1970 *Present :* **H. N. G. Fernando, C.J., Alles, J., and Wijayatilake, J.**

W. A. NONAHAMY, Appellant, *and* K. A. HALGRAT SILVA and 4 others, Respondents

S. C. 483/66 (F)—D. C. Matara, 2406/L

Conciliation Boards Act No. 10 of 1958, as amended by Act No. 12 of 1963—Sections 6 (a) and 14—Conciliation Boards—Scope and nature of their functions—Action brought in District Court for right of way—Application for interim injunction—Requirement of production of Chairman's certificate—Constitutional validity of such requirement—Courts Ordinance, ss. 20, 86, 87.

Where, pending an action in a District Court for a declaration of a right of cartway over a land which was situated in a Conciliation Board area, the plaintiff applied to the District Court under sections 86 and 87 of the Courts Ordinance for an interim injunction restraining the defendants from obstructing the plaintiff's user of the cartway—

***Held* by FERNANDO, C.J., and WIJAYATILAKE, J. (ALLES, J. dissenting), that the District Court had no jurisdiction to grant an injunction under sections 86 and 87 of the Courts Ordinance in the absence of a certificate issued by the Chairman of the Conciliation Board in terms of section 14 of the Conciliation Boards Act. In such a case, the insistence upon a production of the Chairman's certificate does not in any way constitute an erosion of the jurisdiction of the Courts, for there is no ousting or erosion of judicial power unless such power is taken away from the Courts *and* conferred on some other authority.**

***Held further*, that the case of *Wickremaratchi v. Inspector of Police, Nittambuwa* (71 N. L. R. 121) was wrongly decided in so far as it held that section 14 of the Conciliation Boards Act does not apply in a case where parties do not desire to refer a dispute to a Conciliation Board.**

APPEAL from a judgment of the District Court, Matara.

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, *T. Joganathan*, *S. C. B. Walgampaya* and *P. H. Kurukulasuriya*, for the plaintiff-appellant.

N. S. A. Goonetilleke, for the 1st defendant-respondent.

Cur. adv. vult.

June 24, 1970. H. N. G. FERNANDO, C.J.—

The plaintiff in this case filed a plaint on 5th June 1966 alleging that she and her predecessors in title had as owners of a certain land acquired a right of way by prescription over a cart road on the land of the defendants. In the alternative the plaintiff claimed a cartway of necessity over the land of the defendants. Alleging that the defendants

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have obstructed the use of the cart road by erecting a barbed wire fence across the road, the plaintiff claimed a declaration of a right of way and damages. In addition the plaintiff prayed for an interim injunction restraining the defendants from obstructing the plaintiff's user of the road.

The District Judge having accepted the plaint issued summons together with a notice of injunction effective until the hearing of the plaintiff's application for the same. The defendants thereupon filed objections and the enjoining order was stayed until the holding of an inquiry by the Court.

One of the objections taken against the issue of the injunction was in the following terms :—

> "The plaintiff cannot have and maintain this action and/or this application for an injunction in view of the provisions of the Conciliation Boards Act and the amendments thereto. The plaintiff has not complied with the provisions of the Conciliation Boards Act No. 10 of 1958 as amended by Act No. 12 of 1963."

This objection was upheld by the learned District Judge who made order dismissing the application for an interim injunction, and the plaintiff has appealed against that order.

Section 14 (1) of the Conciliation Boards Act No. 10 of 1958 provides as follows :—

> "Where a Penal of Conciliators has been constituted for any Conciliation Board area,—
>
> (*a*) no proceedings in respect 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 ; ".

The dispute referred to in paragraph (*a*) of Section 6 of the Act is—

> "any dispute in respect of any movable property that is kept, or any immovable property that is wholly or partly situate, in a Conciliation Board area."

In the present appeal the appellant does not contest either the position that the land to which this action relates is situated in a Conciliation Board area or the position that the dispute in this action is one in respect of immovable property in that area. The question which therefore arises is purely one of law.

Counsel's first submission was that the Legislature has not in s. 14 of the Act expressed an intention that the condition set out in that section (i.e. the production of a Certificate from the Chairman of the panel of Conciliators) applies in a case where what is sought from the Court is an interim injunction and not a decree in a regular action. There are in my opinion two answers to this submission. In the first place, s. 14 expressly bars the institution or entertainment of *proceedings* unless the requisite Certificate is produced, and I can think of no ground on which to hold that an application to a Court for an injunction is not a proceeding. If the Legislature did intend that the section is to apply in the case of such an application, the expression which the Legislature used was perfectly appropriate to convey that intention.

