

(1955) 08 BOM CK 0015
In the Bombay High Court
Case No : A.F.A.D. No. 180 of 1953

Abehsang Jivabhai and Others	Vs	APPELLANT
Dhirajlal Maneklal and Another		RESPONDENT

Date of Decision : 12-08-1955

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 4, 45, 45(2), 51, 56
Evidence Act, 1872 — Section 101, 102, 103

Citation : AIR 1956 Bom 215

Hon'ble Judges : Vyas, J

Bench : Single Bench

Advocate : D.V. Patel and I.C. Bhatt, for the Appellant; A.A. Adarkar, for the Respondent

Judgement

Vyas, J.—This is an appeal by the plaintiffs and it arises out of a judgment and decree passed by the learned Assistant Judge of Kaira at Nadiad in Civil Appeal No. 125 of 1951 which arose out of Regular Civil suit No. 245 of 1950 which was filed in the Court of the Civil Judge J. D. at Umreth.

2. The suit of the plaintiffs was filed under the D. A. R. Act for taking accounts of a certain transaction dated 12-7-1912, which was an oral transaction and which according to the contention of the plaintiffs, was a transaction in the _ nature of a mortgage, This transaction was effected by one Ander Jaga, the father of the plaintiffs Nos. 3, 4 and 5 in favour of one Maneklal, the father of defendant No. 1. In the suit a prayer was also made for redemption of the suit property and for recovering possession thereof from the defendants.

3. The suit property in this case is survey No. 154 of Malvan Taluka Thasra. This property, along with certain other property, was mortgaged to the grand-father of defendant No. 1 on 15-12-1898. The mortgaged properties were the ancestral properties of one Gotabhai, an ancestor of the plaintiffs. If we turn to the pedigree in this case, which is to be found at page 11 of the print, it would appear that Gotabhai had two sons, Jaga and Bhagwan.

Jaga had a son named Ander and Bhagwan's son was Jiva and plaintiffs Nos. 3, 4 and 5 are the sons of Ander. It is the case of the plaintiffs that they are agriculturists under the D. A. R. Act. On 12-7-1912, the father of the present defendant No. 1 viz. Maneklal, took a sale-deed of the suit property from. Ander, the son of Jaga for Rs. 305/-. It is the plaintiffs' contention in the suit that although the document was a sale deed the real nature of the transaction was a mortgage and it is , of this transaction that the plaintiffs are seeking to take accounts under the D. A. R. Act in the suit which they have filed.

4. The learned trial Judge came to the conclusion that the plaintiffs had" proved their case that the transaction dated 12-7-1912 was really in the nature of a mortgage. He further held that defendant No. 2 had failed to establish his contention that the suit was barred under the provisions of Section 51(a) of the B. A. D. R. Act, 1947. Consistently with these findings, the learned trial Judge passed a decree in favour of the plaintiffs.

On the defendant No. 2 going in appeal to the District Court, the learned Additional Judge held that the plaintiffs were not entitled to challenge the transaction dated 12-7-1912 under the provisions of the B. A. D. R. Act of 1947, since the original application (No. 2880 of 1945) which was made by Jiva Bhagwan, the [father of plaintiffs Nos. 1 and 2, for the adjustment of his debts under the old mortgage transaction of 1898 was pending in the Thasra Court at the date upon which the Act of 1947 was made applicable to Thasra.

The learned Judge of the lower Appellate Court further came to the conclusion that the suit was barred under the provisions of Section 56, B. A. D. R. Act of 1947. Accordingly, the learned Judge in appeal ordered that the suit of the plaintiffs should stand dismissed.

5. As I have just mentioned, application No. 2880 of 1945 was filed by Jiva Bhagwan, the father of plaintiffs Nos. 1 and 2, for the adjustment of a mortgage debt under the old mortgage transaction of 15-12-1898. If we turn to Sub-section (2) Of Section 45of the repealed B. A. D. R. Act of 1939, it says:

"Nothing in this section "(i. e. Section 45) shall apply to any transaction entered info before 1st January 1927".

It was clear, therefore, that under the old B. A. D. R. Act of 1939, the ostensible sale transaction dated 12-7-1912 could not be challenged. The new B. A. D. R. Act, 1947, was made applicable to Thasra Taluka on the "27th May 1947". On that date the original application, to which I have just referred viz., application No. 2880 of 1945, which was filed by Jiva, was pending in the Thasra Court. The bar which obtained under Sub-section (2) of Section 45of the old Act was removed by the new Act.

The defendant No. 2 was thereafter brought on record in the proceedings of Application No. 2880 of 1945. The court held that as the defendant No. 2 had not been brought on record within the prescribed period by the Act, the application

deserved to fail. Accordingly, application No. 2880/45 was ultimately dismissed on 26-4-1950. The learned Judge of the lower appellate Court has taken the view that the present- suit of the plaintiffs is barred by provisions of Section 56 of the B. A. D. R. Act of 1947, and in my opinion, that view is correct.

It is to be noted again that the application No. 2880 of 1945 which was made originally by Jiva Bhagwan and which was prosecuted by his sons after the death of Jiva was pending in the Thasra Court when the New Act was made applicable to Thasra Taluka. Bearing all this in mind, we have now to turn to the provisions of Sub-section (2) of Section 56 of the B. A. D. R. Act of 1947 which lay down as follows:

"All Boards established u/s 4 of the Act shall be dissolved, provided that all proceedings pending before any such Board at the date when this Act comes into force shall be continued and disposed of by the Court under this Act as if an application u/s 4 had been made to the Court in respect thereof".

