

1951

Present: Gratiaen J. and Gunasekara J.

GOVINDASAMY (Liquidator of the Kattankudy Rahumaniya Textile Workers Co-operative Society), Appellant, and
MOHAMADU IBRAHIM *et al.*, Respondents

S. C. 48 (Inty.)—D. C. Batticaloa, 172 (Special)

Co-operative Societies Ordinance—Cancellation of registration of Co-operative Society—Order made under section 36 (1)—Appointment of liquidator—Point of time when such appointment takes effect—Cap. 107, ss. 36, 37, 39, 40 (1), 45, 46 (2) (t)—Co-operative Societies (Amendment) Act, No. 21 of 1949—Scope of Rule 29 made under s. 37 of Ordinance No. 34 of 1921.

The registration of a Co-operative Society was cancelled by the Registrar under section 36 (1) of the Co-operative Societies Ordinance (Cap. 107). No appeal was taken against the order of cancellation. On the day the order of cancellation was made the Registrar appointed the plaintiff to be the liquidator of the Society and also made at the same time an order under section 36 (4) directing that the books, documents, stock-in-trade and other assets of the Society should be immediately handed over to the plaintiff. Thereafter, a dispute between the plaintiff and the Committee of the Society in regard to a certain asset found due from the Committee to the Society was referred by the plaintiff to the Registrar, and the Registrar, purporting to act under Rule 29 of the rules made under section 37 of Ordinance No. 34 of 1921, referred the dispute to an arbitrator. The reference to arbitration was made by the Registrar before the expiry of two months from the date of the order cancelling the registration of the Society.

Held, that, even if the reference to arbitration could be deemed to have been made in the purported exercise of a power under section 45 read with section 40 (1) of the Co-operative Societies Ordinance as amended by Act No. 21 of 1949, the reference and the award made thereupon would still be *ultra vires* inasmuch as in the case of an order made under section 36 cancelling the registration of a Co-operative Society there could be no duly empowered liquidator of the Society until the expiry of at least two months from the date of the order of cancellation.

APPEAL from an order of the District Court, Batticaloa.

C. Shanmuganayagam, for the plaintiff appellant.—The award is not *ultra vires* as Rule 29 under which the reference was made must necessarily be read in conjunction with the principal Ordinance No. 16 of 1936 (Cap. 107). See *Institute of Patent Agents v. Lockwood*¹. Rule 29 merely prescribes the procedure to be followed in giving effect to the provisions of Cap. 107—section 46 (1) and (2) (t) of Cap. 107. Rule 29 is applicable only in so far as it is not inconsistent with the provisions of Cap. 107—section 52 (2) of Cap. 107; Maxwell on Interpretation, 6th ed., p. 524. Hence reference to arbitration and award must be deemed to be under Rule 29 read with the relevant provisions of Cap. 107, viz., section 40 (1) (d) and 45 (1) (b). See section 17 of the Interpretation Ordinance; also *Canagasabai v. Kondavil Co-operative Stores*².

¹ (1894) A. C. at 360.

² (1949) 50 N. L. R. 465

The Co-operative Societies (Amendment) Act, No. 21 of 1949, is retrospective in regard to section 40 (1) (d), which is declaratory in effect—*Attorney-General v. Theobald*¹. In the alternative, even if it be considered not retrospective, Act No. 21 of 1949, furnishes a legislative interpretation of the earlier principal Ordinance, Cap. 107, in regard to section 40 (1) (d) (*Grill v. General Screw Collier Co.*²), and the liquidator represents the Society in section 45 (1) (b) of Cap. 107 (*Waterhouse v. Jamieson*³). Hence section 40 (1) (d) of Cap. 107 must be interpreted in the light of the later amendment Act.

