**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for mandates in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application No: 345/2018**

Mulla Vidanalage Indika Pushpamala,
No. 07, Sooriyagama, Hamburugala.

**PETITIONER**

Vs.

1. Deshapriya Jayarathna,
   Palagas Palatha,
   Wathurawela, Kosgoda.

2. Malani Abeywardana Ranatunga,
   Chairperson.

3. T.K. Poojith Thillekewardena.

4. K.H. Premadasa.

5. K.H. Bandu Ranjith.

6. K.M. Karunaratne.

   3rd – 6th Respondents are members of the Debt Conciliation Board

   2nd to 6th Respondents are at,
   No. 35A, Dr. N.M. Perera Mawatha,
   Colombo 8.

**RESPONDENTS**

| | |
|---|---|
| **Before:** | **Mahinda Samayawardhena, J**<br>**Arjuna Obeyesekere, J** |
| **Counsel:** | Dhammika Gabadage with J.K.H.Pavithra for the Petitioner |
| | Senany Dayaratne with Ms. Eshanthi Mendis for the 1st Respondent |
| **Argued on:** | 17th July 2020 |
| **Written Submissions:** | Tendered on behalf of the Petitioner on 1st July 2020 |
| | Tendered on behalf of the 1st Respondent on 10th July 2020 |
| **Decided on:** | 12th October 2020 |

**Arjuna Obeyesekere, J**

The Petitioner has filed this application, seeking *inter alia* the following relief:

(a) A Writ of Certiorari to quash the Order dated 12th June 2018 marked '**X8**' made by the 2nd – 6th Respondents, who are the Chairman and members of the Debt Conciliation Board, respectively, by which it was held that Deed No. 7470 executed by the Petitioner in favour of the 1st Respondent is not a mortgage but a transfer;

(b) A Writ of Mandamus directing the 2nd – 6th Respondents to issue a notice in favour of the Petitioner in terms of Section 25 of the Debt Conciliation Ordinance No. 39 of 1941, as amended (the Ordinance).

The facts of this matter very briefly are as follows.

The Petitioner states that by Deed No. 7570 dated 10th April 1993, she and her husband purchased a land situated in Galle, in extent of approximately 5 acres, for a sum of Rs. 200,000.[1] The Petitioner admits that her husband transferred his share of the land to

[1] A copy of the said Deed has been marked 'R3'.

her by Deed No. 8444 on 28th June 1994, and that the value declared therein was Rs. 100,000, but states that the transfer was done to enable her to apply for a loan. The Petitioner states that she obtained a loan from the Ruhuna Development Bank in a sum of Rs. 300,000 for the development of the said land and that she cultivated the entire land with Cinnamon. The Petitioner has produced a copy of the Inspection Report prepared by the Bank in July 1994, which values an acre of land at Rs. 160,000. The said report also states that, "**මෙම දේපලෙහි මුළුමනින්ම කුරුදු, වගාවන් පවති. තවමත් ඉතා කුඩා පැල අතර අතුරු වගාවන් ලෙසද පොල් තවානක්ද ඇත. විදුලිය දේපල අසලින්ම යන බැවින්ද, ජලපහසුවද සහිත බැවින් අක්. 01 ක වටිනාකම රු. 160,000 ක් පමණ වන ලෙස තක්සේරු කරන ලදි.**"

In 1998, the Petitioner had obtained a further loan of Rs. 500,000 from the same Bank, as security for which she had once again mortgaged the said land in favour of the Bank.[2]

The Petitioner admits that due to financial difficulties faced by her, she defaulted in the payment of the loan. By letter dated 5th June 2000,[3] the Bank had informed her that unless steps are taken to pay the sum in default, the Bank would be compelled to sell the land by public auction. The Petitioner has produced the resolution passed by the Bank in terms of the Recovery of Loans (Special Provisions) Act No. 4 of 1990, published in Gazette No. 1201 dated 7th September 2001. By the said resolution, the Bank was seeking to recover a sum of Rs. 574,546.65 being the capital and interest outstanding as at 20th November 2000, together with interest on a sum of Rs. 421,300 from 20th November 2000 at the rate of 26% per annum until the date of the auction. The fact that the resolution had been published in September 2001 confirms the fact that even as at that date, the loan was in default, and the sums of money referred to therein, were due from the Petitioner.

