

DHARMASENA AND OTHERS

v.

PERERA, COMMISSIONER & REGISTRAR, CO-OPERATIVE
DEVELOPMENT (WESTERN PROVINCE) AND OTHERS

COURT OF APPEAL.

SENANAYAKE, J.

C.A. APPLICATION NO. 897/91.

AUGUST 21, SEPTEMBER 21 AND OCTOBER 14, 1991.

Certiorari and Prohibition – Election of Board of Directors of a Multi-Purpose Co-operative Society registered under the Co-operative Societies Law No. 5 of 1972 as amended by Act No. 32 of 1983 – Regulation 2 of the Emergency Regulations (Maintenance of Essential Supplies and Services) Regulation No. 1 of 1989 – Appointment of Competent Authority in place of the Board – Good faith – Want of reasonable grounds.

The petitioners were the duly elected members of the Board of Directors of the Attanagalla Multi-Purpose Co-operative Society (7th respondent) – a Society registered under the Co-operative Societies Law No. 5 as amended by Act, No. 83 of 1983. The petitioners were elected on 22.9.90 to the Board of Directors. One T. S. Bandara the leader of the U.N.P. group which was defeated at this election, filed case No. D.C. 3554/Spl. and obtained an enjoining order restraining the petitioners from functioning. The petitioners filed papers for the dissolution of the enjoining order and the District Judge vacated the enjoining order on 9.10.90. Bandara filed Leave to Appeal and Revision Applications in the Court of Appeal and of consent the District Judge's order was set aside and a fresh inquiry directed to be concluded on or before 25.2.91. The District Judge held the fresh inquiry and on 25.2.91 made order refusing the application for an enjoining order. In the meantime the 3rd respondent (Hon. Weerasinghe Mallimarachchi, Minister of Food and Co-operatives) purporting to act in terms of Regulation 2 of the Emergency (Maintenance of Essential Supplies and Services) Regulation No. 1 of 1989 on 18.2.91 made order appointing the 4th respondent (Lionel Gunatilleka, A.G.A. Gampaha), 5th respondent (A. A. de Silva, Inspector of Co-operative Societies) and the 6th respondent (Laxman Hewapana, Assistant Director of Planning) as Competent Authority of the 7th respondent Society. The appointment dated 18.2.91 was published in the Gazette Extraordinary No. 650/6 of 19.2.91 but a copy of the order of 18.2.1991 was filed with his objections by Bandara

even before the Gazette was available to the public. Later the 3rd respondent had informed Mrs. Sirimavo Bandaranayake former M.P. for Attanagalla electorate that the Competent Authority will function only till 18.3.1991 and the petitioners could assume duties from 19.3.91. On being so informed, the Petitioners assumed duties on 19.3.91. At an emergency meeting of the Board held on 20.3.91 the petitioners however were informed that the 4th, 5th and 6th respondents had been re-appointed on 22.3.91 as the Competent Authority by notification published in Gazette No. 655/9 dated 26.3.91.

Held:

The 3rd respondent did not have any material with him to exercise his opinion in issuing the order appointing 4, 5 and 6 respondents as Competent Authority to act for the 7th respondent Society. His discretion was exercised unreasonably with the idea of helping T. S. Bandara the defeated candidate. He had not acted in good faith or reasonably. On the District Judge refusing to grant an Enjoining Order, the Petitioners as the elected members should have been permitted to function in their capacity as Directors of the 7th respondent society. There was no material on which in his opinion there was, is or is likely to be a disruption in the maintenance of supplies and services essential to the life of the community of the area. The 3rd respondent has without any material appointed the 4th, 5th and 6th respondents as Competent Authority and continued to issue the impugned orders with a view to keep the Petitioners out of office. This exercise of his opinion was not in good faith and without any reasonable grounds.

Application for writs of certiorari and prohibition.

G. Dayasiri for petitioners.

B. V. J. Silva for 1st, 8th and 9th respondents.

K. C. Kamalabayson D.S.G. for 2 to 5 respondents.

Cur. adv. vult.

