ANULAWATHIE MENIKE
VS
ABHAYARATNE

COURT OF APPEAL.
SOMAWANSA. J. (P/CA) AND
EKANAYAKE. J.
CA 247/91 (F).
DC KEGALLE 2591/L.
MARCH 17, 2006.

Debt Conciliation Ordinance, sections 17, 18, 22, 30, 49 and 56 - Conditional transfer - Time limit to make an application ? - Settlement before Board - Application outside the time limit - Submitting to jurisdiction?–Challenging jurisdiction in appeal - Permissibility ?

The plaintiff - respondent instituted action seeking to enforce an order made by the Debt Conciliation Board (DCB) to re-transfer the property in suit which was transferred to the defendant - appellant on a conditional transfer. The DCB after inquiry entered a settlement in terms of section 30. The plaintiff - respondent complained to the DCB that his attempts to pay the 1st instalment as per the settlement failed as the appellant refused to accept same. The DCB instructed

the plaintiff respondent to institute action in the District Court to get an order of enforcement.

The appellant in the District Court took up the position that the settlement was bad in law and the application made to the Board has not been made within the stipulated time limit set out by law. The District Court held with the plaintiff-respondent. On appeal the appellant contended that since the respondent failed to make the application to the D. C. B. within the time specified - 30 days- section 19(A)(1)-the application ought to have been dismissed *in limine*.

HELD:

1. The DCB had jurisdiction to inquire into matters of this nature generally and therefore the Board was acting within its jurisdiction. In such a situation irregular exercise of jurisdiction can be waived by the parties which is exactly what the appellant had done, for the appellant did not take any steps to get the certificate issued on the basis of the settlement entered into by both parties, cancelled.

2. It is trite law that issues relating to fundamental jurisdiction of the Court Tribunal to hear and determine a matter must be taken at the earliest opportunity and must be expressly set out. Therefore the appellant having taken no objection to the validity of the application and also having submitted to the jurisdiction of the Board and in fact having taken one step further by entering into a settlement, she cannot now be heard to say the DCB acted beyond its jurisdiction or the settlement entered in terms of section 30 is bad in law.

4. In any event –
   Section 19 A does not refer to any consequences if it is not complied with.

5. As the trial judge has accepted the evidence of the respondent as having been corroborated by the evidence of the Grama Sevaka, there was no reason to disagree with her, for it is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal.

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to :

1. *T. Praisoody vs. K. Gurunathepillai* 74 NLR 567
2. *Hilda Perera vs. Lawrence Perera* 67 NLR 186

3. *Bastianpillai Antonipillai Swamipillai and Another vs. K. Gunaratnam* CA 649/80 (F) DC Jaffna MB/447 CAM 17.11.1993
4. *W. Robinson Fernando, v. Henrietta Fernando* 74 NLR 57

H. G. Dharmadasa for appellant.
Rohan Sahabandu with *Athula Perera* for respondent.

Cur.adv.vult.

March 17, 2006

ANDREW SOMAWANSA, J. (P/CA)

The plaintiff - respondent instituted the instant action in the District Court of Kegalle seeking to enforce an order made by the Debt Conciliation Board to re-transfer the property in suit to the plaintiff - respondent which was transferred to the defendant-appellant on a conditional transfer.

The position taken by the plaintiff - respondent (hereinafter called the respondent) is that on 19.06.1979 he made a conditional transfer of a paddy land to the defendant - appellant (hereinafter called the appellant) for a consideration of Rs. 5,000. The condition of the transfer was for the appellant to re-transfer the property to the respondent within a period of two years upon payment of Rs.9,200 by the respondent to the appellant.

As the respondent could not redeem the said property within the period as stipulated in the conditional transfer, he had written to the Debt Concilliation Board seeking its intervention. The Debt Conciliation Board after holding an inquiry entered a settlement in terms of section 30 of the Debt Concilliation Ordinance. In terms of the settlement the respondent had to pay to the appellant Rs.9700 in three installments the first of which had to be paid on or before 22nd January 1982.

