

1976 Present: **Tennekoon, C. J. Weeraratne, J. and  
Sharvananda, J.**

C. H. WIMALASURIYA, Appellant,

and

M. S. JAYAWEERASINGAM and another, Respondents

S.C. 81/71 (F)—D. C. Colombo 1159/Spl.

*Debt Conciliation Ordinance—Sections 14, 30, 40, 43, 44—Jurisdiction of District Court to enter hypothecary decree—Exercise of such jurisdiction.*

*Waiver—Irregular procedure adopted in entering hypothecary decree—Acquiescence—Validity of such decree—Mortgage Act, section 8.*

There is a fundamental distinction between the existence of jurisdiction and the exercise of jurisdiction. A challenge to the method of the exercise of jurisdiction of a court can never, in law, justify a denial of the existence of such jurisdiction. If a court which has general jurisdiction and has in addition local and personal jurisdiction, exercises such jurisdiction in an unauthorized manner, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision, however wrong, cannot be disturbed.

Cases referred to :

*Sawdoon Umma v. Fernando*, 71 N.L.R. 217.

*Samarasinghe v. Balasuriya*, 69 N.L.R. 205.

*Shafeek v. Solomon de Silva*, 69 N.L.R. 481.

*Kanugasabai v. Velupillai*, 54 N.L.R. 241.

V. Arulampalam for the defendant-appellant.

N. S. A. Goonetilleke for the plaintiff-respondent and the purchaser-respondent.

*Cur. adv. vult.*

June 25, 1976. SHARVANANDA, J.

The defendant-appellant executed mortgage bond No. 43 dated 18.10.58 in favour of the plaintiff-respondent as security for the payment of Rs. 1,500 borrowed by him from the plaintiff-respondent. The defendant, as debtor, made an application to the Debt Conciliation Board under the provisions of section 14 (1) of the Debt Conciliation Ordinance for the settlement of the debt due from him to the plaintiff. The parties arrived at a settlement before the Board and a settlement was recorded in terms of section 30 of the Debt Conciliation Ordinance. This settlement required that the defendant should pay and settle the full sum due to the plaintiff on or before 31.10.64. The defendant, however, failed to make the payment in terms of the said settlement. It was a term of the settlement that in case of default, the creditor was entitled to all legal rights, including

the mortgagee's remedy to sue and recover any sum due on the settlement. Thus, the settlement conserved the right of the plaintiff-creditor to seek the remedies available to a mortgagee, and this right included the right to file a suit for a hypothecary decree. The plaintiff-creditor, thereafter, by his petition dated 23.11.65 instituted the present proceedings. Along with his petition, the plaintiff filed affidavit, mortgage bond and a certified copy of the settlement and prayed that "as contemplated in section 43 (4) of the Debt Conciliation Ordinance, decree nisi be entered in favour of the petitioner against the respondent for the sum of Rs. 2,330 with further interest on Rs. 1,500 at 8 per cent per annum from the date hereof till the date of payment in full". The defendant-appellant was cited as respondent to the said application. The Court issued decree nisi on the respondent, which was duly served, and, on 29.6.66, as the respondent was absent on the said date of inquiry, decree nisi was made absolute. On or about 25.7.66, the plaintiff moved the Court to vacate the decree nisi entered and to allow a fresh application to be filed embodying the necessary clauses in the prayer to the petition regarding the sale of the mortgaged property under the decree. By its order dated 11.8.66, the Court vacated the decree absolute already entered and directed the plaintiff to file a fresh decree nisi amend the petition. The plaintiff, thereafter, by his amended petition dated 27.9.66, amended his prayer to incorporate a prayer for a hypothecary decree. The Court thereafter entered a fresh decree nisi. Though the fresh decree nisi was served on the defendant, he was absent on 5.12.66, the date of the inquiry, and hence decree absolute was entered, which was, in terms, a hypothecary decree in favour of the plaintiff for the sale of the property mortgaged on the bond sued upon. The defendant did not take any steps to appeal against the said decree, nor did he make any complaint against the proceedings that eventuated in the said hypothecary decree entered on 5.12.66. Thereafter, the plaintiff caused, on 26.2.69, the sale of the property in execution of the said hypothecary decree and the purchaser-respondent purchased the property at the sale.