The Petitioner states that having been unsuccessful in finding a buyer to sell the property, she had obtained a loan from the 1st Respondent in a sum of Rs. 650,000, and thereafter settled the outstanding sums due to the Bank. It is not in dispute that the 1st Respondent is engaged in the trading of cinnamon and that he used to purchase from the Petitioner the cinnamon that was produced on the said land. The Petitioner admits

[2] The extracts issued by the Land Registry depicting the above transactions have been marked 'A7'.
[3] The said letter had been marked as 'A1' at the Inquiry before the Debt Conciliation Board.

that she signed a Deed of Transfer in favour of the Petitioner before an Attorney-at-Law, who she claims is a relative of the 1st Respondent. The Petitioner states that the understanding of the parties was that she was only signing the document as security for the loan, and for that reason, the Deed was not meant to be submitted for registration. The Petitioner admits that she handed over possession of the said land to the 1st Respondent pursuant to the said transaction, but states that was done to enable the 1st Respondent to peel the cinnamon and obtain the income as interest for the loan, until such time she was able to repay the loan and obtain possession of the said land.

The Petitioner states that once she had sufficient resources to settle the loan, she had contacted the 1st Respondent, only to be told that she must pay him a sum of Rs. 1.2 million if she wanted possession of the land.

In October 2004, the Petitioner made an application to the Debt Conciliation Board in terms of Section 14(1) of the Ordinance. The purpose of a debtor making such an application in terms of Section 14(1) is to seek the assistance of the Debt Conciliation Board to effect a settlement of the debt/s owed by such debtor to his/her secured creditor/s.

The Debt Conciliation Board, comprising of the 2nd – 6th Respondents, having issued notices on the 1st Respondent, proceeded to conduct a preliminary hearing as provided for by Section 24 of the Ordinance. It is admitted that the Petitioner and the 1st Respondent were afforded the opportunity of giving evidence, the right to summon witnesses of their choice and to produce documentary evidence in support of their respective cases. At the conclusion of this preliminary hearing, the 2nd – 6th Respondents, by decision dated 12th June 2018 annexed to the petition marked '**X8**', held that the Petitioner has not established that the transfer was conditional, and therefore rejected the application of the Petitioner.

It is in the above factual circumstances that the Petitioner has invoked the jurisdiction of this Court seeking *inter alia* a Writ of Certiorari to quash the said Order marked '**X8**'.

In considering the arguments advanced on behalf of the Petitioner, I am mindful that this Court is exercising its Writ jurisdiction as opposed to its Appellate jurisdiction, and that this Court is not concerned with the rights and wrongs of the decision sought to be impugned but only whether the said decision is legal or not.

This distinction has been referred to in **Administrative Law** by Wade and Forsyth[4] in the following manner:

> "*The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful'?*"

As Lord Brightman stated in the House of Lords in **Chief Constable of North Wales Police v Evans**,[5] "*Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power*"[6]*..... "Judicial review, as the words imply, is not an appeal from a decision, but a* ***review of the manner in which the decision was made***.."[7]

In **Council of Civil Service Unions vs Minister for the Civil Service**,[8] Lord Diplock stated that, "*one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'*." He then went onto state that, "*By 'illegality' as a ground for judicial review I mean* ***that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it****. Whether he has or not is par excellence a justiciable*

[4] H.W.R. Wade and C.F. Forsyth, Administrative Law (11th Edition), Oxford University at page 26.
[5] [1982] 1 WLR 1155.
[6] Ibid. p 1173.
[7] Ibid. p 1174.
[8] 1985 AC 374

*question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable*."

