

1963

Present : T. S. Fernando, J.

H. W. SIMON SILVA, Petitioner, and THE DEBT CONCILIATION BOARD and others, Respondents

S. C. 212 of 1963—Application for the grant and issue of Mandates in the nature of Certiorari and Prohibition in terms of Section 42 of the Courts Ordinance

Debt Conciliation Ordinance (Cap. 81), as amended by Debt Conciliation (Amendment) Act, No. 5 of 1959—Sections 19A, 19B, 49, 62—Application for settlement in respect of debt secured by conditional transfer of immovable property—Procedure for “entertaining” and giving notice of it—Incapacity of Board to delegate its functions to Secretary—Effect of invalid notice issued by Secretary—Certiorari and Prohibition.

Where a debt has been secured by such a conditional transfer of immovable property as is a mortgage within the meaning of the Debt Conciliation Ordinance (as amended by Act No. 5 of 1959), the act of “entertaining” an application for settlement under section 19A of the Ordinance must be effected by the Debt Conciliation Board itself and cannot be delegated by the Board to the Secretary.

Accordingly, if the Secretary purports to issue to the creditor, under section 19A (2) of the Ordinance, a notice of the application made by the debtor, before the application is entertained by the Board, the prohibition on alienation or other disposition imposed by section 19B (1) would not be operative.

Where the Debt Conciliation Board in excess of its jurisdiction purports to declare as null and void under section 19B (2) of the Ordinance a sale validly executed by the creditor, *Certiorari* would lie.

APPPLICATION for writs of *certiorari* and prohibition.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the petitioner.

M. T. M. Sivardeen, for the 8th respondent.

~~M.~~ *M. Kumarakulasingham*, with *U. A. S. Perera*, for the 7th respondent.

Cur. adv. vult.

June 11, 1963. T. S. FERNANDO, J.—

The following are the reasons for the order made by me at the conclusion of the argument on this application whereby I quashed the order made on 20th February 1962 by the Debt Conciliation Board.

By deed No. 353 of 18th March 1957 the 7th respondent sold an allotment of land to the 8th respondent for a sum of Rs. 6,000 subject to the condition that if the said sum was repaid within a period of three years from the date of the sale together with interest at 15% the 8th respondent was to retransfer the land to him. The powers of the Debt Conciliation Ordinance of 1941 (Cap. 81) to effect settlements of debts owed by a person to his secured creditors were extended by the (Amendment) Act, No. 5 of 1959, to cover settlements of debts purporting to be secured "by any such conditional transfer as is a mortgage within the meaning of the Ordinance". To give effect to this extension of the Board's powers certain new sections were enacted by the (Amendment) Act, and two of these—Sections 19A and 19B—require examination upon this application.

These two Sections are reproduced below :—

19A. (1) 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 as is a mortgage within the meaning of this Ordinance unless that application is made at least thirty days before the expiry of the period within which that property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor.

(2) Where the Board entertains an application of a debtor in respect of such a debt as is referred to in sub-section (1) the Board shall cause notice of that fact signed by the Secretary to be sent together with a copy of the application by registered post to the creditor to whom the application relates.

19B. (1) Where a creditor receives a notice under sub-section (2) of section 19A relating to an application of a debtor of his in respect of such a debt as is referred to in sub-section (1) of that section, he shall not sell, alienate, transfer, lease or mortgage the property to which such notice relates unless such application is dismissed by the Board or unless the settlement effected under this Ordinance in respect of such debt permits him to dispose of such property.

(2) Any sale, alienation, transfer, lease or mortgage effected in contravention of sub-section (1) shall be null and void.

The 7th respondent made on 15th February 1960 an application to the Board for a settlement to be effected in respect of the transaction which was the subject of deed No. 353. This application was received at the office of the Board on that day, i.e. more than 30 days before the expiry of the period specified in Section 19A (1), and I am content for the purpose of the proceeding before me to assume that it was so received on behalf of the Board. The Secretary of the Board despatched on 7th April 1960 a notice to the 8th respondent that an application had been made by the 7th respondent, but did not attach to that notice a copy of the application itself. This notice was received by the 8th respondent on 10th April 1960 who, however, sold the land to the petitioner by deed No. 4357 executed on 16th April 1960.

The Board inquired into the application made by the 7th respondent and by its order of 20th February 1962 declared that the sale of the land by deed No. 4357 of 16th April 1960 is null and void in view of section 19B (2). This is the order that was challenged in this proceeding on the ground that it was vitiated by error of law on the face of the record and was in excess of the Board's jurisdiction.

There is no dispute now between the parties that the transaction represented by deed No. 353 is one in respect of a debt secured by such conditional transfer of immovable property as is a mortgage within the meaning of the Ordinance; the dispute relates to the question whether the notice received by the 8th respondent was a valid notice under sub-section (2) of Section 19A.

The contention of the petitioner is that an application must receive consideration by the Board for the Board to ascertain whether it is in respect of a debt purporting to be secured by any such conditional transfer as is a mortgage within the meaning of the Ordinance. The expression 'mortgage' had not received a statutory definition in the Ordinance until Section 4 of the (Amendment) Act, No. 5 of 1959, defined it as follows:—

“ mortgage ”, with reference to any immovable property, includes any conditional transfer of such property which, having regard to all the circumstances of the case, is in reality intended to be security for the repayment to the transferee of a sum lent by him to the transferor.’

It is conceded that before the notice was sent out by the Secretary the Board did not consider the question whether the application was one in respect of a debt purporting to be of the nature specified in Section 19A (1) either at a meeting or in some other lawful manner. The Board in the course of its written order of 20th February 1962 took the view that the entertaining of an application was a formal act and could be effected by the Secretary on behalf of the Board which can regulate its own procedure. Section 62 of the Ordinance empowers the Minister to make regulations in respect, inter alia, of the procedure to be followed at the hearing of

applications. No regulation empowering the Board to delegate to the Secretary its function of entertaining applications has been brought to my notice. Even if such a regulation had been made, having regard to the view—indicated below—which I have taken of the nature of the duty involved in the act of “entertaining”, such regulation would, in my opinion, have been *ultra vires* the powers of the Minister.

Learned counsel for the 7th respondent argued that the expression ‘entertain’ in Section 19A (1) means receive or hold for consideration and that the entertaining of an application need not be done by the Board itself but could be effected on its behalf by any one authorised by it to do so. He was compelled to concede that the same word in Section 19 has not that meaning. I can see no good reason for saying that the word has a different meaning in the new Section 19A. The Order of the Board contains on the face of it an admission that the Board did not meet and apply its mind and cause the Secretary to send the notice. The decision the Board reaches at Section 19A (1) stage will be reached *ex parte* and is tentative; nevertheless it is a decision in the nature of a judicial act much in the same way as the *ex parte* decision of a court entertaining or refusing to entertain a plaint in a civil suit. The power to make such a decision cannot, in the absence of power to do so, be delegated.

The prohibition on alienation or other disposition of property imposed by Section 19B (1) is dependent on the receipt of a notice under sub-section (2) of Section 19A. In other words, the issue of a notice in terms of that sub-section and its receipt thereafter by the creditor is a condition precedent to the coming into force of such a prohibition. The laying down of a minimum period of 30 days before the expiry of the redeemable date for applications to be made and the prohibiting of alienations after receipt of notice make it reasonably plain that the purpose was to ensure that the notice will reach the creditor before the expiry of the redeemable date. In the present case the application not having been entertained by the Board but action taken thereon only by the Secretary, the notice received by the 8th respondent was not a valid notice in terms of the Statute. That being so, the prohibition on alienation does not attach to the property.

A further objection was taken to the validity of the notice. Section 19A (2) requires that the notice signed by the Secretary shall be sent to the creditor together with a copy of the application. In the instant case no copy of the application was attached to the notice. As I have held that the notice is invalid because it was issued without the Board entertaining the application it is unnecessary for me to decide here whether the requirement that a copy of the application be sent together with the notice is imperative or merely directory.

Reference has been made in the challenged order of the Board that Section 49 of the Ordinance enacts that it shall be the duty of the Board to do substantial justice in all matters coming before it without regard to matters of form. The Board was inclined to take the view that

the first or *ex parte* entertaining of the application under Section 19A (1) was merely a matter of form. As already indicated by me above, the act of entertaining is not mere form ; but, even on a contrary assumption, Section 49 only protects acts done by the Board without regard to matters of form and not acts done by others, e.g. its Secretary.

It has been pointed out to me that the Board cannot by the very nature of its composition meet frequently. This difficulty is irrelevant as an answer to the ground of challenge made in this proceeding. There is a requirement that the application must be presented at least 30 days before expiry of the redeemable period, and this time was deemed by the legislature to be ordinarily sufficient for the Board to meet without undue inconvenience. It appears to me that there is a duty on the Board to meet in time sufficient to enable the notice to reach the creditor before the expiry of the redeemable period. The facts of this case disclose that the Secretary has delayed nearly two months after the receipt of the application before sending out a notice. Not only was the Board not convened to consider the entertaining of the application, but, even though the Board has without authority left it to the Secretary to send out to the creditor a notice in respect of every application received in time, there was negligence in that the Secretary failed to attach to the notice a copy of the application.

Counsel for the 7th respondent sought to avoid the issue of a writ in this case on the ground of an alleged lack of bona fides on the part of the creditor in regard to the sale of 16th April 1960. It is only right to say that on the material placed before me it was not possible to sustain this allegation. Moreover, this court's discretion was invoked not by the creditor but by the petitioner who was the purchaser.

In the special circumstances of this case where the 7th respondent has, without any fault on his own part, lost an opportunity of obtaining relief under the Ordinance, I have refrained from making any award in respect of costs.

Application allowed.
