BABY
v.
BANDA AND OTHERS

COURT OF APPEAL.
WEERASURIYA, J.
KULATILAKA, J.,
CA NO. 80/97.
DC MATARA NO. 1770.
FEBRUARY 11, 1999.
JULY 2, 1999.

Hypothecary action – Ex parte Order – Civil Procedure Code, s. 85 – Applicability of Debt Conciliation Ordinance, s. 56 Absolute bar – Latent and Patent want of jurisdiction.

The defendant-petitioner sought to revise the *ex parte* order, the order for sale and the subsequent order whereby the District Court refused to vacate the above orders.

It was contended that in terms of s. 56 of the Debt Conciliation Ordinance (DCB), no civil court shall entertain any action in respect of any matter pending before the Board, and as there was a case pending before the DCB, the District Court lacked jurisdiction, and the court could not have made the orders complained of.

Held:

(1) In terms of S. 14 of the Conciliation Board Act there was a condition precedent for the court to have jurisdiction, but as regards s. 56 of the Debt Conciliation Ordinance there is no such condition precedent attached to it, but there is an absolute bar to jurisdiction.

(2) The want of jurisdiction is patent and not latent, objection to jurisdiction can be taken at any time.

"In such a case it is, in fact, the duty of court itself *ex mere motu* to raise the point even if the parties fail to do so."

APPLICATION for Revision from the Order of the District Court of Matale.

Cases referred to:

1. *Ittapana v. Hemawathie* – [1981] 1 Sri L. R. 476.
2. *Sithy Maleeha v. Nihal Ignatius Perera and Others [1994]* 3 Sri L. R. 271 at 275.

3. *Gunawardene v. Jayawardena* – 74 NLR 248.
4. *Fernando v. Fernando* – 74 NLR 57.
5. *Farquharson v. Morgan* – 70 Law Times 152 at 153.

Manohara de Silva for the defendant-petitioner-petitioner.

N. R. M. Daluwatte, PC with *K. K. Weragama* for the plaintiff-respondent-respondent.

Cur. adv. vult.

September 10, 1999.

KULATILAKA, J.

By Mortgage Bond bearing No. 9215 dated 21.3.91 the defendant-petitioner-petitioner (hereinafter referred to as the petitioner) has mortgaged the house and land called Bogahalande Bogahamulahena owned and possessed by him to the plaintiff-respondent-respondent (hereinafter referred to as the respondent) subject to the terms and conditions stated therein. (vide document P1).

The petitioner failed to redeem the property and thereupon the respondent instituted a mortgage action in the District Court of Matale against the petitioner.

By this application for revision the petitioner seeks to set aside an *ex parte* order dated 25.7.95 made by the District Court of Matale in terms of section 85 of the Civil Procedure Code, order of sale made by the court dated 12.3.96 and the order dated 26.12.96 whereby the learned District Judge has refused to vacate the orders he had already made on 25.7.95 and 12.3.96.

We have perused and considered the written submissions tendered on behalf of the petitioner as well as the respondent.

The points in issue raised by the learned counsel for the petitioner are two-fold namely:

(1) whether section 56 of the Debt Conciliation Ordinance bar the District Court from entertaining any action in respect of

a matter pending before the Debt Conciliation Board and as such was the judgment and decree entered in this case a nullity in law.

(2) whether the learned District Judge has misdirected himself by his failure to hold a due inquiry into the question of non-service of summons.

In regard to the issue (2) raised by the learned counsel for the petitioner, he has cited the decision in *Ittapana* v. *Hemawathie*[1] where it was held by the Supreme Court that the failure to serve summons is one which goes to the root of the jurisdiction of the court which means that if the defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered in such circumstances is a nullity and the persons affected by the proceedings can apply to have the proceedings set aside *ex debito justitiae*. Vide the decision in *Sithy Maleeha v. Nihal Ignatius Perera and Others*[2] at 275.

In the instant case the petitioner has taken up the position that he was not served with summons and was not aware of the case. (vide paragraph 5 of the petition). Albeit according to journal entry dated 6.7.95 the Fiscal had reported that the defendant had refused to accept the summons as there was a pending case against the respondent in the Debt Conciliation Board. Thus, the endeavour of the learned counsel for the petitioner citing the decision in *Ittapana* (*supra*) would be of no avail and the proposition advanced by him should fail.

Anyway, the main part of the submissions of the counsel appearing for the petitioner as well as the respondent centered round the proposition advanced by the petitioner that the District Court had no jurisdiction to entertain the plaint. Citing a number of decisions the learned President's Counsel appearing for the respondent submitted that as the want of jurisdiction in relation to section 56 of the Debt Conciliation Ordinance is latent and depends on the proof of facts; there is a duty cast on the respondent to have pleaded and proved that the matter pertaining to the action instituted in the District Court is in respect of an application already pending before the Debt Conciliation Board. He further submitted that the petitioner is precluded by delay from raising the objection to jurisdiction.

Learned President Counsel's submission was mainly based on the decision in *Gunawardena* v. *Jayawardena*[3]. All the cases referred to by the learned President Counsel are pertaining to objections raised to want of jurisdiction in terms of section 14 of the Conciliation Boards Act. It should be stressed that section 14 of the Conciliation Boards Act tags a condition precedent for the court to have jurisdiction. It reads as follows:

"14. (1) Where a Panel of Conciliation has been constituted for any Conciliation Board area:

(*a*) no proceedings in respect of any dispute referred to in paragraphs (1), (*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 relevant portion is *in italics*).

As regards section 56 of the Debt Conciliation Ordinance there is no such condition precedent attached to it and there is *an absolute bar* to jurisdiction. It reads as follows:

> "No Civil court shall entertain any action in respect of any matter pending before the Board."

Hence, we are of the considered view the want of jurisdiction is patent and objection to jurisdiction may be taken up at any time. Vide the decision in *Fernando* v. *Fernando*[4]. In that case Samerawickrema, J. further observed:

> "In such a case it is, in fact, the duty of court itself *ex mere motu* to raise the point even if the parties fail to do so."

In the same case reference has been made to *Farquharson* v. *Morgan*[5] at 153 where Halsbury, LJ. had observed:

"It has long since been held that when the objection to jurisdiction of an Inferior Court appear upon the face of the record it is immaterial how the matter is brought before the Superior Court, for the Superior Court must interfere to protect the prohibition of the Crown by prohibiting the Inferior Court from exceeding its jurisdiction that is to say, where the want of jurisdiction appears upon the libel in an eccesiastical court, or upon the face of the record, and does not depend upon a mere matter of fact, and the cause is entertained by an Inferior Court which is clearly beyond its jurisdiction, no consent of parties will justify the Superior Court in refusing a prohibition."

The respondent in the instant case takes up the position that when he instituted the District Court action on 17.10.94 (according to journal entry the action was filed on 25.10.94) he was not aware of an application pending before the Debt Conciliation Board and that he came to know about it "some time after 18.4.95". Vide paragraph 3 of the affidavit filed by the respondent. This is a false averment because according to the journal entry of 9.3.95 the Attorney-at-law for the plaintiff (respondent) had applied to court for a certified copy of the plaint to be tendered to the Debt Conciliation Board. Thus, even though the plaint did not disclose the pending application before the Debt Conciliation Board, the journal entry of 9.3.95 reveals that the court had become aware of the pending application. Further, the Fiscal report which we have already referred to specifically stated that the petitioner had refused to accept the summons as there was a case pending against the respondent in the Debt Conciliation Board. Thus, the Court should have *ex mere motu* raised the point in regard to jurisdiction at that point of time.

We hold that in the attendant circumstances of this case which we have already referred to and in the interests of justice this is a proper case that warrants the exercise of the revisionary jurisdiction of this Court. Hence, acting in revision we would allow the application, and set aside the orders made by the learned District Judge referred to in the prayer. The petitioner is entitled to costs.

WEERASURIYA, J. – I agree.

Application allowed.