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

In the matter of an Application under Article 140 of the Constitution for a mandate in the nature of Writs of *Certiorari, Mandamus* and Prohibition.

Peli Kankanamge Chandrasiri,
No. 341/20,
Colombo Road, Divulapitiya,
Boralesgamuwa.

PETITIONER

Vs.

Court of Appeal Case No:
CA/WRIT/263/2024

1. Department of Debt Conciliation Board,
   No. 35A, Dr. N.M. Perera Mawatha,
   Colombo 08.

2. W. Iraangani Perera,
   Chairperson,

3. W.C.Pushpamali,
   Member,

4. Kusum Pathirana,
   Member,

5. K.H. Premadasa,
   Member,

6. K.P. Bandula Ranjith,
   Member,
   All of Department of Debt Conciliation Board,
   No. 35A, Dr. N.M. Perera Mawatha,
   Colombo 08.

7. Weeratunge Arachige Luvi De Costa,
No. 11/1,
Sunethradevi Road,
Kohuwala.

RESPONDENTS

Before:	Mayadunne Corea, J Mahen Gopallawa, J
Counsel:	W. Dayaratne P.C.with R. Jayawardena for the Petitioner Sachintha Fernando, S.C. for the 1st and 2nd Respondents P. P. Gunasena for the 7th Respondent
Argued on:	03.07.2025
Written Submissions:	For the Petitioner on 21.08.2025 For the 7th Respondent on 24.07.2025
Decided on:	26.09.2025

Mayadunne Corea J

The Petitioner in this Application, *inter alia*, sought the following reliefs:

> "*(b) Issue a mandate in the nature of Writ of Certiorari quashing the order of the 1st Respondent Board dated 03/11/2023 made by the 2nd to 6th Respondents.*
>
> *(c) Issue a Writ of Mandamus against the 1st Respondent Board to dismiss Case No. 43584*"

The facts of the case briefly are as follows. The Petitioner alleged that the 7th Respondent sold a property to the Petitioner by a Deed of Transfer bearing no. 8568 dated 06.01.2010. Subsequent to the sale Wijedasa Perera, a tenant of the 7th Respondent, entered into a lease agreement with the Petitioner for a period of 1 year from 31.01.2014 to 01.02.2015 and continued to occupy the upper floor of the premises. The Petitioner entered into another lease agreement with one G.M. Anil Shantha for a period of 2 years from 12.05.2011 to

11.05.2013, following the expiry of which the Petitioner leased out the ground floor to one Gayan Suresh Fernando for a period of 2 years from 14.01.2014 to 13.01.2016. Following the lapse of 5 years and 2 months after the Deed of Transfer was executed, the 7th Respondent took up the position that he did not transfer absolute title to the Petitioner but that the transfer was a mortgage to secure a loan of Rs. 700,000. Further it was his position that for the repayment of the interest for the loan the 7th respondent had requested the Petitioner to collect the rent from the tenants.

The Petitioner states that upon the expiry of Wijedasa's lease, the 7th Respondent and his wife forcibly entered into and occupied the upper floor of the premises. The Petitioner made a complaint to the Kohuwala police and information was filed at the Primary Court under section 66(1)(a) of the Primary Court Procedure Act, No.44 of 1997 (as amended). on 03.03.2015. The 7th Respondent filed an application at the Debt Conciliation Board (sometimes hereinafter referred to as the 'Board') under the proviso to section 19A(1A) of the Debt Conciliation Ordinance No. 39 of 1941 as amended (sometimes herein after referred as 'the Ordinance').

The Primary Court delivered its Order on 14.10.2015 by holding that the 7th Respondent and his wife were in possession. The Petitioner had made a revision application to the High Court. The High Court dismissed the said application and still being aggrieved, the Petitioner had appealed to the Court of Appeal. The applications were dismissed affirming the Order of the Primary Court. The Debt Conciliation Board delivered its order on 13.11.2023 by holding that the debtor had been in possession of the premises prior to the making of the application to the Board and fixed the application of the debtor for inquiry.

The Petitioner's contention

The Petitioner challenges the 1st Respondent order *inter alia* on the following grounds:

- The 1st Respondent Board failed to consider the evidence led at the inquiry.
- The 1st Respondent is mandatorily bound by section 19A of the Debt Conciliation Ordinance to hold a fresh inquiry to ascertain possession instead of accepting the Order of the Primary Court.
- The Order impugned is illegal and or *ultra vires* the provisions of the Debt Conciliation Ordinance.