On 30.9.69, the defendant-appellant moved the District Court to set aside the hypothecary decree entered in this action on the grounds :

(a) that the District Court had no power to enter decree nisi, or a hypothecary decree, or to enforce a settlement entered under the Debt Conciliation Ordinance ;  
and

(b) that the plaintiff-respondent had no legal right to ask for a hypothecary decree, except in terms of the

Mortgage Act (Chap. 89) and that the hypothecary decree entered in this case by way of summary procedure is of no force or avail in law, and for that reason the sale held on 26.2.69 was void.

By his order dated 8.9.70, the learned District Judge dismissed his application, and the defendant-appellant has now preferred this appeal against the said dismissal of his application.

The main argument of Counsel for the defendant appellant was that, in view of the judgment of the Supreme Court in the case of *Sawdoon Umma v. Fernando*, 71 N.L.R. 217, the District Court had, in the premises, no jurisdiction to enter a hypothecary decree, and since no regular action, as contemplated in the Mortgage Act, was instituted by the plaintiff, no hypothecary decree could have been entered in these proceedings and that the Court had no jurisdiction to enter a hypothecary decree on the plaintiff's application.

In the case of *Sawdoon Umma v. Fernando*, the Court expressed the view that where a debt due on the mortgage of a land had become the subject of a settlement under the Debt Conciliation Ordinance and the settlement contains no provision for the entering of a hypothecary decree, section 43 of the Debt Conciliation Ordinance does not enable the District Court to enter a hypothecary decree if the debtor fails to comply with the terms of the settlement and that a settlement under the Debt Conciliation Ordinance cannot confer jurisdiction on a Court, even by express provision, to enter a hypothecary decree, otherwise than in an action instituted in conformity with the special procedure provided for in the Mortgage Act. The appellant, therefore, submitted that, as the procedure set out in the Mortgage Act was not followed by the judgment-creditor in the present case, and also as no regular mortgage action, as contemplated by the Mortgage Act, was instituted, the Court had no jurisdiction to enter a hypothecary decree.

In *Samarasinghe v. Balasuriya*, 69 N.L.R. 205, the Supreme Court took the view that where a settlement had been entered under the Debt Conciliation Ordinance, the creditor's right as mortgagee were yet preserved, but the mortgage is deemed to subsist under the settlement so that the creditor would have to make an application in terms of the Debt Conciliation Ordinance for the entering of a decree. Sansoni C. J. there held that where a debt secured by a mortgage has been settled between the parties in accordance with the provisions of the Debt

Conciliation Ordinance, the creditor had no right thereafter, in view of the provisions in section 40 (1) of the Ordinance, to sue on the cause of action arising from the mortgage bond and that if the debtor failed to comply with the terms of the settlement, the creditor's remedy is to make an application to a competent Court of jurisdiction and seek execution in terms of sections 43 and 44 of the Debt Conciliation Ordinance. The plaintiff had followed, in the present case, the procedure which had received the sanction of the Supreme Court in *Samarasinghe v. Balasuriya*.

On the facts of the present case, it is not necessary for this Court to resolve the conflict between these two judgments reported in 69 N.L.R. 205 and 71 N.L.R. 217. For, even assuming that there is substance in the defendant-appellant's submission, his application and appeal can be disposed of on the ground of the defendant-appellant's waiver, as the defendant-appellant did not seek to show cause against the decree nisi that was served on him from being made absolute. The proper stage for him to have agitated the question whether a hypothecary decree could have been competently entered against him was before the date of entering of the decree absolute. The appellant had, by his conduct and/or omission, waived any objection that could have been taken to the procedure adopted by the plaintiff in this case.

On the assumption that a hypothecary decree can be entered only in an action properly instituted under the provisions of the Mortgage Act, it is the District Court of Colombo which, on the facts of this case, had the general jurisdiction and was alone competent to enter a hypothecary decree and grant the relief claimed by the plaintiff. In this case, proceedings were instituted in the proper Court which had general jurisdiction in the matter. On the appellant's submission, the District Court of Colombo, having general jurisdiction, appeared to have proceeded in an unauthorized manner. The error in the procedure could have been remedied, but the error did not deprive the Court of jurisdiction to enter upon the proceedings. Since there was general jurisdiction, lack of objection at the proper stage prevented the appellant from relying upon the irregularity in the proceedings at a late stage. Neither on principle, nor on authority can the appellant's argument that the irregularity that he belatedly complained of deprived the Court of jurisdiction to enter a hypothecary decree be supported. The decree here in question was voidable only and not void, and the time for availing it had long gone by. A challenge to

