1950 *Present :* **Jayetileke C.J. and Nagalingam J.**

FERNANDOPULLE, Appellant, *and* PERERA APPUHAMY, Respondent

S. C. 172—D. C. Negombo, 15,385

Debt Conciliation Ordinance, No. 39 of 1941—Meaning of "debtor"—"Mortgage" does not include "Moratuwa mortgage"—Matter pending before Debt Conciliation Board—Bar of civil actions—Sections 32, 36, 56.

Where there was a transfer of property with an undertaking to re-sell it within a specified time, and the transferor continued to be in possession of the property—

Held, that the transaction was not in form a mortgage or charge over property and could not, therefore, be the subject-matter of proceedings before the Debt Conciliation Board. The term "mortgage or charge" in Ceylon cannot be said to include transactions called "Moratuwa mortgages" which are the local equivalent of the English and Indian mortgages.

Held further, (i) that section 56 (*a*) (ii) of the Debt Conciliation Ordinance could not prevent a proceeding held before the Debt Conciliation Board from being declared by a Court of Law as invalid for want of jurisdiction.

(ii) that the Debt Conciliation Board had no power under section 32 of the Ordinance to make an order postponing *sine die* the hearing of a matter before it and thus to prevent the creditor, under section 56, from exercising the legal rights which are expressly conserved to him by section 36.

APPEAL from a judgment of the District Court, Negombo.

Defendant conveyed certain property to the plaintiff for a consideration of Rs. 4,000. It was further agreed that plaintiff was to retransfer the property to the defendant if the defendant paid a sum of Rs. 4,000 together with a stipulated rate of interest thereon within a period of four years. Defendant continued to be in possession of the property notwithstanding the conveyance in favour of the plaintiff. After the expiry of the four years provided in the deed, plaintiff instituted action to obtain possession of the property and for ejectment of the defendant therefrom. The learned District Judge rejected the plaint on the ground that the subject-matter of the suit was one that was pending before the Debt Conciliation Board and that the Court could not, therefore, entertain the action by virtue of the provisions of section 56 of the Debt Conciliation Ordinance. The plaintiff, thereupon, appealed.

N. E. Weerasooria, K.C., with *K. C. de Silva* and *E.R.S.R. Coomaraswamy*, for the plaintiff appellant.

C. Renganathan, with *Ivor Misso* and *R. K. Herman*, for the defendant respondent.

Cur. adv. vult.

November 23, 1950. NAGALINGAM J.—

This is an appeal by the plaintiff from an order of the learned District Judge of Negombo rejecting the plaint filed by him on the ground that the subject-matter of the suit is one that is pending before the Debt Conciliation Board and that the Court cannot entertain the action by virtue of the provisions of section 56 of the Debt Conciliation Ordinance, No. 39 of 1941.

It has been said that the transaction between the plaintiff and the defendant is not such as could form a matter for investigation or attempted settlement by the Debt Conciliation Board. It has also been argued that even if it be held that the matter was properly before the Debt Conciliation Board, nevertheless the order of the Debt Conciliation Board made in the proceedings before it was an order which did not prevent the Court from taking cognizance of the plaint and determining the disputes that otherwise arose between the parties upon the pleadings presented to Court by them.

The facts briefly are that the defendant transferred by a deed of conveyance certain property, the subject-matter of the suit, to the plaintiff for a consideration of Rs. 4,000. It was further agreed between the parties—and that agreement is embodied in the deed of conveyance itself—that the plaintiff was to retransfer to the defendant the property if the defendant paid him a sum of Rs. 4,000 together with a stipulated rate of interest thereon within a period of four years. It is also admitted that the defendant has continued to be in possession of the property notwithstanding the execution of the deed of conveyance in favour of the plaintiff. The plaintiff institutes this action after the expiry of the period of four years provided in the deed to obtain possession of the property and for ejectment of the defendant therefrom. The defendant in his answer, apart from taking up the plea under the Debt Conciliation Ordinance which has given rise to the present appeal, pleaded that the plaintiff held the property in trust for him. At the time of the framing of the issues, though not pleaded, certain issues were raised as to whether the transaction between the plaintiff and the defendant was one in the nature of a mortgage.

I shall now proceed to deal with the first question raised by the appellant. To answer the question as to whether the Debt Conciliation Board had jurisdiction to entertain any application by the defendant, one has to look at the term "debtor" as defined in the Ordinance. Before a person can avail himself of the rights or benefits conferred by the Ordinance upon a "debtor" he must show that he has satisfied the first requirement prescribed by the definition, namely, that he has *created* a mortgage or charge over an agricultural property. Any disputes arising out of a trust would, therefore, be beyond the scope of the Debt Conciliation Board to deal with.

The only other question is whether, if the transaction is not in form a mortgage or one that creates a charge over property, the transaction could be said to be one which falls within the scope of the Debt Conciliation Board. When the Legislature uses the term "mortgage or charge" in defining the term "debtor", it can only refer to those terms

as understood in our law. Our law of mortgage is the Roman Dutch Law, and under it, in order to effect a mortgage, a security or charge on property is created, and nothing more. No question, as under the English or Indian Law, of a transfer of the title to the property to the creditor reserving to the transferor a right or, more properly, an equity of redemption, is recognised by our law. It cannot therefore be said that when the Legislature used the term " mortgage or charge " in the Ordinance, it intended to use that term in any sense other than that in which that term was understood in the law of the country. In fact, the meaning of the term " mortgage " can be gathered from the use and definition of the term in the Mortgage Ordinance (Cap. 74). The Mortgage Ordinance gives full effect to the conception of a mortgage as understood in the Roman Dutch Law, and cannot in the slightest decree be said to include transactions called " Moratuwa mortgages " which are the local equivalent of the English and Indian mortgages. It seems to me that before the Debt Conciliation Board can assume jurisdiction it must satisfy itself that the transaction is not only in substance one of money-lending but that in point of form the transaction is one which under our law is clothed in the proper garb of a mortgage, whatever the name may be that is applied to the transaction, whether a mortgage or a charge. It will also be easy to see that in this case the creditor claims no debt as owing to him, and would not come within the meaning of that term as defined in the Ordinance, which declares that a creditor means a person to whom a *debt is owing*. It is therefore extremely difficult to assent to the view that the transaction between the plaintiff and the defendant, which is not in form a mortgage, could be the subject of proceedings before the Board.

It has, however, been pointed out that a Court cannot go into the question of the validity of the proceedings before the Board in view of section 56 (*a*) (ii) of the Ordinance. I do not think this contention is entitled to succeed. For one thing, it is open to a party to impeach a judgment or proceeding before another Court or tribunal as one entered or had beyond the jurisdiction of such Court or tribunal. For another, section 56 does not say that the validity of the proceedings before the Board cannot be canvassed in a Court of Law. What it does say is that a Court cannot entertain an *action* in respect of the validity of any procedure before the Board, which is entirely a different matter. The contention raised relates to the want of jurisdiction of the Court, while the provision of the Ordinance prevents the regularity or the validity of the conduct of the business before the Board being called in question.

I now pass on to the next argument. The order made by the Board which has been regarded by the learned Judge as barring these proceedings is that contained in the Board's minutes dated October 5, 1949, and which reads as follows: " Hearing postponed *sine die*. " The Debt Conciliation Board is a statutory body. It has got no inherent powers to make any orders other than those conferred by the Ordinance. Where, in terms of section 32 (2) of the Ordinance, no amicable settlement has been reached between the debtor and a secured creditor, the Board can make one of two orders: (*a*) It can dismiss the application of the debtor, or

(*b*) it may also, in a fit case, issue to the debtor a certificate in the prescribed form. The Board can make no other order. It is clear from the proceedings had before the Board and evidence of which was given before the learned Judge that the attempt at an amicable settlement completely failed. The Board should then have acted in terms of section 32; but on the other hand the Board purported to make an order " Hearing postponed *sine die* ".

The order of the Board, as I indicated earlier, is one which has not the sanction of law. The reason for not investing the Board with such powers is fairly obvious, for so long as the matter is pending before the Board no civil Court can, by reason of the provisions of section 56 (*a*) (i) entertain an action in respect of the same matter. It certainly cannot be said that it was the intention of the Legislature that the right of a person to institute an action to obtain redress by seeking the aid of a Court of Law was to be for ever denied to him because of the Board making an order postponing the hearing *sine die* and never perhaps taking the matter up. The Board has exercised the amplitude of the powers vested in it in regard to the dispute, and the dispute has reached the stage when nothing further can be done by the Board. The Board cannot, by making an order " hearing postponed *sine die* " prevent the creditor, assuming that the plaintiff is a creditor within the meaning of the Ordinance, from exercising the legal rights which are expressly conserved to him by section 36 of the Ordinance. The order of the Board must therefore be construed as having no greater effect than that the application of the defendant before it had been dismissed. I think it is proper to observe that not only is the order made by the Board that it postponed the hearing *sine die ultra vires* of its constitution but also the entertainment of the defendant's application in regard to a transaction which is not in form a mortgage.

The order of the learned District Judge cannot therefore be sustained. In the result I set it aside and direct that the case be tried on the other issues framed. The appellant will be entitled to the costs of this appeal and of the proceedings had in the lower Court.

JAYETILEKE C.J.—I agree.

Appeal allowed.