The Respondent's contention

The 7th Respondent raised the following objections:

- The 7th Respondent's application to the 1st Respondent falls within the proviso to section 19A(1A) of the Debt Conciliation Ordinance.
- The 1st Respondent is yet to make its final statutory determination.
- The application is premature as the Debt Conciliation Board order is not a final determination of the rights of the parties.
- The Petitioner has failed to exercise the alternate remedy provided.

The State Counsel appearing for the 1st and 2nd Respondents submitted that they would not be filing any objections pertaining to the application as they are only appearing for the Board. The State Counsel has filed a motion dated 02.09.2024 to this effect. However, I observe curiously that the said motion has been filed only on behalf of the 1st Respondent, though the 2nd Respondent is the chairperson and the 3rd to 6th Respondents are members of the said Board. It is also observed that the 2nd to 6th Respondents have not filed any objections, and the learned State Counsel did not make any submissions.

Analysis

The Petitioner's main contention is that the 7th Respondent had transferred the land to the Petitioner by Deed of Transfer marked as P1 in the year 2010 for the value of Rs. 1,000,000. He contends that thereafter he had been in possession of the said land until 2015 and in 2015 the 7th Respondent had forcibly entered the premises and thereafter had made an application to the Debt Conciliation Board. It is his contention that the said application is prescribed under the provisions of the Debt Conciliation Ordinance. It is further contended that the application can only be accepted under the proviso to section 19A(1A) of the Ordinance. Hence, the Petitioner alleges that the 7th Respondent had orchestrated the forceful entry to the premises he had sold to the Petitioner, in order to be in possession of the premises that would enable the 7th Respondent to file an application to the Debt Conciliation Board.

The Debt Conciliation Board had held an inquiry and the Petitioner alleges that he had raised a preliminary objection on the jurisdiction of the Debt Conciliation Board to

entertain the application. However, the said objection had been overruled. Hence, this Writ Application challenging the said interim order of the Debt Conciliation Board. At the argument stage, both parties conceded that the Debt Conciliation Board had not come to its final decision and the application is now fixed for inquiry to arrive at the statutory determination. Hence, it is common ground that this Writ Application is against the order made pursuant to the inquiry under section 19(A)(1A).

The Petitioner conceded that though he purchased the premises in dispute he had not been in physical occupation as he was living in another area (para 14 of the Petition). However, he further contended that he had leased the premises to others, and through the tenants he was in possession. This position of occupying the premises through tenants has been rejected by the Board.

The Petitioner's main allegation is that the application is prescribed under the law and the Board should have rejected the application. Let me now consider the provisions pertaining to the Debt Conciliation Board Ordinance namely, section 19A. The said section states as follows:

> *"19A.*
>
> *(1) The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such conditional transfer of immovable property as is a mortgage within the meaning of this Ordinance unless that application is made before the expiry of the period within which that property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor.*
>
> *(1A) The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such transfer of immovable property as is a mortgage within the meaning of this Ordinance, unless that application is made* ***within three years*** *of the date of the notarially executed instrument, effecting such transfer:* ***Provided that nothing in this subsection shall be read or construed as preventing the Board from entertaining, after the period referred to in that subsection, an application by a debtor who is in possession of the property transferred.***
>
> *(2) Where the Board entertains an application of a debtor in respect of such a debt as is referred to in subsection (1), or subsection (1A), the Board shall cause notice of that fact signed by the secretary to be sent together with a copy of the application*

by registered post to the creditor to whom the application relates." (emphasis added)

The 7th Respondent had executed the deed marked as P1 dated 06.01.2010. Pursuant to the provisions in section 19(1A), the application to the 1st Respondent should have been made within three years from the execution of the deed. Hence, it should have been filed in the year 2013, but the application to the Board had been filed in the year 2015. Thus, as per section 19A of the Ordinance, the 7th Respondent's application is prescribed.

However, the proviso to section 19A(1A) allows the Board to accept a belated application where the debtor is in possession of the premises. The parties are not at variance that if the 7th Respondent, who is the applicant before the Debt Conciliation Board, establishes that he was in possession, the Board has the power to accept the application and inquire into the same.

The Parties are also not at variance that if the proviso was not applicable, the 7th Respondent's application to the Board is prescribed, as the three-year period from the date of execution of P1would end on 05.01.2013.