the method of the exercise of jurisdiction of a Court can never, in law, justify a denial of the existence of such jurisdiction. The defendant, having acquiesced in or waived the irregularity, cannot complain of it at a later stage. It is a fundamental principle well established, that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction cannot be cured even by the consent of parties or by waiver, but there is a fundamental distinction between the existence of jurisdiction and the exercise of jurisdiction. The circumstance that hypothecary jurisdiction of the Court had been exercised in the present case in an irregular manner does not destroy the inherent jurisdiction of the Court to grant a hypothecary decree. If the Court had exercised its jurisdiction in an unauthorized manner, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision, however wrong, cannot be disturbed. In this case, the Court had undoubted jurisdiction to be invoked in terms of the provisions of the Mortgaged Act. The defendant, having had the opportunity to contest the regularity of the proceedings that consummated in the hypothecary decree entered against him and having failed to avail himself of the proper steps to have the proceedings set aside, cannot now challenge the regularity of the proceedings.

Laws of the procedure are grounded on the principle of natural justice which requires that a person should not be condemned unheard, that decisions should not be reached behind a person's back, that proceedings that affect the rights of a party should not be conducted in that person's absence. Since the defendant had notice of the proceedings against him, he cannot complain of denial or violation of natural justice. There was a deviation from the proper procedure, but the Court had jurisdiction over the subject, and by the deviation the Court did not assume the jurisdiction of another tribunal. There was no attempt to give the Court a jurisdiction which it did not have. If the defendant chose to waive objection to the procedure, he cannot, afterwards, make any complaint. The defendant, in the circumstances, is debarred from asserting a substantive right which he once possessed, or from raising a particular defence which would otherwise have been available to him.

The Court had undoubted jurisdiction to enter a hypothecary decree. It had, in addition, local and personal jurisdiction in

terms of the provisions of the Civil Procedure Code. It also had jurisdiction over the subject matter. It was thus properly seized of the case. The irregularity of the procedure adopted did not divest the Court of its inherent jurisdiction and the hypothecary decree entered by it was not void consequently for want of jurisdiction. The judgment was, at most, irregular only and voidable, and since the defendant had failed to complain of its irregularity at the proper stage, it is not open to the defendant after the hypothecary sale envisaged by the decree to question the validity of the decree. He is bound by the decree and the sale. The appellant took no steps on the decree nisi being served on him. He is therefore bound by the proceedings and the decree.

Counsel for the appellant fell back on the fact that the provisions of section 8 of the Mortgage Act have not been complied with. He contended that the failure to comply with the said provisions divested the Court of jurisdiction to enter a hypothecary decree. In support of his submission, he relied on *Shafeek v. Solomon de Silva*, 69 N.L.R. 481. True, certain expressions in the judgment lend support to Counsel's submission. But, Fernando, C.J., in that case, did not have in contemplation the facts of this case where the mortgagor himself was served with notice of the proceedings and hence had ample opportunity to canvass, at the proper stage, the regularity of proceedings. As observed by him at page 488; "The purpose of section 8 of the Mortgage Act, considered in the context of the Act, is to secure that persons other than the mortgagor will be bound by the hypothecary decree. That purpose would not be achieved if the requirement of this section can be waived by the mortgagor, who is not a person in the category which this section is designed to reach. And on general principles it seems clear that the breach of the positive requirement cannot be cured by waiver on the part of a person who is intended to be affected or protected by the requirement." In the scheme of the Mortgage Act, section 8 was not designed for the benefit of the defendant-mortgagor. It is only persons who are intended to be affected or protected by the requirements of that section that can complain of non-compliance with the provisions of that section. It does not lie in the mouth of the defendant-mortgagor, who was a party to the proceedings and who had notice of the steps taken in the action, to complain that the plaintiff had, by his omission to comply with section 8 of the Mortgage Act, obtained a decree that is voidable by persons falling in the category of "persons entitled to notice" referred to therein.

(See *Kanagasabhai v. Velupillai*—54 N.L.R. 241). The decree so obtained is not null and void, but is binding on the defendant who was a party to the proceedings. Irregularity of procedure did not deprive the Court of its general jurisdiction to enter a hypothecary decree in this case.

The defendant, having been in a position to show that the proceedings had against him were not in terms of the provisions of the Mortgage Act, deliberately did not seek to have the decree nisi and/or decree absolute set aside and thereby elected to waive the objection, if any, and he cannot now be allowed to set up that the Court had exercised its jurisdiction to enter a hypothecary decree in an unauthorized way.

The appeal is accordingly dismissed with costs.

TENNEKOON, C.J.—I agree.

WEERARATNE, J.—I agree.

*Appeal dismissed.*