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

In the matter of an application for mandates in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 161/2018

Naiduwa Hannadi Jayanthi Mallika Samarasinghe,
No. 397, High Level Road,
Dehiwela.

And now at,
No. 380, High Level Road,
Navinna, Maharagama.

PETITIONER

Vs.

1. Malini Abeywardhana Ranathunga,
   Chairman, Debt Conciliation Board.

2. T.D.K. Pujitha Thilakawardhana.

3. K.H. Premadasa.

4. K.P. Bandula Ranjith.

5. K.M. Karunaratne.

   2nd – 5th Respondents are Members,
   Debt Conciliation Board.

6. D.M. Sarathchandra.

7. M.A.N.S. Gunawardhana.

8. K.A.P. Rajakaruna.

6th – 8th Respondents are Former Members,
Debt Conciliation Board.

9. Keembiya Hettige Roshani Vilasitha,
Secretary.

1st – 9th Respondents at
Department of Debt Conciliation Board,
No. 35A, Dr. N.M. Perera Mawatha,
Colombo 8.

10. Malliyawadu Triyo Gunaratne.

11. Malliyawadu Harry Gunaratne.

12. Vineetha Irenee alias Subasinghe
Pathirana Gamage Vineetha Irene,

10th – 12th Respondents at/formerly at
No. 11/12B, Wata Raum Road, (Circular Road),
Enderamulla,
Ambalangoda.

13. Sembakutti Chandi Nirosha Nilmini,
No. 429, Bath Kumbura,
Bataduwa, Batapola.

14. Muthuwahandi Yasaratna de Silva,
Wellabada, Madampe,
Ambalangoda.

New Address
Hadanagahathotawatta,
Kobeithuduwa, Batapola.

15. Jayasinghe Sumith Manangoda,
Hadanagahathotawatta,
Kobeithuduwa, Batapola.

RESPONDENTS

Before:	**Arjuna Obeyesekere, J / President of the Court of Appeal**
Counsel:	Dr. Sunil Cooray with Nilanga Perera for the Petitioner
	Ms. Indumini Randeny, State Counsel for the 9th Respondent
	Ms. Nishadi Wickremasinghe for the 12th Respondent
Argued on:	5th October 2020
Written Submissions:	Tendered on behalf of the Petitioner on 1st April 2021
	Tendered on behalf of the 9th Respondent on 26th January 2021
	Tendered on behalf of the 12th Respondent on 29th March 2021
Decided on:	21st May 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner states that the land "*Galpoththawelakele*" which is 4 acres in extent, situated in the District of Galle was owned by her father upon whose death half share devolved on her mother while the other half devolved on herself and her four siblings. Her mother had thereafter transferred her half to the Petitioner, and the Petitioner and her husband had subsequently purchased the undivided shares held by her siblings.

The Petitioner states that she and her husband had come into possession of the said land in 1976. Having built a house on the said land, she says her family enjoyed the harvest of the cinnamon plantation and several coconut trees situated on the said land. The Petitioner states that in or about 1992, the Petitioner, her husband and their children had moved to Nugegoda for the purpose of their children's education. However, the Petitioner states that she continued to be in possession of the said land and enjoyed the harvest of the land by employing a caretaker by the name of Goshinnawadu Sarath who resided in the area. The Petitioner states that they frequently visited the said land to ensure that the land and their house remained unoccupied.

In or about 1997, the Petitioner, having subdivided the said land into several allotments as depicted in Plan No. 2697 dated 20th December 1997, had sold all the said subdivided allotments except Lot No. 1 depicted in the said Plan. Lot No. 1 was in extent of 2 Roods and 21.1 Perches and included their house, the cinnamon plantation and several coconut trees. The Petitioner states that while she and her husband continued to be in possession of Lot No. 1, she used to obtain various loans from local money lenders in the area by offering the said land as security for such loans by executing Deeds of Transfer or Conditional Deeds of Transfer in favour of the lenders.[1]

The Petitioner states that on or about 8th March 2010, she obtained a loan of Rs. 1 million from the 10th Respondent which she agreed to repay with interest at 6% per month. The Petitioner admits that she executed Deed of Transfer No. 12255 by which she transferred the said Lot No. 1 to the 10th Respondent as security for the said loan. The Petitioner states further that although she had taken a loan of Rs. 1 million, by mutual agreement, a sum of Rs. 300,000/- was inserted on the said Deed as the consideration. It is important to note that the Petitioner did not hand over possession of the land to the 10th Respondent.

