1971 *Present :* de Kretser, J.

W. S. JAYAWICKREMA, Petitioner, *and*
E. NAGASINGHE, Respondent

S. C. 103/71—Application for Revision and Restitutio in integrum in C. R. Hambantota, 8479

Conciliation Boards Act—Section 14—Absence of certificate of Conciliation Board—Whether it can be a ground for setting aside a consent decree—Courts Ordinance, s. 75.

Where a consent decree has been entered in an action and the defendant has enjoyed the full fruits of the decree, the defendant will not be permitted by the Supreme Court to have the consent decree set aside on the ground that the lower Court had no jurisdiction to entertain or determine the action because a certificate from the Conciliation Board had not been filed with the plaint in terms of section 14 of the Conciliation Boards Act.

Point of time at which objection can be taken in lower Court considered.

APPLICATION for revision or *restitutio in integrum* in respect of a decree entered by the Court of Requests, Hambantota.

C. Ranganathan, Q.C., with *H. M. Jayatissa Herath* and *T. B. Dillimuni,* for the defendant-petitioner.

Nimal Senanayake, with *Nihal Singaravelu* and *Miss S. M. Senaratne,* for the plaintiff-respondent.

Cur. adv. vult.

November 18, 1971. DE KRETSER, J.—

The following facts are relevant to this order :—

On 19.7.68 the Plaintiff filed this action against the Defendant for ejectment and damages.

On 29.10.68 the Defendant filed answer claiming he was not in arrears of rent and pleading the protection of the Rent Restriction Act.

On 19.12.68 by consent of parties, who were represented by Counsel, the Case was settled. The relevant portion of the settlement reads " Of consent, judgment is entered for the Plaintiff in terms of para (*a*) of the Plaint and continuing damages at the rate of Rs. 50 per month. . . . . . . till Plaintiff is restored to possession. Of consent it is agreed that Writ will not issue till the 31st December, 1970. . . . . . ".

On 18.12.70 the Defendant filed Petition and Affidavit stating that he had made every effort to find other accommodation without success. . . . . . . He pleaded the provisions of the Rent Restriction Act and asked that he be allowed to continue paying " monthly damages ".

On 10.1.71 he amended his petition to plead that the Decree entered was null and void in that the Court had no jurisdiction to entertain or determine this action without a certificate from the Conciliation Board of the area having been filed with the Plaint.

The Trial Judge (Mr. H. W. Senanayake) in reference to the non-filing of a certificate from the Conciliation Board held :

(1) That there was no proof, in the absence of evidence, that the Conciliation Board was functioning during this period.

(2) That the Defendant having not taken the objection and having consented to the settlement of 19.12.68 had waived objections available to him re jurisdiction.

(3) That the Defendant by reason of his conduct was precluded from taking the objection at that late stage.

(4) That in any event he did not have the power to set aside a Decree already entered by consent in the Case. He therefore refused the application with Costs. The Defendant thereupon made the present application for revision and/or *restitutio in integrum.*

At the hearing of the Petition the submission urged by Counsel for the Petitioner was that the Court had no jurisdiction to entertain the Plaint as a Certificate of the Conciliation Board did not accompany it.

Section 14 of the Conciliation Boards Act provides that where a Panel of Conciliators has been constituted for any Cociliation Board Area (*a*) noproceedings in respect of any dispute referred to in paragraphs

(*a*) (*b*) (*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 the Board. . . . ."

The view that Section 14 does not apply in a case where the parties do not desire to refer a dispute to a Conciliation Board for which the authority was the Case of *Wickramaratchi v. The Inspector of Police* [1] was overruled in the Divisional Bench Case *Nonahamy v. Silva* [2]. The Chief Justice said "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. . . . .".

Counsel for the Appellant relies strongly on the fact that in *Nonahamy v. Silva* it was held that the filing of a Certificate in terms of Section 14 is an imperative requirement for the institution of proceedings and the entertainment of them by a Civil Court. But as Silva J. pointed out in *Gunawardene v. Jayawardene* [3] "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 to court. . . . . . ".

The Court of Requests therefore in the exercise of the inherent jurisdiction it had by reason of Section 75 of the Courts Ordinance had jurisdiction to entertain the Plaint in this Case unless or until it was made aware that it should not have been instituted without a Certificate in terms of Section 14 of the Conciliation Act.

