

1964 Present : Abeyesundere, J., and Sri Skanda Rajah, J.

V. SINGARAM, Appellant, and S. M. SARIFDEEN, Respondent
S. C. 452/62—D. C. Colombo, 7833

Debt Conciliation Ordinance (Cap. 81)—Sections 19 and 56 (a) (i) (ii)—Debt Conciliation Board—Scope of its jurisdiction.

Where a mortgagor's application for settlement of his debt is dismissed by the Debt Conciliation Board on account of the failure of the mortgagor to appear on the day fixed for the inquiry, and the mortgagee thereafter institutes action in a civil court upon the mortgage bond, the Board has no jurisdiction to vacate subsequently its previous order of dismissal, even with the consent of the parties. In such a case, a settlement effected by the Board after the vacation of the order of dismissal is null and void and does not affect the right of the mortgagee to proceed with his action in the civil court.

APPEAL from a judgment of the District Court, Colombo.

T. Parathalingam, for the plaintiff-appellant.

No appearance for the defendant-respondent.

Cur. adv. vult.

March 20, 1964. ABEYESUNDERE, J.—

The defendant-respondent mortgaged an allotment of land to the plaintiff-appellant by Bond No. 1953 dated 30th July, 1957, as security for a loan of Rs. 3,000 which he obtained from the plaintiff-appellant. An application to effect a settlement of the debt owed by the defendant-respondent to the plaintiff-appellant was made by the defendant-respondent to the Debt Conciliation Board under the Debt Conciliation Ordinance and that application was dismissed by the Board on 25th July, 1961, as the defendant-respondent failed to appear on the day fixed for the inquiry. On 31st July, 1961, the plaintiff-appellant instituted in the District Court of Colombo action No. 7833 against the defendant-respondent on the aforesaid mortgage bond. By letter dated 25th September, 1961, the Secretary of the Debt Conciliation Board informed the plaintiff-appellant that the order dismissing the defendant-respondent's application was "now vacated" and that an inquiry into that application would be held on 10th October, 1961, at 9 a.m. According to the proceedings of the Debt Conciliation Board on 13th December, 1961, a settlement of the debt owed by the defendant-respondent to the plaintiff-appellant was effected.

The second and third issues at the trial of the plaintiff-appellant's action in the District Court of Colombo were as follows :—

"(2) Can the plaintiff have and maintain this action in view of the settlement arrived at before the Debt Conciliation Board on 13.12.1961?"

(3) If not, has this Court jurisdiction to entertain this action?"

The learned Additional District Judge who tried the plaintiff-appellant's action dismissed it holding that it was "barred under section 56 (a) (i) and (a) (ii)" of the Debt Conciliation Ordinance and answering the two aforesaid issues in the negative. The plaintiff-appellant has appealed from the judgment and decree of the learned Additional District Judge.

On the date on which the plaintiff-appellant's action was entertained by the District Court of Colombo there was no application pending before the Debt Conciliation Board in regard to the defendant-respondent's debt to which that action related. Therefore section 56 (a) (i) of the Debt Conciliation Ordinance which provides that no civil court shall entertain any action in respect of any matter pending before the Debt Conciliation Board was no bar to the entertainment of the plaintiff-appellant's action by the District Court of Colombo.

After the order of dismissal of the defendant-respondent's application was vacated by the Debt Conciliation Board on 25th September, 1961, that application was revived and an inquiry into it was fixed for 10th October, 1961. The plaintiff-appellant's action was pending before the District Court of Colombo at the time when the defendant-respondent's application to the Debt Conciliation Board was revived. The revival of the defendant-respondent's application was tantamount to the entertainment by the Debt Conciliation Board of an application by the defendant-respondent in respect of the debt which was the matter directly and substantially in issue in the action previously instituted in the District Court of Colombo by the plaintiff-appellant. The revival of the defendant-respondent's application to the Debt Conciliation Board was in contravention of section 19 of the Debt Conciliation Ordinance which prohibits the Debt Conciliation Board from entertaining any application by any debtor or creditor in respect of a debt which is the matter directly and substantially in issue in a previously instituted action which is pending in any court between the same parties. Therefore all the proceedings before the Debt Conciliation Board on such revived application of the defendant-respondent, including the settlement effected on 13th December, 1961, are invalid.

The learned Additional District Judge has misdirected himself in holding that the plaintiff-appellant's action is also barred by section 56 (a) (ii) of the Debt Conciliation Ordinance which provides that no civil court shall entertain any action in respect of the validity of any procedure before the Debt Conciliation Board or the legality of any settlement. The plaintiff-appellant's action is on the mortgage bond and not in respect of the validity of such procedure or the legality of such settlement.

There is no provision of the Debt Conciliation Ordinance which may be applied to deprive the District Court of Colombo of jurisdiction to try the plaintiff-appellant's action. I set aside the judgment and decree entered by the learned Additional District Judge and I order that the plaintiff-appellant's action be retried by another judge of the District Court of Colombo.

SRI SKANDA RAJAH, J.—

This is an appeal from the judgment of one of the Additional District Judges of Colombo dismissing the plaintiff's action on a mortgage bond on the grounds that it is barred by section 56 (a) (i) and (ii) of the Debt Conciliation Ordinance Cap. 81.

