

1956

Present : Basnayake, C.J., and de Silva, J.

S. M. DON NEREUS, Appellant, and HALPE  
KATANA CO-OPERATIVE STORES SOCIETY, LTD.,  
Respondent

S. C. 170—D. C. Negombo, 16,683

*Co-operative Societies Ordinance—Section 45—Reference of dispute to Registrar—  
Procedure—Requirement of agreed reference—Award of arbitrator—Appeal  
therefrom—Parties must be heard—Referability of dispute to arbitration—  
Crucial date—Validity of Rule 33 (13) made under Section 46 (2) (1).*

In an appeal to the Registrar under section 45 (3) of the Co-operative Societies Ordinance, the appellant should be afforded an opportunity of being heard before a decision is made against him. Failure to observe the rule of *audi alteram partem* would vitiate the decision of the Registrar.

BASNAYAKE, C.J.—(i) The proper way to refer a dispute to the Registrar under section 45 of the Co-operative Societies Ordinance is to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute. An *ex parte* statement signed by one of the parties alone would not be a proper reference.

(ii) The referability of a dispute to arbitration under section 45 must be determined on the state of the law at the time the dispute arises.

(iii) Rule 33 (13) which provides that an award shall be enforceable as if it were a decree of Court is *ultra vires*.

**A**PPEAL from a judgment of the District Court, Negombo.

*H. W. Jayewardene, Q. C.*, with *S. W. Jayasooriya* and *A. C. M. Uvais*,  
for Judgment-Debtor-Appellant.

*E. R. S. R. Coomaraswamy*, with *B. A. R. Candappa*, for Judgment-  
Creditor-Respondent.

*Cur. adv. vult.*

May 16, 1956. BASNAYAKE, C. J.—

The appellant was the Secretary of the Halpe Katana Co-operative Stores Society Ltd from 1944 till 31st January, 1945. In November, 1946, a claim appears to have been made against the appellant for a sum of Rs. 1,492/08 being the value of textiles lost in consequence of the Stores being burgled. He disputed his liability and the dispute was referred to arbitration. In 1948 the arbitrators made an award for Rs. 1,492/08 against the appellant. He appealed to the Registrar and in 1949 the award was set aside on the ground that section 45 of the Co-operative Societies Ordinance, as it then stood, was not applicable to the dispute between the appellant and the Society because the appellant had left the service of the Society at the time the dispute arose and was therefore not an "officer of the Society". Thereafter the Society at a general

meeting held on 29th April, 1951, unanimously decided to waive the claim. Sometime later Don Stephen Jayakody, a member of the Society, applied to the Registrar to refer the same dispute to arbitration and an award was made on 3rd January, 1952, ordering the appellant to pay a sum of Rs. 700 to the above-mentioned Society. He appealed to the Registrar, and on 5th February, 1952, his appeal was dismissed.

On 29th July, 1952, the Society made application for enforcement of the award as if it were a decree of Court. On 5th May, 1953, the appellant applied for a stay of execution and in the petition he filed he prayed *inter alia* that the award be declared null and void. On the same day the Society also filed a petition setting out the facts relating to the arbitration with an affidavit from one W. D. Saviel Appuhamy who claimed to be the duly appointed legal representative of the Society. On 12th November, 1953, the appellant filed objections to the Society's petition challenging the procedure adopted and also attacking the award as a nullity on several grounds.

The main points urged at the hearing of this appeal are :—

- “ (1) that the second reference was bad as the appellant was an ex-officer of the Society and that under the law in force at the time the claim arose a dispute between the Society and an ex-officer could not be referred to arbitration,
- (2) that the second award was bad and contrary to the rules of natural justice as the Registrar dismissed the appellant's appeal without affording him an opportunity of being heard,
- (3) that rule 38 (13) which provides for the enforcement of an award as if it were a decree of Court is *ultra vires*. ”

Before I discuss the above points I should like first to refer to section 45 of the Co-operative Societies Ordinance in the form in which it stood before its amendment in 1949. It reads as follows :—

“ 45 (1) If any dispute touching the business of a registered society arises—

- (a) among members, past members, and persons claiming through members, past members and deceased members ; or
- (b) between a member, past member or person claiming through a member, past member or deceased member, and the society, its Committee or any officer of the society ; or
- (c) between the society or its Committee and any officer of the society ; or
- (d) between the society and any other registered society,

such disputes shall be referred to the Registrar for decision.

A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, shall be deemed to be a dispute touching the business of the society within the meaning of this subsection.

(2) The Registrar may, on receipt of a reference under subsection (1)—

- (a) decide the dispute himself, or
- (b) refer it for disposal to an arbitrator or arbitrators.

(3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar within such period and in such manner as may be prescribed.

(4) A decision of the Registrar under subsection (2) or in appeal under subsection (3) shall be final and shall not be called in question in any civil court.