The second answer to Counsel's submissions depends on the provisions of ss. 86 and 87 of the Courts Ordinance, which are the provisions of law empowering a District Court to issue injunctions. That power is expressed in section 86 of the Courts Ordinance thus :—

> " In any action instituted in any District Court or Court of Requests–
>
> (*a*) where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance the commission or continuance of which would produce injury to the plaintiff ;
>
> (*b*)
>
> (*c*)
>
> it shall be lawful for such court, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, to grant an injunction."

It is thus apparent that the District Court has jurisdiction to grant an injunction only in an action in which it appears from the plaint that certain matters are made out. Accordingly the jurisdiction to grant an injunction can only be exercised after the Court has entertained a plaint. Counsel was compelled to agree that in the absence of the requisite certificate under s. 14 of the Conciliation Boards Act the Court in the instant case had no jurisdiction to entertain the plaint. If then there was not before the Court a plaint duly filed, the condition precedent for the exercise of the Court's jurisdiction under s. 86 of the Courts Ordinance to grant an injunction was not satisfied ; in other words, the grant of an injunction is a step in an action duly instituted by the filing of a plaint, and if the Court has no jurisdiction to entertain a particular action, then *a fortiori* the Court has no power to take a step in the action. The point is made manifest in the language of s. 86 which has been cited above : it cannot appropriately "appear from the plaint that the plaintiff demands and is entitled to a judgment against the defendant ", unless there is before the Court a plaint in an action duly instituted.

Section 87 of the Courts Ordinance also is of some relevance in this connection. An examination of s. 87 shows that the earliest point of time at which an injunction may be granted is at the stage when summons is issued on the defendant. While s. 87 permits a Court to grant an injunction *ex parte* and without prior notice to the defendant, the injunction must in such a case "accompany the summons", that is to say, the injunction will be served on the defendant together with the summons. But in a case where no summons can issue because no plaint has been duly entertained, then there cannot be compliance with the requirement in s. 87 for the injunction to accompany the summons. Even therefore if we were to assume that s. 14 of the Conciliation Boards Act does not prevent a Court from entertaining an application for an injunction filed independently and not together with or in the course of an action, it becomes clear from ss. 86 and 87 of the Courts Ordinance that a Court will have no jurisdiction to grant such an application.

Counsel for the appellant referred to the case of *Wickremaratchi v. Inspector of Police, Nillambuwa* [1] in which a conviction for an offence under s. 314 of the Penal Code was challenged in appeal on the ground that the prosecution had been instituted without production of the certificate of the Panel of Conciliators required by s. 14 of the Conciliation Boards Act. In that case this Court upheld the conviction for two different reasons. Firstly the Court rejected the proposition—

> "that every dispute or offence of the kind enumerated in s. 6 must in the first instance be referred to a Conciliation Board and a certificate obtained from the Chairman, before proceedings can be instituted or entertained in an established Court of law."

Alles J. thought that s. 14 must be read with some qualification, because otherwise it would have "completely ousted the jurisdiction of a Magistrate's Court in respect of certain offences", and "would be tantamount to an erosion of the jurisdiction vested in the established courts of law". I am satisfied however that even the strictest application of the provisions of s. 14 would not have any such drastic consequences. All that the section requires is that certain offences or disputes cannot be the subject of Court proceedings unless the Conciliation Board have first the opportunity to consider the matters which gave rise to the dispute or to the commission of the offence. In the case of an offence, the Board will attempt to settle the "trouble" (if I am so call it) by compounding the offence if such a course is desirable; in the case of a civil dispute the Board will attempt to resolve the matters in dispute by a settlement. In either case, the Board will merely be persuading the parties to end their differences. Thus the part played by the Board is really to assist the parties to settle "troubles" without an invocation of the judicial power of the State. The function of the Board is beneficial and quite unobjectionable, because it is a function which is often performed by mutual friends of disputants or by administrative officials. If the

[1] *(1968) 71 N. L. R. 121.*

Board's effort at making peace fails, and if recourse to the judicial power is not avoidable it is the Courts alone that can exercise that power. I am therefore unable to agree that insistence upon a production of the Certificate referred to in s. 14 of the Act in any way constitutes an erosion of the jurisdiction of the Courts. There is no ousting or erosion of judicial power, unless such a power is taken away from the Courts *and* conferred on some other authority.

Section 6 of the Conciliation Boards Act reads as follows :—

"The Chairman of the Panel of Conciliators constituted for any village area may, and shall upon application made to him in that behalf, refer for inquiry to Conciliation Boards constituted out of that Panel the following disputes and offences :

(*a*) any dispute in respect of any movable property that is kept, or any immovable property that is wholly or partly situate, in that Conciliation Board area ;

(*b*) (*c*) (*d*) ".

In the judgment in *Wickremaratchi's* case, it is stated that the only disputes and offences which can be referred for an inquiry to a Conciliation Board are those which " the Chairman may of his own motion refer to a Board or such disputes and offences which the parties desire to be referred to the Board ". There is implicit in this statement the opinion that if a party *does not desire* a dispute to be so referred, then that dispute can be brought to the Courts without production of the Certificate referred to in s. 14.

I cannot agree with this opinion. Section 6 does not mention the desire of parties to refer disputes for inquiry. When s. 14 imposes a condition precedent of the production of a Certificate from the Board, what is necessary is that the Board's functions have been antecedently exercised ; this exercise can take place because of action taken by the Chairman of his own motion, or because the parties have desired to seek the mediation of the Board, or else because a party who wishes to come to Court is compelled as a first step to submit to an attempt at conciliation. Thus it seems to me that a dispute can be referred to a Conciliation Board under s. 6, not by two methods but by three, the first and the third being compulsory so far as the party is concerned.

I should add that Counsel appearing for the appellant in the present appeal did not argue that any *action* to which s. 14 applies can be entertained by a Court without the production of the Certificate referred to in that section. His argument in substance was that in the application of s. 14 a distinction can be drawn between an action as such and an application for an injunction. That argument has been dealt with in the earlier part of this judgment. I would hold for these reasons that the case of *Wickremaratchi v. Inspector of Police, Nittambuwa*, was wrongly

decided in so far as it held that s. 14 does not apply in a case where parties do not desire to refer a dispute to a Conciliation Board. I should add that in the instant case it is not necessary to consider the correctness of the further finding that the defect in the prosecution was curable under s. 425 of the Criminal Procedure Code.

This appeal has been heard before a bench of three Judges upon a reference made by the two Judges before whom it was originally listed. I understand that one reason for the reference was that the question can arise whether the provisions of s. 14 of the Conciliation Boards Act will prevent the exercise by the Supreme Court of the power to issue injunctions. It is not however necessary to consider that question on the present occasion since this appeal can be disposed of independently of it.

After the preparation of this judgment I have had the advantage of reading the judgment prepared in this appeal by my brother Alles J. One of the grounds of his dissent is that " if the Legislature required the subject to obtain a certificate from an officer appointed by the Executive it would appear that it authorised a procedure which did not secure to the judiciary, in the words of Lord Pearce, ' a freedom from political, legislative and executive control '. " The phrase thus adopted by my brother from the judgment of Lord Pearce in *Liyanage's case* [1] occurs in that part of the judgment which considered a contention that the 1962 Acts " amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which is outside the legislature's competence.. ". With respect, a similar, contention cannot be advanced against a provision which merely requires that a prospective litigant must attempt to have his dispute settled amicably by conciliation before he has recourse to the Courts in an action. The provision does not bear in my opinion any semblance of a control of the Judiciary ; if control is at all involved, it is only a somewhat loose control of the litigant's right to institute an action, by (at the worst) delaying the institution.

We have been familiar for many years with s. 13 of the Rent Restriction Act, which *prohibits the institution* of an action for ejectment (except in specified cases) unless the Rent Control Board has first authorised the institution. It has never been seriously argued that this section unconstitutionally ousted or interfered with the jurisdiction of the Courts. This, despite the fact that s. 13 has in practice almost totally prevented the institution of ejectment actions except on the grounds specified in the section. If then s. 13 has been accepted as a valid piece of legislation, it must follow that the slight restraint which the Conciliation Boards Act imposes on litigants has to be accepted as valid.

[1] *(1965) 68 N. L. R. 265.*

The order of the learned District Judge dismissing the application for an interim injunction is affirmed, and the appeal is dismissed with costs.

ALLES, J.—

I have had the advantage of reading the judgment of My Lord the Chief Justice but, I think there is one aspect of this case which merits further consideration and which compels me to take a view different from that taken by the learned Chief Justice.

The provisions of Sections 86 and 87 of the Courts Ordinance were obviously intended to give immediate relief to the party concerned but it seems to me that the party seeking such relief is likely to be frustrated if he has first to obtain a certificate from the Chairman of the Board of Conciliators. For instance, in the present case the plaintiff would have to make his application to the Chairman ; a Conciliation Board consisting of three members will have to be constituted ; the dispute will have to be referred to the Board ; the Board must meet and issue summons on the opposing party ; an inquiry will have to be held and the Board will only then be able to arrive at a conclusion whether it could grant relief to the plaintiff. Since the powers of a Conciliation Board are only confined to the settlement of disputes and the compounding of offences, even if the dispute regarding the right of way was referred to the Board, it would not have been open to the Board to issue an enjoining order as this can only be done through the mediation of the Courts of law. Consequently the only result of making an application to the Conciliation Board would be to cause unnecessary delay to the party making the application—delay that would be fatal to the interests of the party concerned.

