1971 *Present :* G. P. A. Silva, S.P.J.

S. K. GUNAWARDENE, Petitioner, *and*

Mrs. M. N. JAYAWARDENE, Respondent

S. C 964/70—Application for Revision and/or Restitutio in integrum in C. R. Colombo, 96276

Jurisdiction—Action instituted in a Court of Requests—Requirement of certificate of Conciliation Board—Whether it can be waived by acquiescence—Conciliation Boards Act No. 10 of 1958, as amended by Act No. 12 of 1963, s. 14 (1) (a)—Burden of proof

When a party relies on a plea that the court has no jurisdiction to entertain a plaint without a certificate from the Conciliation Board, the burden is on him to show the existence of facts which deprive the court of such jurisdiction. In the absence of such facts being brought to its notice the court has no duty in every case to launch on an inquiry as to whether the dispute in question arose in a Conciliation Board area.

APPLICATION for revision and/or *restitutio in integrum* in respect of an order of the Court of Requests, Colombo.

In a tenancy action one of the issues raised by the defendant was whether plaintiff could maintain the action without filing a certificate from the Conciliation Board. On the trial date the case was settled, the defendant admitting that a certificate from the Conciliation Board was not necessary. Judgment was accordingly entered for the plaintiff in ejectment and the defendant was granted time till 31st December

1970, a period of nearly two years from the date of trial, to leave the premises.

On 29th December 1970, i.e. two days before the last day granted to him to quit, the defendant filed the present application in revision to have all the proceedings in the Court of Requests case declared null and void on the ground that the Court had no jurisdiction to entertain the plaint as a certificate of the Conciliation Board did not accompany it.

N. R. M. Daluwatte, for the defendant-petitioner.

C. Ranganathan, Q.C., with *L. V. R. Fernando*, for the plaintiff-respondent.

Cur. adv. vult.

July 1, 1971. SILVA, S.P.J.—

The plaintiff-respondent instituted this action in the Court of Requests, Colombo, on 16th August 1967 against the defendant petitioner for ejectment from certain premises belonging to the plaintiff and for arrears of two months' rent and damages till he was restored to possession of the said premises. The plaintiff averred *inter alia* that the premises were assessed by the Municipal Council of Dehiwala-Mount Lavinia at an annual value which excepted the premises from the provisions of the Rent Restriction Act and that notice to quit was duly given by him to the defendant. The defendant in his answer put the plaintiff to the proof of the first averment and in regard to the second, while admitting the receipt of the notice to quit, took up the position that it was bad in law.

On the first day of trial 26.6.68, the defendant and the proctor being absent, the trial proceeded *ex parte* and the learned Commissioner entered decree in favour of the plaintiff as prayed for. Subsequently the defendant moved to set aside the decree *nisi* and, at the inquiry, it was agreed between the parties that that decree be set aside on certain terms. Eventually, when the trial took place, the plaintiff raised two issues :—

(1) Are the premises in suit excepted premises for the reasons stated in certain paragraphs of the plaint and

(2) If issue (1) is answered in the affirmative, is the plaintiff entitled to a decree in ejectment.

The defendant too raised two issues both of which did not arise from the pleadings :—

(1) Does decree in case No. S4463 of the Court of Requests, Colombo, act as a bar to the institution of this action and

(2) Can the plaintiff maintain this action without filing a certificate from the Chairman of the Panel of Conciliators as required by Section 14 (1) (*a*) of the Conciliation Boards Act No. 10 of 1958 as amended by Act No. 12 of 1963.

The plaintiff, having first objected to the two issues raised by the defendant, later agreed to take notice of them and further trial was adjourned for 13.2.1969. On this day the case was settled, the defendant admitting that the premises in suit were excepted premises and that a certificate from the Conciliation Board was not necessary in this case. Judgment was accordingly entered for the plaintiff in ejectment and the defendant was granted time till 31st December, 1970, a period of nearly two years from the date of trial, to leave the premises.

In December, 1970, the defendant filed a petition and an affidavit dated 2nd December, 1970 before the Court of Requests, pleading that the Conciliation Boards Act was in operation in the village area in which the premises in question were situated and that in law the plaintiff could not institute this action and the court could not entertain the plaint without a certificate from the Conciliation Board. The defendant therefore prayed that the proceedings and decree of the Court of Requests be declared null and void. The learned Commissioner ordered notice on the plaintiff returnable on 21.12.1970 and called upon the defendant to support his application. On that day, the court held an inquiry and postponed the order for 13th January, 1971. On 29th December, 1970, two days before the last day granted to him to quit the premises in terms of the settlement reached on 13.2.69 the defendant filed papers in revision before this court to have all proceedings in the Court of Requests case declared null and void, to have the decree in ejectment entered by that court set aside and writ of execution stayed, the application being based almost entirely on the ground that the plaintiff's action was wrongly constituted as he failed to produce before the Court a certificate from the Conciliation Board in terms of Section 14 of the Conciliation Boards Act.

All the submissions of the counsel for the petitioner therefore centred round his main contention that the court had no jurisdiction to entertain the plaint in this case as a certificate of the Conciliation Board did not accompany it. He strongly relied on the Divisional Bench decision in the case of *Nonahamy v. Halgrat Silva* [1], in which the view was expressed that a court had no jurisdiction to entertain a plaint without the requisite certificate under Section 14 of the Conciliation Boards Act. This finding, however, was preceded by the following observation of the Chief Justice :—" In the present appeal the appellant (i.e. the plaintiff) 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 ". With respect, I am in entire agreement with this view. In a case where the following facts are established by the party raising

[1] *(1970) 73 N. L. R. 217.*

the issue that a court cannot entertain a plaint by reason of the absence of a certificate from the Conciliation Board, namely :—

(1) that the nature of the dispute is one to which the provisions of the Conciliation Boards Act apply

(2) that the area in which the dispute arose is in a Conciliation Board area and

(3) that a panel of conciliators has been constituted for that Conciliation Board area

a court will have no jurisdiction to entertain a plaint unless the required certificate from the Conciliation Board is attached to the plaint. Inherent in this principle however is the obligation on the party relying on such plea to show the court in a particular case that those facts exist. 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.

Counsel for the petitioner submitted that, in the case of *Robson Fernando v. Henrietta Fernando* [1], when Samerawickrame J. held that objection relating to the want of jurisdiction to hear a case may be waived by the defendant, if the want of jurisdiction is not apparent on the face of the record but depends on the proof of facts, he had not considered the decision of the Divisional Bench in *Nonahamy v. Halgrat Silva* (*supra*). Counsel for the respondent contended on the other hand that Samerawickrame J. has assumed the correctness of the decision in the Divisional Bench case but that his decision was based on a different principle of waiver by acquiescence. I am inclined to accept the contention of counsel for the respondent and I think that the view taken by Samerawickrame J. can be reconciled with the earlier decision. It must be appreciated that unlike certain other statutes which come into operation throughout the Island the moment they become law, the Conciliation Boards Act was brought into effect in different parts of the Island at different times. Even in an area to which it was made applicable, until such time as a panel was properly constituted the provisions of section 14 would not come into operation. The applicability also depended on the type of dispute which parties desired to bring before court. Even where a panel of conciliators had been constituted, difficult questions can arise as to the demarcation of the village limits and whether a particular portion of a village falls within the village area in which a panel had been constituted. Although the Act was passed as far back as 1958 there would still be many village areas in Ceylon to which it does not apply, no panel being constituted. When a plaintiff therefore institutes an action before a court without any reference to a certificate from a Conciliation Board, the court has

[1] *(1971) 74 N. L. R. 57.*

no alternative but to accept the plaint on the face of it. The question of not entertaining a plaint would arise only if the defendant pleads that the dispute arose within a Conciliation Board area and that it is such a dispute as would require reference to a Conciliation Board before action is filed. The passage from the judgment of the Chief Justice quoted by me earlier shows that in that case it was common ground that the dispute as well as the area in which it arose was such as to bring it within the operation of the Conciliation Boards Act and the question which Samerawickrame J. dealt with did not arise for consideration in that case. Had that question arisen, it may not have become necessary for that court to consider the legality or otherwise of the entertainment of the plaint.

The facts which I have set out earlier in regard to the instant case show clearly that neither the plaintiff nor the defendant in their pleadings made any reference to the dispute arising in a Conciliation Board area. There was therefore no obligation whatsoever on the court to launch on an inquiry into this matter before entertaining the plaint or even after receiving the answer. Thereafter, when the issue as to whether the plaintiff can maintain the action by reason of non-compliance with the Conciliation Boards Act was framed by the defendant, the court was prepared to accept the issue even though there was neither any averment in the answer nor any other fact placed before the court which would enable it to arrive at a decision in this matter. On the next date of trial however the defendant agreed that a certificate from the Conciliation Board was not necessary and consented to judgment. The court was thus left with no material at all to decide the question of the correctness of entertaining the plaint. In fact the conduct of the defendant could only have led the court to believe that no such facts were placed by the defendant as there were none. I think therefore that the broad principle enunciated by Samerawickrame J. in the case referred to earlier is applicable in this case.

Quite apart from the merits of the question of law raised in this petition, the circumstances relating to the conduct of the petitioner preclude me from giving any relief by way of revision which is essentially a discretionary remedy. The defendant by his conduct on the final day of the trial led the Court to believe that there was no basis for the issue raised by him earlier regarding the entertainment of the plaint. 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. These facts strongly point to bad faith on the part of the defendant and savours of an attempt to mislead the court in order to obtain an order favourable to him and, on the basis of an ostensible illegality, to resile from his undertaking made solemnly before court, after securing for himself

the full advantage of the order at the expense of the plaintiff. Furthermore, the course that this case took in court shows that the object of compelling parties to conciliate before coming to court, namely to settle their differences without bitterness being engendered was amply served even at the trial because both parties agreed to settle the case and nothing further could have been gained even by recourse to the Conciliation Board. The delay of nearly two years after the settlement before making this application, apart from showing bad faith as I have stated earlier, is by itself a good ground which will persuade this court against revising the order of the lower court. By making this application, the petitioner has succeeded in depriving the respondent of the fruits of the decree in his favour for another six months. The application is accordingly refused with costs.

Application refused.