Rajiyah and another

v.

Aboobakker & Others

COURT OF APPEAL.
SOZA, J. AND RODRIGO, J.
C.A. (S.C.) NO. 602/73 (F)—D.C. KANDY NO. 4603/M.B.
OCTOBER 20, 1978.

Mortgage—Proceedings under Debt Conciliation Ordinance—Distinction between novation and merger of debt—Does the mortgage subsist after the entering of a settlement—Whether creditor entitled to a hypothecary decree after settlement before Debt Conciliation Board.

Res judicata—Withdrawal of action on mortgage bond—Settlement before Debt Conciliation Board—Institution of fresh action on settlement—Whether fresh cause of action.

Debt Conciliation Ordinance (Cap. 81), section 43—Conciliation Boards Act, No. 10 of 1958, section 6—Is certificate from Conciliation Board necessary before institution of action after inquiry and settlement before Debt Conciliation Board—Applicability of maxim "generalia specialibus non derogant."

Held

(1) Where an action is filed on the basis of a settlement entered into at the Debt Conciliation Board on a mortgage debt, the withdrawal of consent and dismissal of an earlier action filed in the District Court on the same mortgage bond does not operate as res judicata. The two causes of action are not identical.

(2) The entering of the settlement before the Debt Conciliation Board extinguishes the original debt by novation, the creditor being now entitled to seek payment of the new debt due under the settlement, but it does not extinguish the mortgage which persists. The mortgagee is entitled in respect of the settlement to enforce his legal rights in a hypothecary suit under the provisions of Part II of the Mortgage Act or follow the procedure laid down in section 43 of the Debt Conciliation Ordinance.

(3) Where a dispute regarding a debt has been inquired into by the Debt Conciliation Board, a further application or reference to the Conciliation Board established under Act, No. 10 of 1958 is unnecessary. The Debt Conciliation Ordinance deals specially with the settlement of debts and is unaffected by the Conciliation Boards Act which deals with the conciliation of disputes generally. The maxim *generalia specialibus non derogant* applies.

Cases referred to

(1) *Samarasinghe v. Balasuriya, (1966) 69 N.L.R. 205.*
(2) *Ebbs v. Boulnois, (1875) 10 L.R. Ch. App. 479.*
(3) *The Vera Cruz, (1884) 10 A.C. 59; (1881-85) All E.R. Rep. 216; 52 L.T. 474; 1 T.L.R. 111.*
(4) *Arnolis v. Hendrick, (1972) 75 N.L.R. 532.*
(5) *Sawdoon Ummia v. Fernando, (1968) 71 N.L.R. 217.*
(6) *Nona v. Engalthina Hamy, (1969) 72 N.L.R. 152.*

APPEAL from the District Court, Kandy.

M. S. M. Nazeem, for the defendant-appellant.

C. Ranganathan, Q.C., with *Dr. N. Tiruchelvam*, for the 2nd plaintiff-respondent and substituted plaintiff-respondent.

Cur. adv. vult.

December 13, 1978.

SOZA, J.

In this case the original plaintiffs who were husband and wife sued the 1st, 3rd and 5th defendant-appellants and three others for the recovery of a sum of Rs. 215,000 as balance principal and Rs. 11,108 as arrears of interest alleged to be due on bond No. 3310 dated 3rd April, 1961, whereby the estate called Goorookelle described in the schedule to the plaint was hypothecated as security for the repayment of the debt. There were six debtors who were made 1st to 6th defendants in the case. Although summons was served on all, only the 1st, 3rd and 5th defendants appeared and defended the action. The case went to trial *ex parte* as against the 2nd, 4th and 6th defendants.

Prior to the filing of the present suit the plaintiffs had instituted action No. MB 4256 in the District Court of Kandy against the same defendants in respect of the same bond on 23rd January, 1967. In the meantime an application appears to have been made before the Debt Conciliation Board and on 9.9.1968 a settlement was entered into by the parties. On 12.12.1968 in terms of this settlement acion No. 4256 was withdrawn. The proceedings of 12.12.1968 read as follows :

" Case called.

Both Proctors present.

In view of the settlement arrived at before the Debt Conciliation Board Mr. Balasingham moves to withdraw this action.

Allowed.

The plaintiffs' action is dismissed without costs

Enter decree ".

