1960 *Present :* **Sinnetamby, J., and L. B. de Silva, J.**

V. R. MURUGESU, Appellant, *and* THE NORTHERN DIVISION AGRICULTURAL PRODUCERS' CO-OPERATIVE UNION LTD., Respondent

S. C. 620/56—D. C. Jaffna, 141

Co-operative society—Dispute between society and an officer of the society—Reference to arbitration—Right of arbitrator to consider evidence other than that adduced by the parties—"Misconduct" of arbitrator—Award of arbitrator—Incapacity of a party to canvass its correctness—Co-operative Societies Ordinance, s. 45 (5)—Co-operative Societies Rules, Rules 38 (8), 38(9), 38(13).

An award made by arbitrators appointed under section 45 of the Co-operative Societies Ordinance in respect of a dispute between a registered co-operative society and an officer of the society touching the business of the society cannot be rendered invalid on the ground that the arbitrators took into account (after notice to the party affected) a document which was not produced by either party. Rule 38 (9) of the Co-operative Societies Rules does not compel an arbitrator to consider only such evidence as has been given, or such documents as have been produced, by either party.

A party is not entitled, in view of the provisions of section 45 (5) of the Co-operative Societies Ordinance, to canvass the correctness of an arbitrator's award. Questions involving the improper admission or rejection of evidence by an arbitrator are matters which do not affect the validity of the award, and are outside the province of the District Judge who is called upon, under Rule 38 (13), to execute the award as a decree of Court.

APPEAL from an order of the District Court, Jaffna.

S. J. V. Chelvanayakam, Q.C., with *C. Shanmuganayagam,* for respondent-appellant.

S. Nadesan, Q.C., with *M. D. Jesuratnam,* for petitioner-respondent.

November 29, 1960. SINNETAMBY, J.—

The petitioner society, who is the respondent to this appeal, having obtained an award in their favour, made by arbitrators appointed under section 45 of the Co-operative Societies Ordinance, applied to the District Court for execution of the award as a decree of that Court, under Rule 38 (13) of the Co-operative Societies Rules. Notice of this application was served upon the appellant, against whom a dispute is alleged to have arisen, and in consequence of which the matter was referred to

arbitration by the Registrar under section 45. The respondent-appellant appeared and objected to the issue of writ. After inquiry the learned District Judge allowed the issue of writ. The present appeal is against that decision and the argument proceeded on the following grounds :—

(1) that the appellant was not an officer of the Society when the dispute arose—at a later stage, learned counsel did not press this objection conceding that he was an officer of the society,

(2) that the dispute did not touch the business of the society, and

(3) that the arbitrators took into account a document which was not produced by either party, and by so doing were guilty of misconduct, which rendered the award invalid.

In regard to the second of these matters, viz. the question as to whether the dispute touched the business of the society, the evidence discloses that at the relevant time the sole importer of onions into this country was the Director of Food Supplies. The petitioner society was formed in order to distribute seed onions among growers of onions and for the purpose of so distributing seed onions they had in the course of their business to purchase the onions. That was a function which they must necessarily have performed in order to achieve the object for which the society was formed. The purchase of onions, therefore, was something which was part of their business. It is in evidence that the Director of Food Supplies, as sole importer, granted a permit to the society to enable it to purchase onions from a society in South India, where there were restrictions against the export of onions, this society being granted permission to sell a limited quantity to Ceylon. The appellant who was the Secretary of the society appears to have imported in his own name from time to time onions from South India under this permit ; and, in regard to the matter in dispute between the parties, he imported the onions in the name of one K. M. Murugesu. The arbitrators held that K. M. Murugesu was only a nominee of the appellant and that in point of fact it was the appellant who imported the onions, got the documents in his name, cleared the goods, and sold them to the public. It was the case for the Co-operative society that in so doing he stipulated a higher figure than was actually recoverable, and that he, thereby, made a secret profit. It is this secret profit, which the society claimed.

The first question, therefore, that arises, apart from the question as to whether the imports of onions was part of the business of the society, is whether this dispute was a dispute between the society and an officer touching the business of the society. It has been held by this Court in *Mohideen v. Lanka Matha Co-operative Stores Society Ltd.* [1], where a dispute arose between the society and one who happened to be a member, that in order to make a dispute to fall within the ambit of Section 45

[1] *(1947) 48 N. L. R. 177.*

of the Co-operative Societies Ordinance, the dispute must be of such a nature as would arise between the society and a member, qua member. In this case it is an officer and not a member, who is concerned. If the dispute is not between an officer in his capacity as an officer and the society, then that dispute was outside the scope of section 45. In this particular case, from the facts, it is clear that the appellant could not have imported these onions in his own personal capacity. It is only in his capacity as an official of the Society, viz. as the Secretary, that he was in a position to indent for the onions under the permit granted to the Society by the Director of Food Supplies. Applying, therefore, the principle enunciated in *Mohideen v. Lanka Matha Co-operative Stores Society Ltd. (supra)* this clearly is the kind of dispute that is contemplated by section 45. It is a dispute that arises between the Society and one of its officers, qua officer, for that officer was not in a position to transact this business except in his capacity as an officer of the Society. There can, therefore, be no doubt that the dispute in question was a dispute that arose between the Society and one of its officers and also touched the business of the Society.