As the Ordinance is silent with regard to the manner in which the Debt Conciliation Board should act when considering an application under Section 14, I would like to consider parallel situations that exist in other laws.

The Supreme Court, in the context of the role of an arbitrator under the Industrial Disputes Act which requires the arbitrator to arrive at a decision which is just and equitable,[9] held in **Singer Industries (Ceylon) Limited vs Ceylon Mercantile Industrial and General Workers Union and Others**[10] that:

> "*It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties*."

In **Heath and Company (Ceylon) Limited vs P. Kariyawasam and Others**,[11] the Supreme Court held that in the assessment of evidence, an arbitrator appointed under the Industrial Disputes Act must act judicially. Where his finding is completely contrary to the weight of the evidence led before him, such a finding can only be described as being perverse and his award is liable to be quashed by way of Certiorari.

In **All Ceylon Commercial and Industrial Workers Union v. Nestle Lanka Limited**,[12] this Court held as follows:

> "*The arbitrator to whom a reference has been made in terms of section 4 (1) of the Industrial Disputes Act as amended is expected to act judicially. He is required in arriving at his determinations to decide legal questions affecting the rights of the*

[9] Vide Section 17(1) of the Industrial Disputes Act.
[10] [2010] 1 Sri LR 66 at page 84.
[11] 71 NLR 382
[12] [1999] 1 Sri LR 343 at page 348.

*subject and hence he is under a duty to act judicially. Although such arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially.*

*It has been stressed that such an arbitrator's function is judicial in the sense that he has to hear parties, decide facts, apply rules with judicial impartiality and his decision is objective as that of any court of law, though ultimately he makes such award as may appear to him to be just and equitable."*[13]

An arbitrator under the Industrial Disputes Act must arrive at a decision which may appear to him just and equitable. The arbitrator must act judicially. Similarly, given the fact that the Debt Conciliation Board is determining the rights of parties, I am of the view that the Board must act judicially when considering an application under Section 14. Although the Ordinance does not impose a duty on the Board to arrive at a decision which is just and equitable, I am of the view that the rationale laid down in the above judgments would apply to decisions of the Board, especially since the purpose of making an application to the Board is to attempt to bring about a settlement between the debtor and creditor. In fact, the Supreme Court in **Dharmasiri Karunaratne and Another v. The Debt Conciliatian Board and Others**[14] has held that, "*It is quite obvious that the Board has to weigh the question at hand on the weighing balance of "reasonableness". **The string that binds the provisions in each Section is nothing but reasonableness**.*"

I must observe that the Petitioner is not challenging the power of the Debt Conciliation Board to make such an order nor is the Petitioner challenging the said order on the basis that there has been any impropriety with regard to the conduct of the proceedings before the Debt Conciliation Board. The primary submission of the learned Counsel for the Petitioner is that the Debt Conciliation Board failed to consider the totality of the evidence presented to it, as required by Section 21A of the Ordinance, and that this failure amounts to an error on the face of the record, and renders the said decision illegal.

[13] 78 NLR 255.
[14] SC Appeal No. 100/2013; SC Minutes of 3rd February 2016.

Section 21A of the Ordinance, which reads as follows, sets out the framework within which the Debt Conciliation Board must decide whether a conditional transfer of immovable property is in reality a mortgage.

> "*In any proceedings under this Ordinance in regard to an application relating to a transfer or conditional transfer of immovable property, the Board shall, notwithstanding anything to the contrary in section 2 of the Prevention of Frauds Ordinance, or sections 91 and 92 of the Evidence Ordinance and for the purpose of deciding whether or not such transfer or conditional transfer is in reality a mortgage,* ***take into consideration all the circumstances of the case*** *and* ***in particular the following matters****:*
>
> *"(a) the language of the notarial instrument of transfer and where provision in regard to the right of the transferor or any other person to redeem or purchase the property transferred is contained in any other notarial instrument, the language of that other instrument;*
>
> *(b) any difference between the sum received by the transferor from the transferee and the value of the property transferred;*
>
> *(c) the continuance of the transferor's possession of the property transferred; and*
>
> *(d) the existence of any agreement in whatever form between the transferor and the transferee whereby the transferor is bound to pay the transferee interest, or any sum which may reasonably be considered to be interest, on the sum received by the transferor from the transferee*."

In my view, Section 21A makes it clear that the Debt Conciliation Board must consider all the circumstances of the case before them, and that while the Board must consider in particular the four specific matters set out in Section 21A, it cannot limit itself to a consideration of the said four matters. This to my mind is reflective of the principle in Administrative Law that a decision maker must take into consideration all relevant

matters. The four matters set out therein are factors which the legislature has thought important in determining whether a transfer is in effect a mortgage, but, by the use of the words, '*take into consideration all the circumstances of the case*', the legislature has made it clear that the decision of the Board cannot be limited to a consideration and determination of only those four matters. The Board has been empowered to conduct an inquiry, hear the witnesses, and consider documents not for it to then engage in an exercise of ticking off a check list and arriving at a decision based on the number of rights or wrongs they give to the four matters set out in Section 21A(a) – (d). That to my mind, is not acting judicially.

The learned Counsel for the 1st Respondent has drawn the attention of this Court to the following paragraph in **Niroshana and Another v. Gunasekera and Another**:[15]

> "*When interpreting a section, the entire section has to be considered to construe the meaning of the section and every word in the section has to be considered and effect should be given to those words in interpreting the section as the legislature has intentionally included those words for good reasons*."

I agree that this is exactly what the Debt Conciliation Board was required to do.

The learned Counsel for the 1st Respondent has quite correctly pointed out in his written submissions that the use of the words, '*in particular*' in Section 21A means that the legislature has placed emphasis on those four matters. That is precisely the intention of the legislature. It has been further submitted on behalf of the 1st Respondent that the use of the words, '*take into consideration all the circumstances of the case*' means that the matters set out in paragraphs (a) – (d) of Section 21A are not exhaustive, and that the Board can '*exercise its discretion to expand the provisions set out therein but not limit its application.'* I am in agreement with this submission as this is precisely what the legislature requires the Board to do.

[15] [2006] 3 Sri LR 152 at page 159.

Is it **mandatory** that all four, or for that matter, any one of the matters set out in paragraphs (a) – (d) of Section 21A should be **established** for an applicant to succeed? The fact that an applicant has led evidence in respect of the said four matters, and the fact that an applicant has discharged the burden cast on an applicant by Section 21A(2) would most certainly strengthen his/her application and would enable the Board to make a decision in the applicant's favour. Similarly, the failure on the part of an applicant to establish one or more of those matters may make an application weaker. However, that does not mean that an application must be mandatorily dismissed for failure to establish one or more of the four matters set out in paragraphs (a) – (d) of Section 21A. In other words, it is not mandatory that one or more of the four matters must be established for an applicant to succeed. While I agree that these factors carry more weight, and that they require special consideration, I am of the view that they must be viewed in light of *all the circumstances of the case*. This is where the Board must act judicially and arrive at a decision which is both objective and reasonable.

It is in the above background that I have examined the Order of the Board marked '**X8**' in order to ascertain if the submission of the learned Counsel for the Petitioner is borne out by the Order.