H. V. Perera, K.C., with *C. Renganathan* and *A. Nagendra*, for the defendants respondents.—The award is *ultra vires* as the reference by the liquidator of the dispute between himself and the defendants who were members of the Society to arbitration was on the fact of it made under Rule 29 which manifestly does not provide for reference by a liquidator. Any dispute to which a liquidator is a party can be referred to arbitration only under section 41 (h) of Cap. 107 with the consent of the other party. Section 40 (1) (d) merely gives the liquidator general authority to act for the Society. (*Ekanayaka v. Prince of Wales Co-operative Society, Ltd.*⁴) The liquidator having purported to exercise powers under Rule 29 cannot subsequently be heard to claim that he had jurisdiction to act under a different provision of the law—*Illangakoon v. Bogallagama*⁵; *Wijetunge v. Weerasinghe*⁶. In any event the liquidator could not have made a valid reference of the dispute to arbitration until the expiry of two months from the date of the cancellation of the registration of the Society under section 36.

C. Shanmuganayagam in reply.—Intention of the Legislature in enacting Cap. 107 was to provide for compulsory arbitration as far as members of the Society were concerned. The term “third party” in section 41 (h) connotes persons other than those mentioned in section 45, such as creditors—*Royal London Mutual Insurance Society v. Barret*⁷.

Cur. adv. vult.

April 18, 1951. GUNASEKARA J.—

The plaintiff-appellant claims to be the liquidator of a Co-operative Society the registration of which was cancelled under section 36 of the Co-operative Societies Ordinance (Cap. 107), and the nine defendants are the persons who formed the Society's committee at the time when the Registrar of Co-operative Societies made the order under section 36 (1). It is contended for the defendants-respondent that if the plaintiff was validly appointed under section 39 to be the liquidator of the society, the appointment was at any rate in abeyance until the order cancelling the registration took effect. This order and the appointment in question were both made on December 5, 1947, and it appears that no appeal was taken against the order. The Registrar also made at the same time an order under section 36 (4) directing that the books, documents,

¹ (1890) Q. B. D. 557. ⁶

² (1866) L. R. I. C. P. 611.

³ (1870) L. R. Sc. & Div. A. C. Vol. 2, p. 29.

⁴ (1949) 50 N. L. R. 297.

⁵ (1948) 49 N. L. R. 403.

⁶ (1949) 51 N. L. R. 229.

⁷ (1928) Ch. at 415.

stock-in-trade and other assets of the society should be immediately handed over to the plaintiff. The plaintiff says that after he took charge of the books he found that the balance sheet showed an asset of Rs. 3,818.18 as due from the committee to the society, and he asked the committee to make good the money but they refused to do so and he referred the matter to the Assistant Registrar. On January 27, 1948, the Assistant Registrar, who had been duly vested under section 2 with the Registrar's powers under section 45, purported to refer this dispute to an arbitrator for decision as a dispute that had arisen between the plaintiff as liquidator and the nine defendants. The reference purports to be made under rule 29 of the rules made under section 37 of the repealed Ordinance No. 34 of 1921, which are continued in force by section 52 of the present Ordinance (Cap. 107) in so far as they are not inconsistent with its provisions. The award made in pursuance of the Assistant Registrar's reference directed the first to seventh defendants to pay to the plaintiff as liquidator of the society a sum of Rs. 3,818.18, and the plaintiff applied to the District Court for execution of the award by the issue of a writ. This application was originally allowed by the District Court, but upon an appeal to this Court by the present respondents the case was sent back with a direction to the learned District Judge to ascertain the circumstances in which the reference was made and then to decide whether the award was *ultra vires* or not. After the further hearing that was ordered by this Court the learned District Judge has now held that the award was *ultra vires* and has made order refusing the plaintiff's application for a writ. Against this order the plaintiff appeals.

The power given to the Registrar by rule 29 to refer disputes to arbitrators relates only to disputes "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." As was held in *Ekanayaka v. Prince of Wales Co-operative Society, Ltd.*¹, a liquidator falls into none of these categories. It follows that upon the face of it the reference was not one that the Registrar could make in the exercise of any power that was conferred upon him by rule 29.

