IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC Appeal No. 29/2009
SC HCCA LA No. 142/2008
SP/HCCA/KAG No. 40/2007
D.C. Kegalle Case No. 4688/L

K.M.A. ANULAWATHIE MENIKE
Randiwala, Mawanella.
PLAINTIFF

VS.

A.H.M.J. ABEYRATNE
'Lakshmi',Yatimahana, Makehelwala
DEFENDANT

AND

K.M.A. ANULAWATHIE MENIKE
Randiwala, Mawanella.
PLAINTIFF-APPELLANT

VS.

A.H.M.J. ABEYRATNE
'Lashkmi', Yatimahana, Makehelwala
DEFENDANT-RESPONDENT

AND NOW BETWEEN

A.H.M.J. ABEYRATNE
'Lakshmi', Yatimahana, Makehelwala
DEFENDANT-RESPONDENT-PETITIONER/ APPELLANT

VS.

K.M.A. ANULAWATHIE MENIKE
Randiwala, Mawanella.
PLAINTIFF-APPELLANT-RESPONDENT

BEFORE: Sisira J. de Abrew, J.
Prasanna Jayawardena, PC, J.
Murdu Fernando, PC, J.

COUNSEL: Manohara de Silva, PC with Hirosha Munasinghe for the Substituted Defendant-Respondent-Petitioner/Appellant.
M.S.A. Saheed with A.M. Hussain for the Plaintiff-Appellant-Respondent.

WRITTEN SUBMISSIONS FILED: By the Defendant-Respondent-Petitioner/Appellant, on 13th July 2009.
By the Plaintiff-Appellant-Respondent, on 14th August 2009.

ARGUED ON: 28th March 2018.

DECIDED ON: 12th November 2018.

Prasanna Jayawardena, PC, J.

The issue before us in this appeal concerns instances where parties have entered into a settlement in a Debt Conciliation Board under and in terms of the provisions of the Debt Conciliation Ordinance No. 39 of 1941, as amended, for the payment of a "secured debt". Section 64 of that Ordinance defines a *"secured debt"* to mean *"a debt secured by a mortgage of immovable property and includes any debt in respect of which a charge on immovable property is created by a notarial instrument."*.

The question to be decided is whether the *only* course of action available to a party who wishes to institute legal proceedings to enforce such a settlement is to make an application to Court under the provisions of section 43 of that Ordinance. In other words, whether section 43 debars a party who has entered into a settlement in a Debt Conciliation Board from later instituting a hypothecary action in Court to enforce a mortgage bond which figured in that settlement or from instituting a vindicatory action to assert his title to a property which has come to him upon a conditional transfer which figured in that settlement.

Section 43 of the Debt Conciliation Ordinance reads:

"(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 deem 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.

(3) In this section -

"court of competent jurisdiction " means any court in which the creditor could have filed action for the recovery of his debt, if the cause of action in respect of that debt had not been merged in the settlement;

"summary procedure " has the same meaning as in Chapter XXIV of the Civil Procedure Code."

To set out the factual background, the Plaintiff-Appellant-Respondent ["the plaintiff"] filed this action against the Defendant-Respondent-Petitioner/Appellant praying for a declaration of title to a half share in a paddy field named *"Adapanadeniya"* situated in Mawanella. The plaintiff's case was that, in consideration of monies paid by the plaintiff to the defendant, the defendant had transferred the aforesaid half share to her by a Conditional Transfer No. 36014 dated 19th June 1979 subject to the agreement stated therein that, if the defendant repays a sum of Rs.9,200/- to the plaintiff on or before 19th June 1981, the plaintiff shall re-transfer the half share to the defendant. It was also agreed in the Conditional Transfer that the plaintiff will have absolute title to the half share from 20th June 1981 onwards if the defendant failed to pay this sum of Rs.9,200/- to the plaintiff on or before 19th June 1981. The defendant had failed to pay the sum of Rs.9200/- to the plaintiff on or before 19th June 1981 and, therefore, the plaintiff has absolute title to the half share in the paddy field. The plaintiff also averred that the defendant had made an application to the Debt Conciliation Board seeking to effect a settlement of the aforesaid debt owed by him to the plaintiff. A settlement had been entered in the Debt Conciliation Board in terms of which the defendant undertook to pay the debt in three instalments. However, the defendant had failed to pay these monies.

