1975 *Present :* **Rajaratnam, J., Weeraratne, J., and Sharvananda, J.**

MAHANANDA, *alias* MANAM MAGGIE SILVA, Appellant, *and* MANIKKUGE SAI NONA, Respondent

S. C. 519/69 (F)—D. C. Negombo 1208/L

Debt Conciliation Ordinance—Effect of Certificate issued under Section 32(2)—Applicability of Section 39 to a rei vindicatio action by purchaser qua owner against the vendor and his successors.

'K' the owner of the premises in suit sold the said premises on 05.02.64 to 'F' subject to the condition of reconveyance if the vendor re-paid the vendee the sum of Rs. 1,250 with interest thereon within a period of 3 years from 05.02.64. 'F' sold the premises to the Plaintiff on 17.06.65 subject to the aforesaid condition of reconveyance. 'K' died on 26.04.65 without obtaining the reconveyance. The stipulated period of 3 years expired on 05.02.67 without the heirs of 'K' obtaining the reconveyance. On 11.07.66 the widow of 'K' and the administratrix of his estate made applica ion to the Debt Conciliation Board to have the conditional transfer treated as a mortgage and settlement thereof effected with the plaintiff. The Debt Conciliation Board by its order dated 20.08.66 determined that the conditional transfer was, in the opinion of the Board, in reality a mortgage. At the inquiry before the Board on 21.04.67 the said application was dismissed but the Board issued a certificate in terms of Section 32(2) of the Debt Conciliation Ordinance. On 12.08.67 the plaintiff instituted action against the widow of 'K' (defendant) for declaration of title, ejectment and damages. The defendant resisted the action mainly on the ground that the said Certificate issued in terms of Section 32 (2) of the Debt Conciliation Ordinance operated as a bar to a rei vindicatio action and the remedy was to institute an action for the recovery of the principal and interest on the transaction which, the Board had determined, was in reality a mortgage.

Held, (Rajaratnam, J. dissenting) that the certificate issued under Section 32(2) of the Debt Conciliation Ordinance read with Act No. 5 of 1959 cannot reduce a conditional transfer in law to a mortgage. Section 39 of the said Ordinance postulates an action being brought by a creditor *for the recovery of any debt* in respect of which a certificate has been granted. A rei Vindicatio action instituted by the purchaser qua owner against the vendor and his successor for the recovery of possession of his property is not an action for the *recovery of a debt* and the said Section 39 has no application to such an action.

Per Rajaratnam. J :

"In my view, the creditor's title is affected by the impact of a certificate under Section 32(2). The creditor must remove the certificate out of his way before he could bring a rei vindicatio action and to do so he may have to come to this Court in an appropriate case by asking for a Writ of Certiorari. The creditor's right however to proceed against the debtor on the security given by the debtor for the recovery of any debt is not affected or prejudiced."

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayawardene, with *R. L. N. de Zoysa* and *I. Mohamed*, for the plaintiff-appellant.

Nimal Senanayake, with *Rohan Perera*, for the defendant-respondent.

Cur. adv. vult.

November 27, 1975. RAJARATNAM, J.—

The main question for consideration by this Court was whether a certificate issued under s. 32 (2) of the Debt Conciliation Ordinance read with Act, No. 43 of 1952 and Act, No. 5 of 1959 can reduce a conditional transfer in law to a mortgage.

In this case, the defendant did go before the Debt Conciliation Board and made a fair offer which the Creditor ought reasonably to have accepted and on this basis the Board granted the defendant a certificate in the prescribed form in respect of a debt owed by her to the Creditor.

D7 is the application made to the Board on 22nd of July, 1966. D13 is the certified copy of the certificate issued by the Board in terms of s. 32 (2), wherein the Board has held that the Creditor—the plaintiff in this case has refused a fair and reasonable offer of settlement which the said Creditor ought reasonably to have accepted. It is also stated in the certificate that the rate of interest provided in the deed was 16 per cent. per annum and ordinarily the Board fixed the rate of interest at 8 per cent. and 10 per cent. per annum. It is also stated in para. 3—that s. 39 of the Debt Conciliation Ordinance of 1941 and s. 22 of the Regulations published in the Government Gazette No. 8979 of July 31st 1942 as amended by s. 2 of the Regulations published in Government Gazette No. 10,462 of October 1952 apply to these transactions.

