

1955

Present : Gratiaen J., de Silva J. and Fernando J.

D. C. JAYASINGHE, Appellant, and BORAGODAWATTA  
CO-OPERATIVE STORES, Respondent

S. C. 181—D. C. Negombo 16,248

*Co-operative Societies Ordinance (Cap. 107)—Section 46 (2) (f)—Award of arbitrator—  
Procedure for its enforcement—Civil Procedure Code, s 224.*

When a party makes application to Court to enforce an arbitrator's award under the provisions of the Co-operative Societies Ordinance notice must first be issued to the party against whom the award is sought to be enforced. In such a case an *ex parte* application under section 224 of the Civil Procedure Code is inappropriate.

*Kandy Co-operative Urban Bank v. Senanayake* (1937) 39 N. L. R. 352, not followed.

**A**PPEAL from an order of the District Court, Negombo. This appeal was reserved for adjudication by a Bench of three Judges upon a reference made by Palle J. (Weerasooriya J. agreeing) in the following terms :—

“ In this action a Co-operative Society sought to enforce an award in its favour against two debtors. The Proctor for the Society filed a motion on the 28th June, 1951, together with the award, and asked that a writ of execution be issued. The motion was allowed *ex parte* on the 23rd July, 1951, and thereafter notices were issued on the debtors to appear for examination under section 219 of the Civil Procedure Code. The 2nd debtor who is the appellant filed an affidavit dated 3rd December, 1951, in which he stated that he was not possessed of any property excepting his share capital in the Society. He was later examined and he undertook to furnish particulars of deeds by which he had sold certain properties.

“ On the 7th October, 1952, the Society moved to take out writ for the amount of the award and costs. Notice was then ordered to be issued and on the 14th May, 1953, the appellant filed an affidavit stating that, since the first application for writ in June, 1951, the Society had failed to exercise due diligence to procure satisfaction of the decree and he specifically pleaded the benefits of section 337 of the Code. Pending inquiry into the objections raised by the appellant, the Society appears to have been advised, in view of the case of *Barnes de Silva v. Galkissa*

*Wattarappola Co-operative Stores Society*<sup>1</sup> which was decided on the 18th February, 1953, that a fresh application by way of summary procedure should be made to enforce the award. Accordingly the Society filed a petition and affidavit and prayed for an order nisi on the debtors to shew cause. On the 8th September, 1953, the appellant showed cause by affidavit and when the matter eventually came for inquiry on the 17th June, 1954, learned Counsel who appeared for the Society moved to withdraw the application for order nisi and intimated to court that he would support his application for writ on the original motion of 28th June, 1951. Having heard counsel the learned District Judge allowed the application for writ and the 2nd debtor, Don Carolis Jayasinghe, now appeals from this order.

“ It is submitted on behalf of the appellant on the authority of *Barnes de Silva's case (supra)* that unless the award was sought to be enforced either by a regular action or by summary procedure the court had no jurisdiction to order the issue of writ and that the fact that the appellant allowed himself to be examined under section 219 of the Code did not and could not have the effect of conferring a jurisdiction which the court did not have. The Society's contention was two-fold. First, that *Barnes de Silva's case (supra)* did not lay down that, unless the procedure indicated therein was followed a court would exceed its jurisdiction in issuing a writ of execution to enforce an award. It was also argued that the jurisdiction of the court was not dependent on the applicant following either a regular or summary procedure and the Society relied on the case of *Kandy Co-operative Urban Bank v. Senanayake et al.*<sup>2</sup> in which it was held that there was no legal requirement that notice of an application to execute an award made under the Co-operative Societies Ordinance should be given to the party affected and that the position of a person against whom an award has been given differs in no way from that of judgment debtor under a decree. This case does not appear to have been cited during the argument in *Barnes de Silva's case (supra)*. As the two cases cited are of equally binding authority and cannot be reconciled we have been invited by counsel on both sides to refer the present appeal for decision by a fuller court. We have also been informed that there are pending other cases in which the same point has been raised.

“ Let this case be submitted to His Lordship the Chief Justice for directions as to the constitution of the Bench to hear this appeal.”

*H. W. Tambiah*, with *P. Somatilakam* and *H. I. de Silva*, for the 2nd debtor-appellant.

*E. R. S. R. Coomaraswamy*, with *Daya Perera*, for the respondent.