A perusal of the settlement entered in the Debt Conciliation Board reveals that it does not expressly state who will have title to the paddy field in the event the defendant fails to make the agreed payments.

In his answer, the defendant denied that any cause of action had accrued to the plaintiff to sue the defendant and pleaded that the defendant had attempted to pay the monies due to the plaintiff upon the aforesaid debt but that she had refused to accept payment. Therefore, the defendant had instituted D.C. Kegalle Case No. 2591/L against the plaintiff and deposited these monies to the credit of that case to be paid to the plaintiff. On that basis, the defendant had prayed in Case No. 2591/L that he is entitled to a declaration of title to the entire paddy field.

The plaintiff filed a replication stating that the monies which the defendant claimed to have paid, were tendered to her after the agreed date for payment of the monies had passed.

When the case was taken up for trial, the parties admitted, *inter alia*, that an application had been earlier made to the Debt Conciliation Board to effect a settlement of the debt owed by the defendant to the plaintiff and that a settlement had been entered between the parties in the Debt Conciliation Board.

The plaintiff framed six issues in line with the plaint. The defendant framed seven issues in line with the answer. The plaintiff later framed two more issue based on the replication.

Issue No. [7] framed by the defendant was:

"Has the plaintiff instituted this action contrary to the provisions of the Law ?".

Both parties had agreed that this issue could be decided as a preliminary issue of law and tendered written submissions on this issue.

By his judgment dated 30th August 2001, the learned District Judge held that a party to a settlement entered in the Debt Conciliation Board can only make an application to enforce that settlement under the provisions of that Ordinance and has no right to institute a separate action in Court to assert his rights and claim reliefs. On that basis, the District Court held that the plaintiff cannot have and maintain this action and dismissed the plaintiff's action.

The plaintiff appealed to the High Court of Civil Appeal holden in Kegalle. By their judgment dated 30th September 2008, the learned judges of the High Court held that the District Court erred when it took the view that the only remedy available to a party to a settlement entered in the Debt Conciliation Board is to make an application to enforce that settlement under section 43 of that Ordinance. Accordingly, the High Court set aside the judgment of the District Court and directed that the case proceed to trial on the other issues.

The defendant sought leave to appeal from this Court and obtained leave to appeal on the following two questions of law which are reproduced *verbatim*:

(i) The learned Provincial High Court Judges have erroneously decided that after a settlement is entered into at the Debt Conciliation Board the remedy available to the creditor is to make an application under section 43 of the Debt Conciliation Ordinance for a decree in terms of that settlement is not the only remedy for him.

(ii) The learned Additional District Judge, Kegalle has correctly answered to issue No. 7 of the case.

It is seen that section 43 (1), which was set out earlier, provides that, where a settlement has been entered under the provisions of that Ordinance and the debtor defaults in complying with the terms of that settlement, the creditor *"may"* apply to Court to have a decree of Court entered in terms of the settlement. Section 43 does not express exclude other remedies the creditor may be entitled to under the ordinary law.

It is well known that the use of the word *"may"* in a statutory provision with regard to taking action under that statutory provision, means that the right given to take that action is permissive and optional and not mandatory or compulsory. Thus, Maxwell [Interpretation of Statutes 12th ed. at p. 234] states *"In ordinary usage `may' is permissive and `must' is imperative, and, in accordance with such usage, the word `may' in a statute will not generally be held to be mandatory."* In this regard, Maxwell cites COOPER vs. HALL [1968 1 WLR 360 at p.364] where Lord Parker CJ held that regulations which provided that an Authority *"may"* act in a particular manner were *"purely permissive"*. Similarly, Bindra [Interpretation of Statutes 7th ed. at p.1087] states the word *"may"* is *"prima facie enabling and permissive."*. Bindra cites Venkataramana Rao J in RAJAH of VIZIANAGARAM vs. SECRETARY OF STATE [AIR 1937 Mad. 51 at p.77] who observed *"The section says `may'. It is prima facie enabling and permissive. Generally when coupled with a duty it is construed as obligatory."*. Venkataramana Rao J cited the well-known words of Lord Cairns CJ in JULIUS vs. LORD BISHOP OF OXFORD [1880 5 AC 214 at p.222] that when words such as *"may"* and *"it shall be lawful"* are used in a statute *"They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power."*.

Thus, if the word *"may"* in section 43 (1) of the Debt Conciliation Ordinance is given its ordinary meaning, the conclusion must be that the right given to a creditor to apply to Court to have a decree of Court entered in terms of the settlement, is only a right he *"may"* exercise. In other words, that he has an option of exercising that right but he is

not excluded or prohibited from choosing not to proceed under section 43 (1) and, instead, choosing to institute a regular action in court to enforce a cause of action which relates to the subject matter of the settlement.

However, it is also well known that there are some instances where the word *"may"* used in a statute should be read as having compulsory or mandatory force. As Maxwell states [at p. 234] *"In some cases, however, it has been held that expressions such as `may,' or `shall have power,'* or *`shall be lawful;' have - to say the least - a compulsory force, and so their meaning has been modified by judicial authority."* In this connection, Maxwell cites decisions such as R vs. ROBERTS [1901 2 KB 117], SHAW vs. RECKITT [1893 1 QB 779] and BARON INCHYRA vs. JENNINGS, INSPECTOR OF TAXES [1965 2 AER 714] where the word *"may"* in a statutory provision was held to have a mandatory or imperative effect in the particular circumstances of each of those cases. Similarly, Bindra [at p.1087] states *"It is no doubt true that the rule of interpretation permits the interpretation of the word `may' in certain context as `shall' and vice versa, namely, permit the interpretation of `shall' as `may.'."*. In this connection, Bindra cites SUDHIRA BALA ROY vs. STATE OF WEST BENGAL [AIR 1981 Cal. 130 at p 135] where Dutt J stated *"Normally the word `may' used in a statute should be construed as discretionary, but in the context of the statutory provision in which the word finds place, it may become necessary to interpret it as mandatory ….."*.

Accordingly, it is necessary to examine whether there is any reason why the word *"may"* used in section 43 (1) should not be given its ordinary permissive or optional meaning and, instead, should be regarded as having a mandatory or compulsive effect.

When deciding this question, the following observation made by Sir Barnes Peacock in DELHI AND LONDON BANK vs. ORCHARD [1877 4 IA 127 at p.135] gives useful guidance: *"There is no doubt that in some cases the word `must' or the word `shall' may be substituted for the word `may'; but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word `may' must be taken to be used in its natural, and, therefore, in a permissive, and not in an obligatory sense."*. Further, in STATE OF U.P. vs. JOGENDRA SINGH [AIR 1963 SC 1618 at p.1620] Gajendragadkar J stated *"There is no doubt that the word `may' generally does not mean `must' or `shall'. But it is well settled that the word `may' is capable of meaning `must' or `shall' in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word `may' which denotes discretion should be construed to mean a command."*

For the purposes of this case, it will suffice to apply the tests referred to in the aforesaid two decisions and firstly examine whether the legislature intended that the word *"may"* used in section 43 (1) be given a mandatory or compulsive effect; and to also examine whether the context in which the word is used or the fact that a discretion conferred

upon a person by section 43 is coupled with an obligation, suggests that the word *"may"* used in section 43 (1) is to be given a mandatory or compulsive effect

In this regard, when one peruses section 43 and the other provisions and scheme of the Debt Conciliation Ordinance, there is nothing to suggest the legislature intended that the word *"may"* used in section 43 (1) should be given a mandatory or compulsory meaning and, thereby, exclude the rights which a person who comes before a Debt Conciliation Board would ordinarily have to institute a regular action under the ordinary law.

To the contrary, section 40 (1) Debt Conciliation Ordinance explicitly recognises the right of a party to a settlement in a Debt Conciliation Board to institute a regular action to claim his rights on the mortgage bond, charge or other lien securing the debt, Further, sections 56 and 58 implicitly recognise the right of a party to settlement before Debt Conciliation Board to institute a regular action. The only restriction is that a creditor may claim only the amount of the debt stated in the settlement.

