IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of Appeal Case No:
CA/DCF/1058/2000

District Court Trincomalee Case No: **DC/782/98**

Mrs. Balambikai Sivasubramaniyam,
No. 178, Dockyard Road,
Trincomalee
By her Attorney
Poobalasingam Vairavanathan,
No. 178, Dockyard Road,
Trincomalee

Plaintiff

Vs.

1. Mohamed Vapoo Badurdeen,
2. Ameerun Nihar,
   Both at No. 206/5, Central Road,
   Trincomalee

Defendants

AND NOW BETWEEN

3. Mohamed Vapoo Badurdeen,
4. Ameerun Nihar,
   Both of No. 206/5, Central Road,
   Trincomalee.

Defendant-Appellants

Vs.

(Deceased) Mrs. Balambikai, Sivasubramaniyam,
No. 178, Dockyard Road,
Trincomalee.

By her Attorney
Poobalasingam Vairavanathan,
No. 178, Dockyard Road,
Trincomalee.

Plaintiff-Respondent

Poobalasingam Vairavanathan,
No. 178, Dockyard Road,
Trincomalee.

Substituted Plaintiff-Respondent

Before:	**Prasantha De Silva, J.** **K.K.A.V. Swarnadhipathi, J.**
Counsel:	M. Muzni Yakoob and T. Azaza instructed by Mrs. Yamuna for the Defendant-Appellants. S. Mandaleswaran with Ms. S. Abinaya for the Substituted Plaintiff-Respondent.
Argued on:	06.12.2021
Written Submissions tendered on:	28.01.2022 by the Substituted Plaintiff-Respondent Appellant-Respondent. 23.02.2022 by the Defendant-Appellants.
Delivered on:	28.03.2022

Prasantha De Silva, J.

Judgment

The Plaintiff instituted action bearing No. DC/782/98 in the District Court of Trincomalee through her Power of Attorney holder, against the Defendants praying *inter alia* that Plaintiff be declared the owner of the land and premises described in the schedule to the plaint, by virtue of Deed No. 10120 dated 03.01.1992 attested by O.L.M. Ismail, Notary Public, Defendants and others holding under them be ejected from the said premises, for the recovery of damages at the rate of Rs. 1000/- per mensum from 16.02.1998 till Plaintiff is placed in possession and for cost.

It appears that the Defendant had transferred the said land and premises described in the schedule to the plaint, to the Plaintiff, by the said Deed No. 10120 dated 03.01.1992, subject to the condition that Defendants should repay the sum of Rs. 100,000/- with interest at 36% per annum commencing from 03.01.1992 within a period of three years, upon fulfillment of which, the Plaintiff should re-convey the said land to the 2nd Defendant.

The Defendants filed their answer admitting the execution of the said Deed No. 10120 and the conditions contained in the said Deed but denied any cause of action having arisen for the Plaintiff to file an action to obtain a declaration of title to the premises morefully described in the schedule to the plaint.

At the Trial, admissions and issues were framed on 05.11.1998 and issues No.01 to No.10 were raised on behalf of the Plaintiff and issues No.11 to No.29 were raised by the Defendants. Subsequent to the above, the learned District Judge raised issues No.30, 31 and 32, arising from the oral and documentary evidence adduced at the Trial before delivering the Judgment on 13.12.2000.

It appears that the learned District Judge delivered the Judgment on 13.12.2000 in favour of the Plaintiff and further made an Order that a sum of Rs. 117,915/- together with interest at 36% per annum from 31.10.1995 is recoverable by the Defendants from the Plaintiff, it being the sum paid by the Defendants to the Plaintiff in terms of the said Deed bearing No. 10120.

Being aggrieved by the said Judgment, the Defendant-Appellants have preferred this appeal on the following grounds:

a. That the said Judgment is contrary to law and weight of the oral and documentary evidence adduced at the trial.
b. This action is totally misconceived as the prayer contained in the plaint is for declaration of title based on Deed No.10120 marked as P2, ignoring the settlement arrived at between the parties on 22.04.1994 marked as P5, which had completely altered the nature of the said Deed as it has reduced it to a simple monetary debt, recoverable only under terms of settlement of the said Order marked as P5.

It was submitted on behalf of the Defendant-Appellants [hereinafter sometimes referred to as the Appellants], that at the Trial, parties had admitted the fact that the Appellants made their original application marked P3 to the Debt Conciliation Board in respect of the debt due under Deed

marked as P2 and as a result of that application, a Settlement Order marked as P5 was effected by the Board.

