

1967 Present : Manicavasagar, J., and Samerawickrame, J.

G. JOHANAHAMY and 3 others, and K. W. SUSIRIPALA, Respondent

S. C. 46/64—D. C. Galle, 6708/L (N)

Debt Conciliation Ordinance, as amended by Act No. 5 of 1959—Sections 30, 40, 43, 56, 64—Conditional transfer of immovable property—Limited extent to which it is deemed to be a “ mortgage ”—Evidence Ordinance, s. 92—Prevention of Frauds Ordinance, s. 2.

A debt, in respect of which a conditional transfer of immovable property had been executed, was subsequently the subject matter of proceedings before the Debt Conciliation Board. In a settlement which was arrived at, it was agreed between the parties that the capital and interest due to the creditor should be paid by the debtors on dates fixed in the settlement and that in the event of a single default the right to redeem would be at an end. After the debtors committed default in making payments, the creditor sued them in the present action claiming declaration of title to the land described in the conditional transfer. It was submitted on behalf of the defendants that the conditional transfer was in fact a mortgage retaining title in the debtors, that the proceedings before the Debt Conciliation Board were still pending and that, therefore, the plaintiff was not entitled to maintain the action in view of the provisions of sections 43 and 56 of the Debt Conciliation Ordinance.

Held, that the action was maintainable. The amendment to the definition of “ mortgage ” made by Act No. 5 of 1959 has not altered the law relating to the creation of a mortgage over immovable property and has not recognized as a mode of creating a mortgage the execution of a conditional transfer. It merely permits the Debt Conciliation Board to regard a conditional transfer in certain circumstances as a mortgage for the purpose of exercising jurisdiction under the Ordinance in respect of such a transaction. Accordingly, title to the property which is the subject of a conditional transfer falling within the definition is in the transferee and is not retained by the debtor-transferor.

APPEAL from an order of the District Court, Galle.

C. Ranganathan, Q.C., with *N. Jayawickrema*, for the defendants-appellants.

H. W. Jayewardene, Q.C., with *G. P. J. Kurukulasooriya* and *V. Basnayake*, for the plaintiff-respondent.

Cur. adv. vult.

December 3, 1967. MANICAVASAGAR, J.—

I agree with the order made by my brother. The sole purpose of the amendment of 1959 is to enable a vendor, who has entered into an agreement to have the immovable property which he had sold reconveyed to him by the vendee, to seek the intervention of the Board to effect a settlement either in regard to the consideration payable by him on reconveyance, or extension of time, or any other matter which may appear just and reasonable to the Board. Prior to the amendment,

the vendor did not have this remedy because an agreement to reconvey was not a contract of security in respect of a debt within the meaning of the Ordinance. The amendment, as my brother points out, did not create an exception, in respect of an execution of a mortgage, to the formalities imposed by Section 2 of the Prevention of Frauds Ordinance.

The question whether a matter is pending before the Board is one of fact, dependent on the terms of settlement. The settlement effected by the Board and contained in document P1 concluded the matter before the Board, which was *functus* thereafter.

SAMERAWICKRAME, J.—

The plaintiff-respondent brought this action against the defendants-appellants for declaration of title to the land described in schedule B to the plaint and for ejection of the defendants from it.

It would appear that upon deed 2613 dated 11th January, 1958, the defendants-appellants and one Leelaratne transferred their interests in the said land to the plaintiff-respondent subject to an agreement to reconvey the said interests on payment of a sum of Rs. 11,400 within two years from 11th January, 1958. The defendants-appellants and the said Leelaratne made an application to the Debt Conciliation Board and in proceedings held upon that application a settlement was arrived at between the plaintiff-respondent on the one hand and the defendants-appellants and Leelaratne on the other, whereby it was agreed that the arrears of interest due to the plaintiff-respondent and the capital amount due to him should be paid on dates fixed in the settlement. The last two paragraphs of the settlement were as follows :—

- (5) that in the event of any single default the right to redeem will be at an end ;
- (6) that on payment of the full sum the creditor should execute a deed of reconveyance to the debtors at the cost of the debtors.

Thereafter the Proctor for the plaintiff-respondent wrote a letter to the Chairman of the Debt Conciliation Board stating that the debtors had committed default in making payments and asked that the Board should make an order dismissing the application made to it. By his letter (P. 3), the Chairman wrote to the Proctor for the plaintiff-respondent referring to clause 5 of the settlement and stating that an order dismissing the application was not necessary. The plaintiff-respondent thereafter filed the present action against the defendants-appellants alone as Leelaratne had died and his interests had devolved on the defendants-appellants.

The defendants-appellants took up the position in their answer that the conditional transfer executed by them was in fact a mortgage, that the proceedings before the Debt Conciliation Board were pending at the time the action was filed and that the plaintiff was not entitled, therefore,

to have and maintain the action in view of the provisions of Sections 43 and 56 of the Debt Conciliation Ordinance.

At the trial, various issues were framed and the Court took up for decision as preliminary issues the following :—

- (14) Is the plaintiff entitled to maintain this action in view of the provisions of Sections 43 and 56 of the Debt Conciliation Ordinance ?
- (15) Was the matter pending before the Debt Conciliation Board at the time this action was instituted ?
- (16) If so, can the plaintiff have and maintain this action ?

The learned District Judge has answered these issues in favour of the plaintiff-respondent and the defendants-appellants have appealed against his order.

Mr. Ranganathan, Q.C., appearing for the defendants-appellants, submitted that the amendment to the Debt Conciliation Ordinance made by Act No. 5 of 1959 had recognised the creation of a mortgage by the execution of a conditional transfer of land. He submitted, therefore, that the title to the land was at all times in the defendants and that the plaintiff, therefore, could not maintain the action. He further submitted that upon a settlement under Section 30 of the Debt Conciliation Ordinance, the contract in respect of the debt was merged in the settlement and that the mortgage or security created by the conditional transfer subsisted under the settlement to the extent of the amount payable under it in respect of the debt. He submitted that this was the effect of Section 40 of the Debt Conciliation Ordinance. He further submitted that the plaintiff's only remedy was that given by Section 43 of the Ordinance.

It was held as far back as the year 1921 by the Privy Council in the case of *Adaicappa Chetty v. Caruppen Chetty*¹ that Section 2 of the Prevention of Frauds Ordinance prevented the creation of a mortgage otherwise than by a notarial instrument duly executed according to law. It has also been held in a long line of cases that where a person transferred land on a notarial deed, which on the face of it is a transfer, it is not open to the transferor to lead oral evidence to show that the transaction was in fact a mortgage. The leading of such oral evidence is directly prohibited by Section 92 of the Evidence Ordinance. The principles laid down in these cases has been upheld by the Privy Council in the case of *Saverimuttu v. Thangavelautham*², and by a Divisional Bench of Five Judges of this Court in the case of *William Fernando v. Cooray*³. Accordingly, if it had been the intention of the Legislature to alter the law so as to permit the creation of a mortgage by an agreement other than one set out in an instrument which is notarially attested, one would have expected that such alteration of law would have been done by an unambiguous and substantive enactment. I find it difficult to

¹ (1921) 22 N. L. R. 417.

² (1954) 55 N. L. R. 529.

³ (1957) 59 N. L. R. 169.

think that the Legislature intended such a far-reaching alteration in the law by inserting a definition of the term 'mortgage' in the Debt Conciliation Ordinance by Amendment Act No. 5 of 1959.

That amendment provides for the insertion of the following definition of mortgage in Section 64 of the Act which sets out the meanings to be given to terms contained in the Ordinance " unless the context otherwise requires ". The definition is as follows :—" ' Mortgage ', with reference to any immovable property, includes any conditional transfer of such property which, having regard to all the circumstances of the case, is in reality intended to be security for the repayment to the transferee of a sum lent by him to the transferor ". Inclusion of this definition permits the Debt Conciliation Board to regard a conditional transfer in certain circumstances as a mortgage and to exercise jurisdiction under that Ordinance in respect of such a transaction. The Board would, therefore, be entitled to seek to effect a settlement between the transferor and the transferee in respect of the conditional transfer. The settlement would obviously relate to the terms and conditions of payment upon which the transferor would be entitled to obtain a retransfer and would provide for a transfer to be effected by the transferee upon the conditions being satisfied. The settlement P1 provides in clause 6 for such a transfer between the transferee to the transferor upon the payment of the full sum due under the settlement. In clause 5 it further provided that if there was default in any payment the right to redeem would be at an end. As the settlement itself provides that the right to redeem would be at an end, upon the debtors committing a default in payment, I do not see that there can be any disability for the plaintiff to bring an action upon the title that he obtained by the deed of transfer in his favour upon the footing that there had been a default resulting in the right to redeem having come to an end.

Upon the view that I have taken that the amendment to the Debt Conciliation Ordinance does not have the effect of enabling persons to create mortgage other than by notarially attested instruments and that, therefore, the transferee upon conditional transfer has the title, it is unnecessary to consider the elaborate argument put forward by Mr. Ranganathan upon the basis that the title remained in the debtors. I am also of the view that, upon the assumption that a default in payment had been committed as alleged by the plaintiff-respondent, in terms of clause 5 of the settlement, the right to redeem would have ceased to exist and the Board could have no further jurisdiction to deal with any matter relating to this transaction and that, therefore, the application in respect of it could not be said to have been pending thereafter.

I am, accordingly, of the view that the learned District Judge has come to correct findings in respect of the preliminary issues and that his order must be affirmed. The case will now have to go back for trial in respect of the other issues. The plaintiff-respondent will be entitled to his costs of appeal.

Order affirmed.