

1961

Present : Weerasooriya, J., and L. B. de Silva, J.

THE UDUWA CO-OPERATIVE STORES SOCIETY LTD., Appellant,  
and UKKU AMMA *et al.*, Respondents

S. C. 401—D. C. Kandy, 2143/X

*Co-operative Societies Ordinance (Cap. 107), as amended by Act No. 21 of 1949—Sections 45 (1), 45 (2) (b), 46 (1)—Dispute between registered society and heirs of a deceased officer—Arbitration proceedings—All the heirs need not be made parties—Reference does not require consent of both parties to the dispute—Award of arbitrator—Procedure for its enforcement—Validity of Rule 38 (13).*

A reference of a dispute under section 45 (1) of the Co-operative Societies Ordinance need not be in the form of an agreed statement signed by both parties to the dispute. A reference made *ex parte* by the committee of the society would be valid.

Rule 38 (13) made under section 46 (1) of the Co-operative Societies Ordinance and enabling an award to be enforced in the same manner as a decree of court is not *ultra vires*.

In a dispute between a registered co-operative society and the heirs of a deceased officer of the society, all the heirs need not be made respondents to the arbitration proceedings. Section 45 (1) (c) of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949) specifically provides for the reference of a dispute arising between a registered society and *any* heir of a deceased officer.

**A**PPEAL from an order of the District Court, Kandy.

*E. B. Wikramanayake, Q.C.*, with *C. R. Gunaratne*, for petitioner-appellant.

*H. W. Jayewardene, Q.C.*, with *A. M. Ameen*, for respondents.

*Cur. adv. vult.*

January 25, 1961. WEERASOORIYA, J.—

One M. P. Herat, who was the treasurer of the appellant society (The Uduwa Co-operative Stores Society Limited) died on the 28th February, 1955. At the time of his death there was due from him to the Society a sum of Rs. 2,420.22 cents being the balance of moneys received by him on behalf of the Society and not accounted for. He left as his heirs his widow, who is the 1st respondent, and five children, four of whom are the 2nd to the 5th respondents. The other child is said to be a minor and is no party to these proceedings.

On the 12th May, 1955, the committee of the Society referred for decision under section 45 (1) of the Co-operative Societies Ordinance, as amended by the Co-operative Societies (Amendment) Act, No. 21 of 1949, a dispute said to have arisen between the Society and the respondents in regard to their alleged liability, as the heirs of the deceased treasurer, to pay to the Society the said sum of money. The dispute was

thereupon referred in terms of section 45 (2) (b) for disposal by an arbitrator, who in due course made an award directing the respondents jointly and severally to pay to the Society the sum of Rs. 2,420.22 cents.

On the 15th June, 1956, the appellant filed the award in the District Court of Kandy and moved by way of summary procedure to have it enforced as a decree of Court. Thereafter, on an order *nisi* entered by the Court, the respondents appeared and filed a statement setting out various grounds against the appellant's application being allowed. But as they had not filed any affidavit in support of those grounds, they were informed by the Additional District Judge that they should state orally their objections to the enforcement of the award, and that he would proceed to inquire into those objections. The proctor for the respondents then called the 1st respondent as a witness and elicited from her certain objections to the validity of the award. On a consideration of these objections the Additional District Judge discharged the order *nisi* and dismissed with costs the application of the appellant to have the award enforced as a decree of Court. From this order the appellant has appealed.