As the defendants failed to fulfil their obligations under the settlement of 9.9.1968 the plaintiffs instituted the present suit. Three main questions were raised before us namely :

(i) The decree in MB 4256 operates as *res judicata* to bar the present suit ;

(ii) As the plaintiffs had not obtained a certificate from the Conciliation Board the present suit should not be entertained ;

(iii) In any event the plaintiffs' suit is badly constituted and the plaintiff is not entitled to a hypothecary decree.

Preliminary to considering the questions that arise in this case it will be useful to have a clear notion of what the term mortgage means in law. The term 'mortgage' is sometimes employed to denote a right, sometimes the property subject to that right and frequently even the contract by which the right is created—see *Voet* 20.1.1. and *Wille* : *The Law of Mortgage and Pledge in South Africa,* 2nd ed., 1961, p. 1. In its comprehensive sense mortgage is a right over the property of another which serves to secure an obligation—see *Wille (ibid)*, p. 1. The mortgage right is merely accessory to the principal obligation. The principal obligation may arise from various causes but it often takes the shape of a debt arising from the lending of money. A mortgage may arise by agreement between the parties (express mortgage) or by operation of law (legal or tacit mortgage) or by judicial attachment (judicial mortgage). As the mortgage is only accessory to the principal obligation, as a general rule unless there is an original or principal obligation there can be no mortgage—*Voet* 20.1.18. Voet mentions certain exceptions to this rule (see 20.1.19) but these have no relevance so far as the present suit is concerned.

The right that a mortgagee obtains is a *jus in re aliena* or real right over the property secured. This real right of the mortgagee is to hold the property as security for his debt until his debt has been paid or satisfied. For the purpose of enforcing his real right the mortgagee has an action known in the Roman and Roman Dutch Law as the *Actio Hypothecaria* or *quasi-Serviana* or simply as the *Actio Serviana.* The mortgagee is entitled to have the property sold when the mortgagor is in default of his obligations under the contract, e.g., failing to pay the debt when it is due or the interest or breaking any other condition of the contract entitling the mortgagee to foreclose or when the mortgagor becomes insolvent.

There are thus three essential elements in a mortgage :

(i) An obligation which has to be secured ;

(ii) The property of another to which the mortgage right is to attach ; and

(iii) The calling of the mortgage right into existence—See *Wille (ibid)* pages 3, 82 and 83.

On the principal obligation being extinguished generally the mortgage too is extinguished. Voet lists payment, set off, novation, foregoing and merger among the occasions when the principal obligation is wiped off (20.6.2). For the purposes of the instant case only novation and merger need mention.

Ulpian defines novation thus (D 46.2.1. pr) :

> "Novation is the merging and transfer of a prior debt into another obligation either civil or natural, that is, the constitution of a new obligation in such a way as to destroy a prior one"

Pothier's definition is simpler :

> "A novation is a substitution of a new debt for an old. The old debt is extinguished by the new one contracted in its stead, for which reason a novation is included amongst the different modes in which obligations are extinguished"—see *Pothier on Obligations,* Evans Translation (1806), pp. 380, 381 (P III C2 Art. 1 para 546).

From the principal that a novation extinguishes the "ancient debt" it follows also that it extinguishes the hypothecations which are accessory to it—*novatione legitime facta liberantur hypothecae.* But the creditor may by the very act which contains the novation transfer to the second debt the hypothecations which were attached to the first—see *Pothier (ibid),* p. 391, (P. III C.2 Art. V para 563). Therefore when there is novation of the original debt such novation destroys the mortgage unless at the time of the novation it has been expressly agreed to keep the mortgage alive. The difference between novation of the debt and novation of the mortgage must be clearly borne in mind. Novation of a mortgage takes place where the parties have clearly substituted some fresh right in place of the mortgage—see *Wille (ibid),* pp. 121 and 129.

We will now turn to merger. Merger, as the term is known to the Roman Dutch Law, takes place when the titles of the obligor and obligee in respect of the same obligation or of the owner of a *ius in re aliena* and of such *res* unite in the same person. When such merger takes place it extinguishes the obligation or the *ius* as the case may be—see *Lee: Introduction to Roman-Dutch Law,* 5th ed. (1953), page 278, *Voet*: 46.3.18. Merger is regarded by many as synonymous with *confusio* but the two terms are not always co-extensive. When merger occurs there is no substitution of a new obligation or of a new *ius* and in this respect the concept of merger differs from that of novation. When *confusio* or merger of the principal debt takes place it

extinguishes the debt and with it the mortgage accessory to it—see *Wille* (*ibid*), p. 123. Merger of the titles of the mortgagor and mortgagee in the same person extinguishes the mortgage (*Wille* (*ibid*), p. 130) but not necessarily the debt.