March 24, 1993.

SENANAYAKE, J.

The Petitioners have filed this application for Writs of Certiorari and Prohibition to quash the order made by the 3rd Respondent dated 18.2.91, order produced as P24 appointing the 4th, 5th & 6th Respondents as the Competent Authority of the 7th Respondent Society and also prayed for the grant of a Writ of Prohibition restraining the 3rd Respondent from exercising powers in terms of the Emergency (Maintenance of Essential Supplies & Services) Regulation No. 1 of 1989 appointing Competent Authority in respect of the 7th Respondent. The facts relevant to this application are briefly as follows: The Petitioners are the elected members of the

Board of Directors of the 7th Respondent which is a Registered Society under the Co-operative Societies Law No. 5 of 1972 as amended by Act No. 32 of 1983. It is not contested that the 7th Respondent Society was the main society with 85 branches comprising of 28,603 members in the Attanagalla area and a section of the Mirigama area. The Board of Directors were elected on 22.9.1990 which was held in the presence of the 8th and 5th Respondents and several other officers of the Co-operative Development Department of the Western Province and also in the presence of a Deputy Inspector of Police and a number of senior officers of the Police including the O.I.C. of the Nittambuwa Police. The Petitioners were elected and defeated the candidates of the opponent group led by T. S. Bandara and the results of the said election were produced as P.12.

The Petitioners state that the newly elected Board of Directors took oaths and held their 1st meeting on 23.9.90 and elected the 1st Petitioner as the Chairman and the 2nd Petitioner as the Vice-Chairman and appointed Standing Committees for Finance, Education, Consumer Welfare, Loans, Transport and several other decisions in relation to various other matters of the 7th Respondent and the minutes of the 1st Board of Directors was produced as P.13.

It was common ground that on 30.9.90 an *ex parte* enjoining order was obtained by T. S. Bandara from the Additional District Judge of Gampaha in case No. 3554/Spl restraining the functions of the Petitioners as members of the Board of Directors of the 7th Respondent Society. The Petitioners on 8.10.90 filed papers in the District Court of Gampaha with notice to T. S. Bandara to vacate the enjoining order issued against the Petitioners and the Learned District Judge vacated the Enjoining Order on 9.10.90. The said T. S. Bandara preferred a Leave of Appeal Application bearing No. 143/90 and a Revision Application bearing C/A. 1018/90 to the Court of Appeal. The Court of Appeal made order on 14.2.91 of consent (a) that the order of the learned District Judge dated 9.10.90 dismissing the enjoining order was set aside (b) District Judge of Gampaha to hold a fresh inquiry into the question of the enjoining order within 10 days from February 14th 1991 and to conclude same by 25.2.91 (c) the Plaintiff T. S. Bandara was permitted to file his objections on or before 18.2.91.

The Petitioners alleged that the 3rd Respondent purporting to be acting in terms of Regulation 2 of the Emergency (Maintenance of

Essential Supplies and Services) Regulation No. 1 of 1989 acting *mala fide*, apprehending that the District Judge would make an order against the defeated United National Party Candidate and in favour of the Petitioners in 3554/Spl issued an order dated 18.2.91 at Colombo appointing 4th, 5th and 6th Respondents as the Competent Authority of the 7th Respondent Society. And the Plaintiff T. S. Bandara has produced the Gazette Extraordinary No. 650/6 dated 19.2.1991 where the 3rd respondent had appointed the 4th, 5th and 6th Respondents as Competent Authority for the 7th Respondent Society. And T. S. Bandara in the last paragraph of his affidavit had affirmed that three officers of the State have been appointed to the Board to carry on the work of the 7th respondent Society.