The 10th Respondent had passed away in 2011. The 11th and 12th Respondents who are the parents of the 10th Respondent had collected the interest on the said loan from the Petitioner. The Petitioner states that she maintained a book, marked '**X1**', where she made a note of the interest paid to the 11th and 12th Respondents. The Petitioner has produced marked '**X2a**' – '**X2r**' the deposit slips by which she deposited the interest in the bank account of the 11th Respondent. The Petitioner state that from 2014, due to financial difficulties, she only paid part of the interest that was due. The Petitioner states further that as at 6th July 2014, she had paid a total sum of Rs. 2,800,000/- as interest for the said loan of Rs. 1 million.

The Petitioner states that as the 11th and 12th Respondents were threatening to sell the said property, she filed Application No. 43318, marked '**X4**' in the Debt Conciliation Board (the Board) on or about 31st July 2014, which is over four years after the execution of Deed No. 12255, seeking relief under the Debt Conciliation Ordinance.

[1] Vide Deeds of Transfer marked 'A9' – 'A22' before the Board.

The 11th and 12th Respondents had appeared before the Board upon notices being served. It had later transpired that the 11th and 12th Respondents had transferred a portion of Lot No. 1 to the 13th Respondent a few days before the Petitioner filed the application before the Debt Conciliation Board. The remaining portion of the land had been transferred to the 14th and 15th Respondents thereafter, which prompted the Petitioner to name the 13th – 15th Respondents as parties before the Board. Although the 11th and 12th Respondents were represented by their Attorney-at-Law before the Board at the outset, the 11th -15th Respondents were neither present nor represented thereafter, prompting the Board to fix the matter for an *ex parte* hearing.

Section 19A(1A) of the Debt Conciliation Ordinance No. 39 of 1941, as amended by Act No. 29 of 1999 reads as follows:

> *"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;"*

Admittedly, the Petitioner has filed the application before the Board after three years from the date of execution of the Deed of Transfer. As the application was not made within three years from the date of execution of the transfer deed, the Petitioner was required to prove that she was in possession of the said property, according to the proviso to Section 19A(1A) of the Ordinance, prior to her application being entertained by the Board.

The Petitioner states that at the *ex-parte* hearing that commenced before the Board on 17th January 2017, she gave evidence in proof of possession of the said land along with documents marked 'A1' – 'A22' in support of her oral testimony. She states that she also led the evidence of Goshinnawadu Sarath, who looked after the property

after she moved to Nugegoda, the Grama Sevaka in the area, and M.G. Karunapala, the present caretaker of the property. The Petitioner states that in the absence of the 11th – 15th Respondents, the evidence remained uncontradicted and unchallenged.

By its Order delivered on 17th January 2018 marked '**X8**', the Board rejected the application of the Petitioner on the basis that the Petitioner had failed to prove that she was in possession of the said land, as required by the proviso to Section 19A(1A) of the Ordinance.

Aggrieved by the Order '**X8**' the Petitioner filed this application, seeking *inter alia the* following relief:

a) A Writ of Certiorari to quash the Order '**X8**';

b) An order directing the Chairman and the members of the Debt Conciliation Board to entertain the Petitioner's application under Section 19A(1A) of the Ordinance;

c) An order directing the Chairman and the members of the Debt Conciliation Board to proceed with the Petitioner's application under the provisions of the Ordinance.