The only matter which counsel really pressed was the third point on which he addressed us fully, namely that the arbitrators took into consideration a document which has been marked A2, in arriving at their decision. He relied partly on the provisions of section 38(9) of the rules which is to the following effect :—

> " The Registrar or the arbitrator or arbitrators shall hear the evidence of the parties to the dispute and their witnesses and upon that evidence and after consideration of all documents produced by either party shall give the decision or award as the case may be, in accordance with justice, equity and good conscience. "

This provision follows immediately after Section 38(8) which states that the Registrar or the arbitrators have the power to administer oaths, hear evidence and require production of books, etc. Obviously, Section 38(9) merely states that in arriving at a decision the arbitrators or Registrar should proceed upon the evidence given before them. It does not necessarily follow that they must limit their findings to the evidence that is produced by either party, and not consider any other evidence, which, but for this provision, they would legally have been entitled to rely upon. In my opinion, Section 9 does not compel the arbitrators or Registrar to consider only such evidence as has been given or documents produced by either party. This document A2 is something which the consignee of goods had to sign at the Customs before taking delivery of the goods consigned and it appears to be signed by the defendant Murugesu. The case for the Society was that it was Murugesu who ordered the goods, took delivery of the goods and eventually disposed of it. The arbitrators have found that Murugesu the appellant had personally paid the bills that were drawn by the foreign consignors

through the Indian Overseas Bank in respect of six bills, that he did so long after the onions had been removed from the Customs, and that the appellant had through a guarantor obtained release of the documents, and had paid a commission to the guarantor. The bills drawn by the foreign company were sent to Murugesu, that is, the appellant, personally. The final conclusion reached by the arbitrators was that if there was any financier it was Murugesu the appellant and none other. At a certain stage of the proceedings after the case for the Society had been closed the arbitrators thought it desirable to look into documents kept by the Customs in regard to these consignments, particularly with a view to finding out who removed the goods. They accordingly despatched a telegram to the Customs asking them to preserve the documents. At this stage the appellant who had taken part in the proceedings withdrew and took no further part. One cannot help making the observation that his withdrawal at this stage was, perhaps, influenced by the fact that he was aware of the contents of the document A2, which would have proved conclusively that it was he who removed onions that were consigned under the permit, and that if confronted with the document A2 he would have been obliged to admit it. We have no doubt that had he continued to participate in the arbitration proceedings, these documents would have been put to him, and he would be asked to admit or deny them. Learned Counsel for the appellant, however, contended that the conduct of the arbitrators in themselves obtaining evidence, which was not submitted to them by either party, amounted to technical misconduct and in support cited the case of *Owen v. Nicholl* [1]. In that case a claim had been referred to arbitration under the provisions of County Courts Act of 1934 and the sole issue to be decided was whether the defendant was in partnership with his son. It was contended that the arbitrator was guilty of technical misconduct in introducing into the proceedings knowledge he had acquired in other proceedings by consulting the bankruptcy file. The County Court Judge held that there was no misconduct on the part of the arbitrator but the Court of Appeal reversed his finding on the ground of technical misconduct. Lord Justice Tucker in the course of his judgment made the following observations :—

> "it would be misconduct for an arbitrator to introduce into the proceedings evidence other than that adduced by the parties."

It would appear that the Registrar, who was appointed arbitrator, had in his capacity as Registrar heard a bankruptcy case in which the son was involved, and had made use of his knowledge so acquired to put certain questions to the father, who was one of the parties to the arbitration proceedings. The Judge held that it was difficult for the Registrar

[1] *Weekly Notes 1948 at page 138 also reported in 1948 1 A. E. R. page 707.*

not to allow his knowledge acquired in his capacity as Judge in the bankruptcy proceedings to influence him in the arbitration proceedings. The basis of the decision seems to be that it is wrong for an arbitrator to use knowledge which he had acquired earlier in other proceedings in respect of one of the parties, even to the extent of questioning him in regard to matters which have not been placed by the other side for his consideration, as to do so would even unwittingly influence him in the decision of the matters before him in the arbitration proceedings itself. The parties were given no opportunity by the arbitrator of commenting on the matters in respect of which the arbitrator had consulted the bankruptcy file, nor were they given an opportunity of leading other evidence in regard to it.

In the present case, the facts are entirely different. The arbitrators knew nothing of the contents of the document which they called for and they had already come to some very definite findings in regard to the activities of the appellant and the capacity in which he indented for these onions. He had indented in his own name and they only wanted to ascertain whether it was he who actually took delivery of the onions from the Customs. There was evidence that he had dealt with the onions quite independently of the documents. The document in question was a public document, and would, in the ordinary course, have been put to the appellant had he continued to participate in the proceedings ; and he would have had an opportunity of commenting on it or leading other evidence. In any event, one cannot say that but for the document the arbitrators would not have come to the conclusions which they eventually reached.

I have dealt with this matter urged by learned Queen's Counsel on behalf of the appellant as it was dealt with fully in the course of the argument ; but, it seems to me, that the appellant is not entitled having regard to the provisions of Section 45(5) of the Co-operative Societies Ordinance to canvass the correctness of the arbitrator's award. The recent judgment of seven Judges of this Court brings it down quite clearly that such matters are outside the province of the District Judge who is called upon to execute the decree. Questions involving the improper admission or rejection of evidence are matters which do not affect the validity of the award and it seems to me that if an arbitrator does not act judicially or acts in excess of jurisdiction the proper remedy is by way of an application for the issue of one or other of the prerogative writs.

L. B. DE SILVA, J.—I agree.

Appeal dismissed.