In para. 1 of the certificate it is stated that the transfers referred to in deed No. 21446 of 5.2.64 and deed No. 423 of 17.6.1965, i.e. P1 and P2, are both considered to be a mortgage under Debt Conciliation Act No. 5 of 1959. This certificate I presume, is in the prescribed form and it is signed and dated 13.5.1967 by the Chairman of the Debt Conciliation Board.

The conditional transfer is marked P1 which is deed No. 21446 of 5.2.1964. The right to obtain a re-transfer was reserved in these deeds for any time within a period of 3 years and irrespective of the provisions of the Debt Conciliation amendments, the transferor could have obtained a re-transfer at any time before the 5th of February 1967. The interest payable was 16 per cent. on this deed. In other words the vendor on this deed reserved for himself, his heirs, executors, administrators and assigns the right to obtain a re-transfer of the said premises before February, 1967. The vendor also reserved the right to possess and enjoy the said premises during the said period of 3 years. The land in question was an undivided extent of 2 acres 1 rood and 8 perches after excluding an undivided extent of 1 acre already alienated.

The vendee on P1 and by P2 sold the said property to the plaintiff in this case Maggie Silva on 17.6.65 subject to the right of re-transfer reserved by the vendor in P1. The defendant is the wife and administratrix of the estate of her husband Cornelis de Silva Karunaratne (died on 26.4.65) who was the vendor on the deed P1.

The defendant filed papers in a testamentary action applying for letters of administration to the intestate estate of the deceased, the husband making among others the plaintiff as a respondent. The respondent filed objections and inter alia in para. 11 stated that monies were due to the plaintiff upon the said deeds 21446 and 423 as debts due from the estate of the deceased. The defendant before the date she lost her right of re-conveyance on 5.2.67, it will be seen, went to the Debt Conciliation Board for relief and according to her evidence at the trial was prepared to pay the principal and interest during the proceedings before the Debt Conciliation Board held on 21.4.67. The proceedings on 21.4.67 states that the defendant was prepared to redeem the half share belonging to her or even the whole share. There is a finding that the plaintiff's attitude was unreasonable and an order has been made for an issue of certificate under s. 32(2) to the defendant.

The plaintiff notwithstanding the certificate issued by the Board by D13 dated 13.5.67 filed a plaint in the present action on 12.7.67 and therein pleaded P1 and P2 and asked for a declaration of title and for ejectment of the defendant from the land in question.

The defendant, however, took up the position that the transactions on P1 and P2 were considered by the Board in terms of the Debt Conciliation Ordinance as a mortgage. The trial Judge made a finding that the plaintiff was not entitled to a declaration of title on the basis that the orders and certificate issued by the Board reduced P1 and P2 to a transaction in the nature of a mortgage.

Mr. Jayawardena appearing for the appellant cited the decision in the case of *Johanahamy* v. *Susiripala* reported in 70 NLR page 328 which was followed in an unreported case, S.C. 140/67 (F) along with S.C. 156/67 (Inty.), Supreme Court minutes of 19.5.1972. The facts in the latter case are not revealed in the judgment but the judgment does not in itself deal with the question that arises from the provisions of the Debt Conciliation

Ordinance but merely states that it follows the decision in *Johanahamy v. Susiripala* referred to above. Therefore this decision is not of much help.

Before I deal with the decision in *Johanahamy vs. Susiripala* I must state with respect that I am of the view that an execution of a mortgage must conform to the formalities imposed by s. 2 of the Prevention of Frauds Ordinance. There is no question in my mind about the correctness of the decision of the Privy Council in the case of *Adaicappa Chetty* v. *Caruppen Chetty*, 22 NLR 417, and the other case of *Saverimuttu v. Thangavelauthan*, 55 NLR 529, which is also a decision of the Privy Council. The principles laid down in these two Privy Council decisions were followed in the case of *William Fernando v. Cooray* in 1957 which is reported in 59 NLR page 169.

There is no doubt that the prohibition to lead oral evidence relating to the conditional transfer to make it a mortgage is prohibited by s. 92 of the Evidence Ordinance. Further more it is a correct position in law that s. 2 of the Prevention of Frauds Ordinance prevented the creation of a mortgage, otherwise than by a notarial instrument duly executed according to law.