Proceedings before the Debt Conciliation Board

The Petitioner as well as the 7th Respondent contended that subsequent to the 7th Respondent's entry into the premises, the Petitioner had made a complaint and upon inquiry, the police had filed an application under section 66(1) of the Primary Court Procedure Act. The Primary Court after an inquiry had held that the 7th Respondent had been in possession within the meaning of the Act and had given possession to the 7th Respondent. The Petitioner being aggrieved by the said Order had made an application to revise the said Order to the High Court. The High Court affirmed the Primary Court's Order and dismissed the Petitioner's revision application. Being aggrieved by this Order the Petitioner had filed an application to the Court of Appeal bearing case no. CA/(PHC)130/2016. Upon the conclusion of the said case the Court of Appeal too dismissed the application and affirmed the Order of the High Court that affirmed the Primary Court's Order.

The learned Counsel for the 7th Respondent contended that in view of the said litigation the 7th Respondent's possession has been established. Reverting back to the proviso to section 19A(1A), it is clear that if an applicant had been in possession of the premises, the Board can entertain an application notwithstanding the time bar imposed pursuant to section 19(1A) of the Ordinance.

The proceedings of the Debt Conciliation Board were marked and tendered to this Court as X. As per page 35 of the document marked X, the Board has specifically stated that the inquiry is to prove possession. Hence, it is clear that the Board had not proceeded to determine the merits of the case until the 7th Respondent had established his entitlement to fall within the proviso by establishing his possession. The inquiry had proceeded with the participation of the Petitioner and the 7th Respondent on several dates. It is common ground that the parties had called their witnesses who were subject to lengthy cross-examination and had produced documents to establish their respective positions in the case. This alone is sufficient for me to arrive at the conclusion that the Petitioner's allegation that a proper inquiry was not conducted and the violation of *audi alteram partem* does not hold water.

Let me now consider the arguments made by the Petitioner and the 7th Respondent on the main grounds of seeking a Writ of *Certiorari*.

Is the order a final order?

The learned Counsel for the 7th Respondent strenuously contended that the Order impugned is not a final determination of the rights of the parties but only an interim decision as to whether the application should be entertained to hear on its merits. Hence, it was their contention that the impugned Order does not have a finality and there is no final determination pertaining to the parties' rights. It is trite law that in the absence of a final decision a Writ of *Certiorari* will not lie as the decision does not finally determine the rights of parties.

In ***Pushpakumara v. Lieutenant Commander Wijesuriya and others*** **2010 2 SLR 393** considered the decision in the case of ***Air Vice Marshall Elmo Perera v. Liyanage and others*** **2003 1 SLR 331**, and held that

"*This Court cannot quash the recommendation of the 6th Respondent* ***as it is not a decision or determination that affects the Petitioner's right*** *or interest but it is only a step leading to a final decision by His Excellency the President*" (emphasis added).

All parties conceded that the 7th Respondent's application before the Board is now fixed for inquiry for the Board's determination on its merits. As stated above, the Board in the impugned decision has specifically stated and confined itself to only answer the issue whether the application can be entertained under the proviso to section 19A(1A). Hence, in my view, the Board has not come to a final decision pertaining to the parties' rights.

Upon a plain reading of the proviso, it is clear that for the Board to entertain the application notwithstanding the time bar imposed under section 19A(1A), the debtor has to first establish that he falls within the proviso and establish his possession.

Prematurity of the Application

As stated earlier in this Judgment, the Board had commenced its inquiry to ascertain the possession of the debtor. The said impugned decision clearly states that the Board has conducted this inquiry into possession of the impugned premises. Further, the Board in its Order has specifically stated that the evidence led is only considered for the purpose of the possessory inquiry (page 294 of the brief). Hence, it is clear that the outcome of this inquiry is not final and the Board has not determined the final dispute between the parties. Further, as reflected on page 300 of the brief, the Board thereafter had fixed the matter for inquiry. Hence, in the absence of a final determination, the instant Writ Application before this Court becomes a premature application which is not subject to be quashed by a Writ of *Certiorari.*

The Supreme Court in the case of ***Ceylon Mineral Waters Ltd v. The District Judge, Anuradhapura*** **(1966) 70 NLR 312** held that *"an application for Writs of Certiorari and Prohibition should not be made prematurely."* Further, the Court of Appeal in ***Wickrama Arachchi Athukoralage Asantha Udayakara v. Mr. Priyantha Weerasooriya, Inspector General of Police*** **CA/WRIT/725/24 decided on 30.01.2025** followed the above decision.

Has the Debt Conciliation Board made its own finding on possession?

The Petitioner contends that the Board has failed to analyse on its own the evidence presented at the possessory inquiry and had depended on the findings of the Primary Court and the High Court to come to the conclusion the Board has arrived at. Let me now consider the Order marked as P7. In the said Order the Board has considered the judicial Orders made by the Primary Court, the High Court and the Court of Appeal. However, the Board has also analysed the evidence presented by both parties on possession, independent of the said Orders in arriving at its conclusion. This is evident throughout the Order, especially on pages 295, 296, 297 and 298 of the brief. Hence, I am unable to agree with the learned Counsel's contention that the Board had failed to come to a conclusion of its own on possession.

