1974 *Present :* **Walgampaya, J., Vythialingam, J., and Walpita, J.**

K. S. WIJEPALA, Appellant, *and* SAMYDORAI NADAR, Respondent

S. C. 2/70 (Inty.)—D. C. Panadura, 10325

Conciliation Boards Act, as amended by Act No. 12 of 1963—Section 14 (1)—Jurisdiction—Action instituted in District Court in the first instance—Requirement of certificate of Conciliation Board—Waiver thereof by consent of parties—Permissibility.

Plaintiff-appellant sued the defendant-respondent, his tenant, for ejectment from the rented premises. The defendant admitted jurisdiction and consented to judgment, one of the terms of which was that writ of ejectment should not issue till 31st December, 1967. At the stage of execution of the writ, nearly three years after the consent decree was entered, objection was raised for the first time by the defendant that the Court had no jurisdiction to hear and determine the action as a certificate from the Chairman of the appropriate Conciliation Board had not been filed with the plaint as required by section 14 (1) of the Conciliation Boards Act. The trial Court made order that the defendant was entitled to lead evidence even at that late stage in support of his objection.

Held, that the defendant had waived the objection to the jurisdiction of the Court, and he was entitled to do so. He could not thereafter raise the objection, once he had waived it. "Where the want of jurisdiction is not apparent on the face of the record but depends on the proof of facts, it is for the party who asserts that the Court has no jurisdiction to raise the matter and prove the necessary facts. A Court has to proceed upon the facts placed before it and its jurisdiction must, therefore, depend upon them and not upon the facts that may actually exist."

APPEAL from a judgment of the District Court, Panadura.

A. Mahendrarajah, with *S. Mahenthiran,* for the plaintiff-appellant.

Defendant-respondent absent and unrepresented.

Cur. adv. vult.

March 28, 1974, VYTHIALINGAM, J.—

The plaintiff-appellant in this case sued the defendant-respondent his tenant for ejectment, arrears of rent and damages on the ground that he was in arrears of rent. The defendant-respondent admitted jurisdiction and although denying in paragraph 4 of his answer that he was in arrears of rent as from 1st August, 1962, nevertheless set out in paragraph 5 that he had paid a portion of the arrears of rent after receiving the notice to quit and stated that he was prepared to pay the balance due within reasonable time.

On 15.3.1967 when the case came up for trial the defendant consented to judgment in ejectment and damages in a sum of Rs. 537.24 and continuing damages at the rate of Rs. 24.42 per month from 1st March, 1967. It was also agreed that writ was not to issue till 31st December, 1967, and that there should be no costs. On the application of the plaintiff writ was issued on 11/12.3.1968 but was not executed. Thereafter on an application for the reissue of writ, notice was issued on the defendant and he filed objection stating that the plaintiff had accepted rent after 31.12.67 and that a settlement had been effected and a new tenancy created.

He also moved for an order under Section 377 (*b*) on the plaintiff to show cause why the decree in the case should not be certified as having been adjusted under Section 349 of the Civil Procedure Code. At the inquiry the only matter in issue was whether the plaintiff was entitled to a reissue of the writ and it was agreed that it would cover the matters raised by the defendant in his objections. The plaintiff's evidence was recorded "de bene esse" as she was leaving the island and the inquiry was proceeded with on 5.10.69 when plaintiff's rent collector gave evidence, and plaintiff's evidence having been read under Section 178 (3), her case was closed.

Thereafter defendant gave evidence and his cross examination was put off for 13.11.1969. On that date Counsel for the defendant for the first time moved to raise the following further issues :—

2. Does the dispute referred to in the plaint fall within the jurisdiction of the Panadura Conciliation Board area ?

3. Has a certificate from the Chairman of the Panel of Conciliation Board been filed with the plaint ?

4. If issue 3 is answered in the negative, has this Court jurisdiction to hear and determine this action in view of Section 14 (1) of the Conciliation Boards Act as amended by Act No. 12 of 1963 and in view of Section 18 of the Conciliation Boards Act ?