On the other hand the correct legal position enunciated in the above cases does not mean that the Court should not consider the impact of the amending Act No. 5 of 1959 to the Debt Conciliation Ordinance, whereby in 1959 the legislature inserted immediately after the definition of the word "debtor" in the Debt Conciliation Ordinance, the following new definition to the term "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 re-payment to the transferee of a sum lent by him to the transferor". That is to say, by statute a debtor for purposes of the Ordinance can mean a person who has conditionally transferred his property under certain cicrcumstances which in reality is a transaction where the land transferred is intended to be a security.

Therefore, when the defendant went to the Board with an application for relief she was deemed to have gone as a debtor by reason of the subsequent order made by the Board.

In this particular case, the Board was quite justified in making the order taking all the circumstances into consideration, for instance, the defendant was in possession of the land in suit and she endeavoured to invoke the provisions of the law to reduce the interest or to effect a settlement. When she went to the Board she still had time within which she could as a right

obtain a re-transfer of the property and during the proceedings of the Board which was unfortunately 2 months after the redeemable date, she failed to effect a settlement but succeeded in convincing the Board that she made a fair offer which was unfairly refused by the creditor and obtained a certificate under s. 32. If, there had been an amicable settlement and if it had been approved by the Board under s. 30(2), this settlement would have been valid and effectual for all purposes notwithstanding anything to the contrary in the Prevention of Frauds Ordinance. That is to say, that although it was a settlement or an agreement affecting land it did not require the formalities imposed by the Prevention of Frauds Ordinance.

In the present case, the question is whether the certificate obtained by the defendant under s. 32 (2) is of no avail to her when the plaintiff brings a rei vindicatio action. It was argued by Mr. Jayawardena that the only purpose of this certificate will be when a creditor brings an action in any Court for the recovery of any debts. I am of the view that by D13, the defendant obtained certain benefits given to her by the provision of the law. The whole purpose of the Debt Conciliation Ordinance as amended by the Acts was to give relief to debtors including conditional transferors in certain circumstances.

There is no question that the defendant was entitled to this relief given by statute and I do not think that in such a case, it could be lightly said that she lost these statutory reliefs because the plaintiff notwithstanding the operation of the provisions of the Debt Conciliation laws preferred to bring into Court a rei vindicatio action.

If a creditor is permitted to bring in a rei vindicatio action notwithstanding the provisions of the Debt Conciliation laws the provisions of s. 32(2) are rendered useless and of no avail in relation to the conditional transfers, if a transferee in an appropriate conditional transfer can always bring a rei vindicatio action. There will also be no likelihood of any settlement which will almost always be against the interests of the transferee. It will be only a very kind creditor who will submit himself to a settlement when he could take over the land transferred to him by not arriving at a settlement. The purpose of the Debt Conciliation laws was never meant to operate only with regard to such kindly creditors and s. 32(2) has no meaning if a creditor unfairly refusing a reasonable offer of the debtor is permitted to bring a rei vindicatio action inspite of the finding given by the Board in respect of the debts owed by the debtor which includes conditional transfer under certain circumstances.

The facts in the case of *Johanahamy v. Susiripala* are as follows:—

It was a case of conditional transfer and there was a settlement recorded under s. 40 of the Debt Conciliation Ordinance. It was agreed that the arrears of interest due to the plaintiff in that case and the capital amount due to him should be paid on certain dates fixed in the settlement and if there was a default *the right to redeem was to be at an end.*

