
KUMARA RAJAPAKSHE**Vs.****AMARASURIYA AND OTHERS**

COURT OF APPEAL
J. DE SILVA, J.
CA/WRIT/273/2017
FEBRUARY 20, 2019

Writs of certiorari and mandamus—Debt Conciliation Ordinance, section 54 and 21A—Deed of transfer is in reality a mortgage—Failure to resort to an alternative remedy—Exercise of discretionary powers

The petitioner’s application to the Debt Conciliation Board (DCB) seeking a determination that a deed of transfer was in reality a mortgage was rejected. The petitioner filed this application before the Court of Appeal seeking relief by way of writs of certiorari and mandamus to quash the said decision and directing the DCB to issue a certificate in favour of the petitioner in respect of the debt owed by him to the 1st respondent creditor in terms of the provisions of the Debt Conciliation Ordinance.

Held:

1. The court cannot exercise its discretionary powers by way of writ when the petitioner had not resorted to the alternative remedy provided for in section 54 of the Ordinance.
2. The DCB is mandated by section 21 A of the Ordinance to consider certain matters in deciding whether or not a conditional transfer is in reality a mortgage. The Board must weigh the question at hand on a balance of reasonableness and with a mind that the string that binds the provisions in each section is nothing but reasonableness. The order of the DCB rejecting the petitioner’s application is reasonable and not ultra vires.

Cases referred to:

1. Bhambra v. Director General of Customs and others [2002] 3 Sri LR401
2. Niroshana and another v. Gunasekera and another [2006] 3 Sri LR 152
3. Dharmasiri Karunaratne and another v. Debt Conciliation Board and others (SC/APPEAL/100/2013, SC Minutes of 03. 02. 2016)

APPLICATION for Writs of Certiorari and Mandamus.

U. G. B. M. Gamage with E. G. K. M. Samaraweera for the Petitioner.

Lahiru Welgama with Chanaka Nuranga for the 1st Respondent.

Himali Malavige for the 2nd Respondent.

Ruwan Rodrigo for the 3rd Respondent.

cur. adv. vult.

December 18, 2019

J. DE SILVA, J.

The Petitioner made an application to the Debt Conciliation Board on 28. 10. 2015 seeking a determination that deed of transfer No. 3277 dated 12. 07. 2013 attested by C. Jayasinghe, Notary Public is in reality a mortgage.

The 4th to 8th Respondents by order dated 05. 04. 2017 (X6) rejected this application. The Petitioner is seeking a writ of certiorari to quash the said order and a writ of mandamus directing the 4th to 8th Respondents to issue a certificate in favour of the Petitioner in respect of the debt owed by him to the 1st Respondent in accordance with the provisions of the Debt Conciliation Ordinance (Ordinance).

The learned counsel for the 2nd Respondent submitted that the Petitioner had an alternative remedy in terms of section 54 of the Ordinance which he did not seek and as such discretionary relief by way of writ of certiorari should be refused.

Section 54 of the Ordinance reads:

(1) 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.

(2) No order shall be reviewed under subsection (1) unless previous notice of the application or of the intention of the Board to review its order has been served in the prescribed manner on the parties interested in the order which is to be reviewed.

(3) Every order made by the Board under subsection (1) shall be final and shall not be subject to further review by the Board under that subsection.

(4) If the terms of any settlement under section 30 or section 31 are varied by any order of the Board under subsection (1), the Board shall cause the order to be registered in the manner provided in section 41 for the registration of the duplicate of a settlement, and the provisions of that section shall apply accordingly.

De Smith, Woolf and Jowell; *Judicial Review of Administrative Action* (5th Ed., page 813) reads:

Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the court is coming to a discretionary decision.

It is further stated that (at page 814):

where there is a choice of another separate process outside the courts, a true question for the exercise of discretion exists. For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used. In exercising its discretion, the court will attach importance to the indication of Parliament's intention.

In *Bhambra v. Director General of Customs and Others*¹ this Court held that the failure of the Petitioner to resort to an alternative remedy prescribed by section 154 of the Ordinance precludes the Court from intervening and exercising its discretionary powers.

This decision was cited with approval and followed by this Court in *Niroshana and Another v. Gunasekera and Another*² - which is exactly on point with the issue that arises in this case. In that case Srisankandarajah J. held that the Petitioners did not challenge the order of the issue of the certificate of non-settlement before the Debt Conciliation Board under

section 54 of the Ordinance and as such they cannot challenge the said order in that application as they have not exhausted an effective alternate remedy.

As the Petitioner has not resorted to the remedy provided for in section 54 of the Ordinance, the application of the Petitioner must be refused on that ground alone. In any event, I am of the view that the order of the 4th to 8th Respondents dated 05. 04. 2017 (X6) is not ultra vires. The 4th to 8th Respondents were mandated by section 21A of the Ordinance to consider the following matters in deciding whether or not a conditional transfer is in reality a mortgage-

(a) the language of the notarial instrument of transfer and where provision in regard to the right of the transferor or any other person to redeem or purchase the property transferred is contained in any other notarial instrument, the language of that other instrument;

(b) any difference between the sum received by the transferor from the transferee and the value of the property transferred;

(c) the continuance of the transferor's possession of the property transferred; and

(d) the existence of any agreement in whatever form between the transferor and the transferee whereby the transferor is bound to pay the transferee interest, or any sum which may reasonably be considered to be interest, on the sum received by the transferor from the transferee.

The following circumstances weigh against the Petitioner:

(a) The Petitioner did not take any steps for 1 % years although according to him the period to redeem is six months.

(b) The Respondent was placed in possession and continued to do so.

(c) There was no police complaint made by the Petitioner.

(d) The property was transferred to two other persons but the Petitioner did not raise any objections.

The Supreme Court in *Dharmasiri Karunaratne and Another v. The Debt Conciliation Board and Others*³ held that the Board must weigh

the question at hand on a balance of reasonableness and that the string that binds the provisions in each section is nothing but reasonableness.

I am of the view that the decision of the 4th to 8th, respondents (X6) is reasonable in the circumstances of the case.

For all the foregoing reasons the application of the Petitioner is dismissed with costs fixed at Rs. 30,000/=.

Application dismissed.

Judgment by: Janak De Silva, J.

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