

1958 Present: Weerasooriya, J., and Sansoni, J.

PUNCHINONA, Appellant, and GONAGALA CO-OPERATIVE STORES SOCIETY, LTD., Respondent

*S. C. 28—D. C. (Inty.) Balapitiya, 60 Special*

*Co-operative Societies—Dispute between a Society and heirs of a deceased officer—Reference to arbitration—Reference under rule 29 framed under s. 37 (2) of Ordinance No. 34 of 1921—Enforceability of award—Ordinance No. 16 of 1936 (Cap. 107), ss. 45, 46, 52 (2)—Act No. 21 of 1949—Act No. 17 of 1952.*

A dispute between a co-operative society and an heir or legal representative of a deceased officer or employee was not referable to arbitration under Rule 29 of the rules framed under section 37 (2) of the Co-operative Societies Ordinance, No. 34 of 1921. Such a reference is not rendered valid by the provisions of section 45 of the Co-operative Societies Ordinance, No. 16 of 1936 (Cap. 107), as amended by Acts No. 21 of 1949 and No. 17 of 1952.

Where a reference and award which purport to have been made under Rule 29 of the rules framed under section 37 (2) of the Co-operative Societies Ordinance No. 34 of 1921 are shown to be *ultra vires* of that rule, it is not open to the party seeking to enforce the award to bring it under section 45 of the Co-operative Societies Ordinance, No. 16 of 1936 (Cap. 107). The enforcement of such an award, therefore, does not fall under the ruling of the majority of the Court in *The Pinikahana Kahakawa Co-operative Society Ltd. v. Herath* (1957) 59 N. L. R. 145.

**A**PPPEAL from an order of the District Court, Balapitiya.

*H. W. Jayewardene, Q.C.*, with *P. Ranasinghe*, for respondent-appellant.

*Edmund J. Cooray*, with *E. B. Vannitamby*, for petitioner-respondent.

*Cur. adv. vult.*

April 29, 1958. WEERASOORIYA, J.—

This is an appeal from the order of the District Judge of Balapitiya allowing an application by the Gonagala Co-operative Stores Society Limited (hereinafter referred to as "the Society") for execution as a decree of Court of an arbitration award in its favour for the payment of a sum of Rs. 3,275.38 by the appellant. The respondent to the appeal is the President of the Society.

The appellant is the widow of D. N. Punchihewa who at the time of his death on the 5th September, 1947, was the Treasurer of the Society. Letters of administration in respect of the estate left by Punchihewa issued to the appellant on the 4th March, 1949. The heirs of the deceased are the appellant and five minor children.

According to the affidavit filed by the Secretary of the Society, a sum of Rs. 3,275.38 belonging to the Society was in the hands of Punchihewa at the time of his death, and this sum the Society claimed from the appellant. The appellant having repudiated liability, the dispute was referred to arbitration. The document by which the reference was made is P2 in which the authority cited for the reference is "Rule 29 of the rules made by the Governor under section 37 of the Co-operative Societies Ordinance, No. 34 of 1921". The award of the arbitrator also purports to have been made under the same Rule 29 and is dated the 6th March, 1948.

The Co-operative Societies Ordinance, No. 34 of 1921, under which the rules referred to in P2 were made, was repealed by the Co-operative Societies Ordinance, No. 16 of 1936 (Chapter 107), which is the ordinance now in force. Section 46 of that ordinance provides for the making of such rules as may be necessary for the purposes of the ordinance. Section 52 (2) provides that until such rules are made all rules made under the repealed ordinance (No. 34 of 1921) and in force at the time of the commencement of the later ordinance shall, in so far as they are not inconsistent with the provisions of that ordinance, continue in force.

The repealed ordinance did not contain provision for settlement of disputes, but rule 29 of the rules made under section 37 (2) of that ordinance provided for reference of certain specified disputes to the Registrar of Co-operative Societies, who was thereupon empowered either to decide it himself or refer it to arbitration. Rule 29 provided, in addition, for various procedural matters connected with the reference such as the nomination of arbitrators and the manner in which proceedings before the Registrar or the arbitrators shall be conducted. A right of appeal to the Registrar from an arbitration award was given. The decision or award by the Registrar was declared final. The rule also provided that 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, and for the enforcement of a decision or award as a decree of Court. It is clear that Rule 29 was intended to be of a comprehensive nature dealing with most, if not all, the matters arising out of a reference of a dispute to the Registrar.

Section 45 of Chapter 107 contains provision for many of the matters dealt with in Rule 29. But the section is silent as regards certain other matters such as the manner in which the reference is to be made, the nomination of arbitrators, the manner in which proceedings before the Registrar or the arbitrators shall be conducted, the enforcement of a decision or award, and in respect of which matters provision was contained in Rule 29. Until rules providing for these matters were made under section 46 of Chapter 107, Rule 29 would have continued in force by virtue of section 52 (2). The question whether the entirety of Rule 29 continued in force, or only such portions of it as dealt with matters not provided for in section 45, is not free from difficulty but need not be decided in the present case.