The relevant parts of the decision of the Board are re-produced below:

> "නමුත් මෙම මණ්ඩලයට මෙම ඉල්ලුම්කාරිය ප්‍රකාශ කරන පරිදි 7470 දරණ ඔප්පුව විකුණුම්කරයක් නොව ඇපයක් සඳහා ලියා සහතික කර ඇති උකස්කරයක් ලෙසට තීරණය කිරීම සඳහා පණතේ '21 අ' වගන්තියට අනුකූලව සපුරා තිබිය යුතු ප්‍රතිපාධන වලින් පිළිගැනිමට ඇත්තේ දේපළේ වටිනාකම පමණි. අනෙක් '21 අ' වගන්තියේ කිසිම ප්‍රතිපාධනයක් සපුරාලන ලේඛනයක් ඉදිරිපත් වීමක් සිදුව නැත. '21 අ' වගන්තියේ 'අ,ඇ,ඈ' වගන්ති ඉල්ලුම්කාරිය ඔප්පු කිරීමට අවශ්‍ය ලේඛන ඉදිරිපත් කර නැත.
>
> කලින් සඳහන් කළ පරිදි '21 අ' වගන්තියේ ප්‍රතිපාධන අතුරින් දේපළේ මිල ගණනේ පමණක් වෙනසක් ඇති බව දෙපක්ෂයේ සාක්ෂි වලින් හෙළිවිය. ඒ හැරුන විට වගන්තියේ අනෙක් පේදයන්ගෙන් දක්වා ඇති ලේඛණ කිසිවක් ඉල්ලුම්කාරිය ඉදිරිපත් කළේ නැත. එපමණක්ද නොව අදාළ දේපළේ හුක්තියද ඉල්ලුම්කාරිය සතුව නැත. එයද වගඋත්තරකරු සතුව ඇත.
>
> වගඋත්තරකරුට දේපළේ හුක්තිය ලබා දුන්නේ ලබාගත් මුදලට පොළිය වශයෙන් බවට ඉල්ලුම්කාරිය ප්‍රකාශ කර ඇත. අදාළ දේපලේ හුක්තිය ඉල්ලුම්කාරිය සතු නොවන අවස්ථාවක එය

එසේ වුයේ ඇයිද යන්න මෙම වගන්තියේ ප්‍රතිපාධන අනුව සොයා බැලීමක් මණ්ඩලය සිදු නොකරන අතර මණ්ඩළයට සොයා බැලීමට ඇත්තේ අදාළ දේපළේ හුක්තිය ඉල්ලුම්කාරිය සතුද නැද්ද යන්න පමණක්ය. ඒ අනුව අදාළ දේපළේ හුක්තිය වගඋත්තරකරු සතුව ඇත. ඉල්ලුම්කාරියට අදාළ දේපළේ හුක්තිය නැත.

මෙම තත්ත්වය යටතේ මෙම ඉල්ලීමේ ඉදිරිපත් කර ඇති අනෙකුත් සාක්ෂි වලින්ද ඉහත තත්ත්වය වෙනසක් සිදු නොවන බැවින් **එම සාක්ෂි විශ්ලේෂණය කිරීම මෙහිදී අවශ්‍ය වන්නේ නැත.** විමසිමේදී ඉදිරිපත් වූ කරුණු සමස්ටයක් ලෙස සලකා බලා ඉල්ලුම්කාරියගේ ස්ථාවරය පිළිගැනීමට ප්‍රමාණවත් සාක්ෂි හෝ ලේඛණ ඉදිරිපත් වී නැත.

සත්‍ය තත්ත්වය නම් ඉල්ලුම්කාරිය '21 අ' වගන්තියේ ප්‍රතිපාධන වලින් සාමාන්‍ය ප්‍රමාණයකට හෝ ඔප්පු කිරීමට සමත් වී ඇත්තේ දේපළේ නියම වටිනාකමට ඔප්පු ලියා නැති බවය. එම කරුණු මත පමණක් සීමා කර අනෙක් එක් ප්‍රතිපාධනයක්වත් ඔප්පු නොවන අවස්ථාවක මණ්ඩලයට මෙම 7470 දරණ ඔප්පුව විකුණුම්කරයක් ලෙස ලියා සහතික කර තිබුණත් එය සත්‍ය වශයෙන්ම උකස්කරයක් බවට තීරණය කළ නොහැත. මේ අනුව ඉල්ලුම්කාරියගේ ඉල්ලීම ප්‍රතික්ෂේප කරනු ලැබේ."