Prior to considering the legality of '**X8**', it would be useful to briefly consider two matters. The first is the circumstances that led to the introduction of the Debt Conciliation Ordinance. The second is the manner in which Section 19A has evolved over the years.

The Debt Conciliation Ordinance was introduced in 1941 as a piece of welfare legislation by the Colonial Legislature to address a pertinent social issue involving civil debts that particularly affected rural and economically disadvantaged communities. Those who required financial assistance were compelled to mortgage immovable property in order to obtain loans, and keep paying interest at exorbitant rates until such time as they were able to redeem their properties. These instruments were usually executed as outright transfers, due to the disparity in bargaining power between the creditors and debtors, and because debtors are often

desperate to obtain financial assistance and did not have the benefit of access to legal advice to execute a mortgage which protects their rights. This practice led to the eventual loss of property which further widened the gap in society and drove the poor to the depths of poverty.[2]

The Debt Conciliation Ordinance was therefore introduced to provide some relief to the debtor in order to prevent capricious, oppressive, and unconscionable conduct on the part of the creditor. The Department of Debt Conciliation was established to provide relief and legal protection for debtors to redeem on concessional installments and low interest rates, immovable properties such as agricultural land or residential premises hypothecated to obtain a loan on a mortgage or a deed of conditional transfer.[3] The culture of informally mortgaging immovable property for the purpose of obtaining loans exists to date, particularly due to the inability to obtain loans from the formal banking and financial sector. This provides the Debt Conciliation Ordinance and the mechanism set out therein continuing relevance.

The Ordinance in its original form did not provide for applications in respect of conditional transfers. The Debt Conciliation (Amendment) Act No. 25 of 1959 introduced Section 19A which provided for "*Applications in respect of debts purporting to be secured by conditional transfers of immovable property.*" The learned State Counsel for the 9th Respondent, the Secretary of the Board has annexed to her written submissions, the Parliamentary Hansard of 16th September 1958 relating thereto. The intention behind the recognition of conditional transfers is set out in the following paragraph:

> "*The Supreme Court decisions hitherto point to the conclusion that the law does not warrant the construction that a conditional transfer is the equivalent of a mortgage. So that, today the Debt Conciliation Board is empowered to deal only with mortgages and it has no right to entertain applications for relief in the case of conditional transfers. It is therefore to provide this much needed relief in the case of conditional transfers that this Amendment is brought to the existing Ordinance*.

[2] See Debt Conciliation Board v R.D. Hector Jayasiri [CA/APN/MISC 01/2011; CA Minutes of 9th October 2012; Deepali Wijesundera, J.]

[3] Parliamentary Debates of 4th August 1999; speech made by the Minister of Justice when introducing the amendment to the Ordinance.

The other Amendment which is sought to be made is this. As Hon. Members are aware, at present applications for relief can be made in respect of unencumbered agricultural properties only. The amendment that we propose to introduce today in this Bill is to see that any property of any description whatsoever comes within the scope of the authority of the Debt Conciliation Ordinance. It is therefore with regard to these two objectives – firstly, to widen the scope of the work of the Debt Conciliation Board and authorize them to deal with conditional transfers in the same way as they deal with mortgages, and secondly in order to enable a larger section of the people to obtain relief in respect of all properties and not merely certain agricultural properties – that this amending Bill is introduced."

It therefore shows that by introducing *conditional transfers* to the Ordinance, the legislature was seeking to fill a gap which existed in the debt conciliation scheme and the general purpose of the Act.

Section 19A introduced by the Amendment Act No. 25 of 1959 only permitted the Board to entertain applications in respect of debts secured by conditional transfer of immovable property provided such applications were filed *at least* ***thirty days before*** *the expiry of the period within which such property may be redeemed by the debtor*.

By the Debt Conciliation (Amendment) Act No. 20 of 1983, Section 19A(1) was amended, which enabled a party to make an application **any time *before*** *the expiry of the period within which that property may be redeemed.*[4] The Debt Conciliation (Amendment) Act No. 29 of 1999 retained Section 19A(1) and introduced Section 19A(1A), which is the provision which relates to the present application.

