

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

In the matter of an Application for Writ of
Certiorari and Writ of Prohibition under
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Ranathunga Arachchige Dushantha
Gotabaya Wanshanath Bandara,
No.30,
Papiliyana Road,
Nadimala, Dehiwala.

PETITIONER

C.A. Case No. WRT-0104/20

Vs

1. Hon. W. Iranganie Perera (Chairperson)
2. Hon. Shiromi Perera
3. Hon. K. S. Pathirana
4. Hon. Sarath Chandrasiri Withana
5. Hon. Piyaseeli Wickramasinghe
Mathurata
6. Hon. J. M. T. M. P. U. Thennakoon
7. Hon. Mahinda Pinidiya
8. Nandani Ranawaka
9. J. A. Amarasuriya
Members of the Debt Conciliation
Board, Cotta Road,
Borella, Colombo 08.

10. Kahapola Ruguneswaran Rajamani
No. 129/11, Kadawatha Road,
Nadimala,
Dehiwala.

RESPONDENTS

BEFORE : **M. SAMPATH K. B. WIJERATNE, J**

WICKUM A. KALUARACHCHI, J

COUNSEL : Dr. Sunil Abeyrathne with Mihiri Kudakoluwa
instructed by Buddhika Alagiyawanna for the
Petitioner.

Nisala Seniya Fernando for the 10th Respondent
instructed by Lakmini Amarasinghe.

ARGUED ON : 11.08.2023

DECIDED ON: 19.09.2023

WICKUM A. KALUARACHCHI, J.

The petitioner filed this application seeking to quash the order of the 1st to 4th respondents dated 2019.09.05 by way of a Writ of Certiorari, to issue a Writ of Mandamus to the 1st to 9th respondents directing them to hold proceedings under Section 25 of the Debt Conciliation Ordinance (hereinafter sometimes referred to as the “Ordinance”) regarding the application of the 10th respondent, and to prohibit the 1st to 9th respondents from taking further steps upon the same order dated 05.09.2019 by a Writ of Prohibition.

The 10th respondent filed his statement of objections. At the hearing, the learned counsel for the petitioner and the learned counsel for the 10th respondent made oral submissions. After the arguments were concluded, parties were allowed to file only the judicial authorities cited in the course of their oral submissions. Only on behalf of the 10th respondent the relevant judicial authorities were submitted and the court considered the said judicial authorities. On behalf of the petitioner, no judicial authority was submitted but a written submission has been tendered.

The order that the petitioner seeks to quash by way of Writ of Certiorari is the order made by the Debt Conciliation Board (hereinafter sometimes referred to as the “Board”) that the Board has the jurisdiction to hear and determine the application preferred by the 10th Respondent. This order was made in respect of the preliminary objection taken by the petitioner of this writ application that the Debt Conciliation Board does not have the jurisdiction to proceed with the application of the 10th respondent because the property described in the application of the 10th respondent had been transferred to the petitioner by the 10th respondent by Deed bearing No. 4142 dated 26.04.2018 marked P-8.

Admittedly, the Transfer Deed bearing No. 4142 was executed on 26th April 2018, after the 10th respondent preferred the application to the Debt Conciliation Board. The Chairman of the Debt Conciliation Board has stated in her order that the Debt Conciliation Board has jurisdiction to hear the application preferred by the 10th respondent because the Transfer Deed bearing No. 4142 has been executed after the said application was received by the Debt Conciliation Board. Accordingly, the preliminary objection was overruled. It is also stated in the said order that the 10th respondent has not pleaded any relief against the Transfer Deed and thus the acknowledgement of the Deed P-8 by the 10th respondent is merely a technical error in the proceedings of the Debt Conciliation Board. The said

observation had to be made because, according to the proceedings dated 23.11.2018, the Debtor (10th respondent) admitted the fact that the Creditor (the petitioner) registered a Transfer Deed and the preliminary objection was based on that admission. The 10th respondent's position was that he had no connection to the Transfer Deed marked P-8.

The main contention of the learned counsel for the petitioner was that, the Debt Conciliation Board decided without any basis that the aforesaid acknowledgement of the Deed, P-8 is merely a technical error in the proceedings. In addition, the learned counsel contended that if P-8 is a fraudulent deed and the 10th respondent has no connection to the said deed, the said issue should be resolved first, and then only the Debt Conciliation Board gets jurisdiction to hear the application. The learned counsel for the petitioner also urged to consider the serious legal issue involved in the impugned order, disregarding the delay in filing this application.

