

1978 Present : Samarakoon, C.J., Ismail, J. and
Walpita, J.

P. KARUNARATNE, Petitioner

and

COMMISSIONER OF CO-OPERATIVE DEVELOPMENT
and ANOTHER, Respondents

S.C. Application 992/77

Writ of Certiorari—Award made by Arbitrator under Co-operative Societies Law, No. 5 of 1972—Proceedings to quash such award—Failure to make Arbitrator a party—Fatal irregularity.

Where an application was made for relief by way of Certiorari to quash an award made by an Arbitrator in terms of the Co-operative Societies Law, No. 5 of 1972, and the Arbitrator who made such award was not a party to these proceedings.

Held : That the failure to make the Arbitrator a party was a fatal irregularity and the application must therefore fail.

Cases referred to :

Jamila Umma v. Mohamed, 50 N.L.R. 15.

Soyza v. De Silva, 52 N.L.R. 309.

Dissanayake v. Siyane Adikari Co-operative Stores Union, 60 N.L.R. 140.

A PPLICATION for a Writ of Certiorari.

T. Wickremasinghe, for the petitioner.

K. Sripavan, State Counsel, for the 1st respondent.

T. M. S. Nanayakkara, for the 2nd respondent.

Cur. adv. vult.

August 8, 1978. ISMAIL, J.

The petitioner in these proceedings has applied for a writ of certiorari to quash the findings and the order of the 1st respondent, a certified copy of which has been marked 'X' and filed along with the petition. The 1st respondent who is the Commissioner of Co-operative Development and Registrar of Co-operative Societies has filed his objections and taken up the position that he is not a legal person and as such writ cannot lie against him. He has taken up the further position that his powers had been delegated to T. D. J. Vitharana, Deputy Commissioner of Co-operative Development, and it was he who had made the award which is sought to be quashed in these proceedings, and that since he had not been made a party to these proceedings, the application should be dismissed.

The facts briefly are that one Karunaratne the petitioner had been selected as a temporary watcher on 22.5.72 and by letter of appointment dated 1.6.72 he had been made a temporary watcher under the 2nd respondent. This letter specifies that his hours of duty were from 6 p.m. till 9 a.m. the following day and during week ends from 1 p.m. on Saturday till 9 a.m. the following Monday including the whole of Sunday.

On 10.1.73 he had assumed duty at 6 p.m. and in the early hours of the morning of 11.1.73 he had left the premises unattended without permission and without informing anyone in authority and had returned in about two hours time. During his absence the Co-operative Society building had been burgled and goods had been removed.

In terms of section 58 of the Co-operative Societies Law, No. 5 of 1972, the dispute had been referred to an arbitrator in terms of section 58 of that Law. The arbitrator after due inquiry had made an award against the petitioner in a sum of Rs. 7,614.60 plus costs and interest. The petitioner had thereafter appealed against the award. The hearing of the appeal had been delegated by the 1st respondent to one T. D. J. Vitharana, the Deputy Commissioner of Co-operative Development. After hearing the parties and due inquiry he upheld the award made by the arbitrator with a variation that the amount payable was Rs. 6,714.60 plus interest and costs in a sum of Rs. 200.

Counsel for 1st respondent has submitted to us that the application must fail on two grounds, firstly, that the 1st respondent is not a legal person and in any event there is no award made by the first respondent and therefore cannot be made a party, and secondly, that the Deputy Commissioner Mr. Vitharana who made the award at the hearing of the appeal and which award is sought to be quashed in these proceedings has not been made a party.

In the case reported in 50 N.L.R. page 15, Nagalingam, J. stated—

“The petition before Court for the issue of a writ of certiorari is a document that must be construed having regard to the ordinary meaning attached to the words and language used therein. The officer designated ‘Commissioner for Workmen’s Compensation Claims’ is a particular officer who is distinct from a Deputy Commissioner. On an application such as the present one, it is essential that the party or parties against whom relief is sought must be identified clearly and no room left for uncertainty. In the present application the officer whose order is sought to be quashed

is the Commissioner, but it now transpires that the order complained of was made not by the Commissioner but by the Deputy Commissioner, and the relief must consequently be applied for against the Deputy Commissioner and not the Commissioner himself. The second respondent, the Commissioner, therefore, has been wrongly made a party and the application against him must be refused.

The question whether an amendment of the application should be allowed does arise, but the object of the amendment is to substitute a new party or a wrong party on record and an amendment in these circumstances does not lie and cannot be permitted.

The only other question is whether the application against the first respondent too should be dismissed. If the order complained of cannot be quashed in the absence of the proper party who made that order, then the relief applied for against the first respondent too necessarily fails."

The case reported in 52 N.L.R. 309 followed the dictum of 50 N.L.R. 15 and Gunasekera, J. in the course of his order stated—

"I am unable to agree that the 1st respondent has been wrongly made a party. He is the person who purported to make the award that is in question, and the award cannot be quashed in a proceeding to which he is not a party: cf. *Jamila Umma v. Mohammed, et al.*"

In the case reported in 60 N.L.R. 140, Weerasooriya, J. held that,

"When an application is made for a writ of certiorari by a person against whom an award has been given in proceedings referred to arbitration under the provisions of the Co-operative Societies Ordinance, the arbitrator is a necessary party and must be made a respondent."

In the course of the judgment Weerasooriya, J. states,

"Mr. Vannitamby who appeared for the 1st respondent (the Co-operative Society) took preliminary objection that the arbitrator, though a necessary party, had not been made a respondent to this application, and he relied on *Soyza v. de Silva* (52 N.L.R. 309). As specific relief is sought for in the way of an order quashing the arbitration proceedings and declaring the award of the arbitrator null and void, in my opinion the preliminary objection is entitled to succeed."

In view of these authorities it appears to me that the Deputy Commissioner of Co-operative Development T. D. J. Vitharana who made the award is a necessary party to these proceedings

and the failure to add him as a party respondent is a fatal irregularity. It is therefore not necessary to deal with the other matters referred to in the petition. The application is accordingly dismissed with costs.

SAMARAKOON, C.J.—I agree.

WALPITA, J.—I agree.

Application dismissed.