The defendant defaulted and thereby lost the right that was restored to him by settlement to redeem the property. The defendant took up the position in his answer when the plaintiff brought a rei vindicatio action that the conditional transfer executed by him was in fact a mortgage, in other words claiming what even the settlement denied him. In this case, there is no doubt that the defendant lost his right to redeem and even on the terms of the settlement the true nature of the conditional transfer by a single default was restored. The settlement did not invalidate the conditional transfer, but on the other hand, suspended the operation of the conditional transfer as long as the defendant paid the interest and principal on due dates According to s. 30(2), the settlement took effect and by the very validity of the settlement the defendant lost his relief. Nowhere in the settlement was the transaction reduced to a mortgage, if the conditions in the settlement were violated. Therefore, the defendants in Johanahamy's case did not take up the correct position as stated on page 329 of 70 NLR in that the conditional transfer executed by them was in fact a mortgage. It was really a conditional transfer which was to be treated as a mortgage on certain conditions being fulfilled. In that situation, it was not a correct position to take that a mortgage was created by the settlement. In the teeth of s. 2 of the Prevention of Frauds Ordinance and s. 91 of the Evidence Ordinance, the plaintiff in that case certainly could not have brought a rei vindicatio action, if the defendant did not fulfil the term of the settlement. If he had fulfilled the terms of the settlement notwithstanding the decisions in *Adaicappa Chetty v. Caruppen Chetty, Saverimuttu v. Thangavelauthan* and *William Fernando v. Cooray,* the conditional transfer would have been reduced to a mortgage. But it may be argued that s. 30(2) specifically states that a settlement will be valid and effectual for all purposes notwithstanding anything in the contrary in the Prevention of Frauds Ordinance but it is silent with regard to s. 91 of the Evidence Ordinance. This sub-section moreover came into operation long before conditional transfers were included in the amending law by Act No. 5 of 1959.

If a conditional transferee is allowed under these circumstances to bring a rei vindicatio action, the statutory benefits conferred on a conditional transferor in a situation like this would be rendered ineffectual and the amending Act may as well be torn up.

Section 32(2) entitles the debtor to the certificate by reason of which he enjoyed a statutory benefit which in my view he could plead on his behalf in answer to the creditor's claim to a rei vindicatio action. What the law gives him with one hand cannot be taken away by the other hand.

The Debt Conciliation law contemplates a settlement or a reasonable offer by the debtor which ought not to be unreasonably refused. If there is an unreasonable refusal on the part of the creditor to a reasonable offer on the part of the debtor there is a sanction imposed by the law by issue of a certificate which certificate in my view is relevant when a rei vindicatio action is brought to Court by reason of a conditional transfer.

Section 32(2) must be given a meaning and a purpose which the legislature contemplated when it amended the law by Act No. 5 of 1959. I am mindful of the well known maxim that an interpretation must be given "*res ut magis valeat quam pereat.*"

I have taken into consideration the fact that s. 39 refers to a creditor bringing "an action in any Court for the recovery of any debt" and not bringing any action. I have also taken into consideration that nowhere in the Debt Conciliation Laws is there a provision making the certificate valid and effectual for all purposes as it did in the case of settlement. However, I take the view, that the submissions made by learned Counsel for the appellant do not convince me beyond the point that there is another view that could be taken on this question. But I would rather take the view to give life and purpose to the provisions of the law, so that this interpretation might give life to Act No. 5 of 1959 read with s. 32(2) of the Debt Conciliation Ordinance.

My interpretation of the law is in no way in conflict with the decision in Johanahamy's case or the other cases mentioned above. The conditional transfer according to the provisions of the law became processed by law in this case for the benefit of the debtor. The decision in *Henderick Appuhamy v. John Appuhamy*, 69 NLR 29. is not exactly in point but the reasoning therein is not altogether unhelpful on the matter before me. In

Doe v. Bridges as was observed in that case, Lord Tanterden said "Where an act creates an obligation and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner" (1831 1 B. and Ad. 847). A similar rule, it was stated, was enunciated by Wills J. in *Wolverhampton New Waterworks Co. v. Hawkesford*, (1859) 6 C.B.N.S. 336, where he said, "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it ..... the party must adopt the form of remedy given by the statute". I agree with the observations made in that case by Sansoni C. J. that "another principle applicable here is that where a statutory right cannot, without very great inconvenience, co-exist with the ordinary common law right, the former must have been intended as a substantial and not as an additional remedy".

I have considered the decision in Johanahamy's case. The facts in the present case are different. It is unfortunate that although s. 43 of the Debt Conciliation Ordinance was relied on by the appellant's Counsel its impact was not examined by the Court. But even if it had been and answered in favour of the appellant that the creditor should have come under s. 43 of the Ordinance, it would have been of no avail to the defendant as he had lost his right to redeem under the settlement.

