

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

Court of Appeal No.
CA (PHC) APN 39/2015
High Court of Colombo Nos.
HC 2441/2005
HC 2440/2005

Liyanarachchige Indika Thusara,
215 A, Mulleriyawa North,
Angoda.

Accused – Petitioner

v.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent.

Before : Malinie Gunarathne J.
: L.T.B. Dehideniya J.

Counsel : Prinath Fernando for the Accused Petitioner
: Varunika Hettige SSC for the Respondent.

Argued on : 25.01.2016

Written Submissions of the Accused Petitioner : Not filled

Written Submission of the Respondent filled on : 19.04.2016

Decided on : 13.05.2016

L.T.B. Dehideniya J.

This is a revision application to revise an order of the Learned High Court Judge of Colombo. The facts of this case are briefly as follows.

The Petitioner was the manager of the Kolonnawa Multi Purpose Co-operative Society Ltd. (MPCS). He was indicted in the High Court of Colombo in case No. 2441/05 on a charge of criminal breach of trust punishable under section 391 of the Penal Code read with section 51 of the Public Property Act No. 12 of 1982 in respect of a stock of flour and retail goods to the value of Rs. 1,427,007/20, and in case No. 2440/05 for a sum of Rs. 2,097,398/88. The trial proceeded and evidence of several witness were led on behalf of prosecution. In the mean time the Kolonnawa MPCS Ltd. had instituted arbitration proceeding and was granted an award in favour of Kolonnawa MPCS. Thereafter, the Kolonnawa MPCS Ltd., through the Commissioner, instituted action in the Magistrate Court to enforce the arbitral award. The Magistrate Court ordered the Petitioner to pay the amount awarded with a default term of 6 months. The Petitioner being failed to pay the amount, default jail term was implemented. The Petitioner raised the objection of Double Jeopardy in the High Court. The Learned High Court Judge, after an inquiry, rejected this objection. The Petitioner says that he, being aggrieved by the said order, has already appealed against it. The Petitioner made an application to the High Court to stay the proceeding until the said appeals are determined was refused by the Learned High Court Judge. The instant revision application is presented to obtain an interim order to stay the proceedings in the two High Court cases until the final determination of the said appeals.

Section 314(1) of the Criminal Procedure Code Act No. 15 of 1979 provides that no person shall be liable to be tried twice for the same offence. The section reads thus;

314. (1) A person who has once been tried by a court of competent Jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remain in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 176 or for which he might have been convicted under section 177.

Section 176 relates to situation where it is doubtful what offence has been committed and section 177 relates to situations where the accused is charged with one offence and it appears in evidence that he committed a different offence. Both these sections do not apply to the instant case. It is the section 314(1) that applies.

To sustain the plea of double jeopardy under section 314(1), certain requirements have to be fulfilled. Firstly the accused person must have been tried and acquitted or convicted by a Court of competent jurisdiction. Secondly that acquittal or conviction must remain in force. Finally it should be the same offence or the same facts for any other offence for which a different charge from the one made against him might have been made.

In the instant case, the Petitioner was brought before the Magistrate Court to implement an arbitral award. The arbitration procedure is a recovery process. A Co-operative Society was provided with this procedure to recover the moneys due to it without delay. Once the award is granted, it can be implemented through the Magistrate Court. There is no charge against the person and the Magistrate does not try any offence

against the person. Therefore, the first requirement of a trial on a charge and a conviction or acquittal is lacking.

There is no conviction or acquittal in an application for implementation of an arbitration award. The Court ordered to pay the amount specified in the award with a default term. The Petitioner opted not to pay and instead he served the default jail term of six months. The second requirement was also not fulfilled.

The third requirement is that it should be the same offence. As I pointed out earlier the Petitioner was not charged in the Magistrate Court for any offence. He is indicted in the High Court for an offence punishable under section 391 of the Penal Code read with section 51 of the Public Property Act. In the Magistrate Court it was only a recovery procedure.

The doctrine of double jeopardy applies only if the second indictment is on the same offense. The section 314(2) of the Code provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection (1) of section 175.

The Counsel for the Respondent brought to our notice that the second offence should be same on both in facts and in law. He cited the case of *Connelly v. Director of Public Prosecution* [1964] 2 AC 1254, [1964] 2 All ER 401 where Lord Devlin held that;

“For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word ‘offence’ embraces both the facts which constitute the crime and

the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law.”

In the present case, the High Court indictment is on a charge punishable under Penal Code and the Magistrate Court proceeding are on an application to implement an arbitral award. The legal characteristics of these two cases are not the same.

Under these circumstances, I see that there is no probability that the judgment of the appeals referred to by the Petitioner will end up in Petitioner’s favour. As such, there is no reason to stay the proceedings in the High Court.

I dismiss this application. No costs.

Judge of the Court of Appeal

Malinie Gunarathne J.

I agree.

Judge of the Court of Appeal