The Appellants had paid certain installments stipulated in the said Settlement Order P5 and only a sum of Rs.67,085/- had been left unpaid. The Appellants had made another application to the Board marked as P6 to review the original settlement and as a result, Order marked as P7 was made by the Board directing the Appellants to pay the balance sum of Rs. 67,085/- together with interest at the rate of 25% per annum in installments of Rs.5,000/- per month from 30.09.1995. However, the Defendant-Appellants had paid only two installments amounting to Rs.10,000/-.

The Plaintiff-Respondent [hereinafter sometimes referred to as the Respondent], applied to the Board by letter marked as P8 requesting permission of the Board to seek legal remedy in a Court of Law. As a consequence of the said application, Board made the Order marked as P10, rejecting the said Order P7 after considering the original settlement.

It was brought to the notice of Court by the Appellants that the second application by Appellants to the Board, marked as P6, was to obtain permission to extend time for the balance payment and for an Order of the Board granting an extension of time to pay the amount ordered by the said Settlement Order marked as P5.

i. The Orders of the Board marked as P11 and P13 only have the effect of refusing to grant an extension of time to pay the balance unpaid amount Rs. 66,000/-
ii. The Orders marked as P11 and P13 have no effect of vacating or setting aside the original Settlement Order marked as P5.

It is worthy to note that the Debt Conciliation Board, being a Quasi-Judicial body, has no power to vacate its own consent Order. The Board is empowered under the Debt Conciliation Ordinance to direct the parties to implement its Orders in a Court of Law, as was ordered by the Board in its order marked P16.

While the matter was pending before this Court, the original Plaintiff had passed away and her daughter was substituted as the Substituted-Plaintiff-Respondent of this case. It appears that the parties to the instant action had executed a Conditional Transfer and thereafter had entered into a settlement before the Debt Conciliation Board upon an application made by the Debtor [Appellant], which varied the original terms and conditions of the said Conditional Transfer.

It was submitted on behalf of the Defendant-Appellants, that the remedy to apply to the Debt Conciliation Board is made available by the Debt Conciliation Ordinance No. 39 of 1941 and that effecting an amicable settlement too is provided by the said Ordinance.

It was further submitted that once the jurisdiction of the said Board is exercised and parties have arrived at an amicable settlement by accepting and signing it, it is binding on the parties. Therefore, the Defendant-Appellants had taken up the position that once a default in the settlement occurs, the remedy upon a default agreed in the settlement will only be available to a party who had accepted it to be the remedy and not otherwise, since it is agreed before a Judicial Forum and executed as per provisions of the said Debt Conciliation Ordinance No. 39 of 1941.

The Appellants were paying the arrears of interest and portions of capital by way of installments as stipulated in the said Settlement Order of the Board and after paying certain amounts ordered in the said Settlement Order [P5], only a sum of Rs. 66,000/- was left to be paid.

Afterwards, the Defendants had made the said application to the Debt Conciliation Board in 1993 by way of Application No. 36598. The Debt Conciliation Board brought in a settlement between the Plaintiff and the Defendants on 22.04.1994. As per the said settlement, it is seen that the Debt Conciliation Board had considered the said Deed bearing No. 10120 marked as P2, to be a document which transpires a mortgage transaction between the parties and that until the payment is made, the mortgage rights upon the land and premises remain. The rate of interest was reduced from 36% per annum to 25% per annum. In the event of a default by the Debtor, the Creditor has the right to institute an action before Court to obtain any amount that is due to the Creditor under this reconciliation, as per the provisions of the Debt Conciliation Ordinance.

It was argued on behalf of the Defendant-Appellants that the said Deed No.10120 marked as P2 ceased to be a Conditional Transfer and became only a security for the monetary debt as a result of the Settlement Order arrived at, under the Debt Conciliation Board on 22.04.1994 which is marked as P5. Thus, the Plaintiff-Respondent could seek her remedy only under the said Settlement Order of 22.04.1994 marked as P5.

Furthermore, the Settlement Order marked as P5 was effected under Section 30 of the Debt Conciliation Ordinance and it is evident that the said settlement had been sent to the Registrar of Lands in Trincomalee for registration and return, in terms of Section 41 of the Debt Conciliation Ordinance.

Moreover, it was submitted by Defendant-Appellants that there is no provision for any further proceedings before the Board. The settlement effected by the Board, contained in document marked as P5, concluded the matter before the Board, which was *functus* thereafter.