The penultimate paragraph shows that the Board did not think it was important to analyse the material placed by the Petitioner as the matters set out in paragraphs (a), (c) and (d) of Section 21A had not been satisfied. Therefore, it appears that the Board was in fact engaged in an exercise of ticking boxes. Quite apart from contradicting the sentence right thereafter that the Board considered all the facts (**විමසිමේදී ඉදිරිපත් වූ කරුණු සමස්ටයක් ලෙස සලකා බලා**), to my mind, the Board has lost sight of the fact that the Ordinance requires it to *take into consideration all the circumstances of the case,* and not only the particular matters set out in paragraphs (a) – (d) of Section 21A.

It is true that of the four matters set out in paragraphs (a) – (d) of Section 21A, the Petitioner has only placed **documentary material** with regard to the value. The Board has however not considered the fact that *at least* paragraph (d) does not require any documentary proof. All that is required is for the applicant to satisfy the *existence of any agreement **in whatever form** between the transferor and the transferee whereby the transferor is bound to pay the transferee interest, or any sum which may reasonably be considered to be interest*. The explanation of the Petitioner in this regard, although referred to in '**X8**', has not been considered in the context of the entire transaction.

Although the Board has referred to the Valuation Report submitted by the Petitioner, it has failed to consider the Inspection Report prepared in 1994 at the time the Petitioner

applied for a loan of Rs. 300,000, which gives the value of the said land as at 1994. Nor has there been a consideration of the Valuation Report submitted by the Petitioner, except a passing reference. It is my view that the Board ought to have engaged itself in analysing the material presented by the Petitioner and the 1st Respondent with regard to the value, as such an analysis has an impact on the position of the Petitioner as to the circumstances in which she engaged in the transaction with the 1st Respondent.

The Board has referred to the fact that possession of the land has been handed over by the Petitioner to the 1st Respondent. That is admitted by the Petitioner and there is no dispute. However, except to state that "**වගඋත්තරකරු පොළිය වශයෙන් කුරුඳු, ඉඩමේ ආදායම ලබා ගැනීමට එකඟ වී ඇත. ඒ අනුව බැංකුවේ උකස නිදහස් කර ගෙන ඇත,**" the Board has failed to analyse the position of the Petitioner as to what necessitated her to hand over possession of the land, in the overall context of the story of the Petitioner.

Although the Board has referred to the version of the Petitioner as to why she engaged in the impugned transaction, the learned Counsel for the Petitioner has pointed out that there has not been a consideration of the fact as to why the Petitioner would sell the said land for Rs. 650,000 when the sums due to the Bank by then was Rs. 574,540, together with interest at 26% on a sum of Rs. 421,300 for almost a year. In other words, the position of the Petitioner as to why she would want to redeem the mortgage, if she was not receiving any monies over and above what was due to the Bank, is a matter that in my view, required consideration.

The consequence of not taking into consideration *all the circumstances* as required by the Ordinance, or in other words, disregarding relevant considerations, has been captured in the following two paragraphs of **De Smith's Judicial Review**:[16]

> *"When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which*

[16] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell.

*regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. If the exercise of discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised."*[17]

*"If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked, even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard."*[18]

While I am mindful that it is not my duty to analyse the facts as would be done when exercising appellate jurisdiction, I am also mindful that, as stated by Lord Bingham, that '*they (judges) are auditors of legality; no more,* ***but no less***.'[19] Viewed from that context, can it be said that the Debt Conciliation Board has performed the role conferred on it by Section 21A of the Ordinance, and taken *into consideration all the circumstances of the case*? I do not think so. As stated by Lord Diplock, the Board ought to have *understood correctly the law that regulates its decision making power and given effect to it.* In these circumstances, I am of the view that failure to do so renders '**X8**' liable to be quashed by a Writ of Certiorari.

