

1953

Present : Gratiaen J. and Gunasekara J.

W. BARNES DE SILVA, Appellant, and GALKISSA  
WATTARAPPOLA CO-OP. STORES SOCIETY, Respondent

*S. C. 157—D. C. Colombo, 930/X*

*Co-operative Societies Ordinance (Cap. 107)—Sections 45, 46 (2) (t)—Award of arbitrator—Ultra vires—Power of Court to authorise re-reference of dispute—Enforcement of an award—Procedure.*

Where a writ for the enforcement of a purported award under the provision of the Co-operative Societies Ordinance is recalled by a court of law on the ground that the arbitrator's decision was *ultra vires* and therefore inoperative, the court has no power to make an order granting to a party to the dispute liberty to take fresh proceedings under the correct section of the Ordinance. The question whether a dispute may be "re-referred" for arbitration depends on the provisions of the Ordinance.

Before an award can be enforced by court, it is the duty of the person seeking to enforce it to apply either in a regular action or at least by petition and affidavit setting out facts which prove that the purported award is *prima facie* entitled to 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 to be issued.

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

*Colvin R. de Silva*, with *Ananda G. de Silva*, for the defendant appellant.

*H. W. Jayewardene*, with *D. R. P. Goonetilleke*, for the plaintiff respondent.

*Cur. adv. vult.*

February 18, 1953. GRATIAEN J.—

This is an appeal from an order of the District Judge of Colombo refusing to recall a writ issued for the enforcement of a purported award under the provisions of the Co-operative Societies Ordinance (Cap. 107).

I find from certain recorded admissions in the document 'D1 filed of record, that the appellant had been the Treasurer of the Galkissa and Wattarappola Co-operative Stores Society Ltd. (hereinafter referred to as "the Society") during the period 20th August, 1944, to September, 1948, and a dispute had arisen between the Society and the appellant in regard to certain claims preferred against him relating to his period of office as Treasurer. That dispute was referred to the Registrar of Co-operative Societies on 13th August, 1949, for his decision, and he referred it in turn to an arbitrator named A. E. Perera for disposal. On 25th October, 1949, Perera purported to make an award directing the appellant to pay to the Society a sum of Rs. 2,210.56, and the Society applied in due course to the District Court of Colombo for enforcement of the award "as a decree". The application was granted *ex parte*, but

the appellant later moved that the writ should be recalled on the ground that Perera's award had been made without jurisdiction. After some argument on this issue, Counsel for the Society conceded in the lower Court that the arbitration proceedings were irregular and he accordingly moved to withdraw the Society's application for enforcement of the purported award. The learned District Judge made an order in the following terms :—

“ in view of Mr. Misso's submissions, no execution proceedings will be permitted in this Court. Let the writ be recalled forthwith.”

In my opinion this part of the order is equivalent to an *inter partes* decision that Perera's purported decision was *ultra vires* and therefore inoperative. That decision is binding on both the Society and the appellant.

The learned Judge then proceeded to make an order granting to the Society “ liberty to have its dispute with (the appellant) referred to arbitration in accordance with the provisions of the Co-operative Societies Ordinance, provided of course such dispute can be referred to arbitration ”. With great respect, a District Judge has no power to confer such a privilege on a party to a dispute arising under the Ordinance. The only function reserved to a District Court under the Ordinance is that of executing valid decisions made by the Registrar or valid awards made by an arbitrator in regard to disputes of the kind particularised in sec. 45. The question whether a Society may have a dispute “ re-referred ” after a previous award has been found to be *ultra vires* must depend on the provisions of the Ordinance and not on any permission granted by a Court of law whose jurisdiction over the adjudication of disputes has been expressly taken away by the Legislature.

The present appeal relates to the events which occurred after the writ for execution of Perera's purported award had been recalled in the earlier proceedings. On 16th February, 1951, the Society's proctor made an *ex parte* application to the District Court of Colombo in accordance with the procedure laid down in sec. 224 of the Civil Procedure Code for the execution of judicial decrees, for the enforcement of an award against the appellant purporting to have been made on the 27th October, 1950, by an arbitrator named H. E. Amarasinghe upon a reference purporting to have been made to him by the Assistant Registrar of Co-operative Societies, Western Province, on 26th September, 1950—i.e., 4 months after the previous award made by Perera had been declared invalid. It is common ground that this second award relates to the identical dispute in respect of which Perera had previously purported to exercise jurisdiction.

