

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

CA/APN/MISC/01/2011

In the Debt Conciliation Board,
H.D. Simon Fernando alias H.D. Simon Munasinghe
Kelaniya.

Applicant

Vs.

R.D. Hector Jayasiri
Kelaniya.

Chairman and Members,
Debt Conciliation Board,
No: 80,
Adhikarana Mawatha,
Colombo 12.

Respondents

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for a
mandate in the nature of a writ of certiorari
under Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

C.A. APN/MISC/01/2011

BEFORE

: K.T.Chitrasiri J.

: Deepali Wijesundera J.

COUNSEL

: D.R.A.Kannangara for the Appellant

M.D.J. Bandara for the Respondent.

A.H.M.D Nawaz D.S.G. as the Amicus
Curiae.

ARGUED ON

: 09th May, 2012.

DECIDED ON

: 09th October, 2012

Deepali Wijesundera J.

Chairman and members of the Debt Conciliation Board had requested this court under section 53 of the Debt Conciliation Ordinance to seek the opinion of this court on section 19A (1A) of the Debt Conciliation (amendment) Act No.29 of 1999.

Request of the Board is;

Whether Sec. 19A (1A) of Debt Conciliation (Amendment) Act No. 29 of 1999 is applicable to debts secured by transfers made prior to 17th September, 1999 (the said Act was certified on 17th September, 1999)

The Debt Conciliation Ordinance has been amended on a number of occasions, and the above question of law where this Board seeks Your Lordships' opinion is based on Amendment No. 29 of 1999, certified on 17th September, 1999. By this Amendment Sec. 19 of the Debt Conciliation Ordinance has been amended to bring in a transfer of immovable property to be considered as is a mortgage, within the meaning of the Ordinance.

The petitioner Board has also submitted a case record No. 40236 for the perusal of this court where the relevant deed of transfer had been executed prior to the 17th of September 1999.

When the case stated by the Debt Conciliation Board was taken up for hearing under section 53 (4) of the said ordinance a counsel appeared for the Debtor in application No. 40236 as provided for in Sec. 53 (5) of the said ordinance and made submission on behalf of the Debtor all three counsel were heard in support of their applications.

The learned counsel for the Debtor submitted that the amending act does not prevent the board from entertaining applications by debtors who are in continued possession of immovable property prior to the date of the amending Act. He also submitted documents marked **A1** which is a photo copy of the said amendment **A2** which is a photo copy of Maxwell on Interpretation of statutes, **A3** which is a photo copy of parliamentary Debate which he has marked to show the history of this ordinance which is not relevant to the matter in issue. He has also submitted a copy of the Debt Conciliation Ordinance in legislative enactments Vol. IV as **A4** and a copy of the functions of the Department of the Debt Conciliation Board as **A5**.

The Debt Conciliation Ordinance was introduced as way back as 1941 to safe guard the interest of gullible Village folk who mortgaged their land to money lenders who persuaded them to transfer their lands stating it is a mortgage.

The state council was the legislative organ in our country in 1941 and even the British rulers recognized the anomaly of this situation and decided upon legislative intervention to provide relief to the debtor. The Debt Conciliation Ordinance of 1941 is primarily a piece of welfare legislation. It was amended in 1959 and it provides relief to persons owing debts secured by mortgages of immovable property and debts purporting to be secured by conditional transfers.

Under the Debt Conciliation Ordinance the board is vested with authority to settle debts secured by conditional transfers or mortgages of immovable property and unsecured debts obtained along with secured debts.

Section 53 of the Debt Conciliation Ordinance reads as;

-53 (1) : *"The board may in its discretion, at any time in the course of any proceedings under this Ordinance, state a case for the opinion of the*

Court of Appeal on any question of law arising for decision in such proceedings."

-53 (2) : *"The stated case shall set forth in writing the facts of the case as found by the Board and the question of law upon which the opinion of the Court of Appeal is sought, and shall, when signed by the Chairman of the Board be transmitted to the Court of Appeal. At or before the time when the stated case is transmitted to the Court of Appeal, a copy of the stated case shall also be transmitted to each party to the proceedings."*

-53 (3): *"Any two or more Judges of the Court of Appeal may cause a stated case to be sent back for amendment by the Board and thereupon the case shall be amended accordingly."*

-53 (4 : *"Any two or more Judges of the Court of Appeal may hear and determine any question of law arising on a stated case, and upon such determination the Registrar of the Court shall remit the case to the Board with the opinion of the Court of Appeal thereon. Such opinion shall be binding on the Board and on the parties to the proceedings."*

The Debt Conciliation Board has made this request for this court to give an opinion on the amended Section 19A of the Debt Conciliation ordinances (Chapter 81) by Debt Conciliation (Amended) Act No. 29 of 1999. The amended Section 19 A reads thus;

“(1 A) The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such transfer of immovable property as is a mortgage within the meaning of this Ordinance, unless that application is made within three years of the date of the notarially executed instrument, effecting such transfer:

Provided that nothing in this subsection shall be read or construed as preventing the Board from entertaining, after the period referred to in that subsection, an application by a debtor who is in possession of the property transferred:

These amendments are made to grant relief to Debtors who have transferred their properties to creditors on deeds of transfer which in fact is given as security and are at the mercy of the creditors. The intentions of the legislators have to be carefully studied and perused.

What is the terminal date of notarial executions prior to 17/09/1999 that can come before the Debt Conciliation Board? And how far back one can go? The Debt Conciliation Board was vested with jurisdiction to entertain applications in respect of absolute transfers from the date of the amendment which is 17/09/1999. An applicant coming before the Board under the new amendment must have the deed executed within three years from September 1999. Deeds should be executed either on 17/09/1996 or thereafter.

The debtor in application No.40236 had argued he could come under the proviso of sub section 19A (1A) of the amended Act. The proviso makes specific reference to the period of three years running backwards from the date of application. The proviso will apply only if this period has lapsed but the debtor is in possession it will not apply to a person whose deed was executed as far back as 1993.

The proviso to sub section 19A (1A) can only be made use of by those applicants who are in possession of the land whose deeds were executed after 17/09/1996 but failed to make applications to the Debt Conciliation Board. Their application can be entertained by the Debt Conciliation Board provided they establish that they have been in possession of their property inspite of the absolute transfer.

All those who executed deeds of transfers before 17/09/1996 three years prior to the amendment Act No. 29 of 1999 was enacted are not entitled to make applications to the Debt Conciliation Board even if the debtors are in possession of their properties. These applicants are shut out by sub section 19A (1A) and the proviso.

I direct the Registrar of this court to remit the determination of law arising on the case stated by the Board by this court under Section 53 (4) of the Debt Conciliation Ordinance.

JUDGE OF THE COURT OF APPEAL

K.T.CHITRASIRI,J

I had the opportunity of reading the judgment of Hon. Justice Deepali Wijesundera and have no hesitation to agree with its final outcome. Having so agreed, I wish to add my views on the issue

Let me first; briefly refer to the background to the issue that arose before the Debt Conciliation Board. (hereinafter referred to as the Board). When the case came up before the Board on 06.11.2000, question arose as to the maintainability of the applications made relying upon the transfer deeds executed prior to 17th September 1999 since it was the date on which the amendment to the Debt Conciliation Ordinance came into operation. This amendment to the Debt Conciliation Ordinance, particularly the introduction of Section 19A(1A) prevented the Board entertaining the applications relying upon transfers of immovable property unless those have been executed on a date within a period of three years prior to the application being made. The transfer deed upon which this particular application was made had been executed on 01.02.1993 and the application to the Board had been filed on 02.02.2006. Therefore, it is seen that Section 19A(1A) shall be a bar for the Board to entertain this application of the debtor.

However, on behalf of the applicant it was argued that the **proviso to Section 19A(1A)** permits a debtor to make an application to the Board irrespective of the date of execution of the transfer deed if such a debtor is in possession of the property transferred. Accordingly, the Board on 29.11.2010 decided to seek opinion of this Court on Section 19A(1A) of the Debt Conciliation (Amendment) Act No.29 of 1999. The said Section 19A(1A) reads thus:

"The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such transfer of immovable property as is a mortgage within the meaning of this Ordinance, unless that application is made within three years of the date of the notarially executed instrument, effecting such transfer.

Provided that nothing in this subsection shall be read or construed as preventing the Board from entertaining, after the period referred to in that subsection; an application by a debtor who is in possession of the property transferred."

As mentioned before an argument had been advanced on behalf of the applicant debtor that the restriction referred to in Section 19A(1A) does not operate as a bar to entertain applications if the debtor is in possession of the land alleged to have transferred by a notarially executed document, irrespective of its date of execution.

When a proviso to a particular section in an enactment is to be interpreted, it cannot be looked into in isolation or in other words, without having it linked with the main section. In determining this issue, the authorities referred to below would be of great assistance.

In Lloyds & Scottish Finance, Ltd. v. Modern Cars & Caravans (Kingston), Ltd [(1966) 1 Q.B. 764] Edmund Davies, J. held:

"the proviso must of necessity be limited in its operation to the ambit of the section which it qualifies. A proviso receives only a construction so far as the main section itself is concerned."