That being my conclusion on the principal issue urged before this Court by the learned Counsel for the Petitioner, I would now like to consider the submission of the learned Counsel for the 1st Respondent that the Petitioner has an *alternative remedy* in terms of

[17] Ibid; page 305.
[18] Ibid; page 306-307.
[19] Tom Bingham, *The Rule of Law* [2011] Penguin Books at page 61.

Section 54 of the Ordinance which the Petitioner has not invoked, and that this Court should therefore refrain from exercising its discretion in this matter.

Section 54(1) of the Ordinance reads as follows:

> "*The Board may, of its own motion or on application made by any person interested, within three months from the making of an order by the Board dismissing an application, or granting a certificate, or approving a settlement, or before the payment of the compounded debt has been completed,* ***review any order passed by it*** *and pass such other in reference thereto as it thinks fit*."

It has been held in several judgments delivered by this Court as well as by the Supreme Court that a Writ will not lie if (a) **an alternative remedy** (b) **which is equally effective** is available to the Petitioner. The alternative remedy that is generally spoken of is where there is a right of appeal to a body established by law, which is a body other than the body that issued the order that is impugned.

The rationale for this rule has been explained in **Judicial Review of Administrative Action**[20] in the following manner:

> "*Where there is an alternative procedure* ***which will provide the applicant with a satisfactory remedy*** *the courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In so doing the court is coming to a discretionary decision*."[21]

> "*Where there is a choice of another separate process outside the courts, a true question for the exercise of discretion exists. For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases which are perfectly capable of being dealt with in another tribunal. It can also be the situation*

[20] De Smith, Woolf and Jowell, Judicial Review of Administrative Action (5th Edition, 1995), Sweet & Maxwell.
[21] Ibid; page 813.

*that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used. In exercising its discretion the court will attach importance to the indication of Parliament's intention*."[22]

In **Niroshana and Another v. Gunasekera and Another**[23] it was held that as the petitioners did not challenge the order on the issue of the certificate of non-settlement before the Debt Conciliation Board under Section 54 of the Ordinance, that they have not exhausted an effective alternate remedy, and hence cannot challenge the said order in that application.

In **Halwan and Others v. Kaleelul Rahuman**[24], the petitioners had sought a Writ of certiorari to quash an order made by the Wakfs Board. An objection was taken that in terms of the Muslim Mosque and Charitable Trusts or Wakfs Act, No. 51 of 1956 (as amended), a right of appeal is available to this Court from the said order and as the petitioners have in fact sought to exercise that right of appeal, the application for the Writ of Certiorari could not be maintained.

Justice Sarath Silva (as he then was) upheld the above argument, having held as follows:

"*A party dissatisfied with a judgment or order, where a right of appeal is given either directly or with leave obtained, has to invoke and pursue the appellate jurisdiction. When such party seeks judicial review by way of an application for a writ, as provided in Article 140 of the Constitution* ***he has to establish an excuse for his failure to invoke and pursue the appellate jurisdiction****. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavit and necessary documents. In any event,* ***where such a party has failed to invoke and pursue the appellate jurisdiction the extraordinary jurisdiction by way of review will be exercised only in exceptional circumstances*** *such as, where the court, tribunal or other institution has acted without jurisdiction or contrary to the*

[22] Ibid; page 814.
[23] Supra.
[24] [2000] (3) Sri LR 50 at page 61.

*principles of natural justice resulting in an order that is void. The same principle is in my view applicable to instances where the law provides for a right of appeal from a decision or order of an institution or an officer, to a statutory tribunal*."