However, the Defendant-Appellants had failed to comply with the said settlement (P5). Subsequently, the Defendant-Appellants had made an application to the Debt Conciliation Bord and a notice (P6) was sent regarding the revision. Thereafter, an inquiry had been held by the Debt Conciliation Board, after which settlement P7 was entered. According to the said settlement (P7) Defendant needed to pay Rs 67,085 and the said amount was to be paid in monthly installments of Rs. 5000 at the rate of 25% per annum from 30.09.1995. The entire amount was to be settled before 30.06.1996. However, since the Defendant-Appellants have failed to comply fully with the settlement (P7), Plaintiff-Respondent had made an application (P8) to Debt Conciliation Board. Thereafter, the Debt Conciliation Board had sent a notice (P9) to Defendant-Appellants but Defendant-Appellants had not complied with the said notice (P9) and had been absent at the inquiry. The said inquiry report is marked as P10 in evidence. It appears that the said letter (P11) was sent to the Defendant-Appellants by Debt Conciliation Board. Moreover, the application made by Defendant-Appellants to Debt Conciliation Board was rejected by P13 and Debt Conciliation Board permitted Plaintiff-Respondent to institute legal action against Defendant-Appellants by P16.

As such, it clearly shows that the Debt Conciliation Board had dismissed the application of the 1st Defendant-Appellant to review the Settlement Order marked as P5 and had not revised the original settlemt P5 entered between parties. Therefore, it is apparent that the said settlement (P5) had been revived only in relation to the amount to be paid.

Hence, it was the contention of the Defendant-Appellants that in case of default of payments under the said settlement, the proper action available to the Respondent was under Section 43 of the Debt Conciliation Ordinance No.39 of 1941 (Chapter 81) as amended by Ordinance No.19 of 1978 to obtain a decree absolute compelling the payment of the admitted balance sum of Rs.66,000/- together with interest due from the Appellants on the said Settlement Order of the Board marked as P5.

The learned District Judge by raising issues No.30, 31 and 32, had accepted the fact that Deed No.10120 was only a security for a money lending transaction and that the large sum of Rs.117,915 had been paid by the Appellants to the Respondent upon the said deed. The learned District Judge having answered issues No. 11 to 15 in the affirmative, had accepted the fact that the Appellants had applied to the Board before end of the three-year period stipulated in Deed P2 and that parties have arrived at a Settlement Order which the Appellants had implemented by paying several installments.

It was further argued by the Appellants that Respondent having accepted the stance that in the event of a default by the Debtor (the Appellants), the Respondent shall have the right **to institute an action before the Court** as per the provisions of the Debt Conciliation Ordinance to obtain any amount that is due to the Respondent under the said settlement marked as P5, and is thereby estopped from filing an action for declaration of title.

Therefore, it was contended by the Defendant-Appellants that the instant action for declaration of title is misconceived and is in complete violation of the said Settlement Order marked as P5. In view of the settlement entered before the Debt Conciliation Board No. 39 of 1941, it was considered in clause 3 that the Deed marked as P2 was not a transfer but a document relating to a

loan transaction. Moreover, it was contended by the Defendant-Appellant that the creditor, the Plaintiff-Respondent, only has a right to recover the credit amount secured by the mortgage. As such, it was pointed out on behalf of the Defendant-Appellants, that novation has emerged and affected the terms and conditions in the Deed marked as P2 by the said settlement marked as P5 before the Debt Conciliation Board.

A Novation may substitute a new obligation between the same parties, a new debt or a new creditor. A contract that immediately discharges either a previous contractual duty or a duty to make compensation, creates a new contractual duty and includes as a party, one who neither owed the previous duty nor was entitled to its performance - also termed substituted agreement.

It was submitted that novation is the emerging and transfer of a prior debt into another obligation either civil or natural, that is the construction of a new obligation in such a way as to destroy a prior one. It was further submitted that in fact, novation really amounts to the extinction of the old obligation and the creation of a new one, rather than transfer of the obligation from one person to another. According to Black's Law Dictionary (8th edition), Bryan A. Garner defines 'novation' as follows:

> *"The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces as original party with a new party".*

The Law of Contracts by C.G, Weeramanthry-Volume 2 at page 718 has defined 'Novation' as below:

> *"The term "novation" is used in two senses. In its wider sense, it means the creation of a fresh contract by the extinction of pre-excising one in whose room it stands. In its narrower sense, it refers to one only of the varieties of novation comprised within the broader meaning of the term".*

Further, the nature of novation proper is described by the said author at page 719 as follows:

> *"Where there is a novation of a contract, there comes into existence in the eye of the law a new and independent contract. A new obligation must be created which contains some element not found in the earlier obligation. Thus, an absolute obligation may*

succeed to a conditional one or a money debt to an obligation to transfer property. A mere variation of the terms of a document does not produce this effect, for there must be a new agreement superseding the terms and conditions of the old. The grant by the creditor of an extended time to the debtor for payment thus does not constitute a novation nor does the grant of an additional security or the mere confirmation of an original agreement".