The respondent made complaints to the Debt Conciliation Board that his attempts to pay the 1st installment as per the settlement failed as the appellant refused to accept the same. Thereafter on the instructions of the Debt Conciliation Board action was instituted in the District Court to obtain an order to enforce the order of the Debt Conciliation Board.

The appellant took up the position that the respondent failed to pay the first installment on the due date as per the settlement arrived at the

Conciliation Board. She also took up the position that the settlement by the Debt Conciliation Board was bad in law, as the application made to the Board by the respondent had not been made within the stipulated time limit set out by law. The appellant further took up the position that the application to the Board by the respondent had not been made according to law.

At the conclusion of the trial, the learned District judge by her judgment pronounced on 21.06.1995 held with the respondent. It is from this judgment that the appellant has preferred this appeal.

When the appeal was taken up for argument, the only issue raised by the counsel for the appellant was that since the respondent failed to make his application within the time frame specified in the Debt Conciliation Ordinance *viz*: one month before the expiry of the conditional transfer, the Debt Conciliation Board had no jurisdiction to entertain or to make an order and issue a certificate. Hence the said certificate is null and void and cannot be enforced. The appellant did not challenge the correctness of the judgment on the facts. However counsel for the appellant has in his written submissions referred to facts regarding the attempt to pay back the money which I would deal with later.

It is submitted by counsel for the appellant that the Debt Conciliation Board acted beyond its jurisdiction in that the settlement made by the Debt Conciliation Board in terms of section 30 of the Debt Conciliation Ordinance is bad in law. He submits that in terms of section 19A of the Debt Conciliation Board Ordinance an application to the Board has to be made at least 30 days before the expiry of the period in the conditional transfer and that in view of the words used in the aforesaid section 19A(1) : "The Board shall not entertain an application... unless that application is made at least 30 days before the expiry of the period". An application not made within that stipulated period would be fatal.

In the instant action the conditional transfer had been made on 19.06.1979 and the two year period within which the property may have been redeemed would have expired on 18.06.1981. Therefore in terms of section 19A(1) of the Debt Concilliation Ordinance the application to the Board should have been made on or before 18.05.1981. Evidence of the officer from the Debt Conciliation Board reveals that the Board received a letter sent by the respondent on 25.05.1981 though it was dated as

12.05.1981. Since this letter did not comply with the requirements of an application in terms of section 17 of the Debt Conciliation Board Ordinance the Board had sent him a set of application forms by registered post. The Board had received this set of application forms perfected by the respondent on 16.06.1981 that is only 2 days prior to the expiry of the period within which the property should have been redeemed by the respondent. Even if 25.05.1981, the date to which the respondent's letter was received is taken as the date the application was made, it is still one week short of the period stipulated under section 19A(1) of the Debt Conciliation Ordinance. Accordingly counsel submits that the questions to be determined in this appeal are :

(a) when is an application deemed to have been made in the instant action in terms of section 19A(1)?

(b) whether the Debt Conciliation Board has acted exceeding its jurisdiction in entertaining an application that was not made within the stipulated time limit under section 19A(1)?

Counsel submits that the question (a) has been decided in the case *T. Praisoody vs. K. Gurunathapillai 74* and *Hilda Perera vs. Lawrence Perera* [1] [2] wherein it was held that the date an application is deemed to have been made is the date that it had been received by the Board.

With reference to question (b) he again cited the aforesaid case of *Praisoody vs. Gurunathapillai (supra).* Therefore he submits the Debt Concilliation Board in entertaining the application that did not fall within section 19A(1) of the Debt Conciliation Ordinance, *i. e.* an application not made within 30 days before the expiry of the period, had acted in excess of its jurisdiction. Therefore the settlement entered under section 30 on such application is bad in law and what flows from it also is bad in law.