The question whether the Writ jurisdiction of this Court could be exercised where there is an alternative remedy available was also considered by this Court in **J.H.S Jayamaha vs Provincial Public Service Commission (North Western Province) and Others**.[25] After a careful consideration of the relevant authorities, it was held as follows:

"*However, as it is a general principle, Courts have recognized several qualifications in its application. There may be situations where the alternative remedy is not adequate and efficacious in which event judicial review is available*[26]*. It maybe that judicial review is capable of providing immediate means of resolving the dispute in which case it may be the more appropriate procedure. There may also be a need to obtain interim relief which may not be possible under the alternative procedure. This is not an exhaustive list and there are certainly other instances where judicial review may be granted even though an alternative administrative procedure exists.*"

In **Wickremasinghage Francis Kulasooriya and Another vs Officer–in-Charge, Police Station, Kirindiwela and Others**,[27] this Court held as follows:

"*The question that arises for consideration in this application is what should a Court exercising Writ jurisdiction do, when confronted with an argument that an alternative remedy is available to the Petitioner and that such alternative remedy should be resorted to? This Court is of the view that a rigid principle cannot be laid down and that the appropriate decision would depend on the facts and circumstances of each case. That said, where the statute provides a specific alternative remedy, a person dissatisfied with a decision of a statutory body should pursue that statutory remedy instead of invoking a discretionary remedy of this*

[25] CA(PHC)No. 188/2014; CA Minutes of 5th July 2018 – per Justice Janak De Silva.
[26] E.S. Fernando v. United Workers Union and another (1989) 2 Sri L.R. 199.
[27] CA (Writ) Application No. 338/09; CA Minutes of 22nd October 2018.

*Court. That remedy should be equally effective and should be able to prevent an injustice that a Petitioner is seeking to avert. Furthermore, if the Writ jurisdiction is invoked where an equally effective remedy is available, an explanation should be offered as to why that equally effective remedy has not been resorted to*."

I do agree that the Petitioner could have invited the Board to review their decision in terms of Section 54. However, I am not inclined to refrain from granting relief solely due to the failure on the part of the Petitioner to resort to Section 54, for three reasons. The first is, for the reasons already discussed, the decision of the Board is illegal. The second is, what is provided for by Section 54 is not a right of appeal, which means that there will not be a re-consideration of all the facts during the review stage, unlike in an appeal. The third reason follows the second. I have my doubts whether Section 54 is an **effective** alternative remedy. In my view, the effectiveness of the remedy provided by Section 54 is dependent on the grievance of the Petitioner. Where the power of review is limited to the Order already made, I have my doubts whether the Board can re-visit the circumstances that were not considered in the Order, or in other words, act like how an appellate body would do, and re-consider all the circumstances, thereby addressing the grievance of the Petitioner.

Furthermore, the Petitioner has, although only in her counter affidavit, pointed out that her husband has been sick since 2013 and that this prevented her from exercising her right of appeal. She has produced the diagnosis ticket marked '**X16**' which shows that her husband has been discharged from hospital on 10th June 2018, which is two days before '**X8**' was delivered. However, there are no medical records to demonstrate that the Petitioner's husband received treatment after '**X8**' was delivered.

Taking into consideration all of the above circumstances, and the fact that the Writ of Certiorari is a discretionary remedy, I am not obliged to automatically dismiss this application owing to the failure on the part of the Petitioner to act in terms of Section 54. I am of the view that the interests of justice demand that I should exercise the discretion vested in this Court in favour of the Petitioner.

I accordingly issue a Writ of Certiorari quashing the Order of the Debt Conciliation Board marked '**X8**'. I direct the Chairman and Members of the Board to re-consider the evidence already placed before the Board by the Petitioner and the 1st Respondent, **take into consideration all the circumstances of the case and in particular the matters set out in paragraphs (a) – (d) of Section 21A** and arrive at a decision in terms of Section 21A of the Ordinance. I make no order with regard to costs.

**Judge of the Court of Appeal**

**Mahinda Samayawardhena, J**

I agree

**Judge of the Court of Appeal**