The crucial factor appears to be that Bandara was able to file a copy of the appointment on 18.2.1991 even prior to the Gazette of the 19th was available to the Public. They further alleged that the 3rd Respondent had informed the Member of Parliament of Gampaha District and the former member for the Attanagalla electorate Mrs. Srimavo Bandaranayake that the Appointed Competent Authority will cease on 18.3.91 according to the terms of appointment and that the Petitioners could assume duties from 19.3.1991. Accordingly the 4th, 5th and 6th Respondents ceased to hold office as Competent Authority and the 3rd Respondent did not extend the period when their appointment lapsed on 18.3.91. On being informed by the General Manager and the Member of Parliament the Petitioners assumed duties from 19.3.91. The petitioners had attended the emergency meeting of the Board of Directors and annexed a copy of the minutes marked as P.26a. They alleged that the 1st Respondent had informed the General Manager by Telephone that the 3rd Respondent has changed his decision and that he would be appointing a Competent Authority to manage the affairs of the 7th Respondent Society and the 3rd respondent by Gazette Extraordinary bearing No. 655/9 dated 26.3.91 purporting to act in terms of the said Emergency Regulations re-appointed the 4th, 5th and 6th Respondents; the Gazette was produced as P.27. The Petitioners alleged that the 3rd Respondent illegally and in *mala fide* continued to appoint 4th, 5th and 6th Respondents as Competent Authority by orders dated 22.4.91, 22.5.91, 22.6.91, 22.7.91 and 22.8.91 published in the Gazette Extraordinary purporting to act in terms of the Emergency Regulations and P.27A to P.27E. They alleged that the order made on 24.3.91 and subsequent orders appointing the 4th, 5th & 6th Respondents as Directors of the 7th Respondent is *ultra vires*, illegal and or null and void for the following reasons:

(a) The 3rd Respondent could not in law have formed an opinion that there is likely to be a disruption of essential services and supplies as there was no such disruption, and in the absence of an enjoining order, restraining the Petitioners from exercising the powers and functions of the Board of Directors of the 7th Respondent as there was no disruption of maintenance of supplies and services essential to the community. They alleged that the orders were made *maia fide* and had no power to issue as there was no disruption which was a condition precedent to issue such orders.

The 3rd Respondent in his affidavit dated 17.3.92 paragraph 3 admitted paragraphs 1 to 18, 21 to 26, 28 to 40, 42 to 44, 49 to 53 and 55 of the petition and subsequently an affidavit was filed by the 3rd Respondent on 8.5.92 to delete paragraph 3 and new paragraph 3 was substituted where there was no admission of any paragraphs of the petition but specifically denied the averments that are contained in paragraphs 30,39, 42, 54, 57, 58 and 60 of the Petitioners affidavit. In paragraph 5 of the 3rd Respondent's affidavit he affirms to the fact that the members of the Board of Directors of the 7th Respondent were elected on 22.9.90. An unsuccessful candidate filed an action No. 3554/Spl in the District Court of Gampaha contesting the election and obtained an Enjoining Order restraining the Board of Directors and subsequently the order was vacated on 9.10.90. Thereupon the Plaintiff filed a Revision application with an application for leave to the Court of Appeal and the Court of Appeal set aside the order vacating the Enjoining Order and directed that a fresh Inquiry to be held and concluded before 25.2.91.

In paragraph 6 he affirmed that during the above mentioned period the public of the area served by the 7th Respondent and its branches were deprived of the supply of essential supplies and distribution of food and fuel had come to a standstill as the Board was not functioning and as there was no person or persons authorised to sign cheques. This was brought to his notice by the 9th Respondent, Minister of Co-operative Societies and Development, Western Province with supporting documents from the Commissioner of Co-operative Development, Western Province and produced true copies of the documents 3R1, 3R2 and 3R3 and by 3R4. In order to prevent a total breakdown in the supply of food and fuel, he made order under Emergency (Maintenance of Essential Supplies and Services) Regulations appointing the 4th, 5th and 6th Respondents as Competent Authority of the 7th Respondent and they continue to

function with a view to preventing any future breakdown in the supply of Essential Services and Commodities. The 3rd Respondent affirmed that it was necessary to have the Competent Authority to continue to function until the case in the District Court of Gampaha was concluded as it is possible for Bandara to obtain an Enjoining Order against the elected Board of Directors at any time before the conclusion of the case. The 3rd respondent further averred that he acted on the advice of the Attorney-General in appointing the Competent Authority to function until the conclusion of the District Court case.