Section 19A(1) of the Debt Conciliation Ordinance 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 the application is made at least thirty days before the expiry of the period within

> which the property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor".

It is to be noted that Somasiri an officer attached to the Debt Conciliation Board who was called as a witness by the appellant admitted that they accepted the letter sent by the respondent and issued a set of printed forms to the respondent to fill up and return. At this point, it is useful to consider section 22 of the Debt Conciliation Ordinance which reads as follows:

> "The Board may, if it is of opinion that any application is substantially defective in any of the particulars required by section 17 or section 18 return the application and order that it be amended within such time as may be fixed by the Board. If the application is not amended as ordered by the Board it shall be deemed to have been withdrawn by the applicant".

Another very relevant section in the Debt Concilliation Ordinance to the issue at hand is section 49 of the said Ordinance which has given a wide discretion to the Board which reads as follows :

"It shall be the duty of the Board to do substantial justice in all matters coming before it without regard to matters of form"

It is interesting to note that the appellant had submitted to the jurisdiction of the Board and in fact entered into a settlement. The jurisdiction of the Board to entertain, inquire into and determine the respondent's application was not challenged in any way. No objection was taken to the validity of the application or the proceedings. It is trite law that issues relating to the fundamental jurisdiction of the Court or the tribunal to hear and determine a matter must be taken at the earliest opportunity and must be expressly set out. Therefore the appellant having taken no objection to the validity of the application made by the respondent and also having submitted to the jurisdiction of the Board and in fact having taken a step further by entering into a settlement the appellant cannot now be heard to say that the Debt Conciliation Board acted beyond its jurisdiction or the settlement entered into between the two parties in terms of section 30 of the Debt Conciliation Ordinance is bad in law. Furthermore accepting and admitting the settlement before the Debt Conciliation Board the appellant as well as the

respondent have waived off their rights to challenge any lack of latent jurisdiction (if any) of the Board to follow any procedure.

In *Bastianpillai Antonipillai Swamipillai and Another vs. K. Gunarathnam and Others* decided by S. Anandacumaraswamy, J and P Edussuriya, J. Anandacoomaraswamy, J stated "The only question before us is whether the plaintiffs followed the correct procedure and instituted the correct action. Under the provisions of the Debt Conciliation Ordinance where the settlement is effected between the parties it is final and the debt becomes merged in the settlement and the rights of the creditor is deemed to subsist under the settlement. The learned counsel for the appellants submitted that even assuming that the hypothecary decree can be entered in this case the purported hypothecary decree is null and void as statutory procedure had not been followed. This submission was not made earlier and it is taken for the first time in appeal. It is therefore not open to the defendants to complain of this irregularity if any now".

In the case of *Robinson Fernando* vs. *Henrietta Fernando* it was held :

"Having regard in particular to the prejudice to the plaintiff and the late stage at which the amendment of the answer was sought to be made, the defendant was precluded by delay and acquiescence from raising the objection to jurisdiction and that she had in fact waived it".

It is to be seen that the Debt Conciliation Board had jurisdiction to inquire into matters of this nature generally and therefore the Board was acting within its jurisdiction. In such a situation irregular exercise of jurisdiction can be waived by the parties which is exactly what the appellant had done, for the appellant did not take any steps to get the said certificate issued on the basis of the settlement entered into by both parties cancelled. In fact neither did the appellant take any objection to the settlement or to the certificate issued thereafter nor did he institute an action to have the aforesaid certificate cancelled until the respondent instituted the instant action.

It is interesting to note the procedure as prescribed in section 56 of the Debt Conciliation Ordinance which provides that no civil Court has the right to revise any decision made by the Debt Conciliation Board. Section 56 which deals with 'Bar of Civil actions' reads as follows :

'No civil court shall entertain any action in respect of -

(i) any matter pending before the Board : or

(ii) the validity of any procedure before the Board or the legality of any settlement".

