NIROSHANA AND ANOTHER
VS
GUNASEKERA AND ANOTHER

COURT OF APPEAL.
SRISKANDARAJAH. J.
CA 1153/2000.
NOVEMBER 13, 2003.
JANUARY 20, 2004.
FEBRUARY 20, 21, 2006.

Writ of Certiorari - Debt Conciliation Ordinance section 32(2), Section 54, section 54(1) - Amended by Act No. 29 of 1999 - section 5- Settlement of the

debt - Amount not agreed - Board holding it is reasonable and granting a certificate of settlement - Application to review said order and dismissed of same - Refused - Legality of the orders made by the Board ?- Discretion of the Board - "Shall" in Section 32(2) - Is it directory ?- Alternate remedy? No settlement - mandatory to dismiss application?

When the inquiry commenced before the Debt Conciliation Board, 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 order accepting the offer of the respondent as a reasonable offer and granted a certificate under Section 32(2). The petitioner filed a motion under Section 54(1) moving for dismissal of the application of the 1st and 2nd respondents in terms of Section 32(2). The Board refused the said application. The petitioner contended that, the Board under Section 32 could make only an order of dismissal of the application if there is no settlement and when there is no available settlement the Ordinance makes it mandatory to dismiss an application.

HELD:

(1) When interpreting a section the entire section has to be considered to construe the meaning of the section and every word in the section has to be considered and effect should be given to those words in interpreting the section as the legislature has intentionally included those words for good reasons.

(2) For the proper consideration of section 32(2) and to give a meaning and effect to all the words in that section the words "shall" has to be construed as directory. The Board in appropriate circumstances using its discretion may either dismiss the application or without dismissing the application grant the debtor a certificate.

***Per* Sriskandarajah. J :**

"The legislature itself realizing the difficulty faced by the members of the Board interpreting this section has thought it fit to amend Section 5.

Held further:

(3) In any event as the petitioners have not challenged the order of the issue of the certificate of non-settlement before the Board under Section 54 they cannot challenge the said order in this application as they have not exhausted an effective alternate remedy.

Per **Sriskandarajah. J :**

"If the petitioner's submission is accepted then the Board under section 32(2) could only dismiss an application, where no amicable settlement is arrived at between the debtor and the creditor, even if the Board is of opinion that, the debtor has made the creditor a fair offer which the creditor ought reasonably to have accepted. In these circumstances, the words in section 32(2)" if it is of opinion that the debtor has made the creditor a fair offer which the creditor ought reasonably to have accepted, grant the debtor a certificate in the prescribed form in respect of the debts owned by him to that creditor" becomes redundant.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Obeysekera vs Albert and others* - (1978-79) 2 Sri LR 220.
2. *Baldwin and Francis Ltd. vs Patents Appeal Tribunal and others* - 1958-2 All ER 368 (CA).
3. *Bhambra vs Director of Customs and others* - 2002 -3 Sri LR 240.
4. *Auchterarder Presbytery vs Lord Kinkoull* - 187 -6 CH ^ F 646, 68.
5. *Wallersteiner vs Moir* - 1 WLR 991 at 1007.
6. *Liverpool Borough Bank vs Turner* - 1861 - 30 LJ ch 379 at 380.

Faiz Musthapha PC with Ms Tushani Machado and Ms F. Musthapa for petitioner.
P. A. D. Samarasekera PC with Keerthi Sri Gunawardane for 2nd respondent.

Cur.adv. vult.

May 2, 2006.

SRISKANDARAJAH, J.

The petitioners in this application are husband and wife and were cited as Respondents before the Debt Conciliation Board in respect of the Application No. 34958 which was made by the 1st and 2nd Respondents. The 3rd to 6th Respondents (hereinafter referred to as Board) are the Chairman and the members of the Debt Conciliation Board who made the relevant orders and other Respondents are the Chairman and members of the present Debt Conciliation Board.