The inquiry into possession

The inquiry into possession of the impugned premises concluded with the calling of several witnesses and the marking of several documents. The Petitioner contended that the 7th Respondent was not in possession, and therefore the Order on possession is illegal and *ultra vires*. I find that the Board in its Order has considered the material submitted and independently conducted an analysis of the evidence presented.

The Board has considered the marked documents especially the assessment rates and, has observed that the assessment rates had been issued in the name of the 7th Respondent and the payments had been made under the name of the 7th Respondent. The Board has observed that the street lines for the property in question have been obtained only on 23.07.2013 under the name of the 7th Respondent and, also has observed that the electricity bills have been issued and paid under the 7th Respondent's name. If the Petitioner was in possession and if he had acquired ownership, the first thing he would have done is to take steps to transfer ownership in his own name and to pay the said bills, but in this instance, it has not happened.

Another crucial piece of evidence the Board has analysed is that as per the evidence led at the time of execution of the deed, the 7th Respondent had specifically given evidence to the effect that he had not given the keys of the premises to the Petitioner and accordingly, has taken up the position that he had not parted with the possession in favour of the Petitioner.

The Board had analysed this and had arrived at the conclusion that the Petitioner had failed to deny this evidence and had failed to issue any evidence to contradict the 7th Respondent's version.

The Petitioner also contended that he was in possession of the premises through his tenants. To determine possession, the Court of Appeal in ***Naiduwa Hannadi Jayanthi Mallika Samarasingha v. Malini Abeyawardhana Ranatunga and others*** **CA Writ No 161/2018 decided on 21.05.2021** applied a two-prong test to ascertain possession by considering the case of ***Iqbal v. Majedudeen and others*** **(1999)3SLR 213,** which was in the context of Primary Court Procedure Act where it was held:

> *"The Test for determining whether a person is in possession of any corporeal thing such as a house, is to ascertain whether he is in general control of it. Salmond observes that a person could be said to be in possession of, say a house, even though that person is miles away and able to exercise very little control, if any.*
>
> *The law recognizes two kinds of possession;*
>
> *I. When a person has direct physical control over a thing at a given time, he is said to have actual possession of it;*
> *II. A person has constructive possession when he, though not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person..."*

This Court observes that possession can be proved either by establishing that the Petitioner was in control over the premises and had actual possession of the premises or he could establish constructive possession though he is not in actual physical possession by having dominion over the premises directly or through another person. In the instant case, the Petitioner concedes he was not in physical possession of the premises, but the learned Counsel for the Petitioner contended that he was in possession through the tenants in the premises. This would be discussed elsewhere in this Judgement.

If I am to apply the same test pertaining to the 7th Respondent it appears he had dominion over the premises as it was in his name that the utility bills and the assessment rates had been issued and paid. Further, as per the evidence, it is not disputed that the 7th Respondent had been in physical possession of the premises at the time of filing this application. The board has considered the above facts in arriving at its decision pertaining to possession.

Coming back to the argument on constructive possession of the Petitioner the Counsel heavily relied on the tenant Wijedasa to establish this ground. The Board had analysed the evidence of Wijedasa and had concluded that he had come as a tenant of the 7th Respondent's mother, and had observed a contradiction in the evidence of the said Wijedasa. The Board has further observed that his evidence pertaining to the Petitioner had been given under duress. This observation has not been contradicted by the Petitioner. It is also pertinent to note that the Board has considered the evidence that the said Wijedasa had initially occupied the premises as the tenant of the 7th Respondent's mother and had stayed in the same for a long time. Wijedasa has occupied the said premises under the Petitioner only for a year. While the Petitioner alleges that Wijedasa was his tenant, the 7th Respondent contended that Wijedasa was his mother's tenet and had been paying rent initially to the 7th Respondent's mother and subsequently to the 7th Respondent until the 7th Respondent had authorised the Petitioner to collect the rent to set off against the interest the 7th Respondent owed to the Petitioner pursuant to obtaining a loan. Thus, it is the 7th Respondent's contention that Wijedasa too was his tenant. Thus, the tenancy of Wijedasa becomes a disputed fact. It is trite law that when primary facts are in dispute the Writ Court would be reluctant to exercise its Writ jurisdiction.