The decision of this appeal involves the effect of the following provisions of the Debt Conciliation Ordinance :

Section 19 : The Board *shall not entertain* any application by any debtor or creditor in respect of a debt which is the matter directly and substantially in issue in a previously instituted action which is pending in any court between the same parties

Section 56 : *No civil court shall entertain—*

(a) any action in respect of—

(i) any matter pending before the Board ; or

(ii) the validity of any procedure before the Board or the legality of any settlement ;

In each of these sections the word used is “entertain” and not “maintain”. “Entertain” means to receive. “Maintain” means to continue. What is prohibited by section 19 is the receipt by the Board of any application in respect of a previously instituted action which is pending in any court. Section 56 prohibits the receipt by a civil court of any plaint in respect of (i) any matter pending before the Board and (ii) the validity of any procedure before the Board or the legality of any settlement.

The facts briefly are : The defendant-respondent (hereinafter referred to as the debtor) filed an application before the Debt Conciliation Board (hereinafter referred to as the Board) in respect of this mortgage debt ; but, it was dismissed by the Board on 25.7.1961, because the debtor was absent. The plaintiff-appellant (hereinafter referred to as the creditor) filed this action in the District Court of Colombo on 31.7.1961. Thereafter, by letter B2 of 25.9.1961 the Secretary of the Board intimated to the creditor “the order dismissing the application is now vacated” and requested the creditor to attend an inquiry. Ultimately, on 13.12.1961 a settlement was arrived at between the creditor and debtor before the Board. Then on 12.3.1962 the debtor filed answer in this case pleading, inter alia, that (A) the creditor “cannot have and maintain

this action in view of the provisions of section 56 (a) (i) of the Debt Conciliation Ordinance, Cap. 81, inasmuch as the defendant's application was pending before the Board at the date of the institution of this action " by the creditor and (B) the debtor had been granted time by the Board to settle the creditor's claim. At the trial the following issues were raised :—

- (1) What amount is due to plaintiff on the bond sued upon ?
- (2) Can the plaintiff have and maintain this action in view of the settlement arrived at before the Board on 13.12.1961 ?
- (3) If not, has this court jurisdiction to entertain this action ?

Issue 1 was not answered by the learned Judge. He, however, answered issues 2 and 3 in the negative.

It is clear from the facts set out above that when this action was filed on 31.7.1961 the application before the Board had already been dismissed and was, therefore, not "*pending before the Board*". Therefore, section 56 (a) (i) did not preclude the District Court from "entertaining" or receiving the plaint in this action. Once this action was entertained or received by the District Court the provisions of section 19 deprived the Board of jurisdiction or power to entertain or receive "any application" by the debtor in respect of this debt—not even an application to vacate the order of dismissal made on 25.7.1961. It had no jurisdiction or power to vacate the order of dismissal even with the consent of the parties. Where no jurisdiction exists parties cannot confer jurisdiction even by consent. For instance, a Court of Requests has no jurisdiction or power to entertain a matrimonial action. Parties to a matrimonial action cannot confer jurisdiction on it even by consent.

There is a clear distinction between the jurisdiction of a Court or tribunal to entertain, try and determine a matter and the erroneous action of such Court or tribunal in the exercise of that jurisdiction. The former involves the power to act at all while the latter involves the authority to act in the particular way in which the Court or tribunal does act. In the case of usurpation of power the proceedings are an absolute nullity. (vide the judgment of Sri Skanda Rajah, J., in S. C. 25/62 (Inty.)—D. C. Kurungala No. 767/P : S. C. Minutes of 24.2.1964).

All orders made by the Board after the institution of this action on 31.7.1961, including the settlement arrived at on 13.12.1961, were made without jurisdiction or in usurpation of power and were, therefore, an absolute nullity. The learned judge had jurisdiction to make such a declaration.

In the case of *Fernandopulle v. Perera Appuhamy*¹ Nagalingam, J., said, "It has, however, been pointed out that a Court cannot go into the question of the validity of the proceedings before the Board in view of section 56 (a) (ii) of the Ordinance. I do not think this contention is entitled to succeed. For one thing, it is open to a party to impeach a

¹(1950) 52 N. L. R. 204 at 206.

judgment or proceeding before another Court or tribunal as one entered or had beyond jurisdiction of such Court or tribunal. For another, section 56 does not say that the validity of the proceedings before the Board cannot be canvassed in a Court of Law. What it does say is that a Court cannot entertain an *action* in respect of the validity of any procedure before the Board, which is entirely a different matter. The contention raised relates to the want of jurisdiction of the Court while the provision of the Ordinance prevents the regularity or the validity of the conduct of the business before the Board being called in question ”.

If the learned Judge, to whom this case was cited, had given careful consideration to the passage quoted above he could not have failed to realise that section 56 (a) (ii) would not be applicable as this was an action on the mortgage bond and not “ an action in respect of the validity of any procedure before the Board or the legality of any settlement. ”

He should have answered issues 2 and 3 in favour of the plaintiff.

I would, therefore, allow the appeal with costs and direct that the trial do proceed, before another Judge, in respect of issue No. 1.

Appeal allowed.