The meaning and effect of the expression merger was explained by Sansoni, C.J. in *Samarasinghe v. Balasuriya* (1) at 208 :

> " The effect of merger has been described in various ways, and it has been likened at different times to annihilation, or sinking or drowning ".

We may now consider the application of the principles we have discussed to the case in hand.

The decree in case No. MB 4256 is in respect of a cause of action arising on the old debt. The present suit is filed on a cause of action arising on the basis of the new debt as envisaged in the settlement. Hence the two causes of action are not identical and no question of *res judicata* arises. Further, one of the terms of the settlement itself was that action No. MB 4256 would be withdrawn and the plaintiffs did no more than honour an obligation under the settlement.

It must be observed that the novation of the old debt would extinguish also the ancillary mortgage but the proviso to subsection (1) of section 40 of the Debt Conciliation Ordinance expressly conserves the mortgage by a deeming provision. The mortgage is deemed to subsist under the settlement, that is, as a tacit or legal mortgage. Moreover in the instant case the mortgage is preserved in the terms of the settlement itself. Hence the mortgage attaches itself to the new debt and subsists as an express mortgage.

I will now turn to the second ground of objection that this action should not be entertained as no certificate has been obtained from the Chairman of the Conciliation Board as required by section 14(1) of the Conciliation Boards Act, No. 10 of 1958. Under this Act the Conciliation Board set up for a particular area has jurisdiction to inquire, with a view to conciliation and settlement, into any dispute to any movable property kept, or any immovable property wholly or partly situate, or in respect of a cause of action arising, or contract made, within its area. Except with a certificate from the Chairman of that Board that the dispute in question has been inquired into by the Board and that it has not been possible to effect a settlement of such dispute no suit can be instituted in or entertained by any court—see

sections 6 (*a*), (*b*) and (*c*) and 14(1) (*a*) of the Conciliation Boards Act. If a settlement is effected it will be made into a decree of Court—see section 13.

On the other hand under the Debt Conciliation Ordinance, No. 39 of 1941 (L.E.C. Cap. 81), statutory provision had already been made for the settlement of disputes pertaining to debts by the Debt Conciliation Board. No civil action can be entertained in any civil court in respect of any matter pending before the Board—section 56 of the Debt Conciliation Ordinance. The decision of the Board in regard to the existence and amount of the debt or the assets of the debtor is binding on all parties in all proceedings before the Board—section 37. If the Board is unable to bring about a settlement a certificate will be issued to the debtor the effect of which will be to deprive the creditor of his costs of suit and also limit the interest recoverable should the creditor institute action in Court—sections 29, 32 and 39. If the dispute is settled the settlement is final between the parties—sections 30, 31 and 40(1). If the dispute is settled and the debtor fails to comply with the terms of the settlement then the creditor can apply by summary procedure to a civil court having jurisdiction for a decree nisi in terms of the settlement and then, if the debtor fails to show cause a decree absolute—see section 43.

It will be seen that while the Conciliation Boards Act of 1958 provides generally for the conciliation of all disputes the Debt Conciliation Ordinance provides specially for the settlement of disputes relating to debts. As James, L. J. said in *Ebbs v. Boulnois* (2) at 434:

> "It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other".

The maxim *generalia specialibus non derogant* applies. This maxim was thus formulated by the Earl of Selborne, L. C. in his speech from the Woolsack in the case of *Mary Seward v. The owner of the Vera Cruz—The Vera Cruz* (3) at 68:

> "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

To insist on reference to a Conciliation Board of disputes pertaining to debts dealt with by the Debt Conciliation Board may lead to conflicting situations. The settlement by the Conciliation Board may differ from that effected by the Debt Conciliation Board. The Court will then be confronted with two competing settlements both entitled to be embodied in decrees of Court. This would lead to absurd results. Further, once a debt is settled or otherwise dealt with by the Debt Conciliation Board there is no longer a dispute such as is contemplated in section 6(*a*), (*b*) or (*c*) of the Conciliation Boards Act. Moreover the dispute contemplated by the Legislature in section 6 of the Conciliation Boards Act should be one capable in law of conciliation. The settlement effected must be convertible into a legally effective decree. This is why reference to the Conciliation Board is not an essential preliminary to a divorce suit or a partition action—see the case of *Arnolis v. Hendrick* (4) at 534:

Where a dispute regarding a debt is inquired into and a certificate is issued under the provisions of the Debt Conciliation Ordinance, certain legal consequences follow. To require a further reference to the Conciliation Board would place these legal consequences in jeopardy of variation or even nullification. The Debt Conciliation Ordinance deals specially with the settlement of debts and is unaffected by the Conciliation Boards Act which deals with the conciliation of disputes generally. Hence we hold that the failure to obtain a certificate from the Chairman of the Conciliation Board is not a bar to the present suit.