In view of the aforesaid reasons, it was submitted that the settlement entered before the Debt Conciliation Board marked as P5 **is not a mere variation of terms of a document** wherein the rate of interest and the character of the remedy available upon a default too has been altered.

Chief Justice Lascelles emphasized in the case ***Kathikesu Vs. Ponnachchy [14 NLR 486]*** at 487 which held,

".... Novation may take place, not only by express agreement, but also by tacit or by implication, the consent of the parties to the novation being implied from the circumstances and the conduct of parties.

In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation".

It was the contention of the Defendant-Appellants that the acceptance of the settlement by the Respondent and also accepting money as stipulated in the settlement marked as P5 is sufficient evidence to establish an agreement of novation.

The said settlement marked as P5 has been made before a body incorporated by the Parliament and the parties have signed it accordingly. It is tacit proof that the Respondent has agreed to the novation which further establishes the existence of meeting of minds of the creditor and the debtor in forming a new obligation arising out of an express agreement, by conduct or by tacit understanding in place of the previous obligation.

In ***Palaniappa Vs. Saminathan [(1913) 17 NLR 56]*** at page 58, it was held:

> *"No matter what were the respective rights of parties inter se, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such as accord and satisfaction takes place, the prior rights of parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all parties are fully represented by it".*

In view of the aforesaid extract, it was submitted by the Defendant- Appellants that the said Deed marked as P2 is not a document upon which the Respondent can claim title, as the Respondent has waived the said right off by novation, settling the matter before the Debt Conciliation Board with fresh terms and conditions. According to the said contention of the Appellants, the Plaintiff-Respondent can only enforce the settlement entered into with the Debt Conciliation Board on 22.04.1994 marked as P5, and not sue on the Conditional Transfer in Deed No. 10120 marked as P2.

The aforesaid case, ***Palaniappa Vs. Saminathan [supra]*** relates to an agreement between parties regarding profits of a money lending business, which is not regarding a Conditional Transfer. It was submitted on behalf of the Substituted Plaintiff-Respondent that paragraphs 1-13 setout under the title "Novation" in the written submissions of Defendant-Appellants, well and truly apply to a Novation, to Novation Proper in particular. Nevertheless, it does not in any way apply to the proceedings with the Debt Conciliation Board in the instant case. As such, the concept of Novation has had no application whatsoever to the case of the Substituted Plaintiff-Respondent on the said Conditional Transfer [P2].

It was the contention of the Substituted Plaintiff-Respondent that there is no new obligation created on the settlement P5, and that it is only a concession granted to the Defendant-Appellants by the Debt Conciliation Board on the money due to the Substituted Plaintiff-Respondent on easy installments at a reduced interest and that there is no new debt or new creditor but only a variation in the time of payment, reduction of interest and the property remaining transferred with the Substituted Plaintiff-Respondent.

It is appropriate at this stage to refer to the concept of "Novation" by C.G. Weeramantry on the Law of Contract at page 718 (Note 751) referring to 'Novation' and under Varieties of Novation.

*"**Varieties of Novation**. The term 'Novation' is used in two senses;*
In its wider sense, it means the creation of a fresh contract by the extinction of a pre-existing one in whose room it stands. In its narrower sense it refers to one only of the varieties of Novation comprise within the broader meaning of the term.

Novation in the wider sense is of four varieties:

a. *The substitution of a new debt for an existing debt. This is known as 'novation proper'.*
b. *The substitution of a new debt for an existing debtor. This is known as 'delegation'.*
c. *The substitution of a new creditor for an existing creditor. This is known as 'cession'.*
d. *The substitution for one of the original parties of a third person who takes over both rights and obligations. This is known as 'assignment'."*

Then, at page 719 (Note 752 (a)) referring to 'Novation Proper' and under Nature of Novation Proper;

> *"**Nature of Novation Proper.** Where there is a novation of a contract, there comes in to existence in the eye of the law a new and independent contract.*
>
> *A new obligation must be created which contains some element not found in the earlier obligation. ……A mere variation of the terms of a document does not produce this effect, for there must be a new agreement superseding the terms and conditions of the old. The grant by the creditor of an extended time to the debtor for payment thus does not constitute a novation……."*

Further down, C.G. Weeramantry refers to Lord Moulton;

> *"In the words of Lord Moulton, in explaining the similar English concept of "accord and satisfaction by a substituted agreement", "No matter what were the respective rights of the party inter se, they are abandoned in consideration of the acceptance by all of a new agreement. Their consequence is that when such an accord and satisfaction takes place, the prior rights of the parties are extinguished. They have in fact been*

exchanged for the new rights: and the new agreement becomes a new departure, and the rights of all parties are fully represented by it".