Counsel for the plaintiff objected and after hearing the arguments the learned Additional District Judge made order on 11.1.1970 holding that the defendant was entitled to raise the issues even at that late stage and to lead evidence in support of these issues. From 22.7.1966 when the action was instituted right down to 13.11.1969 the plea that the Court had no jurisdiction to hear and determine the action as a certificate from the Chairman of the appropriate Conciliation Board had not been filed with the plaint was at no time taken up. On the other hand the defendant had expressly admitted jurisdiction by para 2 of his answer, consented to judgment and had sought certification of the adjustment arrived at by him with the plaintiff.

Even on 13.11.1969 no material was placed before Court to show that the area in which the dispute arose is in a Conciliation Board area and that a panel of conciliators had been constituted for that Conciliation Board area. These are matters on which he sought to lead evidence nearly three years after the consent decree was entered and two years after the expiry of the date on which he should have quitted the premises in terms of the consent decree.

The nature of the dispute in a tenancy action such as the one which arose in this case is one which falls within the provisions of the Conciliation Boards Act. In the case of *A. Samarasinghe et al v. W. Samarasinghe*[1] *70 N. L. R. 276,* what was prayed for in the plaint was that the plaintiff was at all times material a monthly tenant of the 1st defendant and for the ejectment of the defendants and a restoration of the plaintiff to quiet possession. T. S. Fernando, J. said at page 279 "I have already indicated above that the main dispute was over the allegation of the existence of a tenancy. Indeed the plaint itself and the pleadings taken together establish that there was a dispute falling within one or more or all of the clauses (*a*), (*b*) and (*c*) described in Section 6."

In the case *Mrs. N. E. Brohier v. H. M. S. A. Saheed,*[2] *71 N. L. R. 151,* the plaintiff landlord sued the defendant his tenant for ejectment from certain premises. Sirimane, J. said at page 153, "I am also inclined to agree with the submissions of Mr. Gunasekera for the defendant that the action is one to recover immovable property and the dispute would also fall under Section 6 (*a*). In the case of *Samarasinghe v. Samarasinghe* (supra) this Court was of the view that in a tenancy action the dispute was one falling within one or more or all of the classes (*a*), (*b*) and (*c*) set out above."

Where the provisions of the Conciliation Boards Act apply the Court has no jurisdiction to entertain an action without the requisite certificate from the Chairman of the appropriate Conciliation Board. In the case of *Nonahamy v. K. A. Halgrat Silva*[3] *73 N. L. R. 217,* a Divisional Court held, Alles, J. *dissentiente,* that the District Court had no jurisdiction to entertain a plaint without a certificate from the Chairman and consequently had no jurisdiction to issue an interim injunction because there was before Court, no plaint in an action duly instituted. It was not disputed in that case that the land to which the action related was situated in a Conciliation Board area and that the dispute in that action was one in respect of immovable property in that area.

The question which arises here is whether the defendant has waived the objection to the jurisdiction of the Court and whether he can do so. In the case of *Fernando v. Fernando*[4] *74 N. L. R.* 57, Samerawickrame, J. with Panditha Gunawardena, J. agreeing, pointed out on the authorities cited by him that where the want of jurisdiction is patent, the objection to jurisdiction

[1] *70 N.L.R. 276.*
[2] *71 N.L.R. 151.*
[3] *73 N.L.R. 217.*
[4] *74 N.L.R. 57.*

can be taken up at any time and in such a case it is the duty of the Court itself, *ex mero motu,* to raise the point even if the parties fail to do so and notwithstanding any acquiescence of parties.

But where the want of jurisdiction is not apparent on the face of the record but depends on the proof of facts, it is for the party who asserts that the Court has no jurisdiction to raise the matter and prove the necessary facts. A Court has to proceed upon the facts placed before it and its jurisdiction must, therefore, depend upon them and not upon the facts that may actually exist. As G. P. A. Silva, S.P.J. pointed out in *S. K. Gunawardena v. Mrs. M. N. Jayawardena*[1] *74 N. L. R. 248,* at page 251 "In the absence of such facts being brought to the notice of the Court, there is no duty on the Court—though Counsel for the petitioner seemed to contend there was—to embark on a voyage of discovery in every action instituted before it whether the dispute arose in a Conciliation Board area, in which a panel of Conciliators had been constituted."