The third question regarding the constitution of the action can be disposed of by reference to three recent cases. In the first of these *Samarasinghe v. Balasuriya* (*supra*) Sansoni, C. J. considered a case where after a settlement had been entered under the provisions of the Debt Conciliation Ordinance a creditor filed action on the original bonds. As the debt due on these bonds had been extinguished and a new debt substituted therefor under the settlement His Lordship held that the suit could not be maintained. Although the language of subsection (1) of section 40 is that the "contract in respect of any debt dealt with in the settlement shall become merged in the settlement" the legal notion involved is one of novation rather than one of merger in the strict sense. The settlement represents a novation of the old debt which is extinguished.

In the case of *Sawdoon Umma v. Fernando* (5), H. N. G. Fernando, C J. considered the effect of sections 40 (1) and section 43 (1) of the Debt Conciliation Ordinance and held that once a settlement is entered in respect of a debt due on a

mortgage bond, and a suit is brought in accordance with section 43 of the Debt Conciliation Ordinance, the Court cannot enter a hypothecary decree. His Lordship stated as follows at page 220 :

> " If a debtor fails to comply with the terms of a settlement, section 43 entitles him to obtain a decree nisi in term 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 decision was based on the fact that the settlement contained no provision for the entering of a hypothecary decree, and in such an event neither will section 43 empower the entering of a hypothecary decree. His Lordship H. N. G. Fernando, C.J. pointed out that the statement of Sansoni, C.J. in *Samarasinghe v. Balasuriya* (*supra*) that the creditor's right of mortgage becomes merged in the settlement and is therefore extinguished or wiped out has been made *obiter*. His Lordship H. N. G. Fernando, C.J. went on to say at p. 221 that the true position is that according to the proviso :

> " 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 the debt or the rate of interest payable upon the debt ".

His Lordship after considering the terms of the Debt Conciliation Ordinance expressed the following opinion at page 222 :

> " (*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".

We would refer to another passage appearing in *Samarasinghe v. Balasuriya* (*supra*) which appears to be obiter. At page 208 it is stated as follows :—

> "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".

With great respect, we would venture to say that correctly stated the position is that the entering of the settlement extinguishes the debt but not the mortgage. In place of the debt due under the contract there is now a new debt due under the settlement. With the rest of that passage we would agree. The provisions of the Debt Conciliation Ordinance under discussion were considered also in the case of *Nona v. Engalthina Hamy* (6). His Lordship Alles, J. who wrote the judgment in that case approved the views expressed by H. N. G. Fernando, C.J. in *Sawdoon Umma v. Fernando* (*supra*) and held that the use of the permissive word "may" in section 43 (1) confers on the creditor the right to elect whether he will proceed to exercise his rights under that section or seek satisfaction of his debt by having recourse to a hypothecary action. This case and the decision of H. N. G. Fernando, C.J. are authority for the proposition that where a settlement is entered before the Debt Conciliation Board in respect of a debt secured by a mortgage of immovable property, the mortgagee is entitled in respect of the settlement to enforce his legal rights in a hypothecary suit under the provisions of Part II of the Mortgage Act or follow the procedure laid down in section 43 of the Debt Conciliation Ordinance. Here we should bear in mind that the debt in respect of which the

creditor is entitled to seek payment is under the settlement. While the debt is novated the old mortgage persists. In the instant case the plaintiff has filed his action seeking to recover the debt as set out in the settlement. He has in fact in paragraph 5 of his plaint set out in full the terms of settlement which were entered into before the Debt Conciliation Board. The steps that were taken from the institution of the plaint are in accordance with the steps prescribed by the Mortgage Act. Hence the objection that this action has been improperly constituted is untenable. The plaintiff is entitled to a hypothecary decree in respect of his debt as novated by the settlement. For the reasons given we dismiss this appeal with costs.

RODRIGO, J.—I agree.

Appeal dismissed.