In re.Tabrisky, Ex.parte The Board of Trade [1947 Chancery Division at pg.568]

Lord Greene M.R. had stated thus:

"It is common learning that the object of a proviso is to cut down or qualify something which has gone before. The thing which has gone before is the general power to give a discharge, absolute or suspended, and to impose conditions of the widest possible kind. It would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those powers beyond what compliance with the proviso renders necessary.

What the proviso does is this. It does not give powers; it qualifies powers already given and provides that in the exercise of those powers the court shall be subject to certain limitations in the sense that one or more of the stated alternatives is made obligatory”.

This proposition is supported by “**Maxwell on the Interpretation of Statutes**” as well. [12th Edition at page 189] Accordingly, it is clear that the effect of a proviso is limited to the scope of the section which contains the proviso and therefore a proviso cannot stand on its own. In the circumstances, this position in law should apply to the issue at hand as well.

Section 19A(1A) of the Debt Conciliation (Amendment) Act prevents the Board entertaining any application in respect of a property secured by any transfer of a immovable property within the meaning of this Act unless that application is made within three years of the date of such a transfer. However, the proviso to the said section permits the Board to entertain applications made even after laps of three years from the date of execution of the deed if the debtor is in possession of the land transferred by that instrument. Both these requirements should go together without it being separated. In the circumstances, it is clear that the 3 year rule referred to in Section 19A (1A) should operate subject to the limitation referred to in the proviso to that section.

However, the issue at hand contains another aspect that requires the attention of Court. When an exception to a rule is to be implemented, it should always be operative from the date the said rule came into existence. It is trite law that the laws do not have any retrospective effect under normal circumstances.

It must be noted that the amendment to the Debt Conciliation Ordinance by which the said rule namely the 3 year limitation, came into existence only on 17.09.1999. A debtor who seeks protection under the proviso to Section 19A(1A) of the Act No.29 of 1999 cannot claim benefit out of it for a period not envisaged by that law. The maximum period allowed by the particular Section to file applications is limited to three years counted backwards from the date of execution of the instrument relied upon. **Then the matters contained in that law including the exception referred to in the proviso can only be extended backwards to a maximum period of 3 years as the effect of a proviso is limited to the scope of the main section.**

Therefore, it is clear that the Board is without jurisdiction to have and maintain applications filed by debtors who seek the protection under the proviso if those applications had been filed on a date, 3 years before the date of operation of the law namely 19.09.1999. Accordingly, the Board is empowered to entertain only the applications filed after 19th September 1996 by debtors who seek the protection of the proviso to Section 19A(1A) of the Act.

Hence, the proviso to the said Section 19A(1A) would come into play only to the applications in respect of the properties that had been transferred by a deed executed after 17.09.1996. This criterion should be the basis or the threshold or the bottom line when implementing the matters contained in the proviso to Section 19A(1A) which came into existence on 17.09.1999 upon the introduction of the amending Act No.29 of 1999.

Therefore, it is clear that the Board has no jurisdiction to hear and determine applications made relying upon instruments executed notarially, before 17.09.1996 even though a debtor had been in possession of the property subjected to the said transfer.

Hence, the exception to the three year limitation referred to in the proviso is applicable to the transfer deeds executed after 17.09.1996 only. The deed of transfer in respect of the application made in this matter had been executed on 01.02.1993 and therefore the Board has no jurisdiction to entertain this application.

Also, it must be noted that the said exception to the limitation of three years referred to in **the proviso is applicable only to the applications filed by debtors.** Therefore, the cover under the proviso is not available to the creditors who make applications to the Board. However, the three year limitation referred to in Section 19A(1A) is applicable to the creditors as well, since both categories namely debtors and creditors are being referred to in the said Section 19A (1A).

In the circumstances, if I may elaborate on the opinion expressed by Hon. Deepali wijesundera J, as to the request of the Board made under Section 53 of the Debt Conciliation (Amendment) Act, it reads as follows:

1. **In terms of Section 19A(1A) of the Debt Conciliation (Amendment) Act No.29 of 1999, applications to the Board by a debtor or creditor, in respect of a debt purporting to be secured by a transfer of immovable property though in reality is a mortgaged within the meaning of the Debt Conciliation Ordinance, shall be made within three years of the date of the notarially executed instrument effecting such transfer.**
2. **However, under the proviso to the said Section 19A(1A), the Debt Conciliation Board is vested with the jurisdiction to entertain applications made by debtors relying upon transfers which had been**

notarially executed after 17th September 1996 provided such a debtor is in possession of the land subjected to the said transfer. It would operate as an exception to the time bar referred to in paragraph 1 above.

- 3. The Board has no jurisdiction whatsoever in respect of the applications of the properties that had been subjected to a transfer by a notarially executed instrument effected before 17th September 1996.**

Justice K.T.Chitrasri

Judge of the Court of Appeal