In my view, the creditor's title is affected by the impact of a certificate under s. 32(2). The creditor must remove the certificate out of his way before he could bring a rei vindicatio action and to do so he may have come to this Court in an appropriate case by asking for a Writ of Certiorari. The creditor's right however to proceed against the debtor on the security given by the debtor for the recovery of any debt is not affected or prejudiced. But there must be a demand for the debt which was not made in the present case, on the other hand the creditor carried on regardless of the certificate to bring a rei vindicatio action, which in my view he could not have successfully pursued in Court. His title was affected by the certificate duly issued according to law under s. 32(2) of the Ordinance.

I therefore hold that this appeal must be dismissed with costs.

Weeraratne J.—

I agree with the judgment and order of Sharvananda J., and for the reasons stated by him, I allow the plaintiff's appeal.

SHARVANANDA, *J.*—

I regret my inability to agree with the judgment of Rajaratnam J. In my view, the certificate issued under section 32(2) of the Debt Conciliation Ordinance read with Act No. 5 of 1959 cannot reduce a conditional transfer in law to a mortgage.

One Cornelius de Silva Karunaratne was the owner of the premises described in schedule B to the plaint. By deed No. 21446 dated 5.2.64 (P1), he sold and transferred the said premises, the subject matter of this action, to Daniel Fernando, subject to the condition that if the vendor repaid the vendee the sum of Rs. 1,250 with interest thereon at the rate of 16% per annum within a period of three years from 5.2.64. the said purchaser shall reconvey the said premises to the vendor. The said Daniel Fernando transferred the land to the plaintiff by deed No. 423 dated 17.6.65 (P2) subject to the aforesaid condition of reconveyance. The aforesaid vendor Karunaratne died on 26.4.65 without obtaining the reconveyance. The stipulated period of three years expired on 5.2.67 without the heirs of the said vendor availing themselves of the condition of obtaining a reconveyance and the plaintiff instituted this action on 12.8.67 for declaration of title, for restoration of possession, ejectment and damages against the defendant who is the widow of the deceased Karunaratne and administratrix of his estate.

The defendant, in her answer, stated that:

(i) the plaintiff is bound by deed No. 21446 (P1) and that she (the defendant) as administratrix and heir of the deceased Karunaratne made application D7A dated 11.7.66 to the Debt Conciliation Board in terms of the provisions of the Debt Conciliation Ordinance (Chap. 81) as amended by Act No. 5 of 1959 to have the conditional transfer P1 treated as a mortgage and a settlement thereof effected with the plaintiff;

(ii) the Debt Conciliation Board entertained the application and by its order (D9) dated 20.8.66 determined that the deed No. 21446 (P1) is a conditional transfer which in the opinion of the Board, is in reality a mortgage.

(iii) at the inquiry held by the Debt Conciliation Board on 21.4.67, the plaintiff refused a fair and reasonable offer of a settlement and the said Board therefore dismissed her application but issued a certificate under section 32(2) of the Ordinance to the defendant. The

certificate (D13) testified that " the creditor, in our opinion, has refused a fair and reasonable offer of a settlement by the said debtor which the said creditor ought reasonably to have accepted ".

The defendant resists the action on the main ground that in view of the certificate issued by the Debt Conciliation Board in terms of section 32 (2) of the Debt Conciliation Ordinance (Chap. 81), the plaintiff is barred from maintaining a rei vindicatio action and that his remedy is to institute an action to recover the principal and interest on the transaction which for purposes of proceedings before the Board, had been impressed with the character of mortgage.

The defendant also pleaded that the plaintiff is estopped in law from claiming title to the land in suit as the plaintiff had admitted, by her objections dated 7.4.66 filed in the testamentary case No. 4303/T of the District Court of Negombo, that the said deeds No. 21446 and No. 423 on which her title to the land is based were in effect mortgages and that the money due on same were debts due from the estate of the late Karunaratne to the plaintiff.

The learned District Judge has held with the defendant on both the aforesaid grounds and dismissed the plaintiff's action with costs. The plaintiff has appealed to this Court against the decision and has submitted that the grounds of the decision are not tenable in law.

