1954 *Present :* **Gratiaen J. and Sansoni J.**

NAWADUN KORALE CO-OPERATIVE STORES UNION, LTD., Appellant, *and* W. M. PREMARATNE, Respondent

S. C. 496—D. C. Ratnapura, 391 S

Co-operative Societies Ordinance (Cap. 107)—Section 45—Dispute between co-operative society and past officer—Act No. 21 of 1949—Act No. 17 of 1952—Retroactive effect—Appeal—Power of Appellate Court to re-hear case—Interpretation Ordinance (Cap. 2), s. 6 (3) (c)—Courts Ordinance (Cap. 6), s. 37.

The provisions of neither the Co-operative Societies (Amendment) Act, No. 21 of 1949, nor the Co-operative Societies (Special Provisions) Act, No. 17 of 1952, are applicable to a dispute which had originated between a co-operative society and one of its " past officers " prior to 24th May, 1949, and which was pending in appeal to the Supreme Court at the time when Act No. 17 of 1952 came into force.

Section 2 of the Co-operative Societies (Special Provisions) Act, read with section 6 (3) (*c*) of the Interpretation Ordinance, does not interfere with the rights of the parties in an action which had already commenced before the Act was passed, or in a pending appeal filed before that date.

Quaere : Does the Supreme Court, when hearing appeals, sit as a Court of rehearing, with unqualified power to make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard ? Does its power extend to the re-examination of *substantive rights* in the light of fresh legislation passed in the interval between the judgment of the Court of first instance and the hearing of an appeal against it ? *Silva v. Swaris* (1904) 1 Bal. Rep. 61, considered.

APPEAL from a judgment of the District Court, Ratnapura.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy* and *E. B. Vannithamby*, for the plaintiff appellant.

C. Thiagalingam, Q.C., with *H. W. Jayewardene* and *E. A. D. Atukorale*, for the defendant respondent.

Cur. adv. vult.

June 24, 1954. GRATIAEN J.—

This is an appeal against a judgment pronounced by the learned District Judge of Ratnapura on 25th July, 1951, refusing to enforce a purported award dated 14th February, 1951, in favour of a co-operative society under the provisions of the Co-operative Societies Ordinance (Cap. 107).

The respondent had been the manager of the society from March 1946 until his services were discontinued on 1st November, 1947. In June 1948 the society purported to refer an existing dispute between itself and the respondent under section 45 concerning the respondent's alleged

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accountability for certain sums which he had received during his period of office. The Registrar, however, upheld the respondent's objection that section 45 (in its original form) had no application to a dispute between the society and one of its " past officers ". So matters stood until the Co-operative Societies (Amendment) Act, No. 21 of 1949, passed into law on 24th May, 1949. In consequence of this new legislation, section 45 in its new form for the first time authorised a dispute which " *arises* " between a society and a " past officer " to be referred to the decision of a statutory tribunal under the special machinery set up by the Ordinance.

In spite of objection by the respondent, the society purported on 8th February, 1950, to refer to the Registrar under section 45 (as amended) the present dispute *which had admittedly originated before the amending Act passed into law.* An award upon this reference was made against the respondent (as a " past officer ") in favour of the society on 18th August, 1950, and was filed in Court on 14th February, 1951, with an application for its enforcement. It directed the respondent to pay to the society a sum of Rs. 8,844/35 and accrued interest.

The learned District Judge refused to enforce the award because, although the amending Act of 1949 had enlarged the category of disputes which fall within the scope of section 45, this particular dispute had in his opinion " arisen " before the relevant amendment became applicable.