Thus, section 40 (1) specifies that, where parties enter into a settlement in a Debt Conciliation Board, their rights upon the contract of debt become *"merged"* in the settlement. This makes it clear that the debt which was claimed becomes *"merged"* in the settlement. Consequently, the *only* debt which thereafter survives is the debt specified in the settlement. However, the *proviso* to section 40 (1) expressly states that the rights of a creditor under a mortgage, charge or lien which secures the debt which is dealt with in the settlement 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."*.

Therefore, in terms of the *proviso*, where a debt which is the subject matter of a settlement before a Debt Conciliation Board is secured by a mortgage, the creditor is entitled, unless the settlement specifies otherwise, to obtain an order for the sale of the mortgaged property which secured that debt, to recover the debt. In this regard, it hardly needs to be said that a court may enter a decree for the judicial sale of a mortgaged property to recover a monetary debt which is secured by a mortgage bond, only in execution of a hypothecary decree entered in a hypothecary action instituted under the provisions of the Mortgage Act No.6 of 1949, as amended. As Fernando CJ stated in SAWDOON UMMA vs. FERNANDO [71 NLR 217 at p. 219], *"I need state no reasons for the opinion that a Court cannot enter a decree which includes an order in terms specified in that definition* [*ie:* the definition of a hypothecary action in section 2 of the Mortgage Act] *except in a regular action maintained in compliance with Part II of the Mortgage Act."*. Further, Fernando CJ went on to observe [at p.221] that the provisions of the Debt Conciliation Ordinance do not confer jurisdiction on a court to enter a

hypothecary decree for the judicial sale of a mortgaged property other than in a hypothecary action instituted under the Mortgage Act.

Therefore, it follows that the proviso to section 40 (1) of the Debt Conciliation Ordinance explicitly recognises that a creditor who is party to a settlement in a Debt Conciliation Board in which a mortgage figures, has the right to institute a hypothecary action to enforce that mortgage bond by the judicial sale of the mortgaged property for the recovery of the amount of the debt which is stated in the settlement and is secured by that mortgage bond. Similarly, as stipulated in the proviso to section 40 (1), where such a debt is secured by a charge or a lien over property, the creditor would be entitled to institute an appropriate action in court under the provisions of the ordinary law to obtain a decree to recover that debt in terms of that charge or lien.

Next, section 56 of the Ordinance provides that a Civil Court shall not entertain any action is respect of *"(i) any matter pending before the Board; or (ii) the validity of any procedure before the Board or the legality of any settlement;"* or *"any application to execute a decree, the execution of which is suspended under section 55* [of the Ordinance]*."*. Thus, section 56 clearly points to the conclusion that, although parties who are before a Debt Conciliation Board cannot institute action in a regular court so long as the matter is *pending* before the Debt Conciliation Board, they have every right to institute a regular action in court *after* the conclusion of the proceedings before the Debt Conciliation Board by the entering of a settlement or otherwise.

Finally, section 58 of the Ordinance provides that, where an action is filed in a court for the recovery of a debt which was the subject of any proceedings in a Debt Conciliation Board, the period of time which elapsed while the matter was pending before the Debt Conciliation Board shall not count when calculating the period of prescription *"….. for the purposes of any action filed in or proceedings before a civil court for the recovery of any debt which was the subject of any proceedings under this Ordinance, ….."*. Thus, section 58 also leads to the conclusion that a party to a settlement before a Debt Conciliation Board is entitled to institute a regular action in court to assert his rights.

Thus, it is clear that the provisions of the Debt Conciliation Ordinance do not give any reason to think that the legislature intended the word *"may"* in section 43 (1) to have a mandatory or compulsory meaning which will exclude other remedies available under the ordinary law.

Further, it is evident that there is nothing in section 43 and the other provisions of the Debt Conciliation Ordinance which suggest that the *context* in which the word *"may"* is used in section 43 (1) requires that the word be given a mandatory or compulsive meaning. Further, the discretion given by section 43 to a party to a settlement in a Debt Conciliation Board to make an application under section 43 (1) is not *coupled with an*

obligation which could have the effect of suggesting that the word *"may"* used in section 43 (1) is to be given a mandatory or compulsive effect

In these circumstances, it has to be held that the word *"may"* in section 43 (1) is to be given its ordinary permissive or optional meaning. As a result, the conclusion must be that section 43 (1) only gives a party to a settlement in a Debt Conciliation Board the *option* of making an application to court by way of summary procedure to enforce that settlement under and in terms of section 43 (1). There is certainly *no* exclusion of the right of that party to resort to his ordinary remedies in law by instituting a regular action for the recovery of the amount of the debt which is stated in the settlement.

A perusal of the decisions of this Court on this issue, clearly establishes this position.

Thus, in SAWDOON UMMA vs. FERNANDO [71 NLR 217], Fernando CJ, with Sirimane J agreeing, held that a creditor who has entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, retains the right to institute a hypothecary action for the recovery of the amount of the debt stated in the settlement by the judicial sale of the mortgaged property.

It should be mentioned that in SAWDOON UMMA vs. FERNANDO, Fernando CJ referred to the earlier case of SAMARASINGHE vs. BALASURIYA [69 NLR 205] where Sansoni CJ, with Siva Supramaniam J agreeing, had taken the view that a creditor who is a party to a settlement before a Debt Conciliation Board which deals with a mortgage bond is confined to exercising his remedy under section 43 (1) of the Debt Conciliation Ordinance and has no right to institute a hypothecary action for the recovery of the amount secured by the mortgage bond. However, Fernando CJ observed [at p. 221] that the earlier decision in SAMARASINGHE vs. BALASURIYA appeared to have been reached because the creditor had, contrary to the restriction specified by section 40 (1), sued to recover the original amount of the debt and not the sum which was stated in the settlement before the Debt Conciliation Board.

In SAWDOON UMMA vs. FERNANDO, Fernando CJ went on [at p.221] to state with regard to the earlier decision in SAMARASINGHE vs. BALASURIYA , *"But certain further observations, made obiter in that judgment appear to express the opinion that the creditor's right of mortgage becomes merged in the settlement, and is therefore extinguished or wiped out. With much respect, it seems to me that the Court would not have reached that opinion, if the circumstances of that case had required full consideration of the terms of s. 40 (1) of Chapter 81. 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, continue 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 a debt or the rate of interest payable upon the debt.". If I may add, it also appears that, in SAMARASINGHE vs. BALASURIYA, the attention of the Court had not been drawn to sections 56 and 58 of the Debt Conciliation Ordinance which were referred to above.

Thus, in SAWDOON UMMA vs. FERNANDO, this Court disagreed with some of the *obiter dicta in* SAMARASINGHE vs. BALASURIYA and unequivocally held that a creditor who has entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, retains the right to institute a hypothecary action for the recovery of the amount of the debt which is stated in the settlement, by the judicial sale of the mortgaged property.

Thereafter, in NONA vs. ENGALTHINAHAMY [72 NR 152], Alles J, with Pandita-Gunawardene J followed the decision in SAWDOON UMMA vs. FERNANDO. Alles J observed [p.155-156], *"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."* and *"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."*.

Next, in RAJIYAH vs. ABOOBAKKER [1978-79 2 SLR 131], Soza, J, then in the Court of Appeal, followed the decisions of SAWDOON UMMA vs. FERNANDO and NONA vs. ENGALTHINAHAMY and stated [at p. 139-140] that these two decisions *"….. 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."*. Finally, in BASTIANPILLAI vs. GUNARATNAM [CA 649/80(F) decided on 17th November 1993], the Court of Appeal again followed the decisions of SAWDOON UMMA vs. FERNANDO, NONA vs. ENGALTHINAHAMY and RAJIYAH vs. ABOOBAKKER and upheld the right of a creditor who has entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, to institute a hypothecary action for the recovery of that debt.

