1975 *Present :* **Perera, J. Ismail, J., and Vythialingam, J.**

K. H. SILVA, Respondent-Petitioner, *and* M. Amerasinghe, Petitioner-Respondent

S. C. 129/1975—D. C. Mount Lavinia 74/C. B.
Application in Revision

Conciliation Boards Act—Section 13—Settlement—Execution as decree of Court—Applicability of provisions in Civil Procedure Code—Duty of Court to notice party affected—Inquiry into objections—Administration of Justice Law, Sections 317, 318, 325, 328, 356—Restoration to possession pending inquiry de novo.

(1) In an application under Section 13 of the Conciliation Boards Act, No. 10 of 1958 for the execution as a decree of the Court, of a settlement alleged to have been entered into between the parties before the Conciliation Board, it is the duty of the Court (*a*) to notice the party affected by the settlement sought to be enforced ; (*b*) to inquire into any objections which such party is by law permitted to take.

"Thus, unlike in the case of Section 57 of the Estate Duty Ordinance and section 84 (3) of the Income Tax Ordinance which make only Sections 226 to 297 of the Civil Procedure Code applicable, the Section 13 (2) of the Conciliation Boards Ordinance makes the whole of the provisions including the important provisions in Section 224 and 225 applicable to execution of settlements arrived at under that Ordinance."

(2) Section 328 of the Administration of Justice Law No. 44 of 1973 has not taken away the discretion of the trial judge to allow an application for stay of execution even pending application to the Supreme Court for leave to appeal.

APPLICATION in Revision from an Order of the District Court Mount Lavinia.

N. R. M. Daluwatte for the petitioner.

R. de Silva for the respondent.

Cur. adv. vult.

May 6, 1975. VYTHIALINGAM, J.—

The Petitioner-Respondent applied in terms of Section 13 (2) of the Conciliation Boards Act No. 10 of 1958 for the execution as a decree of the Court, of a settlement alleged to have been entered into between the parties before the Conciliation Board. The Respondent-Petitioner objected to the issue of Writ on the ground inter alia that he had not consented to deliver vacant possession as stated by the Petitioner-Respondent. On one of the dates fixed for inquiry, 12.2.1975, the Respondent-Petitioner moved for a date on the ground that his proctor was dead. The trial judge refused the application and directed that writ be issued.

On the very same date the attorney for Petitioner-Respondent applied for the issue of writ of possession and writ was signed. A later journal entry of the same date shows that notice of appeal was given and attorney for the Respondent-Petitioner prayed for the stay of execution and he was directed to support his application. This was done, again on the very same day. The Respondent-Petitioner was present in person and the Petitioner respondent was represented by Mr. Romesh de Silva, who objected to the stay of execution on the ground that the appeal was against an order and prior leave to appeal had not been obtained from this Court.

The trial judge upheld the objection and issued the writ. On the following day at 11.30 a.m. the Respondent-Petitioner was ejected by the Fiscal from the premises, and he has come to this Court by way of revision praying that the order of 12.2.75 be set aside and that he be restored to possession. In these days when there are so many complaints against the delays in Courts it is refreshing to find that proceedings in Courts are being disposed of at such lightening speed. But as Gratiaen, J. pointed out in *Rev. Sangarakitta Thero vs. Inspector of Police,* Peliyagoda (39 C.L.W. 61) " ..... there is I think a pace at which and beyond which the dispensation of justice becomes impossible of achievement. The fundamental rights of even litigants should not be sacrificed for speed alone. One of those rights is the right not to be condemned unheard." Quite naturally the instant case is teeming with irregularities.

Before I go on to consider these irregularities I would like to advert to one matter a consideration of which would normally have disentitled the Respondent-Petitioner from any relief from this Court in revision proceedings in which this Court has a discretionary power. In his petition dated 21.2.1975 the Respondent-Petitioner states that the Petitioner-Respondent applied to enforce an alleged agreement made before the Conciliation Board (para. 1) and denied that he consented to deliver vacant possession of the house (para. 3). In para. 4 the Respondent-Petitioner sets out that "This Respondent-Petitioner annexed hereto certificates from the said Conciliation Board dated 13.5.73 marked (P3). There is nothing in this certificate to show that the Respondent-Petitioner had consented to vacate the house on 31.3.1974 as alleged by the Petitioner-Respondent. It only refers to the payment of arrears of rent and as to how the further rents were to be paid."

But this certificate (P3) was not the certificate relied on by the Petitioner-Respondent and filed by her along with the plaint, which was a certificate dated 31.5.73. This certificate was

produced marked R2 and filed in this Court along with her objections by the Petitioner-Respondent. This certificate R2 dated 31. 5. 1973 refers to proceedings on 11. 3. 1973 and 13. 5. 1973 and sets out that " the respondent undertook.... to deliver vacant possession of the house on the 31st day of March 1974 unto the plaintiff." So that by filing the proceedings of the wrong date the Respondent-Petitioner either deliberately or unwittingly had tried to mislead Court. A person who seeks the exercise by this Court of its discretionary power must make a full and true disclosure of all relevant facts. However, in the circumstances of this case I do not wish to penalise the Respondent-Petitioner for this default on his part.

On a consideration of the two certificates P3 and R2 it is at the least doubtful as to what was agreed between the parties. P3 states that the dispute " was inquired into by the Board on the 13th day of May 1973 and was settled on the following terms : " The terms being " and then the terms are set out. Obviously the parties were present on that date for the certificate goes on to say that the respondent " pays the said amount (i.e. the arrears of rent) to the complainant now," and that " The complainant promises now to effect the repairs to the house as agreed upon the last date of inquiry. " Then follows the agreement to pay the rent for April on or before the 18th May and thereafter on or before the 10th of each month.

Apparently P3 contains the proceedings of 13th May and the terms of the settlement arrived at on that date. R2 with translation R2A purports to be the certificate under section 12 and is dated 31st May 1973. Apparently there were no proceedings before the Board on that date. The wording of the certificate R2A also shows that there could not have been any proceedings on that for it merely recites what parties had agreed to earlier, and is all in the past tense. Indeed there was no need for any further proceedings on the 31st May 1973 as a settlement had already been arrived at earlier. The certificate R2 contains two matters not referred to in P3. The first is that the Respondent-Petitioner undertook to deliver vacant possession of the house on the 31st March, 1974 and that he further promised to withdraw a complaint he had at that time made to the Rent Control Board.

The certificate R2 refers to an inquiry held on 11.3.73 as well, but P3 makes no reference to it. The proceedings of 11. 3. 1973 are not before us and it is not possible for us to say what happened on that day. P3 however states that the complaint of the petitioner-Respondent was inquired into on that date, i.e. the complaint for the recovery of arrears of rent and for ejectment and that it was settled on the terms set out. Prima Facie therefore the

certificate R2 does not correctly embody the terms of the settlement arrived at between the parties. If there was any agreement arrived at earlier on 11.3.1973 and the probabilities are that there was, then it was for the Petitioner-Respondent to have set out what the terms were and to have filed a certified copy of those proceedings to show that the certificate R2 correctly sets out what was agreed between the parties. However, the Petitioner-Respondent did not file P3 in the lower Court and the trial judge would not have been aware of the discrepancy between P3 and the certificate R2. In these circumstances an inquiry was essential in order that court could satisfy itself that the Petitioner-Respondent was entitled to obtain execution of the decree.

Mr. Romesh de Silva who appeared for the Petitioner-Respondent submitted that as the District Court in this case was merely a court of execution it could not go behind the certificate issued by the Chairman of the Conciliation Board but was bound to issue writ. Indeed he went so far as to submit that the court was wrong in issuing notice on the Respondent-Petitioner and fixing the matter for inquiry on objections being filed. I do not agree. Under subsection 2 of Section 13 of the Conciliation Boards Act No. 10 of 1958 where a settlement has not been repudiated as provided in subsection 1 it is the duty of the Chairman of the Board to forward to the appropriate Court a copy of the settlement within thirty days after the date of settlement. In the instant case the Chairman of the Conciliation Board did not do so. He only forwarded the certificate on the 26th April 1974 a few days after the plaint was filed. However I make no point of it.

When such certificate is received the judge should cause such settlement to be filed of record and with effect from the date of such filing the settlement should be deemed to be a decree of that Court. Thereafter the provisions of the Civil Procedure Code as relate to the execution of decrees will as far as may be practicable apply mutatis mutandis to and in relation to such settlement which is deemed to be a decree. Thus, unlike in the case of section 57 of the Estate Duty Ordinance and section 84(3) of the Income Tax Ordinance which make only sections 226 to 297 of the Civil Procedure Code applicable, the section 13 (2) of the Conciliation Boards Ordinance makes the whole of the provisions including the important provisions in section 224 and 225 applicable to execution of settlements arrived at under that Ordinance.

Section 224 of the Civil Procedure Code provides how applications for execution have to be made and what particulars it should contain. The Petitioner-Respondent did not comply with the provisions of this section. He merely made application by petition and affidavit. This procedure, as pointed out by Gratiaen, J. in *W.*

Barnes de Silva vs. Galkissa Wattarapola Co-op Stores Society, 54 *N. L. R.* 326 and approved by the Divisional Bench of seven Judges by a majority of four to three in *Bandahamy vs. Senanayake* 62 *N. L. R.* 313 would be applicable only where no procedure is laid down for making such applications. Here it is expressly stated that such of the provisions of the Civil Procedure Code as relate to the execution of decrees shall, as far as may be practicable, apply mutatis mutandis to and in relation to such settlements.

When such an application is made it is the duty of court as provided in section 225 (1) to satisfy itself that the application is substantially in conformity with the foregoing directions and the applicant is entitled to obtain execution of the decree or order which is the subject of the application. In order to do so the court is required, if necessary, to refer to the record of the action in which the decree or order sought to be executed was passed. In the case of a decree passed by the court itself there would be no difficulty in doing so. But where it is called upon to execute,, as a decree of a court, a settlement arrived at before an outside tribunal this would not be possible, because the record would not be before it. So that in such a case it would be necessary to notice the party affected and to inquire into any objections which such party is by law permitted to take.

In the case of decrees passed by a court no notice is necessary to the judgment debtor, when an application for execution is made for the reason that the court has the entire record before it for the purpose of satisfying itself that the judgment creditor is entitled to execute the decree. But even in such a case it has been the inveterate practice of our courts to permit the judgment debtor to come in and object to the issue of the writ or to have it recalled if it has already been issued and to inquire into any such objections, although he would not be permitted to challenge the decree itself. Even where no procedure is laid down in regard to applications to execute settlements or awards made by some other tribunal Gratiaen, J. pointed out in Barnes Silva's case (supra) at page 328 " . . it is the clear duty of a court of law whose machinery as a court of execution is invoked to satisfy itself, before allowing writ to issue that the purported decision or award is prima facie a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra judicial tribunal under the Ordinance. In that event alone would the court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule, of enforcement, as if it were a decree of court. To achieve that end, a person seeking to enforce an award should be required to apply either

in a regular action or atleast by petition and affidavit (in proceedings by way of summary procedure) setting out facts which prove that the purported award is prima facie entitled to such recognition. The court should in the latter event enter an order nisi or interlocutory order granting the application and notice thereof should be served on the opposite party so that he may be given an opportunity of showing cause against the proposed enforcement of the award."

In that case it was held that application in terms of section 224 was inappropriate for the enforcement of an extra-judicial decree or award, which a court is empowered upon proof of its validity to recognise and enforce as if it were a judicial decree. In the instant case section 224 is made applicable by the ordinance itself and the proper procedure is to make the application as provided for in that section. But because it is an extra-judicial decree or award and because the court has to be satisfied that the applicant is entitled to obtain execution of the decree, the court should issue notice on the judgement debtor. In the instant case the trial judge did, quite correctly, issue notice on the respondent petitioner. But he did not hold a due and proper inquiry into the objections of the respondent petitioner.

At the inquiry on 12.2.1975 the respondent petitioner moved for a date on the ground that his Attorney was dead. This application was refused, and the judge went on to consider only one of the objections taken up in the objections filed by the respondent petitioner and made his order to issue writ. It is not clear whether the respondent petitioner was given any opportunity at all to participate at the inquiry. In any event the application for a date on the ground that the respondent petitioner's attorney was dead should have been allowed.

Under section 28 of the Civil Procedure Code if any proctor whose proxy has been filed should die then no further proceedings should be taken in the action against the party for whom he appeared until thirty days after notice to appoint another proctor has been given to that party either personally or in such other manner as the court directs. This is an imperative provision and the duty is cast on the court to give notice and to stay proceedings. It is not clear when the attorney for the respondent petitioner died. But the record and the order made by the District Judge show that he appeared in Court on 13.1.75. So he must have died between that date and 12.2.75 and the thirty days could not have expired on 12.2.75 even assuming that he died on 13.1.75 and respondent petitioner became aware of it on that very day itself.

Nor does the fact that these are virtually execution proceedings and that section 25 applies to a case where the attorney died at any time before judgment, help the petitioner respondent because these are fresh proceedings initiated for the first time before the Court. The entire proceedings of 12.275 are on this ground alone completely irregular. In his objections the respondent petitioner took up the position inter alia that the house is vested in the Commissioner of National Housing and that the petitioner respondent was not entitled to the possession of the house and secondly, that he did not consent to deliver vacant possession. The trial Judge only considered the first objection which the respondent petitioner now concedes was erroneously made by him. The trial Judge did not consider the second objection at all and in view of the discrepancy between P3 and the certificate R2 it is obviously a very serious objection. This is not to attack the settlement at all but merely to say that the certificate is not in terms of the settlement. This is one of the matters which the court is required by section 225 to satisfy itself before issuing writ. The court has failed to do so. The position would be the same if in the case of its own decree which is sought to be executed the court finds by reference to the record that the decree is not in conformity with the judgment in the case. It would obviously refuse to execute such a decree, because the party would not be entitled to obtain execution of such a decree, until it is in terms of section 189 brought in to conformity with the judgment.

Mr. Silva submitted that the respondent petitioner's attorney who died was a partner in a firm of attorneys and his death would make no difference as any other partner could have appeared without filing a fresh proxy. The proxy is in a printed form and is in favour of "Gabriel Rajakaruna Gunawardena,....Proctors of the Honourable the Supreme Court of the Island of Ceylon practising in partnership under the name, style and firm of Gunawardena and Gunawardena Proctors....". Certain names had been printed after "Gunawardena" and these have all been scored off. So that either there were no partners at all or the proxy was not in favour of the firm of proctors practising in partnership. Although it is true that where a proxy is given in favour of a firm of proctors and one of the partners dies during the pendency of the action, the surviving partner can continue without a fresh proxy—*Re Solomon Fernando* (27 N. L. R. 245 F. B.) yet such is not the case here.

In any event the important fact in the instant case is that even though the respondent petitioner moved for a date he was not given either the time or the opportunity to make the necessary arrangements to get one of the other partners to appear assuming that the proxy was in favour of the partnership and there

were other partners. The order of the trial judge refusing a postponement on the ground that the respondent petitioner's proctor had died cannot be allowed to stand and ought to be set aside. So also should the order to issue writ be set aside as it was made without giving the respondent petitioner an opportunity to be heard and without an adequate consideration of the objections filed by him.

The respondent petitioner had been ejected from the premises in pursuance of the writ and he moves that he be restored to possession. An application to stay writ pending appeal was refused on the ground that the appeal was against an "order" and leave to appeal had not been obtained from this court. Sub-section 2 of section 317 of the Administration of Justice Law, No. 44 of 1973, sets out that any person who is dissatisfied with any order made by an original Court in the course of any civil litigation, proceeding or matter may prefer an appeal from such order for any error in law, with the leave of the Supreme Court first had and obtained.

Section 328 provides that upon leave to appeal being granted, the Registrar shall so inform the original court. Thereupon unless the Judge has otherwise directed, all proceedings in the original court shall be stayed and the said court shall as speedily as possible forward to the Supreme Court all the papers and proceedings in the case relevant to the matter in issue. The reference to the Judge in this section is to the Judge of the Supreme Court and not to the trial Judge, for the words are in the past tense "unless the Judge has otherwise directed". If it was a reference to the trial Judge then the words used would have been "unless the Judge otherwise directs." So that the stay of proceedings where leave has been granted is mandatory unless the Judge of the Supreme Court has otherwise directed when granting leave.

But the respondent petitioner did not apply to this Court for leave to appeal. He filed notice of appeal together with Bank receipt for Rs. 750 for deposit of security for costs of appeal and postal receipts in proof of posting of notices of appeal on the petitioner respondent in terms of sectin 318 and moved for stay of further proceedings under section 325.

The trial Judge thought that order made by him on 12.2.75 was an "order" within the meaning of section 356 and so refused to stay execution as the respondent petitioner had not obtained leave from this court. Even if he was correct in treating the order as an "order" he did not consider the question as to whether he had any discretion to stay proceedings in such a case pending the application for leave to appeal.

There is nothing in section 328 to show that this discretion has been taken away from the court. I think that where it is shown that an application has been made for leave to appeal the court still has the power to grant a stay of writ if the circumstances so warrant it. And what circumstance can more warrant the stay of writ than the danger that a tenant who has been in occupation of premises for 38 years will be ejected from such premises with the attendant difficulties in the way of his being restored to possession if he should succeed in the appeal ? For as T. S. Fernando, J. said in the case of *Vellamanickam vs. C. A. Davoodbhoy,* (63 N.L.R. 548) at page 550 " What kind of security a landlord can offer will compensate a tenant ejected from rent controlled premises in the event of the Supreme Court in appeal holding against the landlord and refusing ejectment ? The most law abiding landlord who has ejected one tenant and rented his premises to another may find himself physically and legally incapable of ejecting the new tenant so that he may comply with the order of the Court of Appeal. I am of opinion that having regard to the nature of the suit and the relief available to a successful tenant applicant the learned Commissioner should have refused the landlord's application made for execution of decree." In this case too the trial Judge should have allowed the application for stay of execution even pending application for leave to appeal.

However, the respondent petitioner has now been ejected from the premises in pursuance of a writ which as I have shown was wrongly issued. The question is whether we have the power to restore him to possession pending the inquiry which has now to be held into the application of the petitioner respondent to execute the agreement before the Conciliation Board as a decree of Court. In the case of a void order there is no doubt that a person who is ejected from premises on such an order can be restored to possession, because such an order is treated as if it had never been made at all. It was so held in the case of *Beatrice Perera vs. The Commissioner of National Housing* (77 N.L.R. 361). In that case a tenant had been ejected from premises she occupied in pursuance of a writ obtained in the Court of Requests in an action in which she was the defendant but in which it was established that summons had not been served on her.

Although the Commissioner of Requests held that summons had not been served on her and vacated the default judgment and had granted the defendant an opportunity to file answer he made no consequential order in regard to restoration of possession. The tenant therefore applied to the Commissioner of National Housing and he in terms of his powers under the Protection of Tenants (Special Provision) Act, No. 28 of 1970, restored her to possession. This Court held that the Assistant Commissioner of National Housing made no error in law in holding that the ex

parte order of ejectment on the basis of which the 3rd respondent was ejected was the order of a court not competent to make it, as it was void ab initio as summons was not served on the 3rd respondent.

Dealing with the failure of the Commissioner of Requests himself to order restoration of possession pending the trial, Tennekoon, C.J. said at page 363 " It seems to me that the inherent powers of the court are wide enough to have enabled the court to order the plaintiff in that case to vacate the premises and to restore possession to the 3rd respondent, so that the status quo ante the institution of the action in the court of Requests might have been restored and the action which had now been reinstated might proceed meaningfully. See in this connexion the case *Siriniwasa Thero vs. Sudassi Thero,* 63 N.L.R. 31 at 34."

The position would be the same where this Court sets aside an order of the lower Court for then there is no longer a valid order in pursuance of which a party could be dispossessed. In the former case it is void ab initio. In the latter case it is valid till it is set aside and when this has been done a party should restore what he has obtained by the enforcement of that order. It makes no difference that there is to be fresh inquiry. As Tennekoon, C.J. pointed out (supra) the status quo ante the institution of the action should be restored so that the inquiry can be proceeded with meaningfully.

In the case of *Wickremanayake vs. Simon Appu* (76 N.L.R. 166) the judgment and the decree of the District Court were set aside. But in execution of that decree plaintiff had already been placed in possession of the land. H. N. G. Fernando, C.J. said " that being so the effect of the decree of the Supreme Court was that there was no longer in existence a valid decree in pursuance of which the plaintiff could properly be placed in possession of the land. Justice therefore requires that the plaintiff who had been placed in possession in execution of a decree which had turned out to be invalid should no longer be allowed to continue in possession of the land ". Accordingly order was made for the delivery of possession of the land to the defendants and for the ejectment of the plaintiff therefrom.

For these reasons I am of the view that the respondent petitioner should be restored to the possession of the premises in suit pending the inquiry into the application made by the petitioner respondent. In view of this it is unnecessary to consider the further argument addressed to us by Mr. Daluwatte that the order made by the trial judge on 12.2.75 was in fact not an "order" but a "Judgment" within the meaning of section 356 and that therefore his refusal to stay writ was contrary to the imperative provisions of section 325(1) and therefore void.

I therefore set aside the order made on 12.2.75 by the trial Judge to issue writ and direct that the objections of the respondent petitioner be inquired into de novo, before another District Judge. I also direct that the respondent petitioner be restored to possession of the premises in suit pending inquiry and that the petitioner respondent and all those holding under him be ejected from the premises. The respondent petitioner will be entitled to costs of this application in this Court.

MALCOLM PERERA, J.—I agree

ISMAIL, J.—I agree.

Order set aside.