The Substituted Plaintiff-Respondent argued that the purpose of the Debt Conciliation Board is to alleviate the difficulties of the Defendant-Appellants in paying the money due to the Substituted Plaintiff- Respondent by granting some sort of a concession and in default of which the Substituted Plaintiff-Respondent is entitled to revert back to his right to institute action against the Defendant-Appellants on the said Conditional Transfer (P2).

It was the position taken up by the Substituted Plaintiff-Respondent that there is no provision in the Debt Conciliation Ordinance for the Defendant-Appellants to insist the Substituted Plaintiff-Respondent to sue the Defendant-Appellants only on the balance sum due on the settlement (P5). It is to be noted that since Section 43 of the Debt Conciliation Ordinance does not apply to Conditional Transfers as per the Judgments of ***Johanahamy Vs. Susiripala [70 NLR 328]*** and the case of ***Baby Nona Vs. Don Dines Silva [79 (II) NLR 153],*** as such the Defendant-Appellants' said contention is untenable in law.

It was held in the case of ***Johanahamy Vs. Susiripala*** reported in ***70 NLR 328;***

"A debt, in respect of which a conditional transfer of immovable property had been executed, was subsequently the subject matter of proceedings before the Debt Conciliation Board. In a settlement which was arrived at, it was agreed between the parties that the capital and interest due to the creditor should be paid by the debtors on dates fixed in the settlement and that in the event of a single default the right to redeem would be at an end. After the debtors committed default in making payments, the Creditor sued them in the present action claiming declaration of title to the conditional transfer. It was submitted on behalf of the Defendants that the conditional transfer was in fact a mortgage retaining title in the debtors that the proceedings before the Debt Conciliation Board were still pending and that, therefore, the Plaintiff was not entitled to maintain the action in view of the provisions of Sections 43 and 56 of the Debt Conciliation Ordinance.

Held, that the action was maintainable. The amendment to the definition of 'mortgage' made by Act No. 5 of 1959 has not altered the law relating to the creation of a mortgage over immovable property and has not recognized as a mode of creating a mortgage the execution of a conditional transfer. It merely permits the Debt Conciliation Board to regard a conditional transfer in certain circumstances as a mortgage, for the purpose of exercising jurisdiction under the Ordinance in respect of such a transaction. Accordingly, title to the property which is the subject of a conditional transfer falling within the definition, is in the transferee and is not retained by the debtor-transferor".

It was emphasized by *Rajaratnam J.* in the case of ***Baby Nona Vs. Don Dines Silva [79 (II) NLR 153];***

> "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, 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".

Therefore, in view of the *ratio decidendi* of the aforesaid case law, it appears that those are identical to the facts of the instant case. Thus, Court has to reject the contention of the Appellants that the Respondent has agreed to Novation and thereby created a new obligation extinguishing the prior rights of the parties and that those parties can only enforce settlement P5, which was entered before the Debt Conciliation Board. Hence, the Plaintiff - Respondent is entitled to sue the Defendant-Appellants on the Conditional Transfer P2.

It is evident that both Plaintiff-Respondent and the Defendant-Appellants had executed a Conditional Transfer [P2]. Moreover, the Defendant-Appellants had admitted that the entire conditions of the Deed [P2] had not been fulfilled by the Appellants. Thus, according to the Order P16, the Plaintiff-Respondent is entitled to institute action in the District Court to establish his rights.

It is pertinent to note that the learned District Judge held, the Plaintiff can claim ownership and eject the Defendant in terms of the Conditional Transfer [P2] and the Defendant is entitled to get back the payment which he paid to the Plaintiff with interest at the rate of 36%.

In view of the aforesaid reasons, I hold that the Plaintiff-Respondent is entitled to sue the Defendant-Appellants on the Conditional Transfer [P2], Deed bearing No. 10120 dated 03.01.1992.

Hence, we see no reason for us to interfere with the Judgment of the learned District Judge dated 13.12.2000 and we affirm the same. Therefore, the appeal is dismissed with tax cost.

JUDGE OF THE COURT OF APPEAL

K.K.A.V.Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL