

1949 Present: Nagalingam and Windham JJ.

EKANAYAKA, Appellant, and PRINCE OF WALES  
CO-OPERATIVE SOCIETY, LTD., Respondent

*S. C. 113—D. C. (Inty.) Colombo, 480*

*Co-operative Societies Ordinance—Liquidation of society—Dispute between liquidator and president of society—Reference to arbitration—Award—Application for execution—Power of court to inquire into validity—Chapter 107—Section 40 (1) (d)—Rule 29 of rules under old Ordinance.*

*Held*: (i) The liquidator of a co-operative society does not come within any of the categories referred to in rule 29 (a) of the rules framed under Ordinance No. 34 of 1921, and a dispute to which the liquidator is a party cannot be referred to arbitration under that rule.

(ii) Under section 40 (1) (d) of the Co-operative Societies Ordinance a dispute cannot be referred to arbitration by the liquidator except with the consent of the other party.

(iii) Where application is made to execute an award which is invalid for want of jurisdiction it is open to the executing court to refuse to execute it.

**A**PPPEAL from a judgment of the District Judge, Colombo.

*H. V. Perera, K.C.*, with *G. Thomas*, for the appellant.

*J. R. V. Ferdinands*, for the respondent.

*Cur. adv. vult.*

February 9, 1949. WINDHAM J.—

The defendant-appellant, until March 27, 1947, was the President of the Prince of Wales Co-operative Society, Limited, a society duly registered under the Co-operative Societies Ordinance (Cap. 107). On

<sup>1</sup> (1937) 1 K. B. 664.

that date the registration of the society was cancelled, and it went into liquidation, the plaintiff-respondent being the society in liquidation. On April 8, 1947, the defendant was called upon to pay to the liquidator the sum of Rs. 2,174·50, said to be owing from him to the society. The defendant declined to do so. On September 4, 1947, a document was filed in the District Court, bearing date May 24, 1947, purporting to be an arbitrator's award made upon a reference under rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921. The defendant was ordered, in this document, to pay to the society the said sum of Rs. 2,174·50, together with interest and costs. Eventually, upon application on behalf of the plaintiff society, the document, on the footing that it was an award, was made an order of the court, and writ of execution issued against the defendant. Notice was thereupon served upon the defendant under section 219 of the Civil Procedure Code. To this the defendant objected, arguing that he was not bound by anything in the document purporting to be an award, and that the "award" was a nullity. The learned District Judge, after considering his objections, dismissed them, in an order dated July 22, 1948. From that order the defendant now appeals.

The document purporting to be the award consisted of a printed form in which a number of spaces were left blank to be filled in. Some of these spaces were filled in; others were not. The document reads as follows:—

" AWARD.

Under Rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921.

WHEREAS the following matter in dispute between the Liquidator, Prince of Wales Co-operative Stores Society of \_\_\_\_\_ and Mr. H. B. Ekanayake \_\_\_\_\_ Principal \_\_\_\_\_ surety \_\_\_\_\_ surety, viz., whether the said Mr. H. B. Ekanayake \_\_\_\_\_ owe to the said Prince of Wales Co-operative Stores Society the sum of Rupees 2,174·50 \_\_\_\_\_ of \_\_\_\_\_ together with interest to date and until realisation of the debt in full \_\_\_\_\_ has been referred to me for determination by the Registrar's order dated \_\_\_\_\_ I, having duly considered the matter, hereby direct that the said H. B. Ekanayake do pay to the said Prince of Wales Co-operative Stores Society the sum of Rupees 2,174·50 principal with Rupees \_\_\_\_\_ interest at 6 per cent. to this date, and Rupees 42/- \_\_\_\_\_ costs or Rupees \_\_\_\_\_ in all, together with interest on the principal sum awarded at the rate of \_\_\_\_\_ per cent. per annum until the realization of the sum awarded.

The above amount shall be paid by 15.6.47 \_\_\_\_\_ if it is not so paid, the amount may be realized through a civil court.

Award given in the presence of  
Mr. N. Moonesinghe.

Dated 24.5.47.

Sgd. (illegibly)  
Arbitrator "

I may say at once that the leaving blank of some of the blank spaces in the above document indicates a most slovenly attitude on the part of the arbitrator or of whoever was responsible for completing it, and it would be most disturbing to think that this was the manner in which awards made upon references under the Co-operative Societies Ordinance or Rules were commonly drafted. The points for determination now, however, are first, whether this document was a valid award at all, and secondly, if it was not, whether, since it purported to be an award, the court had power to go behind it and to refuse to treat it as such.

There are three provisions of the Co-operative Societies Ordinance, or the Co-operative Societies Rules, under which it has been argued that this "award" either was or could have been made. First, there is rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921, under which it purports to have been made. These Rules, which now appear at page 561 of Volume I of the Subsidiary Legislation of Ceylon, were kept alive by section 52 of the present Co-operative Societies Ordinance (Cap. 107) which Ordinance repealed and re-enacted with considerable amendment the old Ordinance of 1921 under which the Rules were made. Secondly, there is section 40 (1) (d) of the Co-operative Societies Ordinance (Cap. 107). Thirdly, there is section 41 (h) of the same Ordinance.

The contention that the award was made under section 41 (h) may be disposed of at the outset, nor was it seriously pressed by counsel for the plaintiff. For, quite apart from the fact that the award purports on the face of it to have been made under rule 29 of the Rules, and not under section 41 of the Ordinance, section 41 (h) provides that the Registrar may refer "any subject of dispute between a liquidator and any third party" only "if that party shall have consented in writing to be bound by the decision of the arbitrator". The expression "any third party" in this context can only mean any person other than the Registrar or the liquidator, and would thus include the defendant. It is not even suggested in the present case that the defendant ever consented in writing, or at all, to be bound by the decision of any arbitrator. And in order to enable any party to uphold an award on the footing that the reference was made under section 41 (h), it would have to appear on the face of the award that the legal requirements necessary to its validity under that section, namely, the obtaining of the written consent of the other party, had been complied with. The award cannot therefore be treated as having been made upon a reference by the Registrar under section 41 (h).

With regard to section 40 (1) (d) of the Ordinance, however, it has been argued strongly by counsel for the plaintiff that, notwithstanding that the award purports on the face of it to have been referred under rule 29 of the Rules, and to have been so referred "by the Registrar's order", nevertheless it must be deemed to have been made upon a reference by the liquidator under that section. Section 40 (1) (d) provides that—

"A liquidator appointed under section 39 shall, subject to the guidance and control of the Registrar and to any limitations imposed by the Registrar by order under section 41, have power to—

. . . . .

(d) refer disputes to arbitration and institute and defend suits and other legal proceedings on behalf of the society by his name or office ;”

