1969 *Present :* Alles, J., and Pandita-Gunawardene, J.

S. P. NONA and another, Appellants, *and* H. ENGALTHINAHAMY, Respondent

S. C. 104/67 (Inty.)—D. C. Kurunegala, 1644/MB

Debt Conciliation Ordinance (Cap. 81)—Sections 40 (1) and 43 (1)—Debt secured by mortgage of immovable property—Settlement before Board—Default of payment thereafter—Right of mortgagee to institute hypothecary action then—Procedure.

Where the creditor and debtor in respect of a debt secured by a mortgage of immovable property enter into a settlement before the Debt Conciliation Board whereby it is agreed *inter alia* that in case of any default the mortgagee is entitled to all his legal rights including mortgagee's remedies to sue and recover in a court of law in a consolidated sum any amount due on the settlement, it is open to the mortgagee, if the mortgagor defaults in payment subsequently, to institute a hypothecary action under the provisions of Part II of the Mortgage Act. In such a case the Court has jurisdiction to entertain the hypothecary action without following the procedure laid down in section 43 of the Debt Conciliation Ordinance. The law grants a discretion to a creditor, in the case of a secured debt, to choose whether he should proceed under Section 43 or not.

APPEAL from an order of the District Court, Kurunegala.

Lakshman Kadirgamar, with *P. N. Wikramanayake*, for the defendants-appellants.

Felix R. Dias Bandaranaike, for the plaintiff-respondent.

Cur. adv. vult.

July 25, 1969. ALLES, J.—

On 21st January 1959, the defendants executed Mortgage Bond No. 210 whereby they bound themselves to pay the plaintiff a sum of Rs. 1,250 with interest at 12% per annum. As security for the said debt they mortgaged and hypothecated with the plaintiff as a primary mortgage the premises described in the schedule to the bond. Having defaulted in the payment of the principal and interest the parties effected a settlement before the Debt Conciliation Board under the provisions of the Debt Conciliation Ordinance, No. 39 of 1941. The terms of the settlement were entered on 11th May 1961 and have been produced as the document marked 'X' 1. According to the terms of the settlement it was agreed that on 21st January 1965, the amount due to the plaintiff was Rs. 1,250 as capital and Rs. 350 as interest. It was agreed that the instalments of principal and interest were to be paid annually by the defendants from 1965 to 1968. Clauses 7 and 8 of the settlement read as follows :—

(7) that if the payments are made the creditor will discharge the mortgage bond and deliver it to the debtor with the title deeds ;

(8) that in case of any default the creditor is entitled to all his legal rights including mortgagee's remedies to sue and recover in a court of law in a consolidated sum any amount due on this settlement.

An instalment of the interest amounting to Rs. 350 being due before the last day of August 1965 and the defendants having defaulted in this payment, the plaintiff instituted this action on the mortgage bond on 5th October 1965. The defendants in their answer filed on 4th June 1966 stated that the proceedings adopted by the plaintiff were in contravention of Section 43 (1) of the Debt Conciliation Ordinance. Nevertheless on 24th September 1966 the case was settled and judgment was entered for the plaintiff in a sum of Rs. 1,350 with costs fixed at Rs. 150 and legal interest. Order to sell was not to issue for six months in the first instance and the Court entered a hypothecary decree. On 27th March 1967 the defendants filed petition and affidavit and moved that the proceedings be declared void *ab initio* and prayed for a dismissal of the action. The learned District Judge after inquiry made order dismissing the application with costs and stated that the judgment creditor would be entitled to proceed with his writ after a proper application to the Court. In the Court below the only question that was in issue was whether the Court had jurisdiction and the learned trial Judge held that inasmuch as the conduct of the defendants revealed a lack of *bona fides* it was not open to them to raise this issue. The present appeal is from the interlocutory order made by the learned District Judge and the execution of the decree has been stayed pending the disposal of this appeal.