As the learned State Counsel has submitted, the Ordinance as it now stands provides for two regimes governing the admissibility of applications from debtors. The first is where the transaction is a '*conditional transfer*', where the time period within which an application could be made extends up to any date *before the expiry of the period*

[4] Section 19A(1) introduced in 1983 reads as follows: The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such conditional transfer of immovable property as is a mortgage within the meaning of this Ordinance unless that application is made before the expiry of the period within which that property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor."

within which that property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor. The second relates to a transfer *simpliciter,* where a debtor or a creditor is able to make an application within three years from the date of such instrument. In terms of the proviso to Section 19A(1A), the time restriction does not apply to a *debtor who is* ***in possession of the property*** *transferred.*

I have already noted that the Petitioner has come before the Board after the lapse of three years from the date of execution of the Deed of Transfer in question. The Board, in their Order '**X8**' has therefore correctly identified that in order for the Petitioner to seek relief from the Board, she needs to first satisfy the Board that she is in **possession** of the land as per the proviso to Section 19A(1A). It is only if the Petitioner is able to cross this threshold issue that the Board would proceed with her application in terms of Section 21A.

I must at this stage refer to Section 21A of the Ordinance, which was in existence at the time Section 19A(1A) was introduced in 1999. Section 21A provides that in determining whether or not a transfer or conditional transfer is in reality a mortgage, the Board is required to take into consideration all the circumstances of the case and in particular four matters set out therein. One of the matters that must be taken into account is the *continuance of the transferor's possession of the property transferred*. In other words, has the debtor in addition to signing a Deed of Transfer handed over possession of the land to the creditor, with the result that handing over of possession is a possible reflection of the true nature of the transaction.

To my mind, the possession referred to in Section 19A(1A) of the Ordinance is a reflection of the possession provided for in Section 21A. Therefore, a person who effects a *transfer* and at the same time hands over possession to the creditor must make an application within three years, whereas a debtor who does not hand over possession to the creditor and therefore continues to be in possession, can make an application even though a period of three years has lapsed since the execution of the notarially executed instrument. The rationale for drawing a distinction between handing over and not handing over possession is clear. The fact that in this application, the Petitioner did not hand over possession at the time of the execution of the Deed of Transfer, and has not since then handed over possession of the land

to the 10th Respondent or to any of the other Respondents, is sufficient evidence for the Board to have concluded that possession of the property was with the Petitioner.

Prior to considering the position of the Petitioner with regard to possession, it might be useful to consider what constitutes *possession.* The learned Counsel for the 12th Respondent has cited the case of **Iqbal v. Majedudeen and Others**[5] where this Court, considered the meaning of 'possession' in the context of the Primary Courts Procedure Act, and held as follows:

> "*The test for determining whether a person is in possession of any corporeal thing, such as a house, is to ascertain whether he is in general control of it. Salmond observes that a person could be said to be in possession of, say, a house, even though that person is miles away and able to exercise very little control, if any.*
>
> *The law recognizes two kinds of possession:*
>
> *(i)* *when a person has direct physical control over a thing at a given time, he is said to have actual possession of it;*
>
> *(ii)* *a person has constructive possession when he, though not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person.*
>
> *In this case in hand, perhaps, it cannot be said that the 1st respondent has actual physical possession because she was not in physical occupation of the house in question; but she clearly had, at least, constructive possession because she, by keeping the premises locked, clearly exercised not only dominium or control over the property in question but also excluded others from the possession there of. By keeping the premises locked, she, i.e. the 1st respondent, had not only continued to retain her rights in respect of the property in question but also was* ***exercising a claim to the exclusive control there of****, and her affidavit evidence is that she had not terminated her intention to revert to the physical occupation of the relevant premises*."

[5][1999] 3 Sri LR 213.