It might be stated here that only in 1950 were rules made under section 46 providing for those very matters in respect of which section 45 was silent, as indicated earlier. Those rules were published in *Government Gazette* No. 10,086 of the 24th March, 1950. Rule 29 ceased to be in force with the coming into operation of those rules. But at the time when the reference P2 was made Rule 29 continued in force, whether in whole or in part.

P2 does not state on what basis the dispute that arose between the Society and the appellant was referred to arbitration "under the authority given in Rule 29". Mr. Cooray who appeared for the Society submitted, however, that the reference must have been made on the basis that the appellant was an heir of the deceased and also his legal representative. At the time of the reference the appellant was, no doubt, an heir of the deceased, but she was not the legal representative as her appointment as administratrix was made only on the 4th March, 1949, which is nearly one year after the arbitration award was given. Even if the reference was on the basis as submitted by Mr. Cooray he freely conceded that neither under Rule 29, nor under section 45 of Chapter 107 (as it then stood), was a dispute between the Society and an heir or legal representative of a deceased officer or employee referable to arbitration.

Section 45 of Chapter 107 was subsequently amended by Act No. 21 of 1949 so as to bring within the category of referable disputes any dispute, *inter alia*, touching the business of a registered society between the society and "any heir or legal representative of any deceased officer or employee". By Act No. 17 of 1952 special provision was made in regard to the retrospective operation of section 45 as amended by Act No. 21 of 1949. Mr. Cooray submitted that the combined effect of these two pieces of legislation is to render valid and effectual the reference P2 as well as all subsequent proceedings including the arbitration award. But the various arguments which Mr. Cooray addressed to us in that connection were themselves based on the contention that the reference to arbitration in the present case must be deemed to be under section 45 although P2, in express terms, states that the reference is made under Rule 29. This anxiety to demonstrate that "things are not what they seem to be" is understandable since it is only by such a process could he have hoped to remove the taint of illegality which vitiated the

arbitration proceedings from their very inception. It was also on the basis that the reference must be deemed to have been made under section 45 of Chapter 107 that Mr. Cooray relied on the ruling of the majority of the Court in *The Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath*<sup>1</sup> that if an award is *ex facie* regular the Court in which it is sought to execute it has no jurisdiction to test its validity in view of the provisions of section 45 (4).

In *Illangakoon v. Bogallagama et al.*<sup>2</sup> the contention was put forward that an award which purported to have been made under Rule 29 should be deemed to have been made under section 45 of Chapter 107. This was rejected by Gratiaen, J., who stated that he failed to see how any person who purported to exercise extraordinary powers under one provision of the law can subsequently be heard to claim that he had some alternative jurisdiction to act in terms of a different provision of the law. In *Ekanayake v. Prince of Wales Co-operative Society Ltd.*<sup>3</sup> the question was whether an award which on the face of it purported to have been made under Rule 29 could be deemed to have been made on a reference under section 40 of Chapter 107. Windham, J., stated that one reason for holding against such a view was that the award did not on the face of it purport to have been made upon a reference under section 40. In *Wijetunga v. Weerasinghe*<sup>4</sup> the same Judge observed that where a reference and award which purport to have been made under Rule 29 are shown to be *ultra vires* that rule, it is not open to the party seeking to enforce the award to bring it under section 45 of Chapter 107. The last two cases referred to are decisions of a bench of two Judges.

It is clear from these authorities that the Society cannot be heard to argue that the reference to arbitration and the award were made under section 45 of Chapter 107. It is, therefore, not necessary to consider what the legal position would have been had they been so made. Since Rule 29 did not empower a reference of this dispute to arbitration, the arbitration proceedings held thereon were bad for want of jurisdiction and the award itself is a nullity. This being a case where there was a patent lack of jurisdiction in the arbitrator it is the duty of the Court, as pointed out in *Ekanayake v. Prince of Wales Co-operative Society Ltd.* (*supra*), where a party seeks to rely on such an award, to declare it null and void or at least to decline to act on it and leave the party to bring an action on it. See also *Canagasabai v. Kondavil Co-operative Stores Ltd.*<sup>5</sup>, and the Indian case of *Madhava Rao v. Surya Rao*<sup>6</sup> referred to in the judgment of my brother Sansoni in *Kundy Omnibus Co., Ltd. v. Roberts*<sup>7</sup>.

The order appealed from is set aside and the application of the Society will stand dismissed with costs here and in the Court below.

SANSONI, J.—I agree.

*Appeal allowed.*

<sup>1</sup> (1957) 59 N. L. R. 145 at 149.

<sup>2</sup> (1948) 49 N. L. R. 403.

<sup>3</sup> (1949) 50 N. L. R. 297.

<sup>4</sup> (1949) 51 N. L. R. 229.

<sup>5</sup> (1949) 50 N. L. R. 465.

<sup>6</sup> (1951) A. T. R. Madras 103.

<sup>7</sup> (1954) 56 N. L. R. 293 at 303.