Thus, in addition to the fact that a plain reading of section 43 (1) and a perusal of the other provisions of the Debt Conciliation Ordinance establish that a creditor who has

entered into a settlement in a Debt Conciliation Board for the payment of a debt which is secured by a mortgage bond, is entitled to institute a hypothecary action for the recovery of that debt which is recorded in the settlement, there are several decisions of the appellate courts which have recognised and reiterated that right.

However, it has to be noted that, in the present case, the plaintiff's action was *not* a hypothecary action for the recovery of a debt which is recorded in a settlement entered in a Debt Conciliation Board. Instead, the plaintiff instituted a vindicatory action to obtain a declaration of title to the half share in paddy field which came to her under and in terms of the Conditional Transfer when the defendant failed to pay the sum of Rs.9,200/- on or before 19th June 1981. This Conditional Transfer figured in the settlement in the Debt Conciliation Board.

In paragraph [12] of the written submissions filed on behalf of the defendant, learned President's Counsel has, in the light of the aforesaid decisions, acknowledged that the plaintiff would have the right to file a hypothecary action upon a mortgage bond which figures in a settlement entered in a Debt Conciliation Board. But, he submits that the position is different in the case of conditional transfers and that section 43 of the Debt Conciliation Ordinance prohibits the institution of a vindicatory action based on a conditional transfer which figured in a settlement entered in a Debt Conciliation Board.

However, it seems to me that the reasoning used in the aforesaid decisions is equally applicable to instances where a conditional transfer figures in a settlement entered in a Debt Conciliation Board and the creditor later wishes to institute a vindicatory action based on the conditional transfer. I see no reason why a party to a settlement entered in a Debt Conciliation Board in which a conditional transfer figured, who claims that he has obtained title to the property which was subject to the conditional transfer, could be deprived of the right to file a vindicatory action to obtain a declaration of title to the property. There is certainly nothing in the provisions of section 43 (1) or the other provisions of the Debt Conciliation Ordinance which takes away that right.

That view is in line with the authority of two previous decisions of this Court. In JOHANAHAMY vs. SUSIRIPALA [70 NLR 328] a settlement had been entered in a Debt Conciliation Board for the payment of a debt in respect of which a conditional transfer of a land had been executed. Since the debtor failed to pay the debt in terms of the settlement, the creditor claimed that title had passed to him under the conditional transfer and instituted a vindicatory action claiming a declaration of title to the land. The defendant debtor took up a defence that section 43 of the Debt Conciliation Ordinance debarred the plaintiff creditor from maintaining a vindicatory action on the basis that the only remedy available to the plaintiff creditor was to make an application under section 43. These facts are similar to those which are before us.

Samerawickrame J, with Manicavasagar J agreeing, held that the plaintiff creditor had the right to institute a vindicatory action and stated [at p. 331] *" I do not see that there can be any disability for the plaintiff to bring an action upon the title he had 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."*. Thereafter, in BABY NONA vs. DINES SILVA [79 II NLR 153 at p. 157-158] Rajaratnam J, with Vythialingam J and Sharvananda J agreeing, followed the decision in JOHANAHAMY vs. SUSIRIPALA and held *"It is my view that s.43 of the* [Debt Conciliation] *Ordinance does not apply to cases of conditional transfers and I follow the decision in Johanahamy vs. Susiripala."*.

Accordingly, it is clear that the provisions of section 43 of the Debt Conciliation Ordinance do not prevent a creditor who entered into a settlement in a Debt Conciliation Board in which a conditional transfer figured, from later instituting a vindicatory action claiming title based on that conditional transfer.

For the aforesaid reasons, I hold that the learned High Court Judges correctly set aside the judgment dated 30th August 2001 of the District Court and directed that the case proceeds to trial. This appeal is dismissed with costs and the judgment dated 30th September 2008 of the High Court is affirmed. The merits of the cases of the two parties have to be decided upon the evidence. The District Court is directed to proceed to trial on the issues framed in this case, other than the aforesaid issue No. [7] which has been answered in favour of the plaintiff.

Judge of the Supreme Court

Sisira J. de Abrew J
I agree.

Judge of the Supreme Court

Murdu Fernando, PC, J.
I agree.

Judge of the Supreme Court