The position of the 10th respondent is that he has no connection to the Transfer Deed bearing No. 4142. The learned counsel for the 10th respondent advanced the following arguments substantiating the position that the Debt Conciliation Board has jurisdiction to hear and determine the application preferred by the 10th respondent.

- I. Even if it is assumed that the Transfer Deed bearing No.4142 has been duly executed, the Debt Conciliation Board has the jurisdiction to ascertain whether the Transfer Deed is in fact an outright transfer or a mortgage.
- II. According to Section 35(4), a Transfer Deed executed without the written sanction of the Board after the Notice is registered under Section 35(2) is null and void, and thus the

Deed P-8 is null and void, so the Debt Conciliation Board has the jurisdiction to hear the application.

- III. The petitioner seeks to quash the order dated 05.09.2019 on the basis that the Debt Conciliation Board has no jurisdiction to hear the application. At the same time, the petitioner seeks to issue a writ of mandamus to the 1st to 9th respondents directing them to hold proceedings under Section 25 of the Debt Conciliation Ordinance. Thus, prayers (b) and (c) of the petition is contradictory.
- IV. If a writ of certiorari is issued quashing the impugned order, steps taken in terms of Section 29 of the Debt Conciliation Ordinance become futile.
- V. According to Section 54 of the Debt Conciliation Ordinance, the petitioner had the remedy of making an application within three months to review its order by the Board, but the petitioner failed to do so. When an alternative remedy is available, the petitioner cannot invoke the writ jurisdiction of this court without recourse to the said remedy.
- VI. The petitioner cannot maintain this application due to the undue delay.

In support of above argument (I), the case of ***W.D Dharmasiri Karunaratne and Another V. Debt Conciliation Board of Colombo and Others*** – CA(Writ) 463/10 decided on 15th June 2012 was submitted on behalf of the 10th respondent. In this case, the power of the Debt Conciliation Board to decide whether a deed is a transfer or a mortgage has been discussed. Further, in support of the above argument (III), the case of ***W. Thenuki Pehansa de Silva V. Kusala Fernando, The***

Principal, Princess of Wales' College, Moratuwa and Others-
CA/Writ/103/2019 decided on 17th December 2019 was submitted.

Now, I proceed to consider the aforesaid arguments with the arguments advanced by the learned counsel for the petitioner to decide whether the Debt Conciliation Board has the jurisdiction to hear and determine the application filed by the 10th respondent.

Argument - V

Without recourse to the remedy in terms of Section 54 of the Debt Conciliation Ordinance, the petitioner cannot invoke the jurisdiction of this court.

Learned Counsel for the 10th respondent submitted the case of **Niroshana and Another V. Gunasekera and Another** – (2006) 3 Sri L.R. 152 in substantiating his argument that when there is an alternative remedy, without recourse to that remedy, the petitioner cannot invoke the jurisdiction of this court.

In reply, the learned counsel for the petitioner contended that Section 54 is not there to review an order of this nature but to review an order such as the quantum of the amount to be paid by the debtor. The learned counsel for the petitioner also submitted that it cannot be the intention of the legislature to give powers to the Board to review the dismissal of any application by the same Board.

Section 54(1) of the Debt Conciliation Ordinance 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.

In the aforesaid case of *Niroshana and Another V. Gunasekera and Another*, the petitioner has not sought to review the order granting a certificate to the debtors in terms of Section 54 of the Ordinance before invoking the jurisdiction of the Court of Appeal. Following the decision in *Bhambra vs. Director of Customs and Others* – (2002) 3 Sri L.R. 240, it was held by the Court of Appeal that the failure of the petitioner to resort to an alternative remedy provided by law precludes the court from intervening and exercising its discretionary powers.