The primary submission of the learned Counsel for the Petitioner is that the Board failed to consider the totality of the evidence presented to it, and that the decision of the Board is irrational and unreasonable. In considering this argument, I am mindful that this Court is exercising its Writ jurisdiction as opposed to its Appellate jurisdiction, and that this Court is not concerned with the rights and wrongs of the decision sought to be impugned but only whether the said decision is legal or not. As Lord Brightman stated in the House of Lords in **Chief Constable of North Wales Police v Evans**:[6]

> *"Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power"..... "Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.."*

The consequence of not taking into consideration all the circumstances as required by the Ordinance, or in other words, disregarding relevant considerations, has been captured in the following two paragraphs of **De Smith's Judicial Review**:[7]

> *"When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which egard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. If the exercise of discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised....*
>
> *If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential*

[6] [1982] 1 WLR 1155 at 1174.

[7] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, De Smith's Judicial Review [8th Edition, 2018] Sweet Maxwell, page 305.

importance of the factor that was overlooked, even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation." [8]

While I am mindful that it is not my duty to analyse the facts as would be done when exercising appellate jurisdiction, I am also mindful that, as stated by Lord Bingham, that *'they (judges) are auditors of legality; no more, but no less.'*[9]

If a decision has been influenced by considerations which either expressly or implicitly cannot lawfully be taken into account, a Court may hold that such discretionary power has not been exercised validly. In doing so, Courts can consider to what degree the decision maker has been influenced by such considerations and in order to determine the degree of influence, Courts may be guided by the reasons provided by the decision maker. The reasons provided for a decision would allow Courts to effectively scrutinize the decision and detect what factors have influenced the decision maker.

In **De Smith's Judicial Review**[10] it has been stated that:

'*Irrationality may also sometimes be inferred from the absence of reasons.*[11] *When reasons are required, either by statute or by the growing common law requirements, or where they are provided, even though not strictly required, those reasons must be both "adequate and intelligible". They must therefore both rationally relate to the evidence in the case*[12]*, and be comprehensible in themselves*[13]*.'*

The Petitioner had produced the proceedings before the Board marked '**X5(d) – (g)**'. I have examined the evidence of the Petitioner where she has clearly stated as follows:

[8] Ibid. p 306-307.
[9] Tom Bingham, The Rule of Law [2011], Penguin Books, at page 61.
[10] Ibid; page 605.
[11] See Padfield v. Minister of Agriculture Fisheries and Food [1968] AC 997 at 1032.
[12] See Re Poyser and Mills' Arbitration [1964] 2 QB 467 at 478.
[13] See R v. Hammersmith and Fulham LBC Ex parte Earls Court Ltd, The Times,

a) She did not hand over possession of the property to the 10th Respondent;

b) She continues to be in possession of the land;

c) There is a cinnamon plantation and coconut trees on the land;

d) She has employed Karunapala to look after the property;

e) The income thereof is taken by her;

f) She visits the said land every two months or so while her husband visits the land monthly; and

g) She was present when the valuer visited the property.

To my mind, all these are factors which on their own, and without any further corroboration, establish that the Petitioner is in possession of the land.

As noted earlier, the 11th -15th Respondents were not present when the evidence-in-chief of the Petitioner was recorded on 17th January 2017. The Board has therefore directed that notices be issued on the 11th – 15th Respondent informing that the Debtor has given evidence relating to possession and that if the 11th – 15th Respondents are in possession of the land, that they could be present on the next date to cross examine the Petitioner. When the inquiry commenced on 10th March 2017, the Board had noted that none of the persons noticed had appeared even though notices had been dispatched. Thus, the evidence of the Petitioner, which alone was sufficient to establish that she is in possession of the land, has gone uncontradicted. This should have been sufficient for the Board to have arrived at a finding on possession.

The evidence of Goshinnawadu Sarath, M.G. Karunapala and the Grama Sevaka had been led thereafter.

In '**X8**', the Board has accepted the position that there are coconut trees and a cinnamon plantation on the said land, that the Petitioner visits the property once in two months and her husband visits the property once a month, and that the said

land is being looked after by Karunapala. The question as to why the Petitioner and her husband would visit the land unless they were in possession thereof does not appear to have crossed the mind of the Board.