The main contention of counsel for the defendants-appellants was that the Court acted without jurisdiction in entertaining the hypothecary action without following the procedure laid down in Section 43 of the Debt

Conciliation Ordinance. For the purposes of considering the submissions of counsel it is necessary to reproduce Sections 40 (1) and 43 of the Ordinance which read as follows :—

S. 40 (1). A settlement under Section 30 or Section 31 shall, when the original and duplicate thereof have been counter-signed 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 interpretation of these two Sections have been considered in two recent judgments of this court—*Samarasinghe v. Balasuriya* [1] and *Saudoon Umma v. Fernando* [2].

In both cases, as in the present case, the debts were secured by a mortgage of immovable property. In the former case Sansoni, C.J. held that the plaintiff had mistaken his remedy in suing on the mortgage

[1] *(1966) 69 N. L. R. 205.* [2] *(1968) 71 N. L. R. 217.*

bonds when, after the settlement, the right of action which the plaintiff would have had was not on the contracts contained in the mortgage bond which had become merged in the settlement. The learned Chief Justice held that the debt due from the defendant to the plaintiff became a *new* debt, due not on the bonds but on the settlement, and that his remedy to recover his debt was under Section 43. In the latter case, after the settlement, the creditor made an application to the District Court praying for a decree to be entered in terms of the settlement and also praying that a hypothecary decree be entered for the sale of the property mortgaged to the creditor. The Chief Justice held that Section 43 of the Debt Conciliation Ordinance did not enable the District Court to enter a hypothecary decree and went on to hold further that a settlement under the Debt Conciliation Ordinance cannot confer jurisdiction on a Court, even by express provision to enter hypothecary decree, which could only be maintained in conformity with the special procedure laid down in Part II of the Mortgage Act. The learned Chief Justice in the course of his judgment in *Sawdoon Umma v. Fernando* had occasion to consider the rights of a mortgagee in a case where a settlement has been effected under the Debt Conciliation Ordinance and in particular dealt with the proviso to Section 40 (1) and made the following observations, with which I am in respectful agreement :—

> " 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 the payment of the debt due under the settlement. "

In the present case under the proviso to section 40 (1) not only was the statutory right of the mortgagee preserved, but there is an express provision in the terms of settlement which entitled the creditor to institute a hypothecary action. Learned Counsel for the appellant, while conceding the right of the creditor to obtain a hypothecary decree over the property originally mortgaged to him, maintained that such a right was only available after he had exhausted his remedy under Section 43 of the Debt Conciliation Ordinance and that therefore the trial Judge had no jurisdiction to entertain the hypothecary action. I am unable to agree. The creditor is only *entitled* under Section 43 to obtain a decree *nisi* and the use of the permissive word 'may' in Section 43 (1) grants him a discretion as to whether he chooses to exercise his rights under the Section or not. It may well be that in the case of an impecunious debtor the creditor does not consider it worth his while proceeding under Section 43 of the Ordinance and thereby obtaining an empty decree, but prefers to seek satisfaction of his debt under the more profitable hypothecary action. In this connection, with respect, I am inclined to think that in (*b*) of the opinion expressed by the learned Chief Justice in *Sawdoon v. Fernando* 71 N. L. R. at page 222 the learned Chief Justice intended that

the words 'should apply' should mean 'is entitled to apply'. Indeed the learned Judge earlier in the same judgment stated that under Section 43 the creditor is only *entitled* to obtain a decree *nisi*.

In my view the law grants a discretion to a creditor in the case of a secured debt to choose, whether he should proceed under Section 43 or not. Needless to say in the case of an unsecured debt the only remedy available to the creditor is that prescribed under Section 43 (1) of the Ordinance.

The creditor in this case was entitled to file a hypothecary action to recover the amount of his debt and his action is a properly constituted one under the provisions of Part II of the Mortgage act. The appeal is therefore dismissed with costs.

PANDITA-GUNAWARDENE, J.—I agree.

Appeal dismissed.