*Cur. adv. vult.*

June 3, 1955. GRATIAEN J.—

This appeal was referred to a Bench of three Judges in view of a conflict of authority as to the procedure to be followed for the enforcement of a purported decision or award under the provisions of the Co-operative

<sup>1</sup> (1953) 54 N. L. R. 326.

<sup>2</sup> (1937) 39 N. L. R. 352.

Societies Ordinance. Section 46 (2) (f) empowers the appropriate authority (namely the Minister of Food and Co-operative Undertakings) to make statutory rules for, *inter alia*, "the enforcement of decisions of the Registrar or the award of arbitrators", and the relevant rule is in the following terms :—

"A decision or an award shall on application to any civil Court having jurisdiction in the area in which the Society carries on business be enforced in the same manner as a decree of such Court."

In *Kandy Co-operative Urban Bank v. Senanayake*<sup>1</sup> a Bench of two Judges had ruled that there was no legal requirement that notice of such an application should be issued to the party against whom it was sought to be enforced. It was also decided that an *ex parte* application, substantially in the form prescribed for the execution of a decree of Court under Section 224 of the Civil Procedure Code, would suffice to invoke the jurisdiction of the Court.

In the later case of *Barnes de Silva v. Galkissa Wattarappola Co-operative Stores Society*<sup>2</sup> however, a Bench of two Judges ruled that Section 224 was inappropriate to the preliminary application intended in due course to secure the enforcement of an "extra-judicial decision which a Court of law was empowered, upon proof of its validity, to recognise and enforce as if it were a judicial decree". The judgment continues at page 328 :—

"The rule made under Section 46 (2) (f) of the Co-operative Societies Ordinance does not lay down the procedure for making such applications, but it is the clear duty of a Court of law whose machinery as a Court of execution is involved to satisfy itself, before allowing writ to issue, that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance. In that event alone would the Court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule, of enforcement as if it were a decree of Court. To achieve that end, a person seeking to enforce an award should be required to apply either in a regular action or at least by petition and affidavit (in proceedings by way of summary procedure) setting out facts which prove that the purported award is *prima facie* entitled to such recognition. The Court should in the latter event enter an order *nisi* or interlocutory order granting the application, and notice thereof should be served on the opposite party so that he may be given an opportunity of showing cause against the proposed enforcement of the award. Then, and only then, would the Court be justified in permitting execution proceedings under the Civil Procedure Code."

Having considered the matter afresh, we are satisfied that the rule laid down in this later decision is correct, and we respectfully think that the earlier authority (in which the Court did not enjoy the advantage of an argument at which both parties were represented) ought not to be followed.

<sup>1</sup> (1937) 39 N. L. R. 352.

<sup>2</sup> (1953) 54 N. L. R. 326.

In our opinion, the most convenient and satisfactory procedure to be followed would be for a party seeking to enforce an award to make his preliminary application for recognition of the award by way of summary procedure on the lines indicated in *Barnes de Silva v. Galkissa Wattarappola Co-operative Stores Society (supra)*.

The principle involved is one of substance and not merely of form. Justice requires that a party who invokes the aid of a Court to obtain the enforcement of an extra-judicial decision purporting to grant him relief against someone else should proceed in two stages: (1) he must in the first instance place sufficient material before the Court to establish that the decision in question had been validly made by a person vested with jurisdiction over the dispute; and (2) it is only after he has obtained judicial recognition of the extra-judicial decision that he may proceed to take steps to have it carried into execution. It would be quite improper for the Court to grant final recognition to an extra-judicial decision without giving the party alleged to be affected by it an opportunity of challenging its validity.

Applying these principles to the facts of the present case, we are satisfied that the learned Judge should not have ordered execution of the arbitrator's award because the respondent Society had placed no evidence before him to establish its validity. The application was therefore irregular *ab initio*. We accordingly set aside the order under appeal, and send the case back to enable the Society to make a proper application by way of summary procedure, if it so desires, in accordance with the procedure laid down by this Court in *Barnes de Silva v. Galkissa Wattarappola Co-operative Stores Society (supra)*. The appellant is entitled to the costs of the appeal and of the inquiry in the Court below.

DE SILVA J.—I agree.

FERNANDO J.—I agree.

*Order set aside.*

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