In my opinion the learned Judge's judgment was perfectly correct. A dispute " arises " between two persons when one of them has for the first time unequivocally repudiated a claim made upon him by the other ; so long as the claim continues to be repudiated, the dispute which has arisen still exists ; but it certainly cannot continue to " arise ". The amending Act has accordingly no application to a dispute which had originated between a society and one of its past officers before 24th May, 1949 ; it merely legalised the reference of a new class of dispute (which had not previously been capable of a valid reference under section 45 in its original form) provided however that it first " arose " *after the date of the amending Act.*

Mr. H. V. Perera suggested for our consideration an interesting alternative argument based on the provisions of a further amendment to section 45 which passed into law on 21st March, 1952—that is, several months after the judgment under appeal was pronounced. He submitted that, even if the learned Judge's rejection of the award was justified by the state of the law then in force, this Court (as an appellate Court of " rehearing ") ought now to declare the award to be capable of enforcement in view of the provisions of the Co-operative Societies (Special Provisions) Act, No. 17 of 1952.

The argument may be summarised as follows :

(1) that in view of section 2 (1) of the amending Act, section 45 applies to every dispute of any description contemplated by the 1949 amendment *notwithstanding that the dispute may have arisen prior to 24th May, 1949 ;*

(2) that section 2 (2) gives retrospective validity to a previous purported reference of such a " past dispute " ;

(3) that the jurisdiction of the Supreme Court, not being " strictly appellate " in its nature, requires us to take into account for the purposes of our decision all new legislation enacted pending the final decision of an appeal from the court of first instance.

(I shall later examine in this context the scope of the proviso to section 2 (2) of the 1952 amendment.)

It will be convenient first to discuss the true nature of the civil appellate jurisdiction of the Supreme Court. In *Silva v. Swaris* [1] a Bench of two Judges decided that the function of the Court was to decide appeals " by way of re-hearing " and not merely to correct errors of law or fact made by the Court below ; accordingly, there was always power to re-examine the issues in the light of fresh legislation passed in the interval between the judgment of the Court of first instance and the hearing of an appeal against it. The Privy Council found it unnecessary to decide whether this proposition was correct—*Ponnamah v. Arumugam* [2]. A Collective Bench of this Court considered the question afresh, however, in *Guneratne v. Appuhamy* [3]. Middleton J. thought that the Court was bound to determine an appeal " according to the law existing at the time when the action was begun ", and that *Silva v. Swaris* (*supra*) had been wrongly decided. Lascelles A.C.J. decided the case on somewhat different grounds, and Wood Renton J. expressed no independent opinion on the subject.

I am content to say that, whether or not the appellate jurisdiction of this Court is one of " re-hearing ", the propositions laid down in *Silva v. Swaris* (*supra*) cannot be accepted without qualification. Even in England, where the Court of Appeal (as a court of " re-hearing ") is *prima facie* able and bound to give effect to " new procedure " and " new remedies " introduced by statute after an order appealed from was made by the court of first instance, it must generally, *in regard to substantive rights*, apply the same law as that which was in force during the earlier proceedings. The only exception is where the new legislation clearly and in unambiguous terms has retrospectively altered the earlier law—*vide In re a Debtor* [4], explaining the earlier judgments of Jessell M.R. in *Quilter v. Mapleson* [5] and *in re Suche & Co.* [6]. These are the principles which are embodied in every subsection of section 6 (3) of our own Interpretation Ordinance (Cap. 2).

Let us apply the correct rules to the problem now before us. At the time when the judgment under appeal was pronounced, the respondent enjoyed *a substantive right* to have the merits of the particular dispute which had previously arisen between him and the society adjudicated upon only by the regular courts of justice. Can it now be contended that subsequent legislation has retrospectively ousted the jurisdiction of the courts in favour of the jurisdiction of a statutory tribunal ? It

[1] (*1904*) *1 Bal. Rep. 61.*
[2] (*1905*) *8 N. L. R. 223.*
[3] (*1906*) *9 N. L. R. 90.*
[4] (*1936*) *1 Ch. 237.*
[5] (*1882*) *9 Q. B. D. 672.*
[6] (*1875*) *1 Ch. D 48.*

would indeed have been startling if any legislature had thought fit to bring about such a result in regard to the rights of parties in pending actions. It is therefore our clear duty to refuse to infer such an intention in the absence of express words to that effect in the new enactment.