The deed No. 21446 (P1) dated 5.2.64 by which Karunaratne conveyed the premises in suit to Daniel Fernando embodied ex facie a contract of sale subject to the reservation that the said vendor and his heirs, executors, administrators and assigns had " a right to obtain a re-transfer of the said premises at any time within a period of three years from the date hereof on payment unto the said vendee and his heirs, executors and assigns the said consideration herein mentioned (i.e. Rs. 1,250) with interest thereon at the rate of sixteen per centum per annum in one payment and also reserve the right to possess during the said period ". It is not open in a Court of Law to a party who makes an absolute conveyance of immovable property for valuable consideration with such conditions attached thereto to show by other extrinsic evidence that the transaction was not a sale but a mortgage—*Fernando v. Cooray* (59 N.L.R. 169). On the failure of the vendor to comply with such conditions, title vests absolutely on the purchaser free from any

obligation in favour of the vendor and the purchaser by virtue of his title becomes entitled to lawful possession of the property from the time of the expiry of the period stipulated by the vendor to obtain a reconveyance.

By the Debt Conciliation Ordinance, No. 39 of 1941, the Debt Conciliation Board was established to effect a settlement of the debts owed by a debtor to his secured creditors. 'Debtor' was defined to mean a person who has created a mortgage or charge over an agricultural property. In *Fernandopulle v. Perera Appuhamy* (52 N.L.R. 204), it was held that 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, the transaction was not in form a mortgage or a charge over property and could not, therefore, be the subject matter of proceedings before the Debt Conciliation Board. Subsequent to this decision, Amendment No. 5 of 1959 was enacted enlarging the jurisdiction of the Debt Conciliation Board by giving an extended definition of the term 'mortgage'. The amendment provided that *for the purposes of the Ordinance*, the term '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 of money lent by him to the transferor ". By virtue of this amendment, the Board is enabled to entertain, for the purposes of exercise of its jurisdiction, a new category of transactions, viz. conditional transfers savouring of a mortgage. The Board is now authorised to effect a settlement between the parties to a conditional transfer. Any such settlement, on being reached and authenticated, supersedes the terms and stipulations of the original conditional transfer—section 40. The question arises as to the consequences when no settlement between the parties is possible because of the unreasonable attitude of the 'creditor' the transferee. Section 32 of the Ordinance provides for the dismissal of the application in such an eventuality and for the grant of a certificate in terms of the section. Section 39 postulates an action being brought by a creditor for the recovery of any debt in respect of which a certificate has been granted. On his bringing such an action, it visits him with certain penal consequences. The liability flowing from such a certificate attaches only to an action instituted by a creditor for the recovery of the debt referred to in the certificate and not to any and every action filed by the creditor. 'Debt' has been defined in section 6 to " include all liabilities owing to a creditor in cash or kind, secured or insecured ". Ordinarily, a mortgagee has to file a hypothecary action for the recovery of the debt due

to him on the mortgage executed by the debtor, and no straining of language is involved when section 39 is read to apply to an action of such a kind. But, when a conditional transfer has been squeezed into the definition of mortgage for the purpose of proceedings before the Debt Conciliation Board, the engrafting does not outlive such proceedings and the transaction resumes its old label and nature after such proceedings get terminated by the dismissal of the application in terms of section 32 of the Ordinance. When the condition underlying the conditional transfer is not fulfilled, the transferee becomes absolute owner in terms of the agreement of parties, free from any obligation to make a re-transfer. Then, no action can lie for the recovery of any debt, since there is no debt to recover. What is to be recovered is vacant possession of property of which the plaintiff is the owner. No relationship of creditor and debtor between the vendor and purchaser was ever constituted, except for the purposes of proceedings before the Debt Conciliation Board. Outside the Board, the relationship of the parties and their mutual obligations were determined by the original contract in terms of which the purchaser became owner, subject to the obligation to re-transfer. It was an outright transfer with a pactum de retrovendendo, time being of the essence of the contract—*Thambipillai v. Muthukumarasamy* (58 N.L.R. 387). The sale took effect at once but got dissolved on the fulfilment of the condition. On the expiry of the stipulated period, the vendor, remaining in possession of the premises without fulfilling the condition, rendered himself liable to be ejected by the purchaser as the present owner of the premises. Such a rei vindicatio action instituted by the purchaser qua owner against the vendor and his successors for the recovery of possession of his property can, by no straining of language, be described as an action *for the recovery of a debt*, and section 39 cannot be held to apply to such an action. In this context, the case *Johanahamy v. Susiripala* (69 N.L.R. 29) may be usefully referred to. In that case it was sought to be argued, as in the present case, that once the Debt Conciliation Board chose to treat a transaction involving a conditional transfer as a mortgage, it got transformed into a mortgage and the stamp of mortgage attached to the transaction even in proceedings outside the Board also. This argument was rightly rejected. It was held that a conditional transfer was treated as a mortgage only for purposes of the jurisdiction of the Board and that such recognition by the Board as Mortgage did not entail the consequence that title remained with the vendor (debtor). This case was followed in the unreported case. S.C. 140/67 D.C. Ratnapura 6244, S.C. minute of 19.5.72. The process of reasoning in the above case reinforces the argument of the

