

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

In the matter of an application for issuance of
the mandates in the nature of *Writ of*
Certiorari and *Mandamus*.

Alahakoon Mudiyanseelage Jayanthi
Anulawathie of No. 100/7, Wendesiwatta,
Yapagama, Dambulla.

Petitioner

CA. Writ Application No: 152/21

Vs.

1. Ananda Senaratne Bandara Jayasundara
Ulpatha Road, Madatugama.
2. Ms. Iranganie Perera (Hon. Chairman)
3. Ms. Shiromi Perera (Hon. Member)
4. Ms. W.C. Pushpamali (Hon. Member)
5. Ms. J.M.T.M.P.U. Thennakoon (Hon.
Member)
6. Ms. Kusum Pathirna (Hon. Member)
7. Ms. Subhashini Dayananda (Secretary)

All of No. 35A, Dr. N.M. Perera Mawatha,
Colombo 08.

All the 2nd to 6th Respondents above named are the Hon. Chairman and the members of the Debt Conciliation Board.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Chandana Wijesoorita for the Petitioner.
Dinesh De Alwis, for the 1st Respondent.
Hashini Opatha, SC for the State.

Argued On : 06.09.2022

Written Submission : Petitioner : 14.10.2022

Tendered On : 1st Respondent : 21.09.2022

Decided On : 21.10.2022

Dhammika Ganepola, J.

The Petitioner states that the 1st Respondent has made an application before the Debt Conciliation Board (hereinafter sometimes referred to as the Board) on the basis that the 1st Respondent mortgaged the subject matter described therein the said application to the Petitioner in respect of a loan he obtained from the Petitioner by the Deed of Transfer No. 8313 dated 01.06.2018 attested by one Notary Public Jayampathi Rathnadiwakara.

Since the application has been made after 3 years from the date of the notarial execution of the impugned deed, the 1st Respondent was directed to satisfy the Board as to the possession of the impugned property by the 1st Respondent.

After an inquiry to ascertain whether the 1st Respondent was in fact in possession of the subject matter of the application, the Board held that the 1st Respondent had been in possession of the impugned property at the time of the said application by its order dated 12.07.2019 (P2).

Being aggrieved by the said order, an application has been made by the Petitioner to the Board to review or set aside the said order marked P2 under the powers vested on the Board by virtue of Section 54(1) of the Debt Conciliation Board Ordinance. The Debt Conciliation Board by its order dated 17.09.2020 (P3) has refused the said application on the basis that Section 54 of the said Ordinance had not provided provisions to reconsider its own order delivered in respect of possession.

Petitioner states that the said orders P2 and P3 are ultra-vires, arbitrary, unreasonable and violative of principles of natural justice. Accordingly, Petitioner has filed this application seeking inter-alia for an order in the nature of a Writ of Certiorari quashing the said decisions of the Debt Conciliation Board reflected in the documents marked P2 and P3 and a Writ of Mandamus compelling the 2nd to the 6th Respondents to dismiss the said application before the Board.

The Petitioner's stance is that the Board has failed to consider the evidence led before the Board in respect of the possession of the impugned property.

However, it must be borne in mind that there is a distinction between Judicial Review and court exercising appellate jurisdiction.

*“Judicial review must be distinguished from an appeal against a decision. The court and tribunal structure provides a more or less rational appeal structure for those aggrieved by a judicial decision. The appellate court will have the power to reconsider the case and to substitute its own decision for that of the lower court. An appeal may be made on both the law and the facts of the case, so full re-hearing may take place. judicial review, by contrast, is concerned solely with the manner in which the decision maker has applied relevant rules: it is thus procedural in nature. It is not for the court-in judicial review proceedings- to substitute its judgement for that of the decision-making body to which powers have been delegated but, rather, to ensure that the adjudicator has kept within the rules laid down by statute and the common law. In short, the role of the courts in judicial review is to exercise a supervisory, not an appellate, jurisdiction. judicial review ‘is not an appeal from a decision, but a review of the manner in which the decision was made.’¹”***[constitutional & Administrative law by Hilaire Barnett (ninth edition) page 550.**

Thus, a Judicial review is only available to test the lawfulness of a decision made by a public authority and not the correctness of its order. Therefore, I am of the view that it is not the duty of this court to analyse the facts as would be done in an appeal process since this Court is exercising its Writ jurisdiction as opposed to its Appellate Jurisdiction. Furthermore, in the case of **Reg. Vs. Lord Chancellor, Ex p. Maxwell (DC) (1997) 1 W.L.R. 104 at 109**, the court has observed that those courts (which exercise the jurisdiction of judicial review) are not concerned with the merits of such decisions, but only with the legality of them.

¹ Chief Constable of North Wales Police V. Evans [1982]1 WLR 1155 at 1174.

However, it is a recognized principle in law that when a public authority or tribunal fails to take relevant circumstances into consideration and/or takes into account irrelevant considerations, which materially affect the decision, such a decision may be subject to judicial review.