Such being the case, the question immediately arises whether the subject is not effectively deprived from obtaining relief under Sections 86 and 87 of the Courts Ordinance to which he is entitled under the provisions of the law and whether thereby there has not been an interference with the judicial power of the State. It has now been established since the decision of the Privy Council in *Queen v. Liyanage* [1] that the judicial power of the State has been unaffected by the Constitution and rests on the provisions of law under which the Courts function (the Charter of Justice of 1833 and other laws including *the Courts Ordinance*). Therefore if the Legislature required the subject to obtain a certificate from an officer appointed by the Executive it would appear that it authorised a procedure which did not secure to the judiciary, in the words of Lord Pearce, "a freedom from political, legislative and executive control". To this extent, therefore a law which requires recourse to a Conciliation Board before an application is made under Sections 86 or 87 is one which is likely to affect the jurisdiction of the District Court in preventing the subject from obtaining an effective remedy, for the practical effect of such a course would be to make the law laid down in Sections 86 and

[1] *(1965) 68 N. L. R. 265.*

S7 almost a dead letter. Such a deprivation would be tantamount to an interference with judicial power. I am not unmindful of the fact that the subject can have direct recourse to the Supreme Court under Section 20 of the Courts Ordinance for immediate relief but this is no answer to the virtual abrogation of the powers of the District Court under Sections S6 and S7. Although the Conciliation Boards Act is a salutary piece of legislation which deserves to be encouraged, if some of its provisions infringe upon the rights of the subject and fetters recourse to the established Courts of law, one has to be cautious and consider whether such provisions affect judicial power. When the relief available under Sections S6 and S7 is circumscribed in this manner, being dependent on a certificate issued by the Chairman of a Board of Conciliators, there is, in my view, an ouster of the jurisdiction of the District Court and a conference of such power, however limited it may be, on a Conciliation Board (where a proceeding is deemed to be a judicial proceeding) in the sense that the subject is denied an effective remedy.

If however, in spite of the peremptory provisions of Section 14 of the Act, there is room for a view, on a construction of the provisions of the entire Act, that it is open to the parties in certain circumstances to invoke the machinery of the established Courts without the necessity of obtaining a certificate from the Chairman, the problem raised by me will not arise for consideration. In my opinion, such a view is possible on an examination of some of the language used in the Act—"applications made to him (the Chairman) in that behalf" in Sections 6 and 14 (2) and the constant use of the words "reference to a Board" in other Sections—and also the absence of any positive requirement imposing an obligation on a party to obtain a certificate, Section 14 merely imposing a prohibition on the institution of proceedings in Court only in certain stated circumstances. This is the view that appealed to me when I delivered the judgment in *Wickremaratchi v. Inspector of Police, Nittambuwa* [1].

I am therefore of the opinion that the learned District Judge was in error in requiring the plaintiff to produce a certificate before entertaining his application for an injunction. I would allow the appeal with costs.

WIJAYATILAKE, J.—

I have had the benefit of reading the judgments prepared by My Lord the Chief Justice and my brother Alles, J. Much as I agree with the latter that parties seeking urgent relief by way of injunctions would be seriously prejudiced to the point of near disaster if they are compelled to go before the Conciliation Board with its incidental delays in summoning a meeting and taking action, I respectfully agree with the construction and interpretation of My Lord the Chief Justice of Sections S6 and S7 of the Courts Ordinance read with the Conciliation Boards Act. No doubt it will work serious hardship in certain situations but the principal object of the Act being to prevent parties rushing to litigation in Courts,

[1] *(1968) 71 N. L. R. 121.*

the Act seeks to afford an opportunity to parties to settle their disputes with the aid of the Conciliation Board before pursuing the matter in the Courts.

With great respect I am unable to agree with my brother Alles J. that in effect there would be an erosion of judicial power as an aggrieved party could still make an application for an injunction direct to the Supreme Court. This procedure can cause severe hardship to the parties, the cost of litigation being so high, but at the same time it can act as a brake to frivolous applications for injunctions. Perhaps, this is an aspect which warrants early consideration by the Law Reforms Commission. As I have already observed on a construction and interpretation of the relevant statutes I am in entire agreement with My Lord the Chief Justice and I would respectfully subscribe to his judgment dismissing the Appeal with costs.

Appeal dismissed.