The objection to jurisdiction was taken at the earliest possible opportunity in *Nonahamy v. Silva* with the consequence that the Divisional Bench had no reason to consider the position when it is sought to be taken later in the original Court. That has been considered in two Cases *Robinson Fernando v. Henrietta Fernando* [4] and *Gunawardene v. Jayawardene* [5]. In the first of these Cases, a Divorce Case, after Plaintiff's Case had been closed and after the Defendant and two Witnesses had given evidence, the Trial Judge allowed an Application made by the Defendant to amend the answer in order to raise the plea

[1] *(1968) 71 N. L. R. 121.*
[2] *(1970) 73 N. L. R. 217.*
[3] *(1971) 74 N. L. R. at 251.*
[4] *(1971) 74 N. L. R. 57.*
[5] *(1971) 74 N. L. R. 248.*

that the Court had no jurisdiction to try the case as the dispute had not been referred to the Conciliation Board and no Certificate from the Chairman had been annexed to the Plaint. The Trial Judge thereafter upheld the plea to jurisdiction raised by the Defendant and dismissed the action.

In Appeal Samerawickrame J. with whom Pandita Gunawardene J. agreed, pointed out the distinction there is between patent jurisdiction and latent jurisdiction and coming to the conclusion that in this type of Case the jurisdiction was latent, considered the question whether at the time the Defendant sought to take the objection, Defendant had not precluded herself by waiver, delay or acquiescence from raising the objection to jurisdiction and was of the view having regard to the facts " and in particular the prejudice to the Plaintiff and the late stage at which the amendment was sought to be made " that the Defendant was precluded from raising the objection and that she had in fact waived it.

In the other Case *Gunewardene v. Jayawardene*—a Case of Rent and Ejectment—on the Trial date the Defendant raised two issues which had not been pleaded, one of which was " 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 10 of 59 as amended by Act 12 of 1963. The Plaintiff took notice and on the adjourned Trial date the Case was settled, the Defendant admitting inter alia that a certificate from the Conciliation Board was not necessary in the Case. Judgment accordingly was entered for Plaintiff and the Defendant was given time till 31.12.70 to leave the premises. In December 1970 the Defendant filed Petition and Affidavit pleading that the Conciliation Boards Act was in operation in the village area in which the premises were situate and that in Law the Plaintiff could not institute and the Court could not entertain the Plaint without the Section 14 Certificate. The Defendant sought an order that the proceedings and decree be declared null and void. The Court held an Inquiry and postponed its order for 13.1.71. In the meantime on 29.12.70 the Defendant applied to the Supreme Court asking for a similar order in revision.

Justice G. P. A. Silva was of the view that " the broad principles enunciated by Samerawickrame J. in *Fernando v. Fernando* applied and went on to say " 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 . . . . . . "

It will be seem that in *Gunawardene v. Jayawardene* what the petitioner was trying to do was to ask the superior court to revise the proceedings in the inferior court for the reason that the inferior court had no jurisdiction to entertain the action. Dealing with latent jurisdiction Lopez L.J., in his judgment quoted the opinion of the Judges delivered by Willes, J., to the House of Lords in *The Mayor of London v. Cox* :—" Where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Court is not taken away, for mere acquiescence does not give jurisdiction—yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ though of right is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant. . . . . . ". While Davey L.J. in his judgment in the same case said apropos this passage " It will, however, be observed that the learned Judge's statement is confined to cases where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he might have brought forward in the Court below, but has kept back without excuse—that is, when the applicant has been guilty of some misconduct in the proceedings, and has in a sense misled the Court. . . . . . "

It will thus be seen that there is ample support for the refusal of Silva J. to exercise his discretion by way of revision in *Gunawardene v. Jayawardene* and similar considerations cause me to refuse the present application, as Spencer Bower says at page 236 : " when a party litigant, being in a position to object that the matter in difference is outside the local, pecuniary, or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberately elects to waive the objection, and

to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal had no jurisdiction over the cause or parties ".

At the argument before me Counsel for the respondent strongly relied on the case of *Fernando v. Fernando*. At that time *Gunawardene v. Jayawardene* had not found its way into the Law Reports. While I agree with what has been said in *Fernando v. Fernando* in regard to jurisdiction, I must say with the utmost respect to the judges who decided it that had the factual position in the present case been the same as in *Fernando v. Fernando*—in reference to the time at which the objection was taken to jurisdiction—I would have found difficulty in following that decision for it appears to me that an objection to the jurisdiction of a Trial Court to determine a matter should be permitted *at any point of time before its determination*. I do not think that a plaintiff, if it is found that he should in fact have filed a Section 14 Certificate with his plaint, could complain of prejudice even legally when his effort to mislead the Court into entertaining his Plaint is found out. The fact that a defendant who takes the objection late is perhaps resiling from what is called a "gentleman's agreement" between Plaintiff and Defendant or more likely their respective lawyers is no reason for penalising the Defendant when the Plaintiff is as much to blame in what alone the Court should resent viz. the effort to mislead it into thinking that it has jurisdiction for the Court acts on the facts as pleaded before it and not as they actually exist. The Court can always make an appropriate order for costs.

Be that as it may in the instant case 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. The application is dismissed with costs.

Application dismissed.