K. D. S.Gunasekara who was the husband of the 1st Respondent and the father of the 2nd Respondent transferred premises bearing No. 77, Main Street, Kurunegala to the Petitioners by deed No. 54718 dated 21.04.1988 attested by S. G. Patikiriararachchi for the consideration of 350,000. The 2nd Respondent submitted that in the attestation to the said deed the Notary has certified that only a sum of Rs. 200,000 was paid in his presence. It was the contention of the said Respondent that the balance Rs. 150,000 was the interest for the said Rs. 2,00,000 for the period of two years. On the same day by Deed No. 54719(P2) which is the next deed attested by the same Notary, the Petitioners have agreed to re-transfer the said property to the said K. D. S. Gunasekera within two years from the date of the said deed. K. D. S. Gunasekera died on 26.11.1989 before the lapse of two years mentioned in deed P2. The 1st and 2nd Respondents the wife and the daughter of the said Gunasekera made an application (P5) to the Debt Conciliation Board on the basis the said two deeds constituted a mortgage of the property and they are the sole heirs of the said Gunasekera. The Petitioners objected to this application by letter dated 21.04.1990 (P6) and took up the position that the 1st and 2nd Respondents have no status to have and maintain this application. The Debt Conciliation Board issued notice on 28th August 1990 (P7) and proceeded with the inquiry on the said application. The Debt Conciliation Board in the inquiry considered the objections of the Petitioners : namely, that in terms of the Indenture No. 54719 the 1st and 2nd Respondents had no status to make an application to the Debt Conciliation Board, the Board has no jurisdiction and the said application was not one that could have been made under the Debt Conciliation Ordinance and rejected the objections by its order dated 18th November, 1991 (P9). The Petitioners challenged this order in the Court of Appeal in C. A. Application No. 1119/ 91 (9a) and in the Supreme Court in Special Leave to Appeal Application No. 257/96(P9b) and was unsuccessful.

The 2nd Respondent submitted that when the matter was taken up before the Debt Conciliation Board for settlement on 25.08.1999 the Respondent offered to pay to the petitioners a sum of Rs. 700,000 in settlement of the debt. That was double the amount mentioned on the face of the deed P1 and constituted the maximum amount which could be claimed on a debt of Rs. 350,000. But that offer was rejected by the Petitioners who were the creditors and they demanded Rs. 10 million for settlement. Thereupon, the Board made order dated 17.01.2000 (P11) by which the Board accepted the offer made by the Respondent as a

reasonable offer and granted her a certificate under section 32(2) of the Debt Conciliation Ordinance.

The Petitioners by motion dated 21st February, 2000 (P12) filed under section 54(1) of the Debt Conciliation Ordinance sought to review the said order dated 17.01.2000 by moving the Board to dismiss the application of the 1st and 2nd Respondents (Applicants) in terms of section 32(2) of the said Ordinance. The Board by its Order dated 30.08.2000 (P14) refused the application made by the Petitioners by the said motion.

The petitioners in this instant application has sought a writ of certiorari to quash the order marked (P11) dated 17.01.2000 and the Order marked (P14) dated 30.08.2000.

The Order made on 30.08.2000 (P14) was made in consequence to the motion filed by the Petitioners dated 21st February, 2000 (P12) under section 54 of the said Ordinance. In the said motion the Petitioners have stated :

> "The Board having observed that the Amendment Act has no retrospective effective to this application by the Applicants, made order on the 17th of January, 2000 issuing a certificate of non settlement to the applicants on the basis that the Respondent did not accept the reasonable offer of the applicants, but at the same time has not dismissed the application of the applicants under section 32(2) of the said Debt Conciliation Ordinance although in terms of the said section 32(2) it is mandatory that the Board shall dismiss the application. In the circumstances, the Respondent respectfully moves that this Board review the said order dated 17th January, 2000 in terms of section 54 of the Debt Conciliation Ordinance and dismiss the said application of the said applicants under section 32(2) of the Debt Conciliation Ordinance."

Section 54 reads as follows :

54. (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).....
(3).....
(4).....

The Petitioners by the aforesaid motion has sought a mandatory order from the Debt Conciliation Board under Section 32(2) of the said Ordinance to dismiss the application of the 1st and 2nd Respondents (Applicants). Even though the Petitioners have invoked the Jurisdiction of the Debt Conciliation Board under Section 54 of the said Ordinance to review an order made by the Board on 17.01.2000(P11) the petitioners have not challenged the order made on 17.01.2000 (P11) on merits in other words they have not sought to review the order granting a certificate to the debtors.

In the aforesaid motion the Petitioners have not taken up the position that are taken up in this application namely : that the said order P11 was made without taking into consideration of the agreement to repurchase at the market value, in the circumstances the Debt Conciliation Board has no reasonable ground in fact or in law to arrive at the decision that the amount offered by the 1st and 2nd Respondent Rs. 700,000, which amount is twice the amount of the purported debt is a reasonable settlement when in fact it was not clear whether the actual amount paid by the Petitioners to the late Gunasekara is Rs. 350,000. Therefore the Debt Conciliation Board had no factual or legal grounds to issue a certificate of non-settlement under Section 32 of the Ordinance.

As the petitioners have not challenged the Order of the issue of the certificate of non-settlement before the Debt Conciliation Board under Section 54 they cannot challenge the said order in this application as they have not exhausted an effective alternate remedy.

In ***Obeysekera vs. Albert and Other***[1] Soza, J with Abdul Cader agreeing held :

> "Where the right of appealing to the Commissioner of Labour is available to him, he cannot seek a discretionary remedy like

certiorari."