The Board has thereafter arrived at the following findings:

(a) The Petitioner has not led any evidence about the yield from the said land;[14]

(b) Although the Petitioner has stated that she obtains an income from the property, she has failed to show how she obtains an income;[15]

(c) Even though the Petitioner has stated that Karunapala is the caretaker of the said property, she has not stated how the income from the said land is obtained from Karunapala and whether she obtains coconut from the property when she visits the said property;[16]

(d) The Petitioner does not mention about Sarath, their caretaker prior to 2006 in her evidence;

(e) Sarath describes the land as a land which is 100 perches in extent;

(f) The Grama Niladari who gave evidence assumed duties only a few months before the Petitioner made this application to the Board. She has given evidence of what she has heard and not from what she knows.

The Board had thereafter concluded as follows:

> **"මේ අනුව ඉදිරිපත් කර ඇති සාක්ෂි සහ ලේඛණ සමස්ථයක් ලෙස ගෙන සලකා බැලිමේදි මෙම ඉල්ලුම්කාරිය නුගේගොඩ පදිංචිකාරියකි. ඉල්ලිමට අදාල දේපල ගාලු පාරේ දිස්ත්‍රික්කයේ බටපොල නැමති ගමේ පිහිටා ඇත. එහි ඇති නිවසේ ඉල්ලුම්කාරිය පදිංචියක් නැත. ඇය අවුරුදු 25කට පමණ පෙර කොළඹ පදිංචියට පැමිණ ඇත. ඉඩමේ ඇතැයි කියන පොල් ගස් 10 කුරුඳු, වගාව ආදියෙන් ඇයට ආදායමක් ලැබෙන බවට පිලිගත හැකි සාක්ෂිදි නැත. ඇය පොල් කඩාගෙන එන බවවත් කුරුඳු, වල ආදායම ගන්නා බවවත් ප්‍රකාශ කර නැත. ඉඩම බලාගන්නා**

[14] පලදාව ලබාගැනීම ගැන සාක්ෂියක් දී නැ;
[15] ඇය දේපළේ ඇති වගාවේ ආදායම ලබා ගන්නා බව ප්‍රකාෂ කර ඇතග නමුත් එම ආදායම ඇය ලබා ගන්නේ කෙසේද, කියා සාක්ෂිදී නැ;
[16] ඇයට කරුණාපාල යන අය දේපළේ ආදායම ලබාදෙන ආකාරයක් හෝ ඇය එම දේපළේ පොල් ඇය ඉඩමට ගියවිට ගෙන එන බව හෝ ඇගේ සාක්ෂියේ ප්‍රකාශ කර නැ;

බවට ඉල්ලුම්කාරිය ප්‍රකාශ කල කරුණාපාල යන අයගේ සාක්ෂියේ කිසිම වටිනාකමක් නැත. එම සාක්ෂිය ගැන මින් පෙර සඳහන් කර ඇත. සරත් කියා සාක්ෂි දුන් ඉඩම බලා ගත්තා කියන අය ඉල්ලුම්කාරිය සාක්ෂි දුන් අවස්ථාවේ සඳහනක් හෝ කරනැත. මෙම සාක්ෂි කරුවන් දෙදෙනාගේ කට වචනවලට පමණක් සීමාවූ සාක්ෂිවලට වටිනාකමක් දියනොහැක. ග්‍රාම නිලධාරී සාක්ෂියට සාක්ෂිමය වටිනාකමක් දිය නොහැකි සාක්ෂියක් බවට මින් පෙර සඳහන් කරන ලදි."

It is apparent from the above that the Board, instead of considering the evidence of the Petitioner on the core issue of possession, was looking for contradictions between the evidence of the various witnesses, which was irrelevant to the core issue that the Board was called upon to decide. In any event, a perusal of the evidence contained in the proceedings '**X5(g)-(f)**' reveal several inconsistencies between the evidence that was led before the Board and with the conclusions reached by the Board.