The Board of Directors had appropriated Rs. 49,185/- from the funds of the 7th Respondent and he denies that he acted *mala fide* or in excess or abuse of the powers vested in or to obstruct the Administration of Justice.

The 1st Respondent admits holding of the General Meeting of the Society in terms of By-law as amended and the Board of Directors being elected in terms of By-law 44(1) and he admitted paragraph 5, 6 and 16, and that he was aware of P.7 Regarding the other averments in the petition he was unaware as they do not pertain to him. He denies paragraph 50 and states that he did not give instructions of any nature to the General Manager of the 7th Respondent Society.

The 8th Respondent admits para 10 and 14 and admits that he was present at the general meeting of the 7th Respondent Society held on 22.9.90. And the other averments in the petition do not pertain to him.

The 9th Respondent admits para 11 of the Petition and other averments do not pertain to him.

The learned Counsel for the Petitioner submitted that the 3rd respondent has the power to issue orders similar to P.21 under the Emergency Regulations but his submission was that the reasons given in his affidavit were unreasonable, *ultra vires* and the 3rd Respondent has not exercised his opinion correctly. He submitted that P.21 dated 18.2.91 lapsed and the Petitioners had convened an Emergency Meeting of the Board of Directors of the 7th Respondent Society and held a meeting on 20.3.91 and the copy of the minutes

was produced and marked as P.26 and a typed copy as P.26B. And on 23.3.91 the 3rd Respondent brought the emergency provisions without any fresh material. And the counsel submitted that there was no disruption of the supply of essential material to the community and that he has formed the opinion without any material and his discretion was exercised *mala fide*, unreasonably and there were no conditions precedent existing for him to exercise his authority and issue the orders. He submitted the documents 3R1 of 5.10.90, 3R2 of 8.10.90 and 3R3 of 8.10.90. These were material which were effective during the period when the District Court case was pending as the Plaintiff had obtained Enjoining Order against the Petitioners but this order was set aside by the learned District Judge on 9.10.90. The opinion was not exercised properly and the learned Counsel further submitted on 22.3.91 his opinion was based on old material and this was an act of bad faith. And he had no material or basis to exercise his discretion and this was done with the sole idea of keeping the Petitioner out of elected office. He further submitted as the District Court of Gampaha had not granted an Enjoining Order at the second Inquiry there was no possibility in law for the Plaintiff to obtain a subsequent Enjoining Order at a later stage. The 3rd Respondent in his affidavit has stated that he was advised by the Attorney-General that there was a possibility of T. S. Bandara obtaining an Enjoining Order before the conclusion of the District Court case. He submitted that this was not legally tenable.

The learned Counsel submitted that T. S. Bandara with his objections filed on the 18 February 91 filed a copy of the order dated 18.2.91 and it was Gazetted only on 19.2.91 and the public would be entitled to get it only on the 19th. His submission was that this could be given to the said Bandara by the 3rd Respondent or his officials. Therefore he submitted the nexus between the 3rd respondent and Bandara was visible from the commencement. The learned Counsel submitted that this position has not been denied by the 3rd Respondent except to state that he was not aware of the said averment. He further submitted that the 3rd Respondent acted on 3R1, 3R2, and 3R3 on complaints made in October on which the Minister the 3rd Respondent failed to act. He submitted that the 3rd Respondent on 18th of March 1991 allowed the appointment of the Competent Authority to lapse and thereafter he invoked the Emergency Regulations on 22.3.91. He further submitted the conduct

of the 3rd Respondent shows his desire to keep the Petitioner out of office and there was nexus with the defeated Candidate Bandara and his opinion was coloured and not an objective opinion but based on extraneous considerations amounting to *mala fides*.