After the settlement and issuance of the certificate upon the settlement in the present case, if the appellant wished to challenge the said settlement or procedure followed by the Debt Conciliation Board Act, the only remedy available for the appellant was to challenge the same by way of a writ which the appellant has failed to do.

In any event, section 19A does not refer to any consequences if it is not complied with. It does not state that the order is illegal, unlawful or void. Thus giving the impression that parties could waive their right to object if any, and what becomes material is the intention of the parties as in the instant case to settle the dispute *via* Debt Conciliation Board.

Further, the appellant has not raised an issue either before the District Court or this Court that she entered into a settlement before the Debt Conciliation Board upon duress, misdirection of fact or law or for any other reasons.

In view of the appellant submitting to the jurisdiction of the Board not raising any objection whatsoever either to the validity of the application of the respondent or to the proceedings had at the Board and having entered into a settlement thereby waiving any lack of jurisdiction on the part of the Board cannot rely on the decision in *Praisody Vs. Gurunathapillai (supra)* or *Hilda Perera vs. Lawrence Perera (supra)* wherein the facts could be distinguished for unlike in the present application, in those two cases proceedings were pending at the Board when a party came to court whereas in the instant application the parties had submitted themselves to the jurisdiction of the Board without any objections and the parties having come to a settlement and thus had come to Court after the proceedings in the Board was concluded and the certificate issued. In the circumstances it appears to me that the learned District Judge has come to the correct findings and conclusion in her judgment regarding the issues relevant to the jurisdiction or proceedings of the Debt Conciliation Board and there is

no reason to interfere with the judgment of the learned District Judge, Kegalle.

As for facts regarding the attempt to pay back the money, evidence of the respondent reveal that he sent two people to make the payment in compliance with the settlement entered into at the Board, but the appellant had refused. The first person to be sent to make the payment was his uncle on 16.01.1982 but the appellant refused to accept the payment. However this uncle of his was not called to give evidence and the appellant denied that an uncle of the respondent came to her house on 16.01.1982 to made the payment. Counsel for the appellant submits that the respondent's evidence to the effect that he sent his uncle to make the payment is not corroborated and as the uncle did not give evidence it is only hearsay and has no evidentiary value. However the second person through whom the respondent attempted to make the payment the Grama Sevaka of the area was called to give evidence and he in fact corroborated the evidence of the respondent.

Counsel for the appellant sought to make out that the evidence given by the respondent is contradicted by the evidence of the Grama Sevaka. He submitted that though the respondent in his evidence and in her petition filed in Court states that he handed over the money to the Grama Sevaka to be taken with him when he went to meet the appellant, the Grama Sevaka has categorically denied this. This submission appears to be incorrect for the evidence of the respondent as well as the Grama Sevaka was that though the respondent wanted to hand over the money to the Grama Sevaka to be taken with him to make the payment the Grama Sevaka did not accept the money but informed the respondent that he would first go to the house of the appellant and inquire from her as to whether she is willing to accept the money.

According to the evidence of the Grama Sevaka he did go to the house of the appellant on 21.01.82 and this fact is admitted by the appellant. Grama Sevaka goes on to say that he did inquire from the appellant whether she is willing to accept the money, but the appellant has refused to accept the money and this fact was conveyed by him to the respondent. However the position of the appellant is that though the Grama Sevaka did come to her house on 21.01.1982 it was to inquire into a complaint made by the respondent and that the Grama Sevaka did not hand over the money.

The learned District judge has accepted the evidence of the respondent as having been corroborated by the evidence of the Grama Sevaka and I have no reason to disagree with her. For it is well established that findings of prirmary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal. *Vide Alwis vs. Piyasena Fernando* [5]

For the foregoing reasons, I see no basis to interfere with the judgment of the learned District Judge and accordingly the appeal will stand dismissed with costs fixed at Rs. 15,000.

EKANAYAKE, J, — *I agree.*

Appeal dismissed.