Act.

(2) that there was no fair hearing.

Held:

(1) The rules under consideration do not seek to introduce any substantive law. They are purely procedural in nature and therefore do not go beyond the rule making power conferred by section 32.

(2) It seems that provisions for submission of written material only by parties at a hearing of an appeal is not always obnoxious to the principle that they are entitled to a fair hearing. The *audi alteram partem* rule does not inflexibly require an oral hearing. The provisions of rules 136 and 137 which permit, but do not compel, the Commission to decide an appeal (not involving termination of services or dismissal) on the basis of written material, is not contrary to natural justice. There is no doubt that in substance the society was afforded a hearing in terms of the rules. Section 32(1) empowers the Commission to make all regulations as may be necessary for carrying out the provisions of the Act.

APPEAL from the judgment of the Court of Appeal.

Cases referred to:

(1) *Ran Banda v. River Valleys Development Board* (1968) 71 NLR 25.
(2) *Ceylon Workers Congress v. Superintendent, Beragala Estates* (1973) 76 NLR 1.
(3) *Ceylon Co-operative Employees Federation v. Co-operative Employees Commission* (1976) 78 NLR 518.
(4) *Lloyd v. McMahon* 1987 AC 625.
(5) *Stuart v. Raughley Parochial Church Council* (1935) CH 452 (1936) CH 32.

Chula de Silva PC with *M. Hussain* and *C. Wimalaratne* for appellant.

K. Siripavan SSC for Respondent.

Cur. adv. vult.

February 26, 1996.

DHEERARATNE, J.

When the three cases MC Colombo 50459, 65117, and 60205 were taken up in the Magistrate's Court, parties agreed to abide by the decision in the case No. 50459 and evidence was led in that case only. The accused-appellant Society (the Society) was convicted in that case and convictions were entered in the other two cases as well. In the Court of Appeal too, parties agreed to abide by the decision on appeal in the first case and consequently there is one

judgment of the Court of Appeal affirming the convictions in respect of all three cases against which judgment on appeal has now been preferred to this Court.

The undisputed facts of the first case are these: Disciplinary proceedings were taken by the Committee (the governing body) of the Society against an employee called Vidanapathirana who was interdicted without pay pending a decision at an inquiry. At the inquiry, the principal witness against the employee, one H. M. L. Nandasena failed to turn up, therefore the employee was acquitted of the charges. However, the Committee decided to reinstate the employee but without back wages for the period of interdiction. The employee, thereupon appealed to the respondent Co-operative Employees Commission (the Commission) on the question of back wages. The Commission dismissed the appeal. On a second appeal made by the employee, the Commission varied its earlier order and decided that arrears of salary should be paid to the employee. The second order, among other matters reads, "The Commission examined the record to the disciplinary proceedings held against the employee and the file relating to H. M. L. Nandasena who had been paid back wages after being acquitted on similar charges". The case of Nandasena was obviously new material provided to the Commission for consideration at the second appeal. The Society nevertheless failed and refused to pay arrears of salary to the employee, although it was directed to do so by the Commission. It is significant to note that the fact that the cases of Liyanapathirana and Nandasena were similar (indeed identical) was not challenged either in the original Court or in Appeal.

A complaint was then made by the Commission to the Magistrate's Court against the Society, that in breach of section 35 of the Co-operative Employees' Commission Act, No. 12 of 1972, the Society has wilfully neglected or refused or failed to implement the order given by the Commission to pay arrears of salary due to the employee. The procedure for appeals to the Commission is laid down in Rules 135, 136 and 137 of the Regulations made under the Act and published in the Gazette dated 1.12.1981.

Learned President's Counsel in this appeal forcefully contended that the conviction of the Society should be set aside on the ground that inasmuch as the Rules 135, 136 and 137 are *ultra vires* of the Co-operative Employees' Commission Act, the conviction entered against the Society based on an order made by the Commission under those rules was bad in law. Those rules, he contended, are *ultra vires* for two reasons; first, they go beyond the rule making power conferred by subsection 32(1) of the Act; secondly, they violate the *audi alteram partem* rule of natural justice.

Section 11(1) (e) of the Act, empowers the Commission to determine the procedure to be followed by any society in exercising its rights of disciplinary action against its employees, to call upon any society to complete disciplinary action against its employees within a time stipulated by the Commission, and to hear appeals arising out of any disciplinary orders made by any society. Subsection 32(1) empowers the Commission to make all regulations as may be necessary for carrying out the provisions of the Act; subsection (2) provides that no regulation made shall have effect unless it has been approved by the Minister and published in the Gazette.