The Board has held that the Petitioner has not led any evidence about the yield that she obtains from the said land, and although she has stated that she obtains an income from the property she has failed to show how she obtains an income. In her evidence on 17th January 2017 the Petitioner has stated as follows:[17]

"ප්‍ර: පිඹුරේ දැක්වෙන මෙම ඉඩම කවුද භුක්ති විඳින්නේ?
උ: මම.
ප්‍ර: පිඹුර මොනවගේ ස්වාභාවයක ඉඩමක් ද?
උ: කුරුඳු, වගාව තිබෙන ඉඩමක්."
ප්‍ර: එම ඉඩමේ කුරුඳු, වගාව තිබෙන බව තමන් කිව්වා නේද?
උ: ඔව්. පොල් ගස් 10 ක් විතරත් තියෙනවා.
ප්‍ර: එම ආදායම ලබා ගන්නේ කවුද?
උ: මම."

In his evidence, Goshinnawadu Sarath has stated as follows:[18]

ප්‍ර: මොනවද තිබෙන්නේ ඉඩමේ?
උ: කුරුඳු.
ප්‍ර: වෙන මොනවද?
උ: පොල් ගස් 10ක්.
ප්‍ර: කවුද ඵලදාව භුක්ති විඳින්නේ?
උ: මේ ගොල්ලන් කොළඹ ඉඳලා එනකොට මාසයකට සැරයක් එහෙම කඩලා අරන්යනවා. නැත්නම් මාත් පටිබෝපනය කලා."

[17] Vide pages 5-8 of '**X5(d)**'
[18] Vide page 8 of the proceedings dated 10th March 2017 marked '**X5(e)**'.

The fact that the produce is taken by the Petitioner has therefore clearly been established by the evidence of Sarath, but appears to have been inadequate for the Board.

The Board has concluded that even though the Petitioner has stated that Karunapala is the caretaker of the said property, she has not stated how the income from the said land is obtained from Karunapala and whether she obtains coconut from the property when she visits the said property.

In her evidence, the Petitioner had stated as follows:[19]

"ප්‍ර: තමන් කොහොමද කොළඹ පදිංචිව සිට එම දේපළ භුක්ති විඳින්නේ?
උ: කරුණාපාල කියන මනුස්සයට ඉඩම බලා ගන්න කියලා තියෙන්නේ.
ප්‍ර: තමන් කියන්නේ ඉඩම බලාගන්න පුද්ගලයෙක් යොදවලා තිබෙනවා කියල ද?
උ: ඔව්."
ප්‍ර: තමන් මෙම ගරු මණ්ඩලයට කියා සිටින්නේ නඩු කියන මෙම ඉල්ලුම් පත්‍රයට අදාළ ඉඩමේ භුක්ති විඳින්නේ තමන් බවද?
උ: ඔව්."

The evidence of M.G. Karunapala is as follows:[20]

ප්‍ර: තමුන් මෙම ඉඩම බලා ගන්න පටන් ගත්ත මුල් කාලයේ පයන්ති මල්ලිකා මහත්මිය මෙම ඉඩමේ පදිංචි වෙලා හිටිය ද?
උ: මම ඉඩම බලා ගන්න ඉස්සෙල්ලා හිටියේ. මම ඉඩම බලා ගන්න කොට පයන්ති මල්ලිකා මහත්මිය කොළඹ හිටියේ.
ප්‍ර: තමන් මෙම ඉඩමේ වගා කිරීමේ කටයුතු සිදු කරනවාද?
උ: කුරුඳු, තලනවා. පොල්කඩනවා. අවුරුද්දකට දෙපාරක් කුරුඳු, තලනවා
ප්‍ර: තමන් මෙම ආදායම පයන්ති මල්ලිකා මහත්මියට දෙනවාද?
උ: ඔව්."

