<u>IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

In the matter of an application for a mandate 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.

CASE NO: CA/WRIT/244/15
Debt Conciliation Board Application No. 41935

Hambanage Don Ishan Eranda Manohara,
Gahalawathugoda, Batagoda,
Galpatha.

<u>PETITIONER</u>

VS.

1. Mrs. Malani Abeywardena Ranathunga,
   Hon Chairman

2. Mr, Piyasena Samararathna,
   Hon. Member

3. Mr. K.A.P. Rajakaruna,
   Hon. Member

4. Mr. D.M. Sarathchandra,
   Hon. Member

   All of the members of the Debt Conciliation Board,
   Debt Conciliation Board,
   Adikarana Mawatha,
   Colombo 12.

5. Debt Conciliation Board established by Debt Conciliation Board, Adikarana Mawatha, Colombo 12.

6. Kongaha Kankanamge Chulalanda Perera,' Batagoda Road, Millagaspola, Halthota.

7. Hon. Attorney General, Attorney General's Department, Colombo 12.

RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J. &**
K. K. A. V. SWARNADHIPATHI, J.

Counsel: Priyashantha Athukorala for the Petitioner.

T.D. Aluthnuwara, instructed by Piyumi Kumari for the 6A Respondent.

Anusha Fernando SDSG for the 1st – 5th and 7th Respondents.

Written Submissions on: 05.09.2018 & 03.02.2021 (by the Petitioners).

05.10.2018 (by the 6th Respondent).

Argued on: 03.03.2021.

Decided on: 06.10.2021.

MOHAMMED LAFFAR, J.

The Petitioner in this application has invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking, *inter alia,* the following relief:

a) a writ of *certiorari* quashing the orders of the 5th Respondent dated 26.07.2013 marked P5 and 12.03.2015 marked P8.

b) a writ of *mandamus* directing the 1st to 5th Respondents to have an inquiry a fresh and permit the Petitioner to file his statement and participate in the proceedings of the inquiry pertaining to the application bearing No. 41935 in the Debt Conciliation Board.

The 1st Respondent is the chairman and 2nd to 4th Respondents are the members of the Debt Conciliation Board which is the 5th Respondent in this application.

The Petitioner states that by virtue of the Deed bearing No. 4105 dated 24.07.2008 attested by Mahinda Tissa Athukorale, Notary Public marked P1, the 6th Respondent has transferred his property to the Petitioner for a sum of Rs. 50,000/- and thereafter, once again the 6th Respondent collected a sum of Rs. 350,000/- and had given a letter dated 28.12.2010 which is marked as P2 stating that he would not claim anything whatsoever pertaining to the said transaction.

Thereupon, the 6th Respondent made an application to the 5th Respondent on 25.01.2011 stating that the said deed marked P1 was not a transfer, but the particular land had been pledged to the Petitioner in order to secure a loan. In paragraph 8 of the petition, the Petitioner states that having received the notice he was present before the 5th Respondent Board on 13.02.2012, 08.05.2012 and 02.10.2012. Since the Petitioner was not present before the 5th Respondent on 06.11.2012, in terms of section 29 (1) of the Debt Conciliation Ordinance, No. 39 of 1941 (hereinafter referred to as

the "Ordinance"), the 5th Respondent issued notice on the Petitioner, accordingly, the Petitioner was present before the 5th Respondent on 07.01.2013 and 01.04.2013. Thereafter, the matter was fixed for inquiry on 17.07.2013.

The Petitioner further states that he could not take part in the proceedings of the inquiry on 17.07.2013 as a result of an accident due to which his leg was fractured. In the circumstances, on 17.07.2013, the 5th Respondent had taken up the inquiry *ex parte* and consequently under section 29 (4) of the Ordinance issued a certificate dated 24.09.2013. The said order and the certificate are marked as P5 and P6 respectively. Thereafter, the 5th Respondent in its order dated 12.03.2015 marked P8, rejected the application made by the Petitioner to review the aforesaid order marked P5.

Being aggrieved by the said orders marked P5 and P8, the Petitioner invokes the writ jurisdiction of this Court seeking to quash the same on the grounds set out in the petition.

The 6th Respondent in his statements of objection took up the position that he did not intend to transfer the property to the Petitioner by the deed marked P1. The said deed of transfer was executed only as a security for a loan. There was a mutual trust that the Petitioner would re-transfer it to the 6th Respondent upon the settlement of the said loan. Since the Petitioner refused to re-transfer the property as agreed upon, the 6th Respondent made an application before the 5th Respondent Board.

