

1968 Present : H. N. G. Fernando, C J., and Sirimane, J.

SAWDOON UMMA (d/o Tamby Raja) and others,
Appellants, and FELIX H. G. FERNANDO and others,
Respondents

S. C. 328/65—D. C. Kandy, 3487/MB

Debt Conciliation Ordinance (Cap. 81)—Sections 30, 40 (1), 43 (1) and (2), 44—Settlement of a mortgage debt—Failure of the debtor to carry out the terms of the settlement—Procedure thereafter—Incapacity of Court to enter a hypothecary decree in defiance of provisions of Part II of Mortgage Act.

Where a debt due on a mortgage of land has become the subject of a settlement under the Debt Conciliation Ordinance, and the settlement contains no provision for the entry of a hypothecary decree, section 43 of the Debt Conciliation Ordinance does not enable the District Court to enter a hypothecary decree when the debtor fails to comply with the terms of the settlement.

Further, 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 maintained in conformity with the special procedure laid down in Part II of the Mortgage Act.

“(a) Where the debt the payment of which is secured by a mortgage bond is the subject of a settlement, the right of the creditor to a hypothecary decree subsists under the settlement, unless the settlement expressly provides otherwise.

(b) Where the debtor fails to carry out the terms of the settlement, the creditor should apply to a competent Court under s. 43 of Chapter 81 and he can thus obtain a decree absolute to compel the debtor to perform his obligations, principally the obligation to pay the debt and interest, imposed by the settlement.

(c) Where in addition the creditor desires to obtain a hypothecary decree over the property originally mortgaged to him, his right under the mortgage bond to such a decree is preserved by s. 40 (1); but he can obtain such a decree only in a hypothecary action, the procedure in which will be governed by the Mortgage Act.

(d) The hypothecary decree entered in such an action will render the mortgaged property bound and executable, not for the amount of the original debt, but for the amount of the debt and interest payable in terms of the settlement.”

APPPEAL from a judgment of the District Court, Kandy.

C. Ranganathan, Q.C., with S. A. Marikar, for the Respondents-Appellants.

N. E. Weerasooria, Q.C., with M. S. M. Nazeem, for the Petitioners-Respondents.

Cur. adv. vult.

October 11, 1968. H. N. G. FERNANDO, C.J.—

The defendants in this case had executed a mortgage bond in 1954 in favour of a creditor as security for the payment of a debt of Rs. 20,000 and interest. On an application made to the Debt Conciliation Board, a settlement relating to the debt was recorded in terms of s. 30 of the Debt Conciliation Ordinance (Cap. 81). The settlement of 3rd February 1959 provided as follows :—

- (1) “ that interest should be calculated at the rate of 7% per annum and that a sum equivalent to 34 months’ interest was due up to the end of January this year.
- (2) that the debtors should pay jointly and severally a sum of Rs. 100/- on or before 4th May 1959 and thereafter they should pay by quarterly instalments of Rs. 500/- each. The first of such instalments will be paid on or before 4th August, 1959.
- (3) that the full sum should be paid to the creditor within a period of 5 years—that is, on or before 4th February 1964.
- (4) that in the event of a single default the creditor is at liberty to seek legal remedy.
- (5) that delivery of the bond discharged with the deeds and the payment of the balance full sum are concurrent conditions—that is, the creditor must deliver the bond discharged with the deeds when the debtor tender payments of the balance full sum.”

It would appear that no payments were made by the defendants in accordance with paragraph (2) of the settlement. In October 1961, the creditor made an application to the District Court asking for a decree to be entered in terms of the settlement and asking also that a hypothecary decree be entered for the sale of the property mortgaged to the creditor by the bond of 1954. A decree nisi was accordingly entered on 14th November 1961. The original creditor died thereafter, and the two respondents to this appeal were substituted in the place of the original creditor.

At the subsequent inquiry in the District Court, the only objection taken against the creditor’s application was that the original creditor had not signed the proxy filed with the application. This objection was rejected by the District Judge and he ordered the Decree nisi to be made absolute. The point of importance is that the Decree entered by the District Court is a hypothecary decree for the sale of the land mortgaged by the bond of 1954.

Counsel appearing for the debtors has argued in this appeal that a hypothecary decree can be entered by a Court only in a hypothecary action instituted and maintained in accordance with the procedure laid down in the Mortgage Act (Cap. 89), and that the District Judge had no jurisdiction to enter such a decree upon the application made by the creditor in this case. That Act, particularly in Part II, makes special provision for the procedure in a hypothecary action, which is defined in the Act as "an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the moneys due upon the mortgage and to enforce such payment by a judicial sale of the mortgaged property". I need state no reasons for the opinion that a Court cannot enter a decree which includes an order in terms specified in that definition except in a regular action maintained in compliance with Part II of the Mortgage Act.

The advisers of the creditor in this case, in seeking an appropriate remedy for the failure of the debtors to comply with the settlement of 1959, have obviously been influenced by certain provisions of the Debt Conciliation Ordinance which it is necessary to reproduce here:—

s. 40 (1) A settlement under section 30 or section 31 shall when the original and the 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.

s. 43 (1) 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.

(2) If the court is satisfied, after such inquiry as it may seem necessary, that the petitioner is *prima facie* entitled to the decree in his favour, the court shall enter a decree *nisi* in the petitioner's favour in terms of the settlement. The court shall also appoint a date, notice of which shall be served in the prescribed manner on the debtor, on or before which the debtor may show cause as hereinafter provided against the decree *nisi* being made absolute.