The above extracts from the evidence of the Petitioner and the other witnesses quite clearly illustrates that the Petitioner was earning an income from the cinnamon plantation and the 10 coconut trees in her property. The explanation of the Board as to why the evidence led in respect of the income earned from the cinnamon plantation and the 10 coconut trees is inadmissible or inadequate does not stand to reason and is not supported by the evidence. Therefore, in the absence of any evidence of the Respondents to contradict the evidence, I am of the view that the

[19] Vide pages 7 and 8 of the proceedings of 17th January 2017 marked '**X5(d)**'.
[20] Vide page 5 of the proceedings dated 12th June 2017 marked '**X5(f)**'.

Board has erred in concluding that the Petitioner has not established that she earns an income and the yield from the property.

Thus, there was clear evidence before the Board to establish that the Petitioner was in possession of the land. The Board has however gone onto consider matters which are irrelevant to the core issue. In my view, the most important factor was that the Petitioner did not hand over possession of the land to the 10th Respondent at the time the Deed was executed. The fact that the Board was mindful of this issue is evident by the decision taken by the Board, at the end of the evidence of the Petitioner on 17th January 2017, to issue a special notice to the 11th – 15th Respondents to be present before the Board to provide evidence with regard to possession. Having done that, the Board completely failed to take into consideration this issue in determining possession.

In the above circumstances, I am of the view that the Order of the Board marked '**X8**' is not supported by the evidence that was led before the Board, and is therefore unreasonable and irrational. The said Order is therefore liable to be quashed by a Writ of Certiorari.

There is one other matter that I wish to advert to. The learned Counsel for the 12th Respondent submitted that the Petitioner has failed to exhaust the remedy provided in Section 54 of the Ordinance, which reads as follows:

> *"The Board may, of its own motion or on application made by any person interested, within three months from the making of an order by the Board dismissing an application, or granting a certificate, or approving a settlement, or before the payment of the compounded debt has been completed, review any order passed by it and pass such other in reference thereto as it thinks fit."*

The applicability of Section 54 was considered by this Court in **Mulla Vidanalage Indika Pushpamala vs Deshapriya Jayarathna and Others**,[21] where having referred to several decisions of the Supreme Court and this Court relating to the need to exhaust alternative remedies prior to invoking the Writ jurisdiction of this Court, it was held as follows:

[21] CA (Writ) Application No. 345/2018; CA Minutes of 12th October 2020.

"I do agree that the Petitioner could have invited the Board to review their decision in terms of Section 54. However, I am not inclined to refrain from granting relief solely due to the failure on the part of the Petitioner to resort to Section 54, for three reasons. The first is, for the reasons already discussed, the decision of the Board is illegal. The second is, what is provided for by Section 54 is not a right of appeal, which means that there will not be a re-consideration of all the facts during the review stage, unlike in an appeal. The third reason follows the second. I have my doubts whether Section 54 is an effective alternative remedy. In my view, the effectiveness of the remedy provided by Section 54 is dependent on the grievance of the Petitioner. Where the power of review is limited to the Order already made, I have my doubts whether the Board can re-visit the circumstances that were not considered in the Order, or in other words, act like how an appellate body would do, and re-consider all the circumstances, thereby addressing the grievance of the Petitioner.

Taking into consideration all of the above circumstances, and the fact that the Writ of Certiorari is a discretionary remedy, I am not obliged to automatically dismiss this application owing to the failure on the part of the Petitioner to act in terms of Section 54. I am of the view that the interests of justice demand that I should exercise the discretion vested in this Court in favour of the Petitioner."

I am of the view that the failure to invoke the provisions of Section 54 of the Ordinance does not disentitle the Petitioner from invoking the jurisdiction conferred on this Court by Article 140 of the Constitution.

I accordingly issue a Writ of Certiorari quashing the Order marked '**X8**'. The Board shall accordingly entertain the application of the Petitioner and proceed to hear the said application in terms of the provisions of the Ordinance. I make no order with regard to costs.

President of the Court of Appeal