1949 *Present :* **Nagalingam J. and Windham J.**

WIJETUNGA, Appellant, *and* WEERASINGHE, Respondent

S. C. 115—D. C. (Inty.) Avissawella, 5,235

Co-operative Societies Ordinance—Submission to arbitration—Reference under rule 29—Rule not applicable—Can reference be deemed to be under section 45 of Ordinance?—Chapter 107—Ordinance No. 34 of 1921—Rule 29.

Where under the Co-operative Societies Ordinance a dispute is referred to arbitration under rule 29 of the rules framed under Ordinance No. 34 of 1921, in a matter which does not fall within the scope of that rule, such reference cannot be deemed to have been made under section 45 of the Ordinance (Chapter 107.)

APPEAL from a judgment of the District Judge, Avissawella.

N. E. Weerasooria, K.C., with *E. B. Wikramanayake, K.C.*, and *V. Kandasamy*, for plaintiff appellant.

H. W. Jayewardene, for defendant respondent.

Cur. adv. vult.

March 29, 1949. WINDHAM J.—

The plaintiff-appellants, a co-operative society registered under the Co-operative Societies Ordinance (Cap. 107), appeal against an order of the District Court dismissing their application for a writ of execution for the recovery of Rs. 341·16, which sum was decreed to be due to them from the defendant-respondent by an award or purported award dated November 16, 1947. The learned District Judge dismissed the application on the ground that the award was *ultra vires* in that the dispute was not one that the Registrar had power to refer to arbitration under rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921, under which he purported to refer it and under which the award purported to be made, or under section 45 of the Co-operative Societies Ordinance.

The dispute referred to arbitration was between the plaintiff Society and the defendant. The defendant had been the Treasurer of the Society since June, 1946. On November 17, 1946, by reason of an audit inquiry, he was ordered by the committee of the Society to stop his work as Treasurer as from that date, and a temporary Treasurer was appointed. On July 7, 1947, the committee resolved to recover the amount said to be due from the defendant in a court of law. On July 27, the committee appointed a new permanent Treasurer in the place of the defendant. On August 5, the Registrar referred the dispute to arbitration.

On these facts I think the learned District Judge was correct in holding that when the dispute was referred to arbitration the defendant had ceased to be the Treasurer of the Society, and had thus ceased to be an officer. The defendant ceased to be Treasurer on July 27, 1947, when the new permanent Treasurer was appointed. It remains to see whether in these circumstances the Registrar had power to refer the dispute to arbitration. Now, it has not been seriously contested that the Registrar had no power to make the reference under rule 29 of the Rules, since paragraph (*a*) of that rule, which defines the kind of dispute which may

be referred under the rule, does not cover a dispute to which the Society itself is one of the parties, as it was in the present case. It is contended for the plaintiff Society, however, (*a*) that the Registrar did have power to refer the dispute to arbitration under section 45 of the Co-operative Societies Ordinance (Cap. 107), and (*b*) that although the reference and the award itself purported to be made under rule 29, they must be deemed to have been made under section 45.

With regard to the first contention, section 45 (1) (*c*) provides that "if any dispute touching the business of a registered society arises . . . . (*c*) between the society or its committee and any officer of the society, such dispute shall be referred to the Registrar for decision"; and section 45 (2) (*b*) goes on to provide that the Registrar may thereupon refer it for disposal to an arbitrator. The proper construction of this provision in section 45 (1), in my view, is that if the dispute, when it arose, was a dispute between the society and an officer, then it becomes a dispute referable to the Registrar and by him to an arbitrator, notwithstanding that, before it is referred, the officer has ceased to be an officer. For the section provides that "such dispute" may be referred to the Registrar, and by him to an arbitrator; and the words "such dispute" refer back to the dispute which has arisen between the society and its officer. Thus it is this particular dispute which is referred, and it remains the same dispute even after one of the parties to it, an officer, has ceased to be an officer. Accordingly in the present case, if the dispute arose before July 27, 1947, while the defendant was still an officer of the Society, it was a dispute properly referable under section 45 (1) (*c*) on August 5, although on that date he was no longer an officer but an ex-officer, which term has been held in *Illangakoon v. Bogollagama*[1] to be not included in the word "officer" in section 45 (1) (*c*).

A point was raised before us that on August 5, when the reference to arbitration was made, there was not yet any "dispute" at all which was capable of being referred, whether under rule 29 or under section 45, since the defendant had not yet disputed his liability to pay to the Society the sum which was stated to be the subject matter of the dispute, namely Rs. 706·16. Certainly there was nothing in the oral evidence (which included that of the defendant himself) or the documentary evidence before the learned District Judge to show that the defendant had either admitted or denied his liability to pay the sum claimed. And since the burden was on the plaintiff to show that a dispute had arisen at the time when it purported to be referred to arbitration, he would appear to have failed to discharge that burden. I refer to *Wijayarayana v. General Insurance Co. Ltd.*[2] where the necessity of proving that the claim had been disputed before being referred to arbitration as a "dispute" was emphasized. But since this point was not raised or argued below, I do not propose to base a decision upon it, but will turn to consider the second question which the plaintiff Society must also answer satisfactorily if they are to succeed in this appeal, namely whether it is open to them to argue that the reference to arbitration, and the award, must be deemed to have been made under powers conferred by section 45 of the Ordinance, when the Registrar purported to refer the dispute, and the arbitrator to make his award, under rule 29 of the Rules and not under section 45.

[1] *(1948) 49 N. L. R. 403.* [2] *(1946) 47 N. L. R. 289.*

In *Dakshina Ranjan Ghosh v. Omar Chand Oswal* [1] Sanderson C.J. said,—

"The decision of the learned Sub-ordinate Judge implies the importation of words into the section which cannot be found there. He would read the section as if it were ' in respect of any act purporting to be done by such public officer *bona fide* in his official capacity '. In my judgment it is not legitimate to construe the section by importing into the section words which do not appear in the section ".

In *Abdul Rahim v. Abdul Rahim* [2] there occurs the following passage in the judgment of Daniels and Neave JJ. :—

"The contention urged on behalf of the respondent in this Court is that which was adopted by the Court below, namely, that section 80 has no application unless the act complained of was done in good faith. On the language of this section the question seems to us to admit of no doubt. The section does not require that the act should have been done in good faith. It merely requires that it should purport to be done by the Officer in his official capacity. If the act was one such as is ordinarily done by the Officer in the course of his official duties and he considered himself to be acting as a Public Officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term ' purport '. The motives with which the act was done do not enter into the question at all ".

These cases were followed in *Muhammad Sharif v. Nasir Ali* [3] which was an action for malicious prosecution.

For the reasons given by me earlier in the judgment I would dismiss the appeal with costs.

PULLE J.—I agree.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

1949 *Present :* **Jayetileke S.P.J. (President), Canekeratne J. and Gunasekara J.**

THE KING *v.* G. W. FERNANDO

APPEAL 29 OF 1949 WITH APPLICATION 72

S. C. 4—M. C. Colombo, 21,960

Court of Criminal Appeal—Evidence—Deposition of absent witness—Admissibility—Discretion of trial Judge—Circumstances for reviewing it in appeal.

The discretion of the court, under section 33 of the Evidence Ordinance, to admit in evidence the deposition of an absent witness on the ground that the presence of the witness cannot be obtained without unreasonable delay and expense may be reviewed by the Court of Criminal Appeal when a manifest injustice is disclosed.

[1] (1923) *Indian Law Reports, 50 Calcutta 994.*
[2] (1924) *All India Reporter, 46 Allahabad 851.*
[3] (1930) *All India Reporter, 53 Allahabad 742.*