The effect of s.40 in the facts of the present case is that the obligation of the debtors to re-pay the sum of Rs. 20,000/- with interest became merged in the settlement of February 1959. But the "contract in respect of the debt" included the further obligation that the re-payment was secured by the hypothecation of land, and that hypothecation also became merged in the settlement. Neither party to this appeal has contended for the proposition that the settlement had the effect of releasing the debtors from their contractual obligation that the land mortgaged by the bond of 1954 is liable to be declared bound and executable for the payment of the debt due from the debtors in this case. This proposition is negatived in the Proviso to s.40 (1) of Cap. 81. In terms of that Proviso, the rights of the creditor under the mortgage bond of 1954 are deemed to subsist under the settlement, *until the amount of the debt dealt with in the settlement has been paid or the property over which the mortgage was created has been sold for the satisfaction of such debt.*

The concluding words of the Proviso, which I have italicised above, clearly establish that a settlement under the Debt Conciliation Ordinance, unless it expressly provides otherwise, does not extinguish the right of a creditor to obtain a hypothecary decree for the sale of property mortgaged to him as security for a debt. But s.43 of the Debt Conciliation Ordinance appears to have led to some uncertainty as to the mode in which that right is to be enforced.

If a debtor fails to comply with the terms of a settlement, s.43 entitles him to obtain a decree *nisi* in terms of the settlement, and s.44 empowers the Court to make such a decree absolute. But the provisions of the settlement in this case do not in fact authorise a Court to enter a hypothecary decree; the settlement only provides for the rate of interest payable by the debtors and for capital payments to be made by them. On this ground alone, namely that the settlement contains no provision for the entry of a hypothecary decree, I must hold that s.43 of the Debt Conciliation Ordinance did not enable the District Court in this case to enter a hypothecary decree.

But I hold further 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 maintained in conformity with the special procedure laid down in Part II of the Mortgage Act. I have elsewhere referred to the objects and purposes of that Act (*Shafeek v. Solomon de Silva and others*¹); these will be defeated if parties to a mortgage of land, or the members of the Debt Conciliation Board, can in a settlement confer on a Court a jurisdiction to enter a hypothecary decree in defiance of the provisions of the special law contained in the Mortgage Act, and previously contained in the Mortgage Ordinance of 1927.

The Proviso to s. 40 (1) of Chapter 81 provides that the right of a creditor under a mortgage subsists under the settlement, not by the force of the settlement, but by force of the law as enacted in that Proviso. By virtue of the Proviso, that right subsists until the amount (of the debt due under the settlement) is paid or the property over which the mortgage is created has been sold in satisfaction of the debt". There is thus a reference in the Proviso to the forced sale of mortgaged property, and such a sale can lawfully take place only in a hypothecary action, the procedure in which is governed by Part II of the Mortgage Act.

In the case of *Samarasinghe v. Balasuriya*² this Court held that, where a debt due on a mortgage bond has become the subject of a settlement under the Debt Conciliation Ordinance, the obligation to repay the debt thereafter arises on the settlement, and not on the earlier mortgage bond. The judgment therefore rightly held that the action in that case must be dismissed because it was an action to recover the debt due on the bond and not on the settlement. But certain further observations, made *obiter* in that judgment, appear to express the opinion that the creditor's right of mortgage becomes merged in the settlement, and is therefore extinguished or wiped out. With much respect, it seems to me that the Court would not have reached that opinion, if the circumstances of that case had required full consideration of the terms of s. 40 (1) of Chapter 81. The language of the section, in particular of its Proviso, shows that the creditor's former right *under the mortgage*, i.e. the right of hypothec as distinct from the right to receive payment of the debt, continues to subsist under the settlement, even though the settlement may not expressly so provide. The creditor thus retains his right over the property mortgaged to him as security for payment of the debt due under the settlement. A secured creditor cannot lose the benefit of his security, merely because in proceedings before the Debt Conciliation Board he agrees out of sympathy for his debtor to a settlement which only reduces the amount of a debt or the rate of interest payable upon the debt.

¹ (1967) 69 N. L. B. 481.

² (1966) 69 N. L. B. 205.

Learned Counsel appearing for the creditors in this appeal has properly informed us that the advisers of creditors who have been parties to settlement under the Debt Conciliation Ordinance are uncertain as to the correct procedure which is to be followed when debtors fail to carry out the terms of such settlements. I venture therefore to state the following opinion :—

- (a) Where the debt the payment of which is secured by a mortgage bond is the subject of a settlement, the right of the creditor to a hypothecary decree subsists under the settlement, unless the settlement expressly provides otherwise.
- (b) Where the debtor fails to carry out the terms of the settlement, the creditor should apply to a competent Court under s. 43 of Chapter 81 and he can thus obtain a decree absolute to compel the debtor to perform his obligations, principally the obligation to pay the debt and interest, imposed by the settlement.
- (c) Where in addition the creditor desires to obtain a hypothecary decree over the property originally mortgaged to him, his right under the mortgage bond to such a decree is preserved by s. 40 (1) ; but he can obtain such a decree only in a hypothecary action, the procedure in which will be governed by the Mortgage Act.
- (d) The hypothecary decree entered in such an action will render the mortgaged property bound and executable, not for the amount of the original debt, but for the amount of the debt and interest payable in terms of the settlement.

I should add that since the original debt becomes merged in a settlement under the Debt Conciliation Ordinance, such a settlement should clearly set out the amount of the debt to be payable according to its terms.

The decree under appeal is amended by the deletion therefrom of all provisions relating to the mortgaged property, to the said property being bound and executable for the payment of the amount of the decree, and to the sale of the said property, and by the deletion also of the Schedule to the decree.

SIRIMANE, J.—I agree.

Decree amended.