An order for execution was made *ex parte*. Once again the appellant intervened with an application to have the writ recalled on the ground that the second arbitrator had also acted without jurisdiction. This objection raises mixed questions of law and fact, and I find it impossible to decide the issue upon the material which was placed before the learned District Judge who dealt with it in the Court below. It is sufficient

to state that the main ground on which the objection was rejected in the lower Court is, for the reasons which I have already indicated, insupportable. The learned Judge took the view that the appellant was precluded from objecting to the second arbitrator's jurisdiction because the Court had expressly granted "liberty to the Society to take fresh proceedings under the correct section of the Ordinance". As I have said, if the Society already possessed that statutory right, the permission of the Court was superfluous; if it did not, such permission could not cure the defect.

In my opinion the Society's *ex parte* application to enforce the award as a decree of Court was *ab initio* irregular. Sec. 224 lays down the procedure for the execution of a decree passed by a Court of law which is thereafter empowered to execute it. The section is in my opinion inappropriate to proceedings for the enforcement of an extra-judicial decree or award which a Court is empowered, *upon proof of its validity*, to recognise and enforce *as if it were a judicial decree*.

Sec. 46 (2) (t) of the Co-operative Societies Ordinance empowers the appropriate authority to make statutory rules for, *inter alia*, "the enforcement of the decisions of the Registrar or the awards of arbitrators". These powers have in fact been exercised by the Minister of Food and Co-operative Undertakings who, on 22nd March, 1950, made a rule 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". *Vide The Ceylon Government Gazette No. 10,086 of 24th March, 1950, Part I Sec. I (General) p. 305.*

This rule, the validity of which may be assumed for the purposes of the present appeal, 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 invoked 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 to be issued.

None of these essential steps was taken by or on behalf of the Society in the present case. No material of any kind was placed before the Court in the first instance for the purpose of satisfying it that the purported award had been made by the arbitrator upon a proper reference under the Ordinance for the adjudication of an outstanding dispute of a description contemplated by sec. 45. It seems to me that many questions of fact and law would need to be decided before the validity of the purported award could be established. For example :

- (a) Had there been a proper reference of the same dispute to the original arbitrator A. E. Perera ?
- (b) If so, did A. E. Perera become *functus officio* when he made his award which was invalid ; or did he continue thereafter to be vested with jurisdiction over the dispute ?
- (c) In the latter event, was the Registrar entitled, under an appropriate rule passed under the Ordinance, to withdraw Perera's jurisdiction as an arbitrator and to refer the same dispute thereafter to a different arbitrator ?
- (d) Was the reference to the new arbitrator H. E. Amarasinghe a valid reference under the Ordinance, and if so,
- (e) was his award valid and therefore entitled to be recognised and enforced as a decree of Court ?

There is insufficient material on record upon which all these questions can be decided now, and in my opinion it was the duty of the Court, quite apart from the particular objections raised by the appellants, to recall the writ which was prematurely issued *ex parte* on 31st March, 1951, without proof of any of the essential facts relevant to the Court's decision that its jurisdiction as a Court of execution had been properly invoked. In the subsequent proceedings, only some of the relevant matters have come to light, while others, equally relevant, have not yet been divulged.

It must not be thought that the opinions which I have expressed are based on technical considerations. Previous decisions of this Court have served to demonstrate how dangerous it is to assume too lightly, and without strict proof, that purported awards under the Co-operative Societies Ordinance have been regularly made. *Vide Illangakoon v. Bogallegama*<sup>1</sup>, *Ekanayake v. The Prince of Wales Co-operative Society*<sup>2</sup>, *Wijetunge v. Weerasinghe*<sup>3</sup> and *Sirisena v. Kotaraveva-Udagama Co-operative Societies Ltd.*<sup>4</sup>. The legislature had no doubt withdrawn from Courts of law their jurisdiction to determine disputes touching the affairs of co-operative societies or even to scrutinise the correctness of decisions or awards made by extra-judicial tribunals properly exercising jurisdiction under the Ordinance. But the right and the duty to examine the validity of such decisions and awards is still vested in the courts which are empowered to enforce them. And, unless that duty be vigilantly performed, there is great risk that the judicial process may be abused. In the present case, for instance, a man's property has twice been seized

<sup>1</sup> (1948) 49 N. L. R. 403.

<sup>2</sup> (1949) 50 N. L. R. 297.

<sup>3</sup> (1949) 51 N. L. R. 229.

<sup>4</sup> (1949) 51 N. L. R. 262.

without notice to him in execution proceedings irregularly initiated against him—on the first occasion, for the enforcement of a purported award which was subsequently admitted to be invalid, on the second occasion, for the enforcement of a purported award the validity of which has not yet been established.

I would set aside the order under appeal, and direct that the writ issued against the appellant on 31st March, 1951, be recalled on the ground that it had not been obtained upon proper material. The judgment must not, however, be construed as deciding that the Society is necessarily precluded from applying hereafter in due form for the enforcement of the purported award in its favour.

GUNASEKARA J.—I agree.

*Order set aside.*