The Petitioner states that the impugned order marked P2 is tainted by error of law on the face of the record due to the failure of the Board to consider the evidence led in respect of the possession of the impugned property before the Board. The Section 19(1A) of the Debt Conciliation Board Ordinance No.39 of 1941, as amended by Act No.29 of 1999 stipulates that an application of this nature shall not be entertained upon the expiry of three years from the date of execution of the instrument unless the debtor is in possession of the property transferred. Section 19(1A) is 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;”

The deed of transfer in issue No. 8313 was executed on 01.06.2018. The Petitioner has filed the application before the Debt Conciliation Board after the lapse of three years from the date of execution of the said deed. Therefore, the Petitioner was required to satisfy the Board that she was in possession of the impugned property as per Section 19(1A) of the Debt Conciliation Board Ordinance before the application was entertained. This is vital in determining whether the transaction (transfer or conditional transfer)

involved is a real mortgage or not since the handing over of possession of the property reflects the true nature of the transaction. (See Naiduwa Hannadi Jayanthi Mallika Samarasinghe Vs. Malini Abeywardhana and Others, CA(Writ)Application No.161/2018 decided on 21.05.2021)

As per the record of proceedings before the Board marked P1, it is observed that the 1st Respondent and one Grama Niladhari who served in the division where the impugned property is situated have given evidence to establish the position that the 1st Respondent was in possession of the impugned property. However, by its decision marked P2, it appears that the Board has failed to make a determination based on the evidence produced by the said witnesses on whether the 1st Respondent has satisfied the Board of his possession of the impugned property as of the date of the application, thus leading to a failure to take into account relevant considerations. Instead of considering the evidence presented by the said two witnesses, the Board has taken into consideration the failure of the Petitioner to give evidence and her inability to satisfy her possession of the impugned property in making the determination. This results in a wholly irrelevant consideration as the burden of proof to satisfy the possession of the property rests with the 1st Respondent as per Section 19(1A) of the Debt Conciliation Board Ordinance. The Board has placed the burden which is owed to the 1st Respondent on the Petitioner. The relevant part of the order of the Board is reproduced as follows,

“ඉල්ලුම්කාර(ණයකරු) වෙනුවෙන් උගන් නීතිඥවරයා විසින් ඉදිරිපත් කර ඇති ලිඛිත දේශණයෙන් සඳහන් කර ඇත්තේ (ණයහිමි) වගඋත්තරකාරිය මෙම දේපළ භුක්ති විදීම සම්බන්ධයෙන් සාක්ෂි නොදී තිබීම මඟින් ඇය දේපළේ භුක්තිය විදින බව තහවුරු නොවන බවය.

ඉල්ලුම්කරු අදාළ දේපළේ භුක්තිය ඔප්පු කළ යුතුය. නමුත් මෙම විමසීමේදී ඉදිරිපත් වූ ඉල්ලුම්කරුගේ සහ එම ග්‍රාම නිලධාරී වරයාගේ සාක්ෂිය සහ පැ.5 ලෙස ලකුණු කර ඉදිරිපත් කළ පැමිණිල්ල අනුව මෙම දේපළේ භුක්තියේ (ණයහිමි) වගඋත්තරකාර සිටින බවක් තීරණය කළ නොහැක. (ණයහිමි) වගඋත්තරකාරිය ඒ අනුව ඇය දේපළේ භුක්තියේ සිටිනවා නම් ඒ බවට මණ්ඩලයට සාක්ෂි දී නැති බැවින් ඇය දේපළේ භුක්තියේ ඇති බවට මණ්ඩලයට තීරණය කළ නොහැක.

ඒ අනුව ඉල්ලුම්කරු සාක්ෂි දී ඇති පරිදි ඔහු මෙම මණ්ඩලයට මෙම ඉල්ලුම්පත්‍රය ඉදිරිපත් කරන අවස්ථාව වන විට මෙම ඉල්ලීමට අදාළ දේපළේ භුක්තිය ඔහු සතුව තිබූ බවට තීරණය කරනු ලැබේ.”

Where a statutory body or tribunal fails to take account of relevant considerations or takes into account irrelevant considerations which materially affected the decision reached, such statutory body or tribunal may be held to be acting ultra-vires.

“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 regard 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...” (Harry Woolf, Catherine Donnelly, Ivan Hare, De Smith’s Judicial Review [8th Edition 2018] Sweet Maxwell, page 305)

Therefore, I am of the view that the decision reached by the Board by its order P2 cannot prevail in law.

Further, an application has been made by the Petitioner to the Board to revise the said order P2 in terms of S.54(1) of the Debt Conciliation Board Ordinance. An objection had been raised on the ground of maintainability of the said application under S.54(1) of the said Ordinance. Based on the said objection, the Board has refused to entertain the said application affirming that no provisions have been made under Section 54 of the Ordinance to review a decision made on possession delivered after an inquiry by its order marked P3. The Petitioner also seeks to quash the said order.

However, since the said order marked P2 cannot prevail in law as mentioned above, all the proceedings and the steps flowing from the said decision are also bad and cannot prevail in law. Any such outcome of a void decision shall have the same effect as if it was void. Therefore, a Writ of Certiorari to quash the said order marked P3 would not arise.

In the circumstances and the reasons mentioned above, I am inclined to issue a Writ of Certiorari quashing the order marked P2. Furthermore, the Board is directed to consider all the evidence which has already been led before it and make an appropriate order in respect of the possession of the impugned property as provided under Section 19(1A) of the Debt Conciliation Board Ordinance and proceed accordingly. I order no costs.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal