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

In the matter of an application for orders in the nature of *Writs of Certiorari and Mandamus* under and in terms of the provisions of Article 140 of the Constitution.

C.A. WRIT/ 90/2019

Debt Conciliation Board
Case No. 44552

Senanayake Mudiyanselage Malkanthi Senanayake

Senani,

Hambuluwa,

Alawwa.

PETITIONER

-Vs-

1. Adhikari Appuhamilage Don Rathnayake
   Bulugahawatta,

   1st Lane,

   Malkaduwawa,

   Kurunegala.

2. Manelmal Arachchige Mahinda Mithrananda

   No. 100/1,

   Gorokgasdeniya,

   Alawwa.

3. R. Malani Abewardana Ranatunga

   Chairperson

4. R.T. D.K. Poojitha Thilakawardena

   Member

5. Jagath K.P. Bandula
   Member
6. K.A.P. Rajakaruna
   Member
7. K.M. Karunaratne
   Member

Above 3rd – 7th Respondents all of,
The Debt Conciliation Board,
No. 35A, Dr. N.M. Perera Mawatha,
Colombo 08.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J. (P/CA) &
Sobhitha Rajakaruna, J.

COUNSEL : Ransith Gunawardena instructed by Amandi Jayaisnghe for the Petitoner.

Janaki Sandakelum for the 1st Respondent.

Sapumal Bandara with Manoj Beliketimulla for the 2nd Respondent.

Argued on : 26.05.2020

Decided on : 25.11.2020

A.H.M.D. Nawaz, J. (P/CA)

The Petitioner, in the capacity of a debtor, made an application dated 04.09.2017 to the Debt Conciliation Board (the Board) in order to obtain a declaration that the deed bearing No. 2011 and dated 10.07.2007 attested by D.S. Nagasena Notary Public was in fact and in law, a mortgage. The Petitioner asserts that his ability to so vindicate his rights before the Debt Conciliation Board stemmed from the proviso to section 19A (1A) of the Debt Conciliation Ordinance as amended by Act No. 29 of 1999, which provides to the effect that the Debt Conciliation Board may entertain applications of debtors, made even after the expiry of 3 years from the date of attestation of the deed, so long as the debtor has been in possession of the land. The Petitioner further asserts that having so derived jurisdiction to adjudicate on this matter, the Debt Conciliation Board, by its order dated 05.04.2018, directed the Petitioner order to prove possession of the land depicted in the aforementioned deed, in order to hear and determine his application.

Subsequently however, by its order dated 10.01.2019, the Debt Conciliation Board dismissed the application of the Petitioner at first instance based on an objection put forth on behalf of the 2nd Respondent that the Debt Conciliation Board would be acting in contravention of its own regulations introduced under section 3(4) of the Debt Conciliation Ordinance, if it were to hear and adjudicate upon the application of the Petitioner which was made after the expiry of 10 years since the date of attestation of the deed. Whilst the statutory provision permitted the Petitioner to prefer an application before the Debt Conciliation Board even after a lapse of 3 years from the date of notarial attestation provided he establishes possession, the Petitioner complains that the Board acted unfairly by shutting out his application on the basis of a subordinate legislation which denied access to an applicant seeking relief 10 years later than the date of execution of the deed of transfer.

The Petitioner denies knowledge of the existence of any such regulation that imposes a time bar upon an applicant appearing before the Debt Conciliation Board where such an applicant has been in continued possession of the subject matter of the application. The Petitioner asserts that the dismissal of his application by the Debt Conciliation Board on the basis of unascertainable regulations was therefore *ultra vires*.

Thus, the Petitioner by the present application seeks the *quashal* of the order of the Debt Conciliation Board dated 10.01.2019 and the issuance of a mandate in the nature of a writ of *mandamus* directing the 3rd to 7th Respondents to hear and adjudicate upon the application by the Petitioner bearing No. 44552 in accordance with the provisions of the Debt Conciliation Ordinance.

In light of these facts, the quintessential question arising before this court is whether the Debt Conciliation Board acted *ultra vires* in upholding a regulation purportedly created under the statutory powers vested in it by virtue of section 3 (4) of the Debt Conciliation Ordinance and thereby dismissing the application of the Petitioner. In other words, the issue before this court is whether the Debt Conciliation Board, by its order dated 10.01.2019, has exceeded its powers in allowing a regulation formulated in the guise of procedure to trump the substantive rights vested in the Petitioner by virtue of the proviso to section 19A (1A) of the Debt Conciliation Ordinance as amended by Act No. 29 of 1999.

Wille in ***Principles of South African Law*** (8th Edition at page 45) postulates a comprehensive and clear analysis of the distinction between substantive law and the law of procedure.

> *"In each branch of law, whether national or international, there will be found both substantive rules and procedural means for their attainment. Law may accordingly be divided into two parts: the substantive law and the law of procedure.*
>
> *The substantive law deals with legal rights of persons, and their converse, legal duties. The substantive law (a) describes the nature of the various legal rights and duties, and then explains (b) how they are constituted, (c) what their effect is, and (d), how they are extinguished. Suppose, for example, that A has the right of ownership of a motor car. The substantive law defines 'ownership', and proceeds to tell one how ownership is acquired, what are the acts an owner may do and what are those he may not do, and finally, how his ownership is terminated.*
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> *The law of procedure, on the other hand, is composed of the rules which govern the enforcement of the various rights which have just been referred to; it sets forth the nature of the proceedings to be taken in the courts in order to secure redress when legal rights have been infringed, or legal duties have been neglected. Suppose, for example, that A, the owner of a motor car, has been deprived of the possession of the car by B. The law of procedure sets out the steps which A should take in order to recover possession of the car from B. It tells, among other things, in what court he should*

institute legal proceedings; what documents should be prepared by his legal advisers; what proof or evidence he should produce in court in order to substantiate his claim; how proceedings in court are carried out; and how the judgment of the court is enforced. The law of procedure is said to be adjective law, because it is merely accessory to the main or substantive branch of the law."

Section 19A (1A) of the Debt Conciliation Ordinance as amended by Act No. 29 of 1999 reads as follows:

> *"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;"*

Upon a perusal of the aforementioned provision and its proviso it is crystal clear that the Debt Conciliation Board is not barred from entertaining applications made after the expiry of three years since the date of attestation if the applicant has been in possession of the land. A careful consideration of the section thus draws me to the irresistible conclusion that it is immaterial that the Petitioner made an application to the Debt Conciliation Board upon the expiry of 10 years since the date of attestation of the deed if he had been in possession of the subject matter of the deed. It is also evident that the Petitioner derived substantive rights to appear before the Debt Conciliation Board by virtue of the said section.

The order dated 10.01.2019 (at page 64 of the brief) recites that an applicant who has been in possession of the land in question for more than 10 years has other remedies in law. It further contends that the application of the Petitioner cannot be entertained as a regulation formulated under and in terms of the powers derived from section 3(4) of the Debt Conciliation Ordinance dictates that the Debt Conciliation Board may only entertain applications if they have been made within a period of 10 years since the date of attestation of the deed. It is this second contention that has been impugned by the Petitioner in the present application.

The rule making power of the Board contained in Section 3 (4) of the Debt Conciliation Ordinance reads as follows:

> *"The Board may regulate its own procedure in any matter not provided for in this Ordinance or by regulation."*

Section 3(4) empowers the Debt Conciliation Board to formulate regulations regarding procedural matters that have not been provided for by the legislation. It does not however empower the Debt Conciliation Board to formulate procedural regulations that defeat substantive rights afforded to litigants through the empowering statute nor does it empower the Debt Conciliation Board to formulate substantive law in the guise of procedural regulations.

In my view, a self-imposed regulation to the effect that the Debt Conciliation Board may not entertain applications made after the expiry of 10 years since the date of attestation of the deed, purportedly formulated under the powers entrusted through section 3(4) of the Debt Conciliation Ordinance is firstly, contrary to section 3(4) itself as the content of that rule does not deal with any procedural matter. Rather it would tantamount to an enactment of a regulation on a substantive matter. Secondly, the said rule or regulation is in direct contravention of the substantive rights guaranteed to an applicant under section 19A (1A) of the Debt Conciliation Ordinance as amended by Act No. 29 of 1999 and must accordingly be deemed null and void.

Lord Wilberforce in ***Raymond V. Honey*** [1982] 1 All ER 756 articulated the following opinion with regard to a regulation that frustrated the basic rights afforded under the empowering statute:

> *"In my opinion, there is nothing in the Prison Act 1952 that confers power to make regulations which would deny, or interfere with, the right of the respondent, as a prisoner, to have unimpeded*

access to a court. Section 47, which has already been quoted, is a section concerned with the regulation and management of prisons and, in my opinion, is quite insufficient to authorize hindrance or interference with so basic a right. The regulations themselves must be interpreted accordingly, otherwise they would be ultra vires. So interpreted, I am unable to conclude that either rule 34(8) – which is expressed in very general terms – or rule 37A(4), whether taken by themselves or in conjunction with Standing Orders, is in any way sufficiently clear to justify the hindrance which took place. The standing orders, if they have any legislative force at all, cannot confer any greater powers than the regulations, which, as stated, must themselves be construed in accordance with the statutory power to make them."

Furthermore, the case of ***Chester v. Bateson*** [1920] 1 KB 829 at page 836 held that a regulation could not take away the right of access to the courts without an authorization in that behalf from the empowering Act in clear language.

It is indubitable that access to justice itself is derived from substantive law. In such circumstances, any procedural regulation formulated in such a manner so as to interfere with or oust access to justice in effect tampers with the substantive law and rights derived thereby and must undoubtedly be struck out as irrational and *ultra vires*.

I therefore take the view that the dismissal of the Petitioner's application by the Debt Conciliation Board on the basis of a self-imposed regulation that directly hindered the Petitioner's access to justice was unreasonable and *ultra vires*. Accordingly, this court proceeds to set aside the order dated 10.01.2019 by *certiorari* and directs the 3rd to 7th Respondents to hear and adjudicate upon the application made by the Petitioner.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna J.

I agree

JUDGE OF THE COURT OF APPEAL