(5) The award of the arbitrator or arbitrators under subsection (2) shall, if no appeal is preferred to the Registrar under sub-section (3) or if any such appeal is abandoned or withdrawn be final and shall not be called in question in any civil court."

It would appear from an examination of the section that it provides for the reference to arbitration of four classes of disputes. Before a reference to arbitration can be made under the section there must in the first place be a dispute i.e. a contention or controversy or a disagreement in which one party claims something and the other denies it. Then the dispute must be one of the classes (a), (b), (c), or (d). In the instant case it would appear that after the Stores was burgled the Society asserted that the appellant was liable to make good the loss and he denied it. But as the appellant had left the service of the Society at the time the dispute arose it was held that it did not fall within category (c) in subsection (1), because he was no longer an officer of the Society.

It was on that ground that the Registrar appears to have set aside the first award against the appellant. It would appear from the minutes of the general meeting of the Society held on 29th April, 1951, that the dispute between the Society and the appellant had ceased to exist, and the Society did not again ask for a reference. It was not till 26th September, 1951, that D. S. Jayakody, a member of the Society, made his application to the Assistant Registrar, Co-operative Societies, Western Province. By then section 45 of the Ordinance had been amended by section 9 of Act No. 21 of 1949 so as to permit disputes between the Society or any member and any officer or employee of the Society, whether past or present, to be referred to arbitration. That application is in these terms :—

#### " ARBITRATION

Submission to the A.R.C.S., W.P.

The dispute between Don Stephen Jayakody of Ambaláyaya, Katana, Plaintiff, and Setunga Mudalige Don Nereus of Halpe, Katana, Defendant, submitted to the Assistant Registrar of Co-operative Societies, Western Province, for arbitration under section 45 of Ordinance No. 16 of 1936 (Cap. 107) as amended by Act No. 21 of 1949.

Amount claimed is Rs. One thousand four hundred & ninety two 8/100.

The above named Setunga Mudalige Don Nereus Defendant was the Manager of the Halpe Katana Co-op. Stores from 1944 up to 31st January, 1945.

The claim for Rs. One thousand four hundred & ninety two and cents eight only is made up as follows '—

(a) Loss of textiles	..	Rs. 1,492·08
(b)		—
(c)		—
Total ..		Rs. 1,492·08

The above named Plaintiff requests an award authorising the recovery of the said sum of Rs. One thousand four hundred & ninety two and cents 8/100 with interest at 10% per centum per annum from January 1945 to up to date and the cost of this arbitration.

All summonses and other notices regarding the arbitration may be served on Don Stephen Jayakody of Ambalayaya, Katana, and others given in overleaf.

A copy of the Letter of Demand served on the defendant annexed hereto.

Sgd. D. S. Jayakody  
Member, Halpe Katana Co-operative Stores Society Ltd.

Dated at Ambalayaya, Katana,  
on the 26th day of September, 1951".

The matter was on 4th October, 1951, referred by the Additional Assistant Registrar of Co-operative Societies, Western Province, to arbitration in the following terms :—

#### “ REFERENCE TO ARBITRATION

Under the authority given in section 45 of the Co-operative Societies Ordinance No. 16 of 1936 (Cap. 107) as amended by Act No. 21 of 1949 and the rules in force thereunder, I hereby refer for the decision of Mr. D. K. Samaranyake, 330, Union Place, Colombo, as Arbitrator(s) the dispute which has arisen between Mr. Don Stephen Jayakody a member of the Halpe Katana Co-operative Stores Society Limited, of Ambalayaya, Katana, and Mr. Setunga Mudalige Don Nereus of Halpe, Katana, (namely) whether the said Mr. S. M. Don Nereus do owe the said Society the sum of Rupees one thousand four hundred and ninety-two and cents eight (Rs. 1,492/08) being the loss of textiles which occurred during the period he was the manager of the said Society from 1944 to 31.1.1945 with 10 % interest).

Sgd. T. B. Elkaduwa  
Addl. Asst. Registrar, Co-operative  
Societies, W. P.  
4.10.51".

Although the reference speaks of a dispute between Don Stephen Jayakody and Setunga Mudalige Don Nereus it sets out the old dispute between the Society and Don Nereus which had been referred to arbitration and had come to an end with the quashing of the award. The Society did not re-agitate the matter thereafter, and regarded it closed.

Such being the case the reference does not fall within section 45 even in its form as amended in 1949. For, there is now in fact no dispute between the Society and the appellant nor is there any real dispute between Jayakody and the appellant. Even if in fact there was, between Jayakody and Don Nereus, a dispute falling within the ambit of section 45 as amended there has been no proper submission to arbitration in this case.

In declaring that any dispute falling within the ambit of the section "shall be referred to the Registrar for decision" the section does not prescribe the person who shall make the reference. In the absence of such provision the proper way to refer a dispute to the Registrar for decision would be to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute. An ex parte statement signed by one of the parties alone would not in my opinion be a proper reference under the section.

Arbitration is essentially a matter which can take place only when the parties are agreed as to the disputes between them and also as to the person by whom they should be decided. The award is therefore bad not only because there is in fact no dispute between Jayakody and Don Nereus as contemplated in section 45 but also because there has been no agreed reference to the Registrar.

Arbitration proceedings under section 45 have far reaching consequences and it is important that the proper procedure should be followed if the finality contemplated in subsection (4) is to be attached to the decisions made under the powers granted by the section.

It would be convenient at this point to deal with the submission of Counsel that the parties to an appeal to the Registrar should be afforded an opportunity of being heard before a decision is made.

Seeing that the Registrar's decision is final and cannot be called in question in any civil Court I am of opinion that the Registrar is bound to afford such an opportunity.

One of the principles of natural justice is that no party ought to be condemned unheard.

In the case of *Builders v. Union Government*<sup>1</sup>, Wessels, J. A., stated the rule thus in regard to tribunals created by Statute :—

"Unless we adopt the view that the Legislature always implies that the principle *audi alteram partem* should be read into a statutory inquiry, the grossest injustice may be done to the person charged".

This same principle is thus stated in the New Zealand case of *New Zealand Dairy Board v. Okitu Co-operative Dairy Co., Ltd.*<sup>2</sup>.

<sup>1</sup> 1923) A. D. 46 at p. 59.

<sup>2</sup> (1953) N. Z. J. R. 366 at p. 333.

“ It is a sound principle that natural justice exists unless so denied by statute ”.

The principle is equally applicable to tribunals as well as arbitrators<sup>1</sup>. There is no hard and fast rule to be observed as to the procedure by which the tribunal is to hear the cases of the parties. A principle can however be deduced from the decisions on the point that a hearing implies that the procedure and methods adopted by the tribunal must not manifestly depart from the procedural standard appropriate to a tribunal of its kind. The appropriate standard depends upon the nature of the tribunal and of the inquiry and the matters that have been left to its adjudication. Where matters which, but for the statute, would ordinarily have come before the Courts are left to be decided by a special tribunal then its procedure should approximate as near as may be to the standards of the Courts. Having regard to the extensive ramifications of the co-operative movement in this country many of the disputes which come within the ambit of the section are such as would but for the statute ordinarily be agitated in the Courts and their monetary value can in certain cases be extremely high. The present dispute though the amount involved is only Rs. 1,492/08 is one that would ordinarily have been adjudicated upon in the Courts. The Registrar did not afford the appellant an opportunity of being heard before an order against him was made. He has therefore failed to observe the rule of *audi alteram partem* and his decision is therefore vitiated.

The next question that arises for consideration is whether the second reference was bad as under the law in force at the time the dispute arose it was not one that fell within the ambit of the section. It is admitted that at the time the dispute arose it was not referable to arbitration. For that reason the first award was set aside by the Registrar. The referability of a dispute to arbitration under the section must be determined on the state of the law at the time the dispute arises, because that is the time at which the decision to make a reference has to be made—not many years later. In the instant case the dispute that arose in 1945 was referred to arbitration a second time in December, 1951. I am of opinion that the appellant is entitled to succeed on this point too.

The third ground taken by the appellant is that Rule 38 (13) of the Rules appearing in Gazette No. 10,086 of 24th March, 1950, which provides that an award shall be enforceable as if it were a decree of Court is *ultra vires*. The enabling provision, section 46 (2) (t), reads—

“ (t) prescribe the mode of appointing an arbitrator or arbitrators, and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or awards of arbitrators ” ;

The rule made under this power purports to do more than prescribe “ the enforcement of the decisions of the Registrar or the awards of the arbitrators ”. It purports to give an award the legal effect of a decree of a Court of law. Such a thing can be done only by legislation and the enabling section affords no authority for such a rule.

<sup>1</sup> *In re Carus-Wilson & Greene* (18 Q. B. D. 7).

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The Civil Procedure Code makes express provision for the enforcement of the awards of arbitrators where a matter has been referred to arbitration without the intervention of a Court of Justice (section 696). Even in that provision the award is not equated to a decree. On this ground too the appellant is in my opinion entitled to succeed.

For the above reasons the judgment of the District Judge is set aside and the appeal is allowed with costs.

DE SILVA, J.—

I have had the advantage of reading the Judgment of My Lord the Chief Justice and I agree that this appeal should be allowed with costs. In my opinion the second award was bad in that there was a breach of a rule of natural justice when the Registrar dismissed the appeal without affording the appellant an opportunity of being heard. I would also wish to observe that the procedure to be followed in referring a dispute to the Registrar for decision in terms of Section 45 of the Co-operative Societies Ordinance was not a point which was argued in this appeal and I would therefore refrain from expressing an opinion on that matter.

*Appeal allowed.*