When one examines the first affidavit of the 3rd Respondent; in paragraph 3 he had admitted paragraphs 1-18, 21 to 26, 28, 29, 31, 32 to 38, 40, 41, 43, 45, 53 and 56. On 8.5.92 he filed another affidavit, deleted and substituted by a fresh averment according to which there was no admission of any averment nor were there express denials except to state that he was unaware, which in my view was a complete change of position. This in my view appears to be a grave shortcoming of his legal advisers who I believe to be the Hon. Attorney-General.

The issue in my view was that one T. S. Bandara obtained an Enjoining Order from the District Court on the 28th September, 1990 which order was served on the Petitioners on 30.9.90 and this order was vacated on 8.10.91. The Enjoining Order effectively curtailed the rights of the Petitioners in performing their duties as Directors of the 7th Respondent Society. The order of the Court of Appeal dated 14.2.91 had the effect of restoring the said Enjoining Order. But the documents filed by the 3rd Respondent were pertaining to a period dated between 5.10.90 and 8.10.90. The Respondent acted on material which related to the period in which the Enjoining Order was in force. From 4.2.90 to 14.2.91 the Petitioners were free to perform their duties without any hindrance till the Court of Appeal on 14.2.91 in effect had restored the said Enjoining Order and directed the District Judge of Gampaha to hold a fresh Inquiry on the question of the Enjoining Order and conclude the Inquiry before 25.2.91. The 3rd Respondent acted on material which did not pertain to the period. I could understand it if the 3rd Respondent acted under the Emergency Regulations prior to the vacation of the Enjoining Order by the District Court on 8.10.90 because he was acting on material on which in his opinion there was, is or is likely to be a disruption in the maintenance of supplies and services essential to the life of the community in the area. But on 3R1, 3R2 and 3R3 there was no material for him to issue an order under the Emergency Regulations appointing the 4th, 5th and 6th Respondents as Competent Authority to perform the functions of the 7th Respondent Society. When he issued the order

on 18.2.91 he did so without any fresh material and without any basis. The 3rd Respondent did not take action on 3R1, 3R2 and 3R3 when the Petitioners were effectively Enjoined by Court. The Court of Appeal directed the District judge to hear the inquiry regarding the Enjoining Order and conclude it before 25.2.91. The Plaintiff T. S. Bandara filed objections and he was able to get a copy of the Order dated 18.2.92 which was signed and issued on 18.2.91 but was published in the Gazette Extraordinary only on 19.2.91. This shows the close nexus between the 3rd Respondent and his Officials with Bandara. The order was issued not on any fresh materials and when the 3rd Respondent's officials were fully aware that the matter had to be concluded before 25.2.91. T. S. Bandara in his affidavit and his petition filed on 18.2.91 took up the position that an Enjoining Order from the District Court should not affect the Petitioners as 4th, 5th and 6th Respondents were appointed as Competent Authority. The Learned District Judge after inquiry refused the issue of an Enjoining Order. There was no Appeal or an Application to Revise the order of 25.2.91. The direction of the Court of Appeal was that the order should be delivered on or before 25.2.91. The averment in para 10 was irrelevant to the issue of the Order under the Emergency Regulations. Smith on "Judicial Review of Administrative Affairs" 4th Edition at page 339 states "If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by disregard of relevant considerations, a court will normally hold that the power has not been validly exercised." The appropriation of the funds or legal expenses cannot under any circumstances have any bearing on the Order issued in terms of the Emergency Regulations (Maintenance of Supplies and Services). This is an irrelevant ground which would have no bearing to effect his opinion that this appropriation was likely to disrupt supplies and services essential to the life of the community