There is no language in the Act of 1952 which convinces me that Parliament intended to interfere with the substantive rights of the parties in an action which had commenced long before the Act was passed, or in a pending appeal filed before that date. We must therefore decide this appeal as if the earlier law had not been repealed—see *section 6 (3) (t) of the Interpretation Ordinance*. Indeed, the indications are that this was precisely what Parliament required to be done in the present case. The relevant words of the proviso to section 2 of the 1952 Act are as follows :

> " Provided, however, that in any case where any court of competent jurisdiction has prior to the date of the commencement of this Act made order or entered judgment holding that any dispute was not duly referred . . . . *nothing in the preceding provisions of this sub-section shall be construed to affect the validity of the order or decree made or entered in that case.*"

I do not consider these words as applying only to cases where a court has made an order on the basis of the earlier law which has reached finality (in the sense that no appeal was pending against it when the amending Act was passed) ; the proviso also precludes the Court, sitting in appeal, from applying the new law so as to disturb the validity of the order of the Court of first instance, provided of course that the original decision was correct at the time when it was pronounced. The judgment under appeal has properly interpreted the law in force on 25th July, 1951 ; our duty is therefore to pronounce that *it remains " valid " in spite of the subsequent changes in legislation.*

For these reasons, I would dismiss the appeal with costs.

SANSONI J.—

I agree. I should like to add my own reasons in view of the interesting argument addressed to us by learned Counsel for the appellant. In order to succeed in this appeal, the Society must establish : (1) that this Court when hearing appeals sits as a Court of rehearing, with the power to make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard ; (2) that the amending Act No. 17 of 1952 (which I shall refer to as the amending Act), is retrospective, and (3) that there is no saving clause which restricts the retrospective action of the amending Act in any way.

On the first question I am of opinion that this Court is a Court of rehearing and not merely a Court of error. I rely for this view on the decision in *Attorney General v. Birmingham, Tame, & Rea District Drainage Board* [1]. Lord Gorell there points out, at page 801, that the Court of Appeal in England is a Court of rehearing and has power to make any

[1] *(1912) A. C. 788.*

order which ought to have been made, and to make such further or other order as the Court may think fit (Order LVIII, Re 1 and 4). The Court also has the power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (Order LVIII R. 24). Section 37 of the Courts Ordinance, Cap. 6, makes it competent for this Court on the hearing of an appeal to pass such judgment, sentence, decree or order therein as it shall think fit. This Court also has the power under that section to receive and admit new evidence touching the matter at issue in any original cause, suit, prosecution or action as justice may require. The absence of a statutory declaration that the hearing of an appeal is by way of rehearing does not, to my mind, conclude the matter. In India it has always been held that an appeal to the High Court is, under the processual law of that country, in the nature of a rehearing of the cause. The provisions of O 41 R 33 of the Civil Procedure Code of 1908, and the conferment of the power to allow further evidence to be adduced have invariably been relied on in support of that position, and it was so held by the Federal Court in *Shukul v. Chaudhuri* [1]. Varadachariar J. in his judgment said that it makes no difference that it is not explicitly stated in the Indian Statute that an appeal is by way of rehearing. As the learned Judge has pointed out in that judgment : " The practice of the Judicial Committee in this respect does not appear to have been uniform. In *Ponnamma v. Arumugam* [2], Lord Davey, delivering the judgment of the Board, observed that : ' Their Lordships have only to say whether that judgment (of the Supreme Court) was right when it was given ' . . . . In the recent case of *Mukherjee v. Ram Ratan* [3], it would appear from the report of the arguments in *63 I. A. 47* that *Quilter v. Mapleson* [4] was referred to, and it was observed by Lord Thankerton in the course of the argument that the duty of a Court is to administer the law of the land at the date when the Court is administering it. This adds significance to the fact that their Lordships in that case did not deal with the judgment of the Patna High Court on its merits, but dismissed the appeal on the strength of a provision contained in an enactment which was passed only during the pendency of the appeal before His Majesty in Council. In the circumstances I am of opinion that we should follow the law as laid down in the latter case ". With respect, therefore, I would agree with the decision in *Silva v. Swaris* [5].