In the House of Lords case of ***Baldwin and Francis Ltd.*** vs. ***Patents Appeal Tribunal and Others***[2] Lord Denning applied this principle saying :

> "I am prepared to assume that the appellants are aggrieved, but as they have another remedy, open to them, the Court in its discretion should refuse a certiorari."

In ***Bhambra*** vs. ***Director of Customs and Others***[3] Wijeratne, J with Thilakawardane, J (P/C.A.) agreeing held :

> The failure of the petitioner to resort to alternative remedy provided by law, irrespective of the reason that he is a foreigner and a sailor, precludes this court from intervention and the exercise of the discretionary powers.

As the petitioners have not challenged the order dated 17.01.2000 (P11) under Section 54 of the said Ordinance on merit and as they have not exhausted an effective alternative remedy this court is not inclined to exercise judicial review in this application on the order marked P11. Therefore this court only considers the order of the Debt Conciliation Board made on 30.08.2000 marked P14 in exercising judicial review under Article 140 of the Constitution. This Order was made inconsequence to the motion of the Petitioners filed on 21st February, 2000 (P12) under Section 54 of the said Ordinance. In this motion what was urged before the Board was that the Board could not have granted a certificate without first dismissing the application.

The Petitioners challenged the aforesaid order on the basis that the Board under Section 32 could make only an order of dismissal of the Application if there is no settlement. The Petitioners submitted that the Board members misdirected themselves when they have erroneously observed that Section 32 has given the Board two powers, which are independent of each other and are together joined only by the conjunction "and", when in fact Section 32(2) should be considered in its entirety. The said Section reads thus :

> *"Where no amicable settlement is arrived at between the debtor and any secured creditor, the Board shall dismiss the application*

so far as it relates to the debts due to that creditor and may if it is of opinion that the debtor has made the creditor a fair offer which the creditor ought reasonably to have accepted, grant the debtor a certificate in the prescribed form in respect of the debts owed by him to that creditor".

Therefore the Petitioners submitted that the Board was obliged to dismiss the application when section 32 of the Debt Conciliation Ordinance (prior to the amendment) makes it mandatory to dismiss an application where there is no amicable settlement, in as much as the said application was made in the year 1990 and the amendment has no retrospective effect.

When interpreting a section the entire section has to be considered to construe the meaning of the section and every word in the section has to be considered and effect should be give to those words in interpreting the section, as the legislature has intentionally included those words for good reasons. A statute is never supposed to use words without a meaning (***Auchterarder Presbytery v Lord Kinnoull)***[4]. If the Petitioners submission is accepted then the Board under Section 32(2) could only dismiss an application where no amicable settlement is arrived at between the debtor and the creditor, even if the Board is of opinion that the debtor has made the creditor a fair offer which the creditor ought reasonably to have accepted. When an appliation is dismissed the Board will not have jurisdiction to make any other order in relation to that application. In these circumstances the words in Section 32(2) "if it is of opinion that the debtor has made the creditor a fair offer which the creditor ought reasonably to have accepted, grant the debtor a certificate in the prescribed form in respect of the debts owed by him to that creditor" becomes redundant.

For the proper construction of Section 32(2) and to give meaning and effect to all the words in that section the words "shall" has to be construed as directory. The Board in appropriate circumstances using its discretion either dismiss the application or without dismissing the application grant the debtor a certificate.

In ***Wallersteiner*** vs. ***Moir***[5] Lord Denning M. R. held :

"At the time when Mr. Moir took out his summons for judgment, Dr. Wallersteiner was plainly in default. Twelve months has

passed. He has not served any defence to the counter claim. According to R. S. C., Ord. 19 r 7(1) :

"On the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim"

Although the word "Shall" is used in that rule, it is clear from the authorities that it is not imperative but directory. The court will not enter judgment which it would afterwards set a side on proper grounds being shown."

In ***Liverpool Borough Bank*** vs. ***Turner*** [6] at 380 Lord Campbell L. C. observed :

"No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try and get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed"

The legislature itself realising the difficulty faced by the members of the Board in the interpretation of this section has thought it fit to amend the said section. Debt Conciliation Ordinance (Amendment) Act, No. 29 of 1999 Section 5 states as follows :

"Section 32 of the principal enactment is hereby amended in sub-section (2) of that section, by the repeal of all the words from "the Board shall dismiss the application" to "may, if it is" and the substitution therefore of the following words "the Board may, if it is".

In the given circumstances the Board has correctly decided not to dismiss the application of the debtor and to reject the application for review made by the creditor. Therefore this Court dismiss this application with costs fixed at Rs. 10,000.

Application dismissed.