Smith at page 335 states: "The concept of bad faith eludes precise definition, but in relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believed the power to have been conferred. For example a local committee would exercise in bad faith its powers to exclude interested members of the public if it deliberately chose to hold the meeting in a small room. The intention may be to

promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. . .” If the court concludes that the discretionary power has been used for an unauthorised purpose it is generally immaterial whether its repository was acting in good or bad faith. But there will undoubtedly remain areas of administration where the subject-matter of the power and the evident width of the discretion reposed in the decision maker render its exercise almost wholly beyond the reach of Judicial Review. In these circumstances, courts have still asserted jurisdiction to determine whether the authority has endeavoured to act in good faith in accordance with the prescribed purpose. In most instances the reservation for the case of bad faith is hardly more than a formality. But when it can be established, the courts will be prepared to set aside a judgment or order procured or made fraudulently despite the existence of a generally worded formula purporting to exclude Judicial review.”

Wade in “Administrative Law” 6th Edition at page 396 citing Lord MacNaghten states: “It is well settled law that a public body invested with Statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must act within the limits of the authority committed to it. It must act in good faith and it must act reasonably. The last proposition is involved in the second if not in the first.”

Lord Wrenbury stated “A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so; he must in the exercise of his discretion do not what he likes but what he ought. In other words he must by the use of his reason ascertain and follow the course which reason directs. He must act reasonably.”

“With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority. As Lord Hailsham, L.C. said two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.”

In my view the 3rd Respondent did not have any material with him to exercise his opinion in issuing the order appointing 4th, 5th and 6th Respondents as Competent Authority to act for the 7th Respondent Society. His discretion was exercised unreasonably with the idea of helping T. S. Bandara the defeated candidate and who was also the Plaintiff in the District Court Case in Gampaha. He had not acted in good faith or acted reasonably. On the District Judge refusing to grant an Enjoining Order, the Petitioners as the elected members should have been permitted to function in their capacity as Directors of the 7th Respondent Society. There was no possibility of T. S. Bandara obtaining an Enjoining Order from the court. If he was dissatisfied he should have moved in Revision and filed papers in the Court of Appeal and this was not done by T. S. Bandara. The learned Counsel for the 3rd Respondent in his written submissions has stated that there was a possibility of Bandara obtaining from the District Court an injunction. But the 7th respondent in his affidavit has stated that he was advised by the Hon. Attorney-General that Bandara could obtain an Enjoining Order before the case was concluded in the District Court. With all due respect to the Hon. Attorney-General I am of the view that the position taken by him is not legally tenable. This in my view is not legally permissible under the provisions of the Civil Procedure Code. Once an Enjoining Order is refused the Plaintiff cannot seek another Enjoining Order on the same material facts disclosed in his Petition. The Attorney-General has many powers and duties. In the exercise of those powers he is not subject to the direction of any Public Officer or to the control and supervision of courts. It may well be and it is true in the instant case that the Hon. Attorney-General ought not to put into operation the whole machinery at his disposal in order to support what is not legally tenable.

I am of the view the 3rd Respondent without any material has appointed 4th, 5th and 6th Respondents as Competent Authority and continued to issue the said orders with a view to keep the Petitioners out of office. This exercise of his opinion was not in good faith and without any reasonable grounds.

In view of the above reasons I allow the prayer in the amended petition and issue and grant a Writ of Certiorari quashing the orders made by the 3rd Respondent of 18.2.91 and 22.3.91 appointing the 4th, 5th and 6th Respondents as the Competent Authority of the 7th

Respondent and the subsequent orders made under the Emergency (Maintenance of Essential Supplies & Services) Regulation No. 1 of 1989 in respect of the 7th Respondent, and also issue and grant a Writ of Prohibition restraining the 3rd Respondent from exercising powers in terms of the Emergency (Maintenance of Essential Supplies & Services) Regulation No. 1 of 1989 appointing Competent Authority in respect of the 7th Respondent Society.

The delay in delivering this order was due to my recent illness.

I allow the petitioner's application with costs fixed at Rs. 3,500/-.

Writs issued.
