

1978          *Present: Rajaratnam, J., Vythialingam, J. and  
Sharvananda, J.*

W. K. BABY NONA, Appellant

*and*

P. G. DON DINES SILVA, Respondent

S.C. 323/71 (F)—D.C. Tangalla 1416/L

**Debt** *Conciliation Ordinance (Cap. 81), section 43—Amending Act No. 5 of 1959—Conditional transfer—Settlement between transferor and transferee before Board—Default by transferor—Right of purchaser from transferee (creditor) to maintain vindictory action—Whether provisions of section 43 applicable in such a case.*

Where a transferor on a conditional transfer applies to and obtains relief from the Debt Conciliation Board, but defaults thereafter in complying with the terms of settlement which provided that the right to redeem was to be at an end in the event of any default, a purchaser from the transferee gets good and valid title and can maintain an action *rei vindicatio* even against the heirs of such transferor. Section 43 of the Debt Conciliation Ordinance does not apply to the case of conditional transfers.

Cases referred to :

*Johanahamy v. Susiripala*, 70 N.L.R. 328.

*Adaicappa Chetty v. Caruppen Chetty*, 22 N.L.R. 417.

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

*S. Ruthiramoorthy*, with *A. P. Niles*, for the defendant-appellant.

*H. W. Jayewardene*, Q.C., with *N. R. M. Daluwatte* and *Miss A. Aboosaly*, for the plaintiff-respondent.

*Cur. adv. vult.*

July 25, 1978. RAJARATNAM, J.

The plaintiff had filed this action against the defendant-appellant for a declaration of title to the land described in paragraph 3 of the plaint, for ejectment of the defendant therefrom and for damages. The plaintiff by deed No. 9666 of 3.10.64 had purchased from one Edirisinghe Don Davith the premises in suit subject to the vendor's life interest. This land was subject to a settlement arrived at before the Debt Conciliation Board under s. 30 of the Ordinance, between Edirisinghe Don Davith and Malhamy the creditor and debtor, vide P3. In terms of the settlement the debtor was to pay the creditor quarterly instalments of Rs. 450 each commencing on the last date of June 1962 and thereafter on or before the last day of each and every succeeding quarter until the full sum was paid off and in the event of any default the right to redeem was to be at an end. The transaction between Edirisinghe Don Davith and Malhamy was a conditional transfer. The defendant is the daughter of Malhamy who died in 1970 leaving five children of whom the defendant is one. The payment of the agreed instalments were to be completed by 31.12.63. It is admitted that Malhamy had not defaulted except with regard to a sum of Rs. 150 which was outstanding. The account of the instalments due and the instalments paid are detailed in D2 which is a letter sent to Malhamy by the Proctor for the creditor Mr. A. S. de Silva on 24.12.63. By D2, Malhamy was requested to pay a balance sum of Rs. 150 and get the deed of re-transfer written. On the settlement as stated in P3, if this sum was due and in default, it was agreed that the right to redeem was to be at an end. The sum of Rs. 3,000

was to be paid out at the end of every quarter and therefore before 31.12.63 Malhamy appears to have sent the six instalments totalling Rs. 2,700 but on 20.12.63 she had paid only Rs. 150 and the Proctor in all fairness had reminded her of this balance. But she appears to have not tendered this money, as her letter D3 of 8.6.65 to the Secretary, Debt Conciliation Board, reveals. This letter states that in accordance to the letter D2 of 24.12.63 she paid by Money Order a sum of Rs. 150 on 16.10.64 which clearly is outside the period stipulated in the settlement. It also refers to the return of the Money Order and the Proctor refusing to accept same. By D3 she requested the Debt Conciliation Board to get the transfer effected. The defendant's position in Court, however, was that within 2 weeks of the letter D2 they went to Davith's Proctor who refused to accept the Rs. 150 and to re-transfer the land. We are unable to disturb the finding of the trial Judge on the crucial and factual point whether Malhamy was in default or not. On the evidence of the defendant herself Malhamy lost her right to redeem. The whole matter undoubtedly was unfortunate but we are compelled to hold by the terms of the agreement and the evidence led that Malhamy had lost her right to redeem her property.

Learned Counsel for the defendant-appellant valiantly argued—

(1) That time was not the essence of the agreement and in view of the fact that the whole debt more or less has been paid with only Rs. 150 outstanding, Malhamy could not have been said to have defaulted and lost her right to redeem her property

(2) That the property had after the alleged default been transferred by Edirisinghe Don Davith to the plaintiff by deed No. 9666 on 3.10.64 when the former was of unsound mind and therefore the deed was not the act of Edirisinghe Don Davith.

(3) In any case s.43 of the Debt Conciliation Boards Ordinance applied with regard to the first submission, and the failure of Edirisinghe Don Davith to go into a competent Court on the debtor Malhamy's default was fatal to the plaintiff's case.

