

1961

Present : Weerasooriya, J.

KODDIYARPATTU CO-OPERATIVE, AGRICULTURAL PRODUCERS AND SALES SOCIETY, LTD., MUTUR, Appellant, and ABDUL HAMEED *et al.*, Respondents

S. C. 242—C. R. Trincomalee, 802

Co-operative Societies Ordinance (Cap. 107)—Section 45 (2)—Award of arbitrator—Procedure for its enforcement—Rule 38 (13) framed under s. 46 (2).

By rule 38 (13) of the rules made under section 46 (2) of the Co-operative Societies Ordinance :—

“ 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.”

Held, that an application under rule 38 (13) for the enforcement of an award shall be by petition and affidavit in proceedings by way of summary procedure under Chapter XXIV of the Civil Procedure Code. The award cannot be enforced by way of a regular action.

APPEAL from a judgment of the Court of Requests, Trincomalee.

E. R. S. R. Coomaraswamy, with *H. Mohideen*, for the plaintiff-appellant.

No appearance for the defendants-respondents.

Cur. adv. vult.

May 5, 1961. WEERASOORIYA, J.—

The plaintiff-appellant is a co-operative society registered under the Co-operative Societies Ordinance (Cap. 107). On a reference to arbitration under section 45 (2) of that Ordinance an award was given directing the defendants-respondents to pay a sum of Rs. 280/28 to the plaintiff. This award the plaintiff sought to enforce by filing on the 19th August, 1955, an action by way of regular procedure against the defendants for the recovery of the amount due. In the answer of the defendants various defences were taken attacking the validity of the award. After trial the learned Commissioner of Requests delivered judgment dismissing the action with costs, one of the grounds for doing so being that the award was bad as there was no proof that the reference to arbitration was of a dispute touching the business of the plaintiff. From this judgment the plaintiff has appealed.

Rule 38 (13) of the rules made under section 46 (2) of the Co-operative Societies Ordinance, and published in *Government Gazette* No. 10,086 of the 24th March, 1950, 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.”

This rule, it will be observed, does not specify the procedure to be adopted in applying for the enforcement of the award as a decree of Court. The question as to the correct procedure has been the subject of conflicting judicial opinion, but in the recent case of *Bandahamy v. Senanayake*¹ the majority of a divisional bench of seven Judges held that the correct procedure is as stated by a divisional bench of three Judges in *Jayasinghe v. Boragodawatte Co-operative Stores*,² which had affirmed the decision in *de Silva v. Galkissa Wattarappola Co-operative Stores Society*.³ The effect of these decisions is that an application under rule 38 (13) for the enforcement of an award should be by petition and affidavit in proceedings by way of summary procedure under Chapter XXIV of the Civil Procedure Code.

The only authority that learned counsel for the plaintiff was able to cite in support of the procedure adopted in the present case is an *obiter dictum* of Gratiaen, J., in the last mentioned case, that one of the courses open to a person applying to enforce an award is to do so "in a regular action". But it was the alternative procedure laid down in the same case—of applying by petition and affidavit by way of summary procedure—that was adopted by the bench of three Judges (of whom Gratiaen, J., himself was one) in the subsequent case of *Jayasinghe v. Boragodawatte Co-operative Stores (supra)* and held to be the correct procedure by the majority of the seven Judges in *Bandahamy v. Senanayake (supra)*. The terms of rule 38 (13) clearly contemplate proceedings in the nature of execution proceedings, and not the filing of a regular action for the enforcement of an award. It is a well established rule that where an enactment creates new rights or obligations and provides a special procedure for their enforcement, resort must be had to the prescribed procedure and to no other in enforcing those rights or obligations. There seems to be no ground for departing from that rule in the present case.

With all respect to Gratiaen, J., I am, therefore, of the opinion that the present action is misconceived and was rightly dismissed by the Commissioner of Requests. The appeal is dismissed, but without costs, as the defendants-respondents were not represented at the hearing of it. In view of the particular ground on which the appeal is disposed of, no final decision is given by me in regard to the Commissioner's findings on the issues framed at the trial. In the result, in any fresh proceedings that the plaintiff may be advised to take for the enforcement of the award in terms of rule 38 (13), the parties would appear to be free to raise such of the same issues as may properly be said to arise for decision in those proceedings.

Appeal dismissed.

¹ (1960) 62 N. L. R. 313.

² (1955) 56 N. L. R. 462.

³ (1953) 54 N. L. R. 326.