plaintiff that Section 39 does not bar her from maintaining this action, that title is with her and that her remedy under the common law revives to her after the dismissal of the vendor's application by the Board. This case discloses a gap in the legislative scheme of the Debt Conciliation Ordinance read with its amendment No 5 of 1959 The function of this Court is interpretation and not legislation, and a Judge acting judicially cannot, under the guise of interpretation, usurp the function of the legislature and supply the gap or omission. A lacuna not provided for in the Debt Conciliation Ordinance cannot be dealt with under it merely because there does not appear to be any good reason why it has not been provided for. On the basis of the principle of 'ut res magis valeat quam pereat', the Court is not warranted in re-writing the language of Section 39 by adding or subtracting words from it. Section 39 can be given a sensible meaning and effect without violence being done to its language. That section applies to actions for the recovery of a debt. In the original scheme of the Ordinance, prior to it being amended by Act No. 5 of 1959, this section covered and was intended to cover hypothecary actions. The hiatus is revealed when by the amending Act No. 5 of 1959 the Debt Conciliation Board was given jurisdiction to treat conditional transfers as mortgages and to endeavour to settle them as such. But no effective relief is provided against a recalcitrant transferee (creditor). The issue of a certificate under Section 32 to the vendor (debtor) is futile as the purchaser will not at any time conceivably be instituting action for recovery of a debt which has been defined in Section 64 "to include all liabilities owing to a creditor, in cash or kind, received or unreceived." Section 39 deals with proceedings before another tribunal after the Board has become functus. The meaning given statutorily to the word 'mortgage' for the purpose of jurisdiction of the Board cannot be extended to other jurisdictions unless there is warrant in the language of the statute. The unnatural sense ascribed to the word should be confined to the statutory context and should not be extended to other contexts though in pari materia.

The plea of estoppel raised by the defendant was based on the fact that the plaintiff had, in her objections dated 7.4.66 marked D2 in Karunaratne's testamentary case No. 4303, admitted that moneys were due to her upon deeds No. 21446 (P1) and No. 423 (P2) from the estate of the deceased. The right to obtain a conveyance subsisted for three years from 5.2.64, and hence on 7.4.66 when the objections D2 were filed by the plaintiff, she was justified in stating that a debt or obligation was due in terms of P1 from the estate of the deceased; but non constat, this objection involved the admission or representation that title to the premises was in the deceased. Paragraphs 8, 9, 10 and 11 of the statement of objections (D2) unequivocally sets out the position. It is stated there that the 3rd land in the petition (the subject matter of this action) was transferred by the deceased during his life-time upon deed No. 21446 dated 5.2.64 to P. Daniel Fernando for Rs. 1,250 subject to a right of reconveyance within three years from the date of the said deed and that the said P. Daniel Fernando, had, by deed No. 423 dated 17.6.65, sold and conveyed his right, title and interest upon the said deed No. 21446 to the plaintiff for a sum of Rs. 1,466.64 and that the money due to the plaintiff upon the aforesaid deeds No. 21446 and No. 423 were debts due from the estate of the deceased. These averments in the objections (D2) describe truly a subsisting fact and import no representation that the title to the land was not in the plaintiff. From these averments, one cannot reasonably spell out that the plaintiff was only entitled to a debt and not to the land. The plea of estoppel by representation fails and has to be rejected.

The learned District Judge has erred in upholding the defendant's contention and dismissing the plaintiff's action. I set aside the judgment and decree entered by the District Court and allow the appeal and enter judgment for the plaintiff as prayed for, but with damages at Rs. 10 per month only, from 6th February, 1967, until the defendant is ejected from and the plaintiff is restored to possession of the land and premises described in the schedule B to the plaint. In the circumstances, the plaintiff appellant is entitled to costs of this appeal only.

Appeal allowed.