In view of these provisions, the learned Judge below was right in saying that since the plaintiffs were debtors and since the provisions of the B. A. D. R. Act of 1947 would be applicable to them in view of the fact that application No. 2880 of 1945 which was filed by the father of plaintiffs Nos. 1 and 2 for the adjustment of his debts was pending in the Thasra Court at the date upon which the Act of 1947 was made applicable to Thasra Taluka the suit deserved to fail.

6. Mr. Vakil for the plaintiffs has contended before me that so far as the record goes, it would appear that only the plaintiffs Nos. 1 and 2 were debtors and that, therefore, at the best so far as they are concerned, the suit might fail, But according to Mr. Vakil, there is nothing to show, on the record of this case, that plaintiffs Nos. 3, 4 and 5 were debtors.

Mr. Vakil says that they are not debtors and, therefore, the provisions of the B. A. D. R. Act of 1947 will not apply to them and since the provisions of the Act of 1947 would not apply to the plaintiffs Nos. 3, 4 and 5, but would apply to plaintiffs Nos. 1 and 2, Mr. Vakil has urged that the suit would deserve to succeed so far as plaintiffs Nos. 3, 4 and 5 are concerned.

It is true that the application No. 2880 of 1945 for the adjustment of the debts under the earlier transaction of 1898 was made by Jiva in his individual capacity. Under the definition of the word "debtor" given in the Act of 1947, a joint family may also be a debtor as also an individual may be. From this Mr. Vakil wants me to hold that I must accept his contention that the plaintiffs Nos. 3, 4 and 5, who are not the sons of Jiva, but who are sons of Jiva's cousin, were not debtors. I am afraid I am unable to agree.

Since the plaintiffs have come to the court asking for relief under the provisions of the D. A. R. Act the onus rests entirely upon the plaintiffs to show that the provisions of the D. A. R. Act would govern their suit and not the provisions of the B. A. D. R. Act 1947. To me this position appears to be quite elementary and

does not admit of any dispute or controversy. Unless the plaintiffs showed that all of them were not debtors, it would not be possible for them to bring a suit under the D. A. R. Act. In this connection, we have only got to turn to the provisions of Section 56 of the B. A. D. R. Act 1947 which say:

"Notwithstanding the repeal of the D. A. R. Act 1879, by the B. A. D. R. Act 1939, the first mentioned Act shall, in so far as it applies to transactions and proceedings to which this Act does not apply be deemed to have been re-enacted with effect. etc."

The re-enactment of the D. A. R. Act 1879 was done only for a limited purpose and that purpose was that the D. A. R. Act 1879, would apply only to those transactions and proceedings to which the B. A. D. R. Act 1947, would not apply. Clearly, therefore, the people seeking relief under the re-enacted D. A. R. Act had to show both the things viz., firstly, that they were agriculturists, and secondly, that they did not fall within the ambit of the B. A. D. R. Act of 1947.

Clearly, therefore it was entirely for the plaintiffs to show that they were not debtors; because if they were debtors, the provisions of B. A. D. R. Act 1947, would apply to them, and the re-enacted D. A. R. Act of 1879 would not be of any assistance to them. It is needless to dilate any further on this point. Although the onus was entirely upon the plaintiffs to show that they were not debtors, they did not press for an issue on that point in the trial Court. The suit was resisted by the defendants upon the contention that it was barred under the provisions of Section 51 (a) of the B. A. D. R. Act 1947. Now, if we turn to Section 51 (a) of the B. A. D. R. Act, it says:

"Except as otherwise provided by this Act, and notwithstanding anything contained in any other law no civil Court shall entertain or proceed with any suit or proceeding in respect of any matter pending before the Court under the B. A. D. R. Act".

It is clear, therefore, that the defendants resisted the suit of the plaintiffs upon the allegation that the trial Court had no jurisdiction to entertain the suit u/s 51 (a) of the B. A. D. R. Act 1947, because the suit related to a matter pending before a Court established under the B. A. D. R. Act 1947. It was clearly implicit in the position which the defendants took while resisting the suit that all the plaintiffs were debtors and therefore the suit was governed by the provisions of B. A. D. R. Act, 1947 and that being so, it was for the plaintiffs to prove that they or some of them were not debtors.

Notwithstanding the above contention of the defendants taken in their written statement, the plffs. did not even as much as press for an issue in the trial Court alleging that the plaintiffs or some of them, at any rate, were not debtors. No such issue was raised in the trial Court, with the result that no evidence was recorded by the trial Court on the point whether the plaintiffs or any of them were or were not debtors.

If we turn to the Memo of appeal in this second appeal filed by the plaintiffs, even there I do not find any such allegation that the plaintiffs or some of them at least were not debtors.

In this view of the matter, the learned Judge of the trial Court was, in my opinion quite right in proceeding upon the assumption that all the plaintiffs were debtors. Undoubtedly, Jiva, the father of plaintiffs Nos. 1 and 2 was held to be a debtor in Application No. 2880 of 1945. The plaintiffs Nos. 1 and 2 are his sons; plaintiffs Nos. 3, 4 and 5 are close relatives of the plaintiffs Nos. 1 and 2. The suit property was a joint family property; all the plaintiffs formed a joint and undivided Hindu family.

The plaintiffs did not even as much as allege that they or some of them, at any rate were not debtors. In view of all these circumstances", I am of the opinion that the learned trial Judge, on a proper appreciation of the above-mentioned circumstances, was quite right in proceeding on the assumption that the plaintiffs were debtors and, therefore, the present suit would not fall within the ambit of the D. A. R. Act of 1879.

7. The result is that the appeal fails and is dismissed with costs.

8. Appeal dismissed.