In the aforesaid case, an inquiry commenced before the Debt Conciliation Board, and the respondent (debtor) offered to pay to the petitioner (creditor) a sum of Rs.700,000 in settlement of the debt, which was Rs. 350,000. This offer was rejected by the petitioners, and they demanded Rs. 10 million for settlement. The Board made an order accepting the offer of the respondent as a reasonable offer and granted a certificate under Section 32(2). So, in the said case, both parties admitted the jurisdiction of the Debt Conciliation Board and expected a decision from the Board regarding their dispute. Section 54 provides room for the parties who invoked the jurisdiction of the Debt Conciliation Board and obtained an order. Such a party could make an application to review a decision of the Board under this section. The petitioner in this application maintained his position from the beginning that the Board has no jurisdiction to hear the application filed by the 10th respondent. At the very first instance that he came before the Board, the learned counsel for the petitioner raised this objection as a preliminary objection before the Debt Conciliation Board. So, the party who took up the position that the Board has no jurisdiction to hear the matter, cannot make an application to review its order by exercising the powers given by the Ordinance. Therefore, to canvass an

order regarding the jurisdiction of the Debt Conciliation Board, I hold that the petitioner can directly come to this court by way of a writ.

Argument - III

Prayers (b) and (c) of the petition is contradictory

The prayer (b) reads as follows: “Quash the order of the 1st – 4th Respondents dated 2019.09.05 by way of Writ of Certiorari.” The prayer (c) is, “Issue Writ of Mandamus to the 1st – 9th Respondents directing them to hold proceedings under Section 25 of the Debt Conciliation Ordinance regarding the application of the 10th Respondent.”

If the relief prayed for in the prayer (b) is granted, the order of the Debt Conciliation Board that the Board has jurisdiction to inquire in to this matter must be quashed. That is, the petitioner seeks an order asserting that the Board has no jurisdiction to hear and determine the 10th respondent’s application. By the relief prayed for in the prayer (c), the petitioner seeks from this court an order directing 1st to 9th Respondents to exercise the jurisdiction of the Board and make an order in terms of Section 25 of the Debt Conciliation Ordinance. Therefore, as correctly pointed out by the learned counsel for the 10th respondent, those two reliefs are contrary to each other and thus both reliefs cannot be granted together.

However, this court can grant one relief from the aforesaid two reliefs prayed for in the prayers (b) and (c). Hence, there is no legal bar to maintain the instant application.

Argument - VI

The petitioner cannot maintain this application because of the undue delay.

The instant application has filed nearly nine months after the impugned order dated 05.09.2019. So, there is a delay in filing the application. Stating his illness and inability to get ready with the application due to the Covid -19 pandemic situation, the petitioner urged to consider the delay as an excusable delay.

The learned counsel for the 10th respondent contended that the petitioner, not the learned counsel, has intentionally misled this Court in explaining his medical condition in order to justify the delay.

As it is not a very long delay and the issue pertaining to this application is a legal issue with regard to the jurisdiction of the Debt Conciliation Board, I decide to consider the merits of this application without dismissing it on the ground of delay in making the application.

Argument - IV

If a writ of certiorari is issued quashing the impugned order, steps taken in terms of Section 29 of the Debt Conciliation Ordinance becomes futile.

It is my view that whatever steps that were taken by the Board, if they were taken without jurisdiction, those steps could not be allowed to stand. This is not a situation where the issuance of the writ becomes futile. Therefore, the aforesaid futility is not a reason to consider in issuing or not issuing the writ of certiorari prayed for in the petition.

Argument - I

The Debt Conciliation Board has the jurisdiction to ascertain whether in fact the Transfer Deed is an Outright Transfer or a Mortgage.

The learned counsel for the 10th respondent pointed out that according to paragraph 13 of the petition, the 1st to 4th respondents have considered the acknowledgement of the Deed bearing No. 4142 as a technical error, acted abusing their powers, and refused to dismiss the application of the 10th respondent on the ground of lack of jurisdiction. However, the learned counsel contended further that even if the Deed bearing No.4142 is assumed to be a duly executed transfer deed, according to Section 21A of the Debt Conciliation Ordinance, the Debt Conciliation Board has the jurisdiction to ascertain whether the transfer deed is in fact an outright transfer or a mortgage. Therefore, he submitted that even under the said circumstances, the Board has the jurisdiction to hear and determine this matter.

The contention of the learned counsel for the petitioner was that the property subject to this application had been transferred to the petitioner by the 10th respondent after the institution of the instant application and thus the Debt Conciliation Board has no jurisdiction to hear this matter. The learned Counsel submitted further that according to the proceedings dated 23.11.2018, the 10th respondent firmly acknowledged the execution of the Deed bearing No. 4142 and he has not taken a single step to rectify the said acknowledgement if it is wrongly recorded. In the circumstances, the learned counsel for the petitioner contended that it is erroneous to hold by the Board on 05.09.2019 that it is a technical error made on the part of the proceedings.