Now to my mind there is more than one reason why the award in the present case cannot be deemed to have been made upon a reference under section 40 (1) (d). In the first place the award on the face of it does not purport to have been made upon a reference under that section, but under rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921. In the second place it purports in the body of it to be an award upon a reference by the Registrar, which is provided for in Rule 29, and not upon a reference by the liquidator, which is provided for by section 40 (1) (d). No doubt the printed form upon which the award is made was printed when the Ordinance No. 34 of 1921 was still in force, which Ordinance contained no provisions for reference to arbitration corresponding to sections 40 (1) (d) and 41 (f) of the new Ordinance (Cap. 107). But if this fact indicates anything at all (beyond laxness in using obsolete forms) it indicates that the reference was intended to be under the only provision relating to references to arbitration which did exist under the old Ordinance, namely, rule 29 of the Rules, which is preserved under the new Ordinance. Lastly, upon a perusal of sections 40, 41 and 42 of the present Ordinance, I am driven to the conclusion, which was urged by learned counsel for the defendant, that section 40 (1) (d) confers on a liquidator nothing more than that which is the inherent right of any legally competent individual under the Arbitration Ordinance (Cap. 11), namely, the right to refer a dispute to arbitration upon a proper submission of that dispute, that is to say under an agreement with the other side so to refer it. The necessity for making specific legal provision in the case of a liquidator of a co-operative society is to enable him to exercise this right *on behalf of the society*, in the same way as he is given specific power in the same clause to institute legal proceedings on behalf of the society. For a liquidator has no power to act for or bind the society save in so far as such power is statutorily conferred upon him. To place upon section 40 (1) (d) the construction urged by learned counsel for the plaintiff, namely, to hold that it enables a liquidator to refer to arbitration any dispute in which he himself is a party, without the consent of the other party, would be to adopt a construction not only most inequitable, but one entirely inconsistent with the provisions of section 41 (h), which deals specifically with the subject by enacting that such a dispute may be referred by the Registrar, and not even by him save with the written consent of the other party. If the latter's written consent is required even where the dispute is being referred by one who is not a party to it (i.e., the Registrar) how much more must his consent be required to a reference sought to be made by one who is a party to the dispute (i.e., the liquidator). For all these reasons I hold that the award in the present case cannot be deemed to have been made by the liquidator under section 40 (1) (d) of the Co-operative Societies Ordinance (Cap. 107).

There remains the question whether the Registrar had power to make the reference under rule 29 (a) and (b) of the Rules, under which the

award purports on the face of it to have been referred. That rule provides as follows :—

“ 29. (a) Any dispute concerning the business of a co-operative society between members or past members of the society or persons claiming through them, or between a member or past member or persons so claiming and the Committee or any officer shall be referred to the Registrar.

Reference may be made by the Committee or by the society by resolution in General Meeting or by any party to the dispute, or if the dispute concerns a sum due from a member of the Committee to the society by any member of the society.

(b) The Registrar may either decide the dispute himself or appoint an arbitrator, or refer the dispute to three arbitrators, of whom one shall be nominated by each of the parties and the third shall be nominated by the Registrar and shall act as Chairman.”

It is not seriously contended that the Registrar had power, under paragraph (b) of rule 29 to refer the present dispute to an arbitrator ; for it is clear that the dispute is not one which falls within the first part of paragraph (a) of the rule. It appears on the face of the award that the dispute is between Mr. H. B. Ekanayake (the defendant) and the liquidator. Rule 29 (a) relates to disputes between a member or members or a past member or past members, or persons claiming through them, on the one hand, and “ the committee or any officer ” on the other hand. A liquidator falls into none of these categories. He cannot be argued to be an “ officer ” of the society, for as soon as it goes into liquidation the society ceases to have any officers ; nor does he fall within the definition of “ officer ” in section 54 of the Ordinance (Cap. 107) which, in the absence of any definition of that term in the Rules, may be taken to apply to the Rules. For while “ officer ” under that definition includes any person “ empowered under the rules or by-laws to give directions in regard to the business of a society ”, a liquidator derives his powers not under the rules or by-laws but under the Ordinance itself.

Thus it appears on the face of this document purporting to be an award that it was not such an award as could legally be made upon a reference under rule 29, nor indeed (for the reasons I have already given) under section 40 or 41 of the Ordinance. As an award, it is thus bad on the face of it. That being so, ought the learned District Judge to have given effect to it, making it an order of court and allowing consequential execution proceedings upon it ? The learned District Judge held that he had no power to “ go behind ” the award unless it was patent on the face of it that it was irregular. But for the reasons I have given, this award was patently irregular, indeed it was patently *ultra vires*. The learned District Judge held himself bound to enforce and unable to question the validity of the award by reason of the provisions of paragraphs (j) and (k) of rule 29, which read as follows :—

“ (j) Any decision or award of the Registrar shall in every case be final. No decision of an arbitrator shall be set aside by a court except on the ground of corruption or misconduct on the part of the arbitrator.

(k) A decision or award shall on application to any civil court having jurisdiction in the area in which the society operates be enforced in the same manner as a decree of such court.’

But these paragraphs can only apply to a document which is in fact an award, and not to one which on the face of it is not. For an award invalid for want of jurisdiction, such as that in the present case, is no award, and so far from the court’s being bound to act on it, it is the duty of the court, where a party seeks to rely on it, to declare it null and void, or at the least to decline to act on it and to leave the party to bring an action on it. Such is the position in England, where in a case where the validity of an award is doubtful, even though the reference was by consent, it will not be enforced as a judgment, but the successful party will be left to bring an action upon it. (*Vide* Russell on Arbitration and Award, 13th edition, at page 240).

The general position has been clearly laid down in India, where the relevant legislation is identical with that of Ceylon, in *Abdul Ghani v. Anjuman-i-Imdas Qarsa Bahmi Chak No. 127 R.B.*<sup>1</sup> In that case the question arose whether the court was bound to execute an order made by the liquidator of a co-operative society determining a certain sum of money to be the contribution due from the appellant to the assets of the society, where that order was *ultra vires* as being in excess of the jurisdiction conferred on the liquidator under the section of the Act under which he purported to make it. The Act made provision that an order of the liquidator under that section should be enforced by a civil court as if it were a decree of that court, and it made further provision, identical with section 43 of the Co-operative Societies Ordinance (Cap. 107) that, save as otherwise expressly provided, “no civil court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act”. Nevertheless the court on appeal laid down the legal position in the following terms :—

“The question for decision, therefore, is whether the civil court could decline to execute the order of the liquidator passed in the circumstances mentioned above. The answer must depend on whether the liquidator in making the order exceeded the limits of the jurisdiction and, therefore, the order was a nullity, or whether it was an irregular or erroneous order passed in the exercise of his jurisdiction. If the former, the executing court could, indeed it must, refuse to execute it. But if it was the latter the court could not question its correctness and must enforce it . . . . .

It is common ground that the general rule is that an executing court cannot go behind the decree. It must take the decree as it is and must proceed to execute it . . . . . To this general rule, however, there is a well-established exception that if there was a lack of inherent jurisdiction in the court which had passed the decree and for some other reasons, the decree is a nullity, the executing court must refuse to execute it”. The principles set out in the passage which I have quoted, though they were there applied to the case of an order of the liquidator, apply equally, in my view, to the case of an award made without jurisdiction, in particular where, as in the present case, the lack of jurisdiction is due to there having been no power to refer and is patent on the face of the award.

<sup>1</sup> A. I. R. (29) 1942 Lahore 237.

I am unable to discover any decision of the courts of Ceylon directly in point, but the legal position as I have set it out appears to have been tacitly assumed in *Dissanayake v. Jayawardene*<sup>1</sup>, where the appeal was against an order of the District Judge refusing to execute an award made in the appellant's favour upon a reference by the Registrar under section 45 of the Co-operative Societies Ordinance (Cap. 107), his refusal being on the ground that no "dispute" existed between the parties such as could be the proper and only subject-matter of a reference to arbitration under that section. This order was thus in effect a refusal to execute the award on the ground that it was a nullity for lack of jurisdiction, owing to there having been no power in the Registrar to refer to arbitration the matter which he purported to refer. The case was accordingly similar to the present one, and, as I have said, the upholding by this court of the District Judge's refusal to act on the award involved a tacit recognition of the principles which I have held to be applicable.

For the foregoing reasons this appeal must be allowed with costs here and in the court below. The order of the learned District Judge dated July 22, 1948, is set aside, the award dated May 24, 1947, is declared to be null and void, and the respondent's application for writ of execution upon it is dismissed.

NAGALINGAM J.—I agree.

*Appeal allowed.*