In the case of ***Thajudeen v. Sri Lanka Tea Board and another*** **(1981) SLR 471,** it was held that:

> *"where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct, a writ will not issue."*

The Board has given its reasons as to why it is not accepting the purported lease agreements which had been executed by the Petitioner with tenants, especially in view of the fact that the said agreements had not been registered. Another observation the Board has made against the Petitioner is that even in the deed of lease the Petitioner has registered, the Petitioner has not identified himself as the owner of the premises.

It appears that the Petitioner, though he alleges that he is the owner, had not made any attempt to assert his ownership and register the said property in his name, which would have established the Petitioner's position that he had purchased the property as an outright transfer and not as a security for a debt and would also have established his possession.

Further, the Board has observed a discrepancy in the assessment numbers of the premises and come to the conclusion that the Board is unable to accept the evidence of the 7th Respondent vacating the premises after the execution of the deed. By observing the electoral registers, the Board has come to the conclusion that the 7th Respondent's name had been reflected throughout in relation to the disputed premises.

The most crucial evidence which militates against the Petitioner as observed by the Board, the Primary Court, the High Court and the Court of Appeal, is the affidavit tendered by the Petitioner himself to the Primary Court at the inquiry under section 66 of the Primary Courts Procedure Act. It has been observed that in the said affidavit, the Petitioner has under oath admitted that possession was with the 7th Respondent.

Correctly, the Board also has taken into cognizance the judicial pronouncements made on this admission, especially the observations stated in the judgment of the Court of Appeal regarding the possession of the 7th Respondent. Accordingly, it appears after considering all the evidence, the Board had come to the conclusion that there is sufficient material produced before it to arrive at a conclusion on the initial issue before it, namely, on the issue of possession.

It is common ground that at the time of filing the application before the Board, the Petitioner had been in possession of the premises. As stated above the Board had further taken into cognizance of the judicial pronouncements whereby the 7th Respondent's possession has been established prior to the institution of the Primary Court case and also had given its reasons for coming to the conclusion that the 7th Respondent had been in possession.

It is also pertinent to note that the Petitioner has conceded that he is residing at another address and had personally not been in occupation of the premises. However, as stated above, the learned Counsel for the Petitioner contended that he was in possession through his tenants. This Court notes that this assertion had not been accepted by the Board in their decision marked as P7, which also contains the reasons for the decision. Hence, in my view, the Petitioner has failed to impugn the order of the Board pertaining to possession and has also failed to establish any illegality or *ultra vires* in the procedure adopted by the Board in arriving at the said Order.

This Court observes that the Order of the Board has also given reasons as to why the testimony of Petitioner and his witnesses have not been accepted.

The Petitioner also contended that as per the evidence, the Board has failed to consider the actual premises the 7th Respondent was in possession. This contention was made on the premise that the premises has three buildings and the 7th Respondent was anyway occupying the house adjoining the disputed premises. This was denied by the 7th Respondent. Hence, it becomes a disputed fact. It is trite law that when the facts are in dispute the Writ Court is reluctant to use its discretionary power.

The learned Counsel for the Petitioner in his submissions invited this Court to come to a determination as to who was in possession of the premises and to answer whether the 7th Respondent's application should be entertained under the proviso to section 19A(1A). In summary, it is his contention that the finding of the Board that the 7th Respondent was in possession of the premises is erroneous. In my view, the said finding has to be made after hearing and considering the evidence. Hence, the question of possession should be decided after the consideration of evidence, and the appropriate forum for the same is not the Writ Court.

It is also pertinent to note that in a Writ Application the Court does not decide if the decision is right or wrong, but whether it is legal or illegal.

Does the Petitioner have an alternate remedy?

Further, the Petitioner has filed this Application against a preliminary Order that has been given by the Debt Conciliation Board. It is pertinent to note that the Petitioner has the right to take part in the inquiry and present his evidence, allowing the Board to come to its final decision. The Petitioner has failed to explain the reason for his reluctance to follow this ordinary course.

In my view, the Petitioner has failed to establish or demonstrate any illegality in the order marked P7. Accordingly, prayer (b) of the Petition has to fail. In view of prayer (b) being answered in the negative, and as elaborated elsewhere considering the fact that the Board

has now fixed the application for inquiry on its merits, in my view, prayer (c) is premature and therefore, has to fail.

Conclusion

Accordingly, for the reasons stated above, this Court is not inclined to grant the reliefs prayed for by the Petitioner and proceeds to dismiss this Application. The parties are to bear their own costs.

Judge of the Court of Appeal

Mahen Gopallawa, J

I agree

Judge of the Court of Appeal