Having scrutinized the petition of the Petitioner and the statements of objection of the 6th Respondent it appears to this Court that the overriding questions for determination in this petition are as follows:

1. Whether the aforesaid impugned orders marked P5 and P8, made by the 1st to 5th Respondents were in terms of the provisions of the Debt Conciliation Ordinance.

2. Did the 1st to 5th Respondents err in facts and law, when they held that the deed marked P1 was executed as a security for a loan obtained by the 6th Respondent from the Petitioner?

The 6th Respondent made an application to the Debt Conciliation Board on 25.01.2011 claiming that the said deed of transfer marked P1 is not, in fact, a transfer but a security for a loan obtained from the Petitioner. Thereafter, upon being served with summons by the 5th Respondent Board, the Petitioner by his letter dated 12.10.2011 informed the 5th Respondent Board that he has not entered into any transaction with the 6th Respondent, and therefore, there is no necessity of him being present before the Board for an inquiry (vide page of 118 of the case record). Thereupon, under section 29 (1) of the Ordinance, the Board issued notices on the Petitioner. Accordingly, the Petitioner was present before the Board on 07.01.2013 and 01.04.2013. Thereafter, matter was fixed for inquiry on 17.07.2013. Admittedly, the Petitioner did not take part in the proceedings of the inquiry on 17.07.2013. Hence, acting under section 29 of the Ordinance the 5th Respondent rightly had taken up the inquiry *ex parte* and consequently on 24.09.2013 issued a certificate in terms of section 29 (4) of the Ordinance. Hence, it appears that the Board had given *adequate opportunities* to the Petitioner to take part in the proceedings in accordance with the provisions of the said Ordinance. As such, the contention of the Petitioner stating that the order marked P5 is contrary to the provisions of the said Ordinance is devoid of merits.

It is pertinent to be noted that the Petitioner, having received the notice under section 25 (1) of the Ordinance, informed the 5th Respondent Board that it is not necessary for him to be present before the Board. Moreover, the Petitioner having received the notice under section 29 (1) of the Ordinance opted not to file the statement of debts or objections. Furthermore, the Petitioner was absent on the

date of inquiry. In the circumstances, there is no option to the 5th Respondent Board but to take up the matter *ex parte* against the Petitioner. Having scrutinized the proceedings of the 5th Respondent Board it is manifestly clear that, the Petitioner has not taken interest to proceed with the inquiry with due diligence.

It is the contention of the Petitioner that he had not been served with notice in terms of section 29 (2) of the Ordinance prior to the granting of the certificate in favour of the 6th Respondent in terms of section 29 (4) of the Ordinance. It is borne out from the case record that the notice under section 29 of the Ordinance had been first served on the Petitioner upon being absent on 24.07.2012. Once again on 06.11.2012 notice under section 29 had been served on him through the Divisional Secretary. After notices have been duly served on the Petitioner in terms of section 29 as aforesaid, the matter was fixed for inquiry. As such, it is the considered view of this Court that the 5th Respondent has *duly given notices* to the Petitioner in terms of the provisions of the Ordinance before issuing certificate under section 29 (4).

The Petitioner, in terms of section 54 of the Ordinance, made an application dated 20.12.2013 to review the aforesaid order marked P5. After inquiry, the 5th Respondent by order dated 12.03.2015 marked P8, dismissed the application on the basis, *inter alia*, that the said application was time barred. An application for revision under section 54 (1) of the Ordinance to be filed within three months from the date of the order, which reads thus,

> *"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."*

In the instant case, the order granting a certificate in favour of the 6th Respondent was made on 26.07.2013 and the application under section 54 (1) of the Ordinance was made by the Petitioner on 20.12.2013. As such, it is abundantly clear that the order of the 5th Respondent, dismissing the application made under section 54 (1) of the Ordinance, on the footing that the application was out of time, is not wrong.

In paragraph 12 of the petition, it is stated that the Petitioner could not take part in the proceedings of the inquiry on 17.07.2013 as a result of an accident due to which his leg was fractured. This fact has to be proved with cogent evidence to the satisfaction of the 5th Respondent Board. It is to be noted that, in order to substantiate the foregoing reason, the Petitioner has submitted only a private medical certificate issued by an *Ayuvedic* practitioner who was not testified before the Board as well. In the circumstances, it appears to this Court that the Petitioner totally failed to establish the fact that he could not be present before the Board on 17.07.2013 due to the purported accident by which his leg was fractured.