One of the objections taken by the 1st respondent was that her consent had not been obtained to the arbitration proceedings and that she was not a party to the reference of the dispute. This objection was upheld by the Additional District Judge on the strength of the opinion of my Lord the Chief Justice in *Don Nereus v. Halpe Katana Co-operative Stores Ltd.*<sup>1</sup>, that the proper way in which a dispute should be referred for decision under section 45 (1) of the Co-operative Societies Ordinance is "to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute". The Additional District Judge also took the view (although the point was not specifically raised in the form of an objection by the 1st respondent) that Rule 33 (13) made under section 46 (1) of the Co-operative Societies Ordinance, and which provides for the enforcement of an award as a decree of Court, is *ultra vires*. This finding was also based on an opinion to that effect expressed by my Lord the Chief Justice in the same case. But in regard to these opinions, it should be mentioned that L. W. de Silva, J., who was the other member of the Bench which heard that case, while concurring in the order allowing the appeal, stated that he did so only on the ground that there was a breach of a rule of natural justice in that the appeal filed against the award of the arbitrator was dismissed without the appellant having been given a hearing; and he added that since the procedure to be followed in referring a dispute to the Registrar for decision in terms of section 45 of the Co-operative Societies Ordinance was not a point which was argued before them, he was refraining from expressing an opinion on that matter. If I may say so with respect, the two opinions of my Lord the Chief Justice to which I have referred cannot, therefore, be said to form part of the decision in that case.

<sup>1</sup> (1956) 57 N.L.R. 595.

In *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath*,<sup>1</sup> which was an appeal specially reserved for hearing before a Bench of five Judges in view of the decision in *Don Nereus v. Halpe Katana Co-operative Stores Ltd.* (*supra*), the majority of the Bench expressly dissented from the opinion of my Lord the Chief Justice that Rule 38 (13) is *ultra vires*. They would also appear to have dissented from the other opinion expressed by my Lord the Chief Justice that a reference of a dispute under section 45 (1) of the Co-operative Societies Ordinance should be in the form of an agreed statement signed by both parties to the dispute. For they upheld as valid the award of the arbitrator notwithstanding that the reference in that case had been made *ex parte* by the committee of the society (a fact which I have verified from the record). Palle, J., who delivered the majority judgment, pointed out that the procedure to be followed was already set out in Rule 38 (13), which provides for a reference by, *inter alia*, the committee of the society concerned.

At the time when the order appealed from in the present case was made, *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath* case had not yet been decided by this Court. In view, however, of the majority judgment in that case, the finding of the Additional District Judge that the award in favour of the appellant is not enforceable as a decree of Court cannot be sustained on the grounds stated by the learned Judge.

At the hearing of the appeal Mr. Jayewardene for the respondents took two further objections, neither of which had been stated by the 1st respondent at the inquiry. One objection is that no dispute is shown to have *arisen* between the Society and the respondents (in the sense that a demand for payment was made by the former and repudiated by the latter) prior to the reference of the alleged dispute for decision under section 45 (1) of the Co-operative Societies Ordinance, and, therefore, the reference was invalid and all the steps subsequently taken under section 45 were of no force or avail in law. Paragraph 5 of the affidavit filed by the president of the appellant Society contains, however, a categorical statement that after the death of the deceased treasurer a dispute arose between the Society and the respondents as to what sum of money was in his hands as treasurer of the Society and what sum the respondents as his heirs should pay the Society. No evidence to the contrary was adduced by the respondents at the inquiry. In my opinion this objection fails. The other objection is that since the dispute, if any, involved all the heirs of the deceased, all of them should have been made respondents to the arbitration proceedings. I do not think that this objection is tenable seeing that section 45 (1) (c) of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949) specifically provides for the reference of a dispute arising between a registered society and *any* heir or legal representative of a deceased officer or employee.

<sup>1</sup> (1957) 59 N.L.R. 145.

The order dismissing with costs the application of the appellant for the enforcement of the award as a decree of Court is set aside. The record will be returned to the District Court with a direction that the award be enforced as a decree of that Court. The respondents will pay the appellant the costs of this appeal and also a sum of Rs. 105 fixed by the Additional District Judge as costs of the inquiry in the District Court. In view of this order I wish to advert to a matter which was incidentally discussed at the hearing of the appeal without, however, any argument being addressed to us on the point, namely, whether in the enforcement of the award as a decree of Court all the property of the respondents which falls within the description of "property" in section 218 of the Civil Procedure Code is liable to be seized and sold in realisation of the amount due under the award, or only such property as came into their hands as the heirs of the deceased. The question is not one which arises on this appeal. It may or may not arise in the course of the execution proceedings that will take place as a result of the award being enforced, and is reserved for decision if and when it does arise.

L. B. DE SILVA, J.—I agree.

*Appeal allowed.*

