

1970 . Present : H. N. G. Fernando, C.J., and Alles, J.

D. P. JAYASEKERA and 2 others, Appellants, and
MINUWANGODA CO-OPERATIVE SOCIETY LTD.
and others, Respondents

S. C. 130,67 (F)—D. C. Negombo, 397/Spl.

Co-operative Societies Ordinance—Claim by a co-operative society for moneys due from a member of its committee—Exclusive jurisdiction of the Courts over such dispute—Invalidity of reference for arbitration—Ceylon (Constitution) Order in Council, 1946, s. 88.

Where a co-operative society claims that a member of its committee of management has failed to account for moneys entrusted to him, the jurisdiction to adjudicate upon such a dispute is vested by the Constitution in the

Courts and is not ousted by the provision of the original section 45 of the Co-operative Societies Ordinance which, before the Constitution Order in Council of 1946 came into operation, purported to vest it in an arbitrator. The mere fact that the original section 45 of the Co-operative Societies Ordinance was not amended by a Proclamation under section 83 of the Constitution does not justify an argument that all its provisions continued to be valid despite the fact that some of them are in conflict with over-riding provisions of the Constitution.

A PPEAL from a judgment of the District Court, Negombo.

Bala Nadarajah, for the 1st to 3rd defendants-appellants.

Nimal Senanayake, with *Miss Adela P. Abeyratne*, for the plaintiff-respondent.

Cur. adv. vult.

June 16, 1970. H. N. G. FERNANDO, C.J.—

This is an appeal against an order of the District Judge that the award of an arbitrator appointed under the Co-operative Societies Ordinance be enforced as decree of Court. A Bench of three Judges held in the case of *Karunatilleke v. Abeywira*¹ that a dispute between a society and one of its officers concerning a matter arising from a contractual relationship, such as the entrustment of the society's funds to the officer, is not one which may lawfully be decided by an arbitrator, because the determination of such a dispute involves the exercise of the judicial power of the State.

In the instant case, the persons who had custody of the society's funds were members of the committee of management. Learned Counsel who appeared for the society argued that, even before the Ordinance was amended in 1949, a claim by a society against *its members* for any debt or demand was deemed by the original Section 45 to be a dispute which could be referred for arbitration. He sought on this ground to distinguish the case of *Karunatilleke v. Abeywira*, which in his contention covered only cases of claims by a society against *an officer*. No doubt the judgment in that case did take account of the fact that claims against an officer were not, prior to the amendment of 1949, included in the classes of disputes specified in the original s. 45. But the judgment, brief though it was, did in two passages express doubts whether the original s. 45 had been intended to apply to a claim by a society against its members "not arising by reason of their membership of a society, but arising instead upon transactions involving ordinary contractual rights and obligations".

¹ (1966) 68 N. L. R. 503.

Counsel's contention in the present case is based on the assumption that the original s. 45 did contemplate reference of such claims to arbitration ; and the contention was that, since s. 45 was in operation before Ceylon's present Constitution came into force, references authorised by the original s. 45 are yet valid. But even if that assumption be correct, Counsel's contention is in my opinion unsound.

It cannot be denied that an adjudication upon a claim of this nature does involve the exercise of judicial power, and Counsel quite properly made no such denial. Hence the question is whether, despite that conflict, the exercise of such jurisdiction by an arbitrator can be regarded as valid because s. 48 of the Ordinance conferred that jurisdiction before the Constitution came into operation.

When the Ceylon (Constitution) Order in Council of 1946 was enacted there clearly was contemplation that pre-existing Ordinances did contain provisions which would conflict with provisions of the Order in Council. Accordingly, s. 88 of the Order in Council authorised the Governor to make Proclamations amending, repealing or modifying written law in order to bring such law into conformity with the provisions of the Constitution. Numerous amendments were in fact made in pursuance of this authority ; but the fact that a particular written law was not thus amended cannot in reason have the consequence that the law does not conflict with the Constitution or that it must be regarded as valid despite such conflict.

A single instance suffices to make the position clear. Section 54 of the Courts Ordinance, which formerly provided for the appointment of District Judges and Magistrates *by the Governor* was altered by deleting the reference to the Governor's power of appointment. That alteration was made for the quite obvious reason that the power of appointment of judicial officers was vested by the Constitution in the Judicial Service Commission, and that the alteration was necessary to avoid conflict between s. 54 and the Constitution. But even if (by accident or deliberately) no such alteration had been made in s. 54, the Governor would have ceased to be vested with that power when the Constitution came into operation. Thus the mere fact that s. 45 of the Co-operative Societies Ordinance was not amended by a Proclamation under s. 88 of the Constitution does not justify an argument that all its provisions continued to be valid despite the fact that some of them were not in conformity with over-riding provisions of the Constitution.

Counsel sought also to rely on judgments of this Court, *A. G. Gunaseela v. A. R. Uduagama*¹, *Panagoda v. Budinis Singho*², *Xavier v. Wijeyekoon*³, upholding the validity of the exercise of judicial power by Courts Martial, Workmen's Compensation Tribunals and Revenue Tribunals. I need only say that those judgments were based on special considerations to which they refer, and not on the mere fact that the

¹(1964) 69 N. L. R. 193. ²(1966) 68 N. L. R. 490. ³(1966) 69 N. L. R. 197.

Statutes establishing those tribunals were enacted before the present Constitution came into force. Similar special considerations do not arise in a case where a co-operative Society claims that a member of its committee of management has failed to account for moneys entrusted to him.

To repeat the language of the judgment in *Karunatillake v. Abeywira*, "the liability of the members of the committee in this case arises at the least upon an implied contract, in the nature of agency, and the dispute concerning the existence of this liability and the duty to perform it is an ordinary civil dispute within the traditional jurisdiction of the Courts". The jurisdiction to adjudicate upon such a dispute is vested by the Constitution in the Courts, and that jurisdiction is not ousted by any provision of the Co-operative Societies Ordinance which purports to vest it in an arbitrator.

For the reasons now stated, we made order allowing this appeal, and quashing the order made by the District Judge on 21st March 1967 for the enforcement of the award of the arbitrator.

ALLES, J.—I agree.

Appeal allowed.