On the first submission, certainly the amount in default is small and considering the circumstances, the equities lay with Malhamy, though technically there was a default in terms of the settlement. On other hand we cannot ignore the following circumstances :

(a) The letter D2 which in all fairness was written to Malhamy on 24.12.63. Her default was revealed to her well in time.

- (b) The conduct of Malhamy not availing herself of the opportunity given to her and her tender of the sum only in October 1964 according to D3 and the answer filed by the defendant.
- (c) The conduct of the defendant in stating for the first time that Malhamy tendered the money soon after D3 which the Proctor refused.
- (d) Malhamy not being vigilant even after she received D2 in not making payment soon after or getting a re-transfer. She had slept over her rights if any.

The Court is reluctantly compelled to reject this submission and is unable to hold that Malhamy was not in default.

With regard to the second submission the letter D3 sent by Malhamy on 8.6.65 does not refer to the fact that the creditor was of unsound mind. The deed of sale No. 9666 was attested on the 3rd of October 1964. The evidence with regard to his insanity relates to a period in 1966. Proctor H. S. de Silva was unhelpful to the defence. He was called by the defendant. He stated that in May 1965 he got instructions from Edirisinghe Don Davith to file an action M/7525. This submission too fails.

With regard to the 3rd submission, learned counsel for the appellant cited the judgment of Samerawickrema, J. in the case of *Johanahamy v. Susiripala*, 70 N.L.R. 328, and referred us to section 43 (1) of the Debt Conciliation Ordinance which reads :—

“Where the debtor fails to comply with the terms of settlement under this Ordinance, any creditor may except in a case where a deed or instrument has been executed.....  
.....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”.

“ (2) If the court is satisfied.....that the petitioner is *prima facie* entitled to the decree in his favour, the court shall enter a decree *nisi* in his favour in terms of the settlement. The court shall also appoint a date ..... for the debtor to show cause against the *decree nisi* being made absolute.”

The “Court of competent jurisdiction” has been defined to mean any court in which the creditor could have filed action for the recovery of his debt.

I am mindful of the fact that when section 43(1) came into existence, the term 'debt' and 'debtor' did not include a conditional transfer or conditional transferor but by the amending Act No. 5 of 1959 conditional transfer and the conditional transferor were brought into the scope of the operation of the Debt Conciliation Board Ordinance. The Privy Council in the case of *Adaicappa Chetty v. Caruppen Chetty*, 22 N.L.R. 417, held that s. 2 of the Prevention of Frauds Ordinance prevented the creation of a mortgage otherwise than by notarial instrument duly executed according to law. It is not open to the transferor of a conditional transfer to lead evidence to show that the actual transaction was in fact a mortgage nor does the extended operation of the provisions of the Debt Conciliation Ordinance beat the provisions of s. 92 of the Evidence Ordinance which prohibits the leading of oral evidence in such cases. It is not possible to say the law was altered by the amending Act No. 5 of 1959 being the mere extension of the operation of the Ordinance to include conditional transfers. I am fortified by the view of Samerawickrema, J. in Johanahamy's case (70 N.L.R. at 331) which case was referred to by learned Counsel for the appellant. One of the issues raised in the original Court in the said case which was also a case where the 'debtor' in a conditional transfer defaulted the terms of the settlement, was "Is the plaintiff entitled to maintain this action (a *rei vindicatio* action) in view of s. 43 of the Debt Conciliation Board"? The trial Judge answered that the plaintiff was entitled to do so. Samerawickrema, J. held on this point "In clause 5 (of the settlement before the Board) it further provided that, if there was a 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 debtor committing a default in payment, I do not see 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". The meaning and purpose of the provisions of the Ordinance is to enable the conditional transferors in the merciful generosity of the legislature to have once again a right they have lost to redeem the property. This right in terms of the settlement in the present case as in Johanahamy's case rests with the transferor as long as he does not default, but as in Johanahamy's case, in the present case "in the event of any default the right to redeem is at an end" (Clause 3 of P3). Far from supporting the submission of learned counsel for the appellant, the decision in Johanahamy's case cuts across his argument.

The transferee had a deed in his favour, the right of the transferor to redeem in terms of the deed was lost. The transferee was entitled to his property but by the operation of the provisions of the Ordinance a settlement was arrived at which gave the defendant's mother, Malhamy, a conditional right to redeem it. She defaulted and the transferee therefore in terms of the settlement, the transferor having lost her right to redeem it, sold the land to the plaintiff as he lawfully could have. The transferee died thereafter. Both the transferee and then the plaintiff became owners of the property in suit, when Malhamy lost her right to redeem it.

• It is my view that s. 43 of the Ordinance does not apply to cases of conditional transfers and I follow the decision in *Johanahamy v. Susiripala (supra)*.

The appeal therefore is dismissed with costs.

VYTHIALINGAM, J.—I agree.

SHARVANANDA, J.—I agree.

*Appeal dismissed.*

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