On the question whether the amending Act is retrospective, section 2 (1) of the Act expressly makes section 45 of the Co-operative Societies Ordinance, Cap. 107, applicable to every dispute " notwithstanding that the dispute may have arisen prior to the date on which (Act No. 21 of 1949) came into operation " and section 2 (2) makes section 45 applicable to every reference " which may heretofore have been made in purported pursuance of the provisions of (section 45) ". If the amending Act had stopped there nothing could have been clearer than that it was intended to have retroactive effect.

[1] *(1940) 20 Patna 429.*
[2] *(1905) 8 N. L. R. 223.*
[3] *A. I. R. (1936) P. C. 49.*
[4] *(1882) 9 Q. B. D. 672.*
[5] *(1904) 1 Balasingham 61.*

But here one has to consider the effect of section 6 (3) (*c*) of the Interpretation Ordinance, Cap. 2. Since this appeal was pending when the amending Act came into operation, the appeal would have to be decided regardless of the amending Act since there is no express provision making the amending Act applicable to this particular appeal.

Apart from this objection, it seems clear to me that the provisos to section 2 (1) and (2) prevent the amending Act having retroactive effect in two respects. Firstly, if the dispute was a matter in issue in an action which was pending at the date of the commencement of the Act in any Court of competent jurisdiction, the Court was empowered to hear and determine that matter, and section 2 (1) is specifically made inapplicable either to affect the jurisdiction of the Court or " the validity or operation of the order or decree made or entered in the action ". I would only observe at this point that whatever the word " action " may mean in this context, this provision cannot apply to the case under consideration because the proceeding in the lower Court was not pending at the date of the commencement of the amending Act. I have no doubt that the phrase " in any Court of competent jurisdiction " can only apply to a Court of first instance. Secondly, if any Court of competent jurisdiction has prior to the date of commencement of the amending Act made order or entered judgment holding that any dispute was not duly referred for decision under section 45, again section 2 (1) is specifically made inapplicable to affect " the validity of the order or decree made or entered in that case ".

Mr. H. V. Perera submitted that in seeking to make the amending Act apply to this case he was not attacking the validity of the order of the District Court. While conceding that it was valid, his submission, as I understood it, was that it was open to him to show that it was rendered incorrect by the operation of the amending Act, and since it was under appeal when the amending Act was passed it was not a final order ; in other words, the order ceased to be *res judicata* and was rendered *sub judice* and became at large, and its correctness has to be determined in the light of the amending Act. I agree that there may well be cases where an order which was correct when it was made can be reversed by this Court—a course taken by the Court of Appeal in England in the case of *Quilter v. Mapleson* (supra) where that Court gave effect to an Act which came into operation with retrospective effect after an appeal had been filed against the order of the lower Court. But this is not one of those cases. There is, as I have pointed out, the obstacle created by section 6 (3) (*c*) of the Interpretation Ordinance. The second obstacle is the proviso to section 2 (2) of the amending Act. Reading the amending Act as a whole, as I think one should, and bearing in mind the purpose underlying the proviso to section 2 (1), I think it is clear that the proviso to section 2 (2) was also enacted in order to preserve unaffected the operation of all orders or decrees entered before the amending Act came into operation so long as they had been entered by a competent Court of first instance. It would not be surprising if the framers of the amending Act felt that it would be a grave thing to deprive a suitor of his vested rights either in a pending action or in a decided case.

The Concise Oxford Dictionary defines the word " Valid " as meaning " sound and sufficient ". The appellant is seeking to get the order of the District Judge entirely out of the way and to render it of no effect. The clear purpose of the proviso to section 2 (2) was to protect a party who had obtained an order such as the respondent had obtained, and to prevent the soundness and sufficiency of this order being questioned by reason of the provisions of the amending Act.

Appeal dismisssed.