

1966

*Present* : Sansoni, C.J., and Siva Supramaniam, J.

A. SAMARASINGHE, Appellant, and  
W. F. BALASURIYA, Respondent

*S. C. 675/1964—D. C. Colombo, 8542/MB*

*Debt Conciliation Ordinance (Cap. 81)—Sections 40 (1), 43 (1), 44—Settlement entered between the parties—Effect—Remedy of creditor thereafter—Meaning and effect of “merger”.*

When a debt secured by a mortgage has been settled between the parties in accordance with the provisions of the Debt Conciliation Ordinance, the creditor has no right thereafter, in view of the provisions of section 40 (1) of the Ordinance, to sue on the cause of action arising from the mortgage bond. If the debtor fails to comply with the terms of the settlement, the creditor's remedy is to make an application to a court of competent jurisdiction and seek execution in terms of sections 43 and 44.

**A**PPEAL from a judgment of the District Court, Colombo.

*H. W. Jayewardene, Q.C.*, with *J. Weerasekera*, for the plaintiff-appellant.

*A. C. Nadarajah*, for the defendant-respondent.

*Cur. adv. vult.*

September 18, 1966. SANSONI, C.J.—

The plaintiff sued the defendant on two causes of action to recover Rs. 8,172 together with interest on Rs. 7,000 at 15 per cent. per annum. He also asked for a hypothecary decree binding certain lands described in the plaint. On the first cause of action he pleaded a mortgage bond executed in 1956 by which the defendant promised and bound himself to pay him the principal sum of Rs. 5,000 with interest at 16 per cent. On the second cause of action he pleaded a mortgage bond of 1958, by which the defendant promised to pay a sum of Rs. 2,000 with interest at 15 per cent. The cause of action in each case was the failure to pay the amounts due under the said bonds.

The defendant admitted the execution of the bonds. She pleaded that in May 1959 she made application bearing No. 6972 to the Debt Conciliation Board for relief in respect of the two bonds and another bond which has been sued upon in D. C. Colombo Case No. 8543/MB; that the Board made order on 22nd February 1961 reducing the rate of interest payable, ordering Rs. 2,400 to be paid on that day and Rs. 1,500 every six months thereafter commencing from 22nd August 1961, and that the whole amount due should be paid by 29th February 1964. She set out various payments made before and after the order of the Board was made. In her prayer she asked that the action be dismissed except to the extent admitted by her.

At the trial the defendant's Counsel stated that the plaintiff could not maintain this action in view of ss. 40 (1) and 43 (1) of the Debt Conciliation Ordinance, Cap. 81. The plaintiff's counsel replied that s. 40 (1) gave the plaintiff the right to sue the debtor on the bond and that the remedy provided under s. 43 (1) was merely one of the remedies available to the plaintiff. Both Counsel agreed that it was not necessary to call any witnesses.

Thereafter judgment was delivered dismissing the plaintiff's action. The learned Additional District Judge took the view that the combined effect of ss. 40 (1) and 43 (1) was to prevent the plaintiff maintaining this action. I shall set out the two sections referred to by Counsel at the trial. Section 40 (1) reads :—

“ A settlement under section 30 or section 31 shall when the original and duplicate thereof have been countersigned by the Chairman and subject to any order the Board may make in respect of that settlement

under section 54, be final between the parties, and the contract in respect of any debt dealt with in the settlement shall become merged in the settlement :

Provided, however, that where any debt secured by any charge, lien or mortgage over any property, movable or immovable, is dealt with in any settlement, the rights of the creditor under such charge, lien or mortgage shall, unless otherwise expressly provided in the settlement, be deemed to subsist under the settlement to the extent of the amount payable thereunder in respect of such debt, until such amount has been paid or the property over which the charge, lien or mortgage was created has been sold for the satisfaction of such debt. "

Section 43 (1) reads :—

" Where the debtor fails to comply with the terms of any settlement under this Ordinance, any creditor may, except in a case where a deed or instrument has been executed in accordance with the provisions of section 34 for the purpose of giving effect to those terms of that settlement, apply to a court of competent jurisdiction, at any time after the expiry of three months from the date on which such settlement was countersigned by the Chairman of the Board, that a certified copy of such settlement be filed in court and that a decree be entered in his favour in terms of such settlement. The application shall be by petition in the way of summary procedure, and the parties to the settlement other than the petitioner shall be named respondents, and the petitioner shall aver in the petition that the debtor has failed to comply with the terms of the settlement."

The position of the parties at the trial clearly was that a settlement had been entered into between these two parties ; and the only dispute was whether the action was maintainable in view of that settlement. The answer to that depends on the meaning to be given to the words in s. 40 (1) " A settlement ..... shall ..... be final between the parties, and the contract in respect of any debt dealt with in the settlement shall become merged in the settlement".

The meaning of these words seems to me to be too clear for argument. The settlement being final, the dispute between them must be decided on the terms of that settlement and that alone. The contract in this context is clearly the contract set out in the two mortgage bonds, whereby the defendant promised to pay the plaintiff certain sums of money borrowed and interest. The money borrowed on those bonds was the debt : and that debt was dealt with in the settlement. Therefore when s. 40 (1) provides that the contract shall become merged in the settlement, it surely means that the right of action which the plaintiff would have had on the contracts contained in the mortgage bonds became merged in the settlement, and was extinguished by it. The debt due from the defendant to the plaintiff became a new debt, due not on the bonds but on the settlement. The proviso which says that " where any debt secured by any ..... mortgage over any property ..... is dealt with in any settlement, the rights of the creditor under such ..... mortgage shall ..... be deemed

to subsist under the settlement to the extent of the amount payable thereunder", preserves to the creditor his rights as a mortgagee; and the mortgage which subsisted under the bonds is now deemed to subsist under the settlement, so that the creditor still remains a secured creditor by virtue of the proviso.

The entering of the settlement does not extinguish the debt. Instead of being a debt due under the contracts, it becomes a debt due under the settlement. The plaintiff's remedy is no longer an action under the contracts contained in the bonds, for his cause of action now arises out of the settlement.

The effect of merger has been described in various ways, and it has been likened at different times to annihilation, or sinking, or drowning. In a case of merger which arose where judgment had been entered upon a mortgage debt, *Silva v. Leiris Appu*<sup>1</sup>, Koch, J. said: "Once the intervention of the Court has been sought and once a decree has been entered, the contractual relations are determined and the liability of one to another is no longer under the contract but under the decree which takes its place . . . . . The parties thereupon pass out of the domain of contract and enter that of a decree". If one were to substitute "settlement" for "decree" and "Board" for "Court" in this passage, the changed positions of the parties in this case is apparent. In *Ramalingam v. James*<sup>2</sup>, Soertsz, A.C.J. dealt with a decree entered on a promissory note. He said "When decree was entered, the promissory note was swallowed up by it and lost its identity. The judgment merged and destroyed the original cause of action. The debt due on the decree is a new debt".

This being the consequence of a settlement, it is easy to understand the meaning of s. 43 (1). The creditor, where a debtor fails to comply with the terms of a settlement, could apply to a Court of competent jurisdiction asking that a certified copy of the settlement be filed in Court and that a decree be entered in his favour in terms of such settlement. The application would be by summary procedure, and unless the debtor proves that he has complied with the terms of the settlement, the decree *visi* entered under s. 43 (2) will be made absolute and executed as if it were a decree entered in a civil action. The provisions of ss. 43 and 44 are clear on this point.

The plaintiff in this case has mistaken his remedy. He had no right to sue on the causes of action arising from the bonds, because he was confined to enforcing the settlement. Accordingly, this appeal must be dismissed with costs.

SIVA SUPRAMANIAM, J.—I agree.

*Appeal dismissed.*

<sup>1</sup> (1936) 38 N. L. R. 295.

<sup>2</sup> (1939) 40 N. L. R. 489.