In both these cases it was held that the defendants were precluded by delay and acquiescence from raising the objection to jurisdiction at a late stage and that it had been waived. *Gunawardena's case* (supra) was also a case for rent and ejectment on the ground of arrears of rent where the defendant consented to judgment and was given time to quit. He took up the objection to jurisdiction a few weeks prior to the time to quit expired. In regard to the conduct of the defendant in that case, G. P. A. Silva, S.P.J. said "He thereby obtained an advantage from the plaintiff and the court to remain almost two years in the premises even though the plaintiff was entitled to an immediate order for ejectment. The defendant enjoyed the full benefit of this period and only brought up this question again during the last month of his stay in the premises."

In the case of *Adiris Fernando v. Rosalin et al*[2] *81 C. L. W. 13,* it was held that in a partition action where interlocutory decree had been entered it was too late to raise the objection to jurisdiction that the certificate from the Chairman of the Conciliation Board had not been obtained.

In *P. M. Kurera v. R. C. Fernando*[3] 75 N. L. R. 179, it was held following these decisions that where a consent decree has been entered in an action the defendant is not entitled to have it set aside subsequently on the ground that the action and the proceedings were null and void by reason of the absence of a certificate required by Section 14 (1) (*a*) of the Conciliation Boards Act.

[1] *74 N. L. R. 248 at 251.* [2] *81 C.L.W. 13; 74 N. L. R. 563.*
[3] *75 N. L. R. 179.*

Samerawickrame, J. with H. N. G. Fernando, C.J. agreeing, pointed out that " As G. P. A. Silva, S.P.J. has pointed out in *Gunawardena v. Jayawardena* (supra) this view accepts the decision of the Divisional Bench in *Nonahamy v. Silva* (supra), but is based on a different principle which was not applicable on the facts to the case decided by the Divisional Bench. " He also further pointed out " There is one further matter—the purpose of having a dispute referred to a Conciliation Board is to affect a settlement. The parties have in fact effected a settlement in Court. In the circumstances the objection that the dispute had not first been referred to the Conciliation Board for settlement is in any view of the matter, technical " page 181. Such is the case here.

W. S. Jayawickreme v. E. Nagasinghe,[1] *74 N. L. R. 523,* was also a case for ejectment and damages and the case was settled of consent and defendant was given time to quit. Shortly before the expiry of the period he moved for further time and a few days after the expiry of the period he filed papers objecting to the jurisdiction of the Court on the ground that a certificate from the Conciliation Board had not been obtained. The application to set aside the consent decree was refused by the trial Judge and in revision, De Kretser, J. in dismissing the application said, " What the defendant is trying to do is to get an advantage not only after a determination of the matter in the lower Court but also after he has enjoyed the full fruits of that determination. Such conduct must not be permitted." Page 528. The position is identical in the instant case.

At the time the learned Additional District Judge made his order on 11.10.1970 these judgments referred to by me in this judgment had no been delivered. Had the learned Additional District Judge had the advantage of these judgments, I have no doubt his decision would have been otherwise.

It is a matter of regret that the respondent was not represented or present at the hearing and we did not have the benefit of any submissions on his behalf. But the authorities are quite clear to admit of any other view.

I allow the application and set aside the order of the Additional District Judge dated 11.1.1970 and disallow the issues Nos. 2 to 4 raised on 13.11.1969. The inquiry will now proceed only in regard to issue No. 1 and the matters raised in the defendant's application as set out in the proceedings of 5.10.1969. It is unfortunate that the defendant who had agreed to vacate

[1] *74 N. L. R. 523.*

the premises on 31.12.1967 should still continue to be there in February, 1974, as a result of these dilatory tactics.

The plaintiff will be entitled to costs both here and the Court below.

WALGAMPAYA, J.—I agree.

WALPITA, J.—I agree.

Order set aside.