Mr. Shanmuganayagam contends, however, that although the reference cites only rule 29 it must be regarded as having been made under that rule, read with section 40 (1) and section 45, and that the Registrar's power to make the reference is derived from these two sections while the rule merely prescribes the mode of appointing an arbitrator and the procedure to be followed in the subsequent proceedings. His argument is as follows: Ordinance No. 34 of 1921 did not itself empower the Registrar to decide disputes or to refer them to an arbitrator. Before the enactment of Cap. 107 that power was derived solely from rule 29, which was made under section 37 of Ordinance No. 34 of 1921. That section enacted that such rules may—

"provide that any dispute touching the business of a registered society between members or past members of the society or persons claiming through a member or past member, or between a member

or past member or persons so claiming and the committee or any officer, shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators, and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators;”—Section 37 (2) (s).

The corresponding provision in Cap. 107, which is section 46 (2) (t), enacts merely that such rules may—

“ prescribe the mode of appointing an arbitrator or arbitrators, and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators; ”

The rule-making authority is no longer empowered to legislate for the other purposes specified in section 37 (2) (s) of the repealed Ordinance. Instead, the present Ordinance itself now makes provision for those purposes and, in section 45, re-enacts with amplification the provisions of rule 29 that empower the Registrar to refer disputes to arbitrators. Consequently those provisions of rule 29 are no longer operative and only so much of the rule continues in force as deals with the matters of procedure specified in section 46 (2) (t). Therefore, it is contended, the Assistant Registrar's citation of rule 29 must be understood to be a citation of only so much of the rule as is in operation and he must be taken to have made the reference under the only provisions of law which empower him to refer a dispute to an arbitrator, notwithstanding that he has purported to make it “ under the authority given in rule 29 ”; in so far as this rule is cited as the source of the power that is exercised the citation is mere surplusage, for the rule gives no such power. It is further contended that such a reference as the one in question can lawfully be made under section 45 read with section 40 (1) of Cap. 107 as amended by the Co-operative Societies (Amendment) Act, No. 21 of 1949, and that although the amending Act came into force only on May 24, 1949, it is retrospective in operation.

The question whether a reference that purported to be made under rule 29 could be deemed to have been made under section 45 was considered in *Illangakoon v. Bogollagama*¹ and again in *Wijetunga v. Weerasinghe*², and it was held in each of those cases that a party could not be heard to argue that the reference and award, having been shown to be *ultra vires* rule 29, must be deemed to have been made under section 45. These decisions perhaps do not cover precisely the point raised by Mr. Shanmuganayagam, for they assumed that the provisions of rule 29 which empowered the Registrar to refer certain disputes to arbitration were still in force, and their effect appears therefore to be that the Registrar having purported to exercise a power that he had under one provision of law could not, when it was found that he had exceeded that power, be deemed to have exercised a power that he has under another provision.

¹ (1948) 49 N. L. R. 403.

² (1949) 51 N. L. R. 229.

The provisions of sections 40 and 45, as amended by Act No. 21 of 1949, which are relied on by Mr. Shanmuganayagam read as follows:

40. (i) 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 for arbitration under section 45 any dispute of any description mentioned in that section (references therein to the society being construed as references to the liquidator), and institute and defend suits and other legal proceedings on behalf of the society by his name or office;

45. (1) If any dispute touching the business of a registered society arises

(b) between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer or employee of the society, whether past or present, or any heir or legal representative of any deceased officer or employee;

such disputes shall be referred to the Registrar for decision

(2) The Registrar may, on receipt of a reference under sub-section (1)—

(a) decide the dispute himself, or

(b) refer it for disposal to an arbitrator or arbitrators

It is contended that under section 40 (1) a dispute between a liquidator and members or past members may be referred by the liquidator to the Registrar for arbitration under section 45, and the Registrar may thereupon in terms of section 45 (2) refer the dispute to an arbitrator for disposal, and that is what happened in the present case.

