

**CHANDRAWATHIE
VS
WIMALADASA AND OTHERS**

COURT OF APPEAL
AMARATUNGA, J AND
BALAPATABENDI, J
CA(REV)1044/2001
D.C. KULIYAPITIYA 11745/M
JULY 29, 2002

Debt Conciliation Ordinance, sections 29, 39, and 41 - Certificate obtained that conditional transfer was a mortgage - Procedure to be followed in the District Court to get the property reconveyed - Is it regular or summary? - Civil Procedure Code, section 8.

The petitioner-respondent obtained a loan from one 'D', having secured the debt by a conditional transfer of immovable property. On an application made to the Debt Conciliation Board, the petitioner respondent obtained a certificate under section 29 of the Debt Conciliation Ordinance, to the effect that the said conditional transfer was a mortgage.

The petitioner-respondent thereafter filed an application by way of summary procedure to get a decree nisi for the petitioner -respondent to get the property reconveyed. After inquiry, the decree nisi was made absolute.

The petitioner moved in revision.

HELD

- (1) Section 39 is the only section which provides for an action by the debtor to obtain an order to re-convey a property in respect of which a certificate under section 29 of the Debt Conciliation Ordinance has been issued. There is no procedure laid down for such an action.
- (2) An action for an order to reconvey a property conveyed by a conditional transfer to secure a debt has to be instituted by way of regular procedure and not by way of summary procedure.
- (3) The whole procedure adopted by court to deal with the purported application of the petitioner - respondent was irregular and illegal.

APPLICATION in revision against the order of the District Court of Kuliyaipitiya.

Chula Bandara for petitioner

M. C. Jayaratne for petitioner- respondent

Cur.adv.vult

October 07, 2004

GAMINI AMARATUNGA, J.

This is an application to revise and order made by the learned Additional District Judge of Kuliyaipitiya in a proceeding, purporting to be a proceeding under the provisions of the Debt Conciliation Ordinance. The petitioner -respondent has obtained a loan of Rs.20,000 from one H. M. Dissanayake, having secured the debt by a conditional transfer of immovable property belonging to the petitioner - respondent. Thereafter, upon an application made to the Debt Conciliation Board, the petitioner-respondent has obtained a certificate under section 29 of the Debt Conciliation Ordinance to the effect that the said conditional transfer was a mortgage.

By petition and affidavit dated 30.06.1997, the petitioner respondent has filed an application by way of summary procedure by presenting a petition and affidavit to get a decree nisi for the petitioner - respondent to get the property re-conveyed to him by paying a sum of Rs.20,000. The

caption to the petition states that it is an application under section 29 of the Debt Conciliation Ordinance. It is to be noted that the said section 29 does not provide for presenting such an application to Court. At the time the petitioner- respondent filed his application, the said Dissanayake was dead and accordingly his wife and children were made respondents to the application. Since the children of Dissanayake were minors, their mother, the present petitioner was appointed guardian-at-litem of the minors.

The learned Judge, having considered the petition filed by the petitioner - respondent has issued a decree nisi. After it was served on the present petitioner she has filed her objections to the petitioner - respondent's application. Thereafter, at the inquiry held by Court several witnesses have given evidence for the petitioner - respondent and the present petitioner has given evidence on her own behalf. After the inquiry the learned Judge has made order making the decree nisi absolute. This revision application is against that order.

The question to be decided in this revision application is whether there was a valid legal proceeding before Court. The provision under which the petitioner - respondent could have brought his action to get the property re-conveyed to him is section 39 of the Debt Conciliation Ordinance. The section reads as follows.

“Where a certificate has been granted under this Ordinance in respect of a debt secured by a conditional transfer of immovable property and subsequent to the granting of that certificate an action is instituted in any Court for the recovery of that property, the Court (a) may, notwithstanding that the title to that property has vested in the creditor in relation to that debt, make such appropriate orders as are necessary to re-convey title to, and possession of that property to the debtor, in relation to that debt, on the payment by the debtor of the debt together with the interest thereon in such installments and within such period not exceeding 10 years, as the Court thinks fit”.

Section 39 is the only section which provides for an action by the debtor to obtain an order to re-convey a property in respect of which a certificate under section 29 of the Debt Conciliation Ordinance has been issued. There is no procedure laid down for such an action. Section 8 of the Civil Procedure Code enacts that “Save and except actions in which it is by this Ordinance or any other law specially provided that proceedings may be taken by summary procedure, every action shall

commence and proceed by a course of regular procedure, as hereinafter prescribed”.

Thus, in the absence of any reference to summary procedure in section 39, an action for an order to re-convey a property conveyed by a conditional transfer to secure a debt has to be instituted by way of regular procedure. The petitioner respondent's action had been filed under summary procedure. Therefore, that action had not been properly filed according to the proper procedure. As such the decree nisi had been improperly issued and accordingly has no force as a decree nisi. In the result, the order of Court making the decree nisi absolute is a nullity. Section 45 of the Debt Conciliation Ordinance, under which the District Court dealt with the petitioner - respondent's application has no application to the action as that section dealt with an action by a creditor to enforce a settlement. The whole procedure adopted by Court to deal with the petitioner - respondent's purported application was irregular and illegal and accordingly all proceedings taken in D. C. Kuliyaipitiya case No. 11745 were null and void and were incapable of producing any legally binding decree. I accordingly allow this revision application and quash all proceedings in the purported action including the decree nisi and the decree absolute. The petitioner is entitled to Rs.7,500 as costs of this application.

BALAPATABENDI J. - I agree.

Application allowed.