I am of the view that when the 10th respondent states that he has no connection to the Transfer Deed bearing No. 4142, there is no purpose in ascertaining whether the deed had been executed as an outright transfer or mortgage. According to the position taken up by the 10th respondent, first, it should be decided whether, in fact, the 10th respondent transferred the property by executing Deed bearing No. 4142 or whether the said deed is not an act of the 10th respondent. However, it is to be noted that this issue must be decided by a Court with competent jurisdiction to determine that issue and not by the Debt Conciliation Board.

Anyhow, the question of ascertaining whether in fact the transfer deed is an outright transfer or a mortgage does not arise, as the 10th respondent has taken up the position that the said deed is null and void.

Argument - II

Transfer Deed executed without the written sanction of the Board after the Notice registered under Section 35(2) is null and void

The learned Counsel for the 10th respondent contended that the 10th respondent does not admit the execution of the Deed bearing No. 4142, however, even if it is assumed that the said deed had been executed, the Transfer Deed executed after the notice issued under Section 35(1) and registered under Section 35(2) of the Ordinance is null and void.

The contention of the learned Counsel for the petitioner was that since the 10th respondent transferred the property subject to this application to the petitioner, the Board has no jurisdiction to hear this application.

The relevant subsections of Section 35 read as follows:

- (1) *Where, at any time in the course of proceedings before the Board, any land in respect of which a notice under section 25 (1) (c) or section 26 (1) (c) has not already been registered is disclosed to be the property of the debtor, the Board may cause a notice in the prescribed form to be delivered or transmitted to the proper Registrar of Lands for registration, setting out the prescribed particulars relating to that land and stating that proceedings under the Ordinance have commenced in respect of the debts owed by that debtor or of certain of such debts, as the case may be.*
- (2) *Every notice under subsection (1) or under section 25 (1) (c) or section 26 (1) (c) **shall be registered by the Registrar in the manner provided in the Registration of Documents Ordinance** for the registration of an instrument affecting or relating to land and shall be deemed for such purpose to be an instrument affecting or relating to each land the prescribed particulars of which are set out in such notice; and the provisions of that Ordinance shall apply accordingly*
- (3)
- (4) *Every alienation, transfer, lease, mortgage, or other transaction whatsoever, of or affecting any immovable property of the debtor made or executed by him without the written sanction of the Board, at any time **while a notice registered under subsection (2) is in force** in respect of such property, shall be void and of no effect.*

(Emphasis added)

The following facts are not in dispute:

- I. The 10th respondent made an application to the Board based on Mortgage Bonds bearing numbers 3621, 3669, 3699 and 3841.
- II. On the said mortgage bonds, the 10th respondent obtained a loan facility.
- III. The property mortgaged by those mortgage bonds is the same property described in the schedule to the Transfer Deed bearing No. 4142.
- IV. The notice under Section 35 has been registered in Folio F 270/82 on 2018.02.08.
- V. The Deed bearing No. 4142 was executed on 26th April 2018 after the aforesaid notice had been registered on 08th February 2018.

It is apparent from the photocopy of the registered notice filed of record that the notice under Section 35 of the Ordinance has been registered in Folio F 270/82 on 2018.02.08. The said photocopy of the registered notice is filed of record at the 7th page after the proceedings of Debt Conciliation Board meeting dated 2018.11.23. The said registration is not transpired from the land registry extracts attached with the Mortgage Bond No. 3841, marked P-5, because the said extracts have been obtained in 2017.11.29, prior to the notice being registered

In terms of Section 35(4) of the Ordinance, every alienation, transfer, lease, mortgage, or other transaction whatsoever, of or affecting any immovable property of the debtor made or executed by him without the written sanction of the Board, at any time while a notice registered under subsection (2) is in force, the said instrument is null and void. If it is assumed that the Deed bearing No.4142 is duly executed, the written

sanction of the Board has not been obtained to execute the deed and thus the Transfer Deed bearing No. 4142, which has been executed while a notice registered under subsection 35(2) is in force, is null and void. Therefore, the decision of the Debt Conciliation Board to overrule the preliminary objection raised on the ground that the relevant property had been transferred to the petitioner by a duly executed deed is correct.

Hence, I find no reason to exercise the writ jurisdiction of this court with regard to the instant application. Accordingly, the application for writs prayed for by the petitioner is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

M. Sampath K. B. Wijeratne J.

I agree.

JUDGE OF THE COURT OF APPEAL