This argument implies that at the time when the plaintiff referred to the Registrar his dispute with the defendants he was vested with a liquidator's powers under section 40 (1). Section 39, which empowers the Registrar to appoint a person to be the liquidator of a society, provides that he may make such appointment "where the registration of a society is cancelled under section 36 or section 37." In the latter case it seems clear that a person appointed "to be the liquidator" can assume the functions of his office and exercise the powers of a liquidator as soon as the order of cancellation is made, for section 37 itself enacts that "every such order shall take effect from the date thereof". Where, however, the registration of a society is cancelled under section 36 the order of cancellation made by the Registrar cannot take effect until the expiry of a period of at least two months from the date of the order, within which period any member of the society may in terms of sub-section (2) appeal from such order to the Minister. Sub-section (3) provides that where no appeal is presented within two months the order shall take effect on the expiry of that period, and that where an appeal is presented that order shall not take effect until it is confirmed. It seems to follow that where the order is reversed in appeal it does not take effect at all and the

case is not one " where the registration of a society is cancelled under section 36 ". In the present case, where no appeal was taken, the order took effect only on the expiry of two months from December 5, 1947. It seems to me that until the expiry of that period there could be no duly empowered liquidator of the society.

This view is supported by the circumstance that sub-section (4) of section 36 provides that where the Registrar cancels the registration of a society under sub-section (1) he may make such order as he may think fit for the custody of the books and documents and the protection of the assets of the society until the order cancelling registration takes effect or until such order is reversed in appeal by the Minister. (The last eleven words were added by the amending Act.) There is no provision empowering the Registrar to make a special order for the custody of the books and documents and the protection of the assets of the society where he cancels its registration under section 37. Such a provision is not necessary in the case of a cancellation under that section for the reason that under section 40 (1) (i) the liquidator, as such, has power to " take possession of the books, documents and assets of the society ", and a person appointed to be the liquidator can assume that office on the very day on which the order of cancellation is made. The reason why it is necessary in the case of a cancellation under section 36 can only be that in the interval between the making of the order of cancellation and its taking effect or its reversal in appeal there can be no duly empowered liquidator.

The provisions of sections 38 and 39 regarding the vesting of the society's privileges and property in the liquidator when the order of cancellation takes effect also tend to support the view that that is the earliest point of time at which a person appointed to be the liquidator can assume the functions of his office. Section 36 provides that the society shall cease to exist as a corporate body from the date on which the order of cancellation takes effect, provided that any privileges conferred on the society under the Ordinance shall be deemed to be vested in any liquidator or liquidators appointed by the Registrar; and section 39, as amended by the Act of 1949, provides that all the property of the society shall vest in the liquidator or liquidators on the date on which the order of cancellation under section 36 or section 37, as the case may be, takes effect.

In the present case what purports to be a reference to arbitration was made by the Assistant Registrar on January 27, 1948, before the expiry of two months from the date of the order of cancellation made under section 36 (1). It appears therefore that the plaintiff was not vested with the powers of a liquidator when he referred to the Assistant Registrar his dispute with the defendants. His appointment under section 39 was no more than a dormant appointment that could not become effective unless and until the cancellation of the society's registration took effect; and the dispute was one to which he was a party not as a liquidator appointed under section 39 but in a different capacity; namely, as a person empowered under section 36 (4) to take charge of the books, documents and stock-in-trade and other assets of the society

until the order of cancellation should take effect or be reversed. In these circumstances even if the reference to arbitration could be deemed to have been made in the purported exercise of a power under section 45 read with section 40 (1) of the Ordinance as amended by the Act of 1949, the reference and the award made thereupon would still be *ultra vires*. It is therefore unnecessary to consider the further question whether Act No. 21 of 1949 is retrospective.

I would dismiss the appeal with costs.

GRATIAEN J.—I agree.

Appeal dismissed.