The 2nd question to be considered is, as to whether the deed marked P1 was an outright transfer, or a security executed in a loan transaction. The contention of the 6th Respondent was that he has executed the deed marked P1 in favour of the Petitioner as a security for the loan of Rs. 50,000/- obtained from the Petitioner. In short, the contention of the 6th Respondent was that the Petitioner is holding the property by deed marked P1 on a constructive trust.

The possession of the property in dispute is a most important factor to be considered in deciding the question of constructive trust. The fact that after the execution of the deed of transfer, the transferor remained in possession of the land would be an attendant circumstance. It would show that the transferor did not intend to dispose of the beneficial interest, although he signed the deed of

transfer. Vide ***Ehiya Lebbe v. Majeed*** *[1947] 48 NLR 357,* ***Thisa Nona and Three Others v. Premadasa*** *[1997] 1 Sri LR 169* and ***Carthelis v. Ranasinghe*** *[2002] 2 Sri LR 359.*

The 6th Respondent has categorically given evidence before the Board on 22.06.2011 that he is in possession of the land in dispute even after the execution of P1 (vide page 21 of the case record). The 6th Respondent's evidence has been substantiated with the complaint made by him to the police on 21.11.2010 (vide page 125 of the case record). Furthermore, it is evident from the letter dated 23.01.2011 issued by the Divisional Secretary of Millaniya and the Girama Niladari of Millaniya that the 6th Respondent is in possession of the land in question (vide page 142 of the record). Accordingly, it was well established before the Board that the Petitioner has not obtained possession of the land in dispute from the 6th Respondent after the execution of P1.

True it is that the valuation of the land in dispute is another significant aspect to establish the claim of constructive trust. Vide ***Jayanthi Chandrika Perera v. D. Don Chandrakumara*** (*SC Appeal No. 83/2014, SC Minutes of 24.03.2017I* and ***W.M. Chandralatha v. H.M. Punchi Banda and Another*** (*SC Appeal No. 185/2015, SC Minutes of 04.12.2017).* As per the deed marked P1, a sum of Rs. 50,000/- was paid by the Petitioner to the 6th Respondent for an extent of 52.13 perches. According to the evidence of the 6th Respondent, the value of a perch was of Rs. 40,000/- (vide page 20 of the case record).

In paragraph 6 of the petition, the Petitioner states that the 6th Respondent had accepted in a sum of Rs. 350,000/- in addition to the consideration stipulated in P1 and had given a letter dated 28.12.2010 stating that he would not claim anything whatsoever pertaining to the said transaction. The 6th Respondent, in his statements of objection has denied this letter. In such a situation,

there is a burden cast upon the Petitioner to prove the said letter before the Board, where the Petitioner failed to do so. Besides, it is to be noted that there is a doubt created before Court that, if, P1 is an outright transfer, there is no necessity to pay an additional amount of Rs. 350,000/- to the 6th Respondent after five months from the date of execution of P1.

Having considered the proceedings adopted and the totality of the evidence adduced before the Board, it appears to this Court that the impugned orders are not contrary to section 21 of the said Ordinance.

In these respects, it is apparent that the determination of the 5th Respondent stating that the deed P1 was executed for a loan transaction is justifiable.

Furthermore, it is settled law that a party seeking prerogative relief should come to Court with clean hands. The expression is derived from one of Equity's maxims - '*He who comes to Equity must come with clean hands.'*

In the case of ***Alphonso Appuhamy v. Hettiarachchi*** *[1973] 77 NLR 13,* it was held that,

> *"When an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with uberima fides."*

Undisputedly, upon being served with summons by the 5th Respondent Board, the Petitioner by his letter dated 12.10.2011 informed the Board that he has not entered into any transaction with the 6th Respondent, and therefore, there is no necessity of him being present before the Board for an inquiry. This is a material fact as far as the allegations made by the Petitioner against the 5th

Respondent Board are concerned, which was suppressed by the Petitioner in his petition.

In paragraph 16 of the petition, the Petitioner states that the 5th Respondent Board has no jurisdiction to entertain the application of the 6th Respondent. It was further stated that the application and the affidavit tendered by the 6th Respondent to the 5th Respondent Board were defective. It is to be noted that the foregoing preliminary legal objections were not raised before the Board by the Petitioner, and therefore, the Petitioner is estopped from taking up such objections in this Court.

For the foregoing reasons, I see no basis to interfere with the impugned orders marked P5 and P8 of the 5th Respondent Board.

In the circumstances, I proceed to dismiss the application.

The parties should bear their own costs as to this application.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

K. K. A. V. SWARNADHIPATHI, J.

I Agree.

JUDGE OF THE COURT OF APPEAL