1977 *Present:* **Samarakoon, C.J., Wimalaratne, J. and Tittawella, J.**

J. K. WINDSOR, Appellant *and* K. H. S. SINGHO AND ANOTHER, Respondents.

S. C. 304/73 (F) – D. C. Matara L/2708

Conciliation Board Act – Civil Procedure Code, Section 247 action combined with Paulian action – Certificate from Conciliation Board necessary – Objection to Court's jurisdiction – Duty of Court to decide it first.

HELD:

An action under section 247 Civil Procedure Code combined with a Paulian action cannot be instituted without the necessary certificate from the Chairman, Conciliation Board. Since an action under section 247 Civil Procedure Code has to be instituted within fourteen days of the order in a claim inquiry, the time taken in proceedings before a Conciliation Board shall not be taken into consideration in terms of section 14 of the Conciliation Board Act.. Where the Court's jurisdiction is challenged, it is the duty of Court to decide this question first.

APPEAL from a judgment of the District Court of Matara.

Daya Pelpola for plaintiff-appellant.

No appearance for defendants-respondents.

Cur. adv. vult.

December 20, 1977. SAMARAKOON, C.J.

This is an appeal from a judgment of the District Court of Matara. The history of this case is relevant for the purpose of deciding this case. The Plaintiff-Appellant instituted this action on the 21st of February, 1968, against the 1st Defendant (hereinafter referred to as the judgment-debtor) and the 2nd Defendant, praying *inter alia* that deed No. 2342 dated 27th July, 1965, attested by L. Goonetillake be declared null and void, and the property, called and known as Kelekumbura, more fully described in the schedule to the plaint, be declared the property of the judgment-debtor and liable to be sold in execution of a decree entered in favour of the Plaintiff-Appellant against the judgment-debtor. It appears that the Plaintiff-Appellant instituted action No. M/2284 in August 1963 against the judgment-debtor praying for judgment against him in a sum of Rs. 900/- being the value of a boat which the judgment-debtor had wrongfully removed from the Plaintiff-Appellant, and for damages in a sum of Rs. 500/- per annum till the boat is returned to the Plaintiff-Appellant. The judgment-debtor filed answer in that case but did not appear on the trial date. Decree Nisi was entered on the 9th September, 1964, (P3) and it was made absolute on the 14th of May, 1967 (P4). On the

20th of April, 1967, the judgment-debtor was subjected to an examination under the provisions of section 219 of the Civil Procedure Code. In the course of that examination he disclosed that the property called Kelekumbura of which he owned 4/14 shares had been transferred upon deed N. 2342 dated 27th July, 1965, for a sum of Rs. 2,500/- to the 2nd defendant. The judgment-debtor also stated that of this Rs. 2,500/- a sum of Rs. 1,500/- was paid in settlement of the amount due from him under the decree entered against him in D. C. Matara case No. MB/1490. This fact is borne out by the attestation to that deed which was produced marked P7. In the course of his examination the judgment-debtor further disclosed the fact that although he sold his right, he did not leave the land, but continued to reside on the land. A certified copy of his evidence on the said examination had been produced marked P8. In spite of the disclosure made upon such examination, the Plaintiff-Appellant caused writ to be issued and the Fiscal was directed to seize the said 4/14 shares of Kelekumbura, and the Fiscal by P5 dated 1.8.1967 reported such seizure to the District Court of Matara. The property was then claimed by the 2nd Defendant. His claim was inquired into, upheld, and the property ordered to be released from seizure. The Plaintiff-Appellant then filed this case on the 21st of February, 1968, as stated above. The judgment-debtor and the 2nd Defendant both filed answer and asked that the Plaintiff's action be dismissed. In his plaint which purports to be an action instituted in terms of section 247 of the Civil Procedure Code, the Plaintiff-Appellant claims not only that the land in question was liable to be sold in execution of the decree which is in his favour against a judgment-debtor, but he also pleaded that the said deed No. 2342 (P7) was executed by judgment-debtor "acting in fraud and collusion with the 2nd Defendant without consideration and with intent to defraud the Plaintiff", "and the Plaintiff has thereby been defrauded as the 1st Defendant is left with no property to satisfy the claim of the Plaintiff". This plaint incorporates not only an action under the provisions of section 247 of the Civil Procedure Code, but it is also coupled with a Paulian action. Such a procedure is well known to our law and is maintainable in our law. In the case of *Haramanis v. Haramanis*[1] it was held that a Paulian action could be combined with an action under the provisions of section 247 of the Civil Procedure Code. That principle has since been accepted and followed by all Courts. The purposes of a Paulian action is to establish "that the alienation impeached was intended to defeat the claim of creditors, that it left the alienator without sufficient property to meet the claims of his creditors, and that a creditor had been prevented by the alienation from recovering what was due". Per Garvin, J., in *Fernando v. Peiris*[2]. A successful Plaintiff in a Paulian action then obtains only a declaration that the impeached deed is void in so far as it is necessary to make the property available for execution. Title does not revest in the judgment-debtor and any unsold portion after execution remains in the judgment-debtor. *Abdul Cader v. Munasinghe,*[3] and *Punchi Banda v. Perera*[4].

[1](1908) 10 N.L.R. 332.
[2](1957) 58 N.L.R. 162.
[3](1932) 33 N.L.R. at 6.
[4](1928) N.L.R. 355.

To this plaint the Defendants filed answer. Both denied the allegation of fraud and both stated that the Plaintiff-Appellant could not maintain his action by reason of the fact that he had failed to obtain the necessaray certificate from the Conciliation Board having jurisdiction in the matter. The case appears to have been taken up for trial on the 28th January, 1971. Nine issues were framed. Issue 9 raised the question whether the action could be maintained for want of the necessary certificate from the Conciliation Board having jurisdiction with regard to the dispute. Counsel who appeared for the Plaintiff objected to this issue stating that this was "a statutory action arising out of an action under section 247 and therefore this action does not come under the purview of the Conciliation Board Act". There seems to have been a prolonged argument on this objection and the case was postponed for the 26th of February, 1971, for further submissions. On that date by agreement between counsel appearing for the various parties, issues 1-6 framed on the 25th January, 1971, were adopted, and three new issues suggested by counsel for the 2nd defendant were also adopted by consent. Issue 8 was identical with the original issue 9. Thereafter the learned Judge seems to have commenced the trial of all issues framed and after trial he answered issue 8 in the affirmative. This necessarily means that the Plaintiff-Appellant could not have instituted or maintained this action.

Issue 8 goes to the very foundation of this case in that the defendant challenged the jurisdiction of this court to entertain this action. Section 14(1)(a) reads as follows:–

> "Where a Panel of Conciliators has been constituted for any village area."
>
> (a) no proceedings in request of any dispute referred to in paragraphs (a), (b) and (c) of section 6 shall be instituted in, or be entertained by, a Civil Court unless the person instituting such proceedings produces a certificate from the Chairman of such Panel that such dispute has been inquired into by a Conciliation Board and it has not been possible to effect a settlement of such dispute by the Board, or that a settlement of such dispute made by a Conciliation Board has been repudiated by all or any of the parties to such settlement in accordance with the provisions of section 13;"

Section 6(a) refers to any dispute in respect of any immovable property that is wholly or partly situate in that village area. There was no doubt a dispute between the parties within the meaning of section 6(a) of the Conciliation Board's Act. That dispute was a dispute between parties as to whether the land called Kelekumbura had been transferred in fraud of the Plaintiff-Appellant, and therefore, whether it was liable to be taken in execution in so far as it was required to satisfy the decree in favour of the

Plaintiff-Appellant. The judgment-debtor and the 2nd defendant had to prove that this land fell within the Conciliation Board area. For this purpose they called the Chairman of the Conciliation Board of Dondra, by name Danister Thenabadu. He produced - certified copy of Gazette marked 2D3 which established that a panel of conciliators had been appointed for the Devinuwara Town Council area for a period of 3 years from 9th September, 1966. He also stated that the Chairman who was named in the Gazette had died, and that he himself was appointed Chairman on the 2nd of August, 1968. It is therefore apparent that at the time the plaintiff instituted this action there was a panel of conciliators for the Devinuwara Town Council area described therein. Witness Thenabadu also stated that he knew the house where the judgment-debtor originally lived, meaning thereby the land in dispute, and that that land fell within the Conciliation Board area. The Plaintiff-Appellant did not lead any evidence in rebuttal and the learned Judge was entitled to hold, and he did hold, that the land in dispute fell within the Conciliation Board area of the Devinuwara Town Council, and that on the date the action was instituted by the Plaintiff-Appellant there was in existence a panel of conciliators. The authority to decide a dispute is conferred on the Conciliation Board. That Board is comprised of conciliators drawn from the panel of conciliators. Its decision is recorded and signed by the President of the Board. The Chairman may or may not be a member of the Board. His functions are purely ministerial and involve "no element of discretion or independent judgment". Vide "Judicial Review of Administrative Action" by S. A. De Smith (Ed. 3 page 59). The fact that there is temporary absence of a Chairman by reason of death, resignation or removal from office does not render the panel powerless. Its jurisdiction continues to exist. Furthermore in this case there is no proof adduced that a Chairman did not function in February 1968. The learned Judge was therefore correct in his decision that a panel of conciliators was in existence for the Devinuwara Town Council with power to decide the dispute between the parties to this case.

The next question that arises is whether an action had been in fact instituted or whether, as counsel for the Plaintiff-Appellant contended, these proceedings were merely a continuation of the original execution proceedings. Section 247 of the Civil Procedure Code gives the judgment-creditor the right to "institute an action within 14 days" from the date of the order complained of. The question then arises as to whether such an action falls within the purview of section 14(1)(a) which states that no proceedings "shall be instituted in, or be entertained by a civil court" unless the person instituting produces the necessary certificate from the Chairman. The manner of instituting a regular action is set out in section 39 of the Civil Procedure Code. It states that "every action of regular procedure shall be instituted by presenting a duly stamped written plaint to the Court or to such officer whom the court shall appoint in this behalf". I have no doubt that this action

conforms to the provisions of section 39 and the plaint conforms to section 40 of the Civil Procedure Code. There is also another reason for stating that an action has been instituted. This action under the provisions of section 147 has been combined with a Paulian action which is not a step in execution proceedings. It is a special remedy having its own consequences. Furthermore this action is mainly directed at the 2nd Defendant who is the vendee on deed P7 and who was not a party to the earlier proceedings. A new action therefore had to be brought to obtain relief against him. In an action under the provisions of section 247 the judgment-debtor is not a necessary party – *Panditha v. Dawoodbhoy*[5]. It is only when it is combined with a Paulian action that the judgment-debtor becomes a necessary party. *Haramanis v. Haramanis* (supra). It is therefore clear that an action has been instituted within the meaning of section 14(1)(a) of the Conciliation Board Act, and therefore could not have been instituted by a plaintiff-appellant without the necessary certificate. At the time of the institution, a Court is unable to decide whether a certificate is necessary or not. It has to await the necessary evidence. Once it is proved to the Court's satisfaction that the necessary certificate has not been produced, the Court has no power to entertain it any further. I must necessarily dismiss it. The Court must also bear in mind the fact that section 18 of the Conciliation Board Act provides that that Act shall have effect notwithstanding anything to the contrary in any other written law. In the circumstances I hold that the Court had no jurisdiction to entertain this action.

Where the Court's jurisdiction is challenged by a plea based on the provisions of section 14 of the Conciliation Board Act, it is the duty of Court to decide this question first as it will be futile for the Court to enter into inquiry into other issues when it has no power to do so. Any answer given to other issues will have no legal consequences. The reason for the provisions of section 76 of the Civil Procedure Code which states that a defendant who disputes the jurisdiction of a Court must do so by a separate and distinct plea, is obvious. This section read together with section 71 of the Courts Ordinance (Cap. 6) makes it abundantly clear that jurisdiction of a Court if challenged must be first decided before it can entertain the case. In the course of the argument, counsel for the Appellant referred to the fact that the provisions of section 247 of the Civil Procedure Code required an action to be instituted within 14 days of the order in a claim inquiry and therefore hardship would be caused to any judgment-creditor who has first to obtain a certificate from the appropriate Conciliation Board, because that must necessarily take considerable time extending beyond 14 days. It is precisely to avoid such hardship that the Conciliation Board Act by the provision of section 15 thereof provides that in computing the period of prescription in regard to any cause of action, the time taken in proceedings before a Conciliation Board in regard to that cause of action "shall not be taken into consideration notwithstanding anything to the contrary in any other written

[5](1939) 40 N.L.R. 191.

law". Prescription as used in this section, only means any period of limitation, such as the period of limitation of 14 days referred to in section 247 of the Civil Procedure Code. By reason of the provisions of section 16 of the Conciliation Board Act, no hardship as envisaged by the counsel would in any event be caused to a judgment-creditor, I therefore hold that the learned Judge should have first decided issue 7 as a preliminary issue and following his finding on that issue be should have dismissed the entire action without inquiry into the other issues.

For these reasons I dismiss the Plaintiff's appeal without costs.

WIMALARATNE, J. – I agree.

TITTAWELLA, J. – I agree.

Appeal dismissed.