The relevant rules read:–

135. All appeals to the Commission against an order made in disciplinary proceedings against an employee by a Committee, must be made in writing, substantially in the form given in Appendix-V within sixty days of the date of the order, by the aggrieved employee himself. Appeals made on his behalf by any other person may not be entertained or acknowledged. A copy of such appeal shall be sent by registered post by the employee to the Committee.

A second appeal within sixty days from the date of the decision may be allowed if the Commission is satisfied that there appears on the face of the appeal new and material facts which might have affected the decision together with adequate reason for non disclosure of such facts at an earlier date.

136. The Committee shall submit to the Commission within fourteen days of the receipt by the Committee of a copy of such appeal, a brief report relating to matters set out in such appeal, and any document relevant thereto shall be submitted by the Committee concerned to the Commission.

137. In every appeal other than an appeal from an order of termination of services or dismissal, the Commission may decide such appeal on the basis of the written material in appeal.

I shall first deal with Learned Counsel's submission that the rules made go beyond the rule making power conferred by section 32. In support of this submission reliance was placed on two decisions of this Court – *Ran Banda v. RVDB*[1] and *Ceylon Workers' Congress v. Superintendent, Beragala Estates*[2]. Both those cases dealt with rule 16 of the Industrial Disputes Regulations of 1958 by which a prescriptive period was imposed within which a workman should complain to the Labour Tribunal. On the basis that such imposition of a limitation was one of substantive law rather than procedure, it was held that the impugned regulation was *ultra vires* of the Industrial Disputes Act. The rules under consideration do not seek to introduce any such substantive law and they are purely procedural in nature and therefore the principle established in those cases has no application.

I shall now turn to the argument of learned Counsel based on the *audi alteram partem* rule on which he attacks the *vires* of the regulations made and the second order made by the Commission. It could be seen from rule 135 that in the case of all appeals to the Commission a copy of the appeal shall be sent by the employee to the Committee. This procedure applies to a second appeal as well. Learned President's Counsel contended that the first paragraph of rule 135 applied only to the first appeal; and that upon a second appeal, a copy of the appeal was not required to be sent to the Committee. The word "appeals" in the first paragraph of rule 135 refers to **all** appeals – first as well as second, and therefore the rule requires a copy to be sent in the case of a second appeal as well.

When the employee gave evidence, it was not put to him in cross-examination that he did not send a copy to the Committee. Although the General Manager of the Society gave evidence thereafter he did not say that the Committee did not receive any such copy. In terms of rule 136 the Committee shall submit within 14 days of the receipt of such copy of the appeal, a report relating to that matter and any document relating thereto to the Commission. The General Manager did not say that such report or document was not submitted. It seems to me that in all probability that was done which accounts for how the Commission had access to the file of Nandasena. The rules have sufficiently provided an opportunity for the case of the Society being heard before the Commission by way of written material and the evidence led at the trial does not show that such material was in fact not submitted. There is no doubt that in substance the society was afforded a hearing in terms of the rules.

Was there a fair hearing? Learned President's Counsel submitted that the rules should have provided only for an oral hearing of the appeal. In support of this contention, he cited the case of *The Ceylon Co-operative Employees' Federation v. The Co-operative Employees, Commission*[3]. That case related to an appeal made to the Commission on the dismissal of an employee, under the regulations promulgated in 1972. The rule 102 in those regulations is identical to the rule 137 of the present regulations; it excludes recourse to written material only in the consideration of an appeal from an order of termination of services or dismissal and it thereby impliedly requires an oral hearing in such instances. Therefore, that case is clearly distinguishable and has no relevance. It seems to me that provision for submission of written material only by parties at a hearing of an appeal is not always obnoxious to the principle that they are entitled to a fair hearing. See *Lloyd v. McMahon*[4] and *Stuart v. Haughley Parochial Church Council*[5]. The *audi alteram partem* rule does not inflexibly require an oral hearing. The provisions of rules 136 and 137 which permit, but do not compel, the Commission to decide an appeal (not involving termination of services or dismissal) on the basis of written material is not contrary to natural justice. It may be, however, that in some circumstances the Commission ought to

exercise its discretion under rule 137 and to allow an oral hearing – but that does not mean that the rule is bad.

For the above reasons I am of the view that there has been a fair hearing afforded to the Society in terms of the rules and neither the order made by the Commission nor the rules themselves are vitiated for non-compliance with the rule of *audi alteram partem.* The convictions are affirmed and the appeal is dismissed with costs.

It is unfortunate that protracted litigation has prevented three employees from obtaining what was due to them nearly thirteen years ago. I direct the Registrar of this Court to send the records of these cases to the Magistrates' Court forthwith to enable the learned Magistrate to take steps to enforce the orders of conviction entered in these cases as expeditiously as possible.

FERNANDO, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.
Conviction affirmed.