

(1955) 07 BOM CK 0009
In the Bombay High Court
Case No : A.F.A.O. No. 327 of 1953

Asaram Bapu Waghmode and Another	APPELLANT
Vs	
Bhanudas Dhondiba Patil and Others	RESPONDENT

Date of Decision : 22-07-1955

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 22, 27, 29(1), 31, 32
Civil Procedure Code, 1908 (CPC) — Section 100, 101, 9

Citation : AIR 1956 Bom 687 : (1956) 58 BOMLR 95

Hon'ble Judges : Vyas, J

Bench : Single Bench

Advocate : V.M. Tarkunde, for the Appellant; J.G. and B.J. Rele, for the Respondent

Judgement

Vyas, J.—The appellants in this appeal are original defendants and the appeal has arisen out of a judgment and decree passed by the learned Assistant Judge at Ahmednagar in appeal No. 431 of 1951 which arose out of suit No. 32 of 1950 filed in the Court of the Civil Judge, J.D. at Newasa.

2. A few facts leading upto this litigation may be stated. The Plaintiffs of the present suit are minors and the suit has been filed by them through their guardian, their father. It is a suit for a declaration that the sale-deed in respect of survey Number 70/2 which was passed by the father of the plaintiffs on 22-12-1947 is void as it would be hit by the provisions of Section 40, B.A.D.R. Act and for possession of Section No. 70/2; or, in the alternative, the prayer made by the plaintiffs is that they should be granted a declaration that the abovementioned sale deed is not binding upon them as the transaction was entered into for immoral purposes and as there was no legal necessity for it. In the suit the plaintiffs have claimed three-fourths share in the suit property.

3. On 23-4-1915 the father of the plaintiffs, Dhondiba Paul, passed a possessory mortgage deed of the suit property for Rs. 400/- in favour of the plaintiff Ex. 43 to the Court established under the defendants. On 26-10-1945 Dhondiba made

an ap- B.A.D.D. Act for the adjustment of his debts. In that application Dhondiba showed four creditors. Two of these four creditors were alleged to be mortgages in respect of the sale mortgage transactions and the other two creditors were the present two defendants. On 18-3-1947 Dhondiba passed a second possessory mortgage of the same property to the defendants for Rs. 300/-. Thereafter, on 22-12-1947, Dhondiba took an additional amount of Rs. 900/- from the Defendants and passed a sale-deed of the suit property in their favour for Rs. 1,600/-. On 12-1-1950, the Plaintiffs, who are the sons of Dhondiba, filed the present suit through their guardian Dhondiba. In the application which was filed by Dhondiba under the B.A.D.R. Act, he was held to be a debtor by the Court established under the B.A.D.R. Act on 11-10-1950. It may be noted that throughout the present litigation the abovementioned application filed by Dhondiba under the B.A.D.R. Act was pending. The trial Court came to the conclusion that, apart from the provisions of Section 40, B.A.D.R. Act, the transaction of the sale-deed dated 22-12-1947 was binding upon the plaintiffs as in the view of the learned trial Judge the transaction was not entered into by Dhondiba for any immoral purpose and also as there was no want or lack of legal necessity. But the learned Judge held that the transaction of the sale-deed was hit by the provisions of Section 40, B.A.D.R. Act and was, therefore, void. Accordingly, he decreed the suit in favour of the plaintiffs. On the matter going in appeal, the learned Assistant Judge confirmed the Judgment and decree passed by the trial Court. That is how the defendants have come in second appeal to this Court.

4. The learned Advocate Mr. Tarkunde appearing for the defendants has submitted his principal contentions before me as under: (1) By virtue of the provisions of Section 51A, B.A.D.R. Act, 1947, a Civil Court has no jurisdiction to entertain, or proceed with any suit or proceeding in respect of any matter pending before the Court under the B.A.D.R. Act. Mr. Tarkunde says that in this case the suit, which was filed by the Plaintiffs was in respect of a matter pending before the Court under the B.A.D.R. Act and, therefore, the court of the Civil Judge who tried and decided the suit had really no jurisdiction to do so, (2) Even apart from the provisions of Section 51A, B.A.D.R. Act, 1947, the present suit is not maintainable as the plaintiffs have no right to file a suit. According to Mr. Tarkunde, Dhondiba Patil, the father of the Plaintiffs, should have filed the suit. Mr. Tarkunde's contention is that the application Ex. 48 which was made by Dhondiba Patil under the provisions of the B.A.D.R. Act was made by him in his individual capacity and not on behalf of the undivided family. But, even if the application were to be treated as having been made by Dhondiba Patil on behalf of the undivided family, Mr. Tarkunde says that even in that view of the matter so long as Dhondiba is alive, the suit could not have been filed by the plaintiffs, alive, the suit could not have been filed by the plaintiffs, but ought to have been filed by Dhondiba. Mr. Tarkunde's contention is that, as the application Ex. 48 was made by Dhondiba in his individual capacity, at best only Dhondiba's one-fourth share in the suit property would be hit by the provisions of Section 40,

B.A.D.R. Act, and even if the sale transaction had to be challenged on that score, the challenge should have been made by Dhondiba himself and not by his sons, the plaintiffs. Mr. Tarkunde's point is that a three-fourth share in the suit property belonging to the plaintiffs would not be hit by the provisions of Section 40, B.A.D.R. Act as the application Ex. 48 was made by Dhondiba in his individual capacity. Mr. Tarkunde contends that for this reason also the suit filed by the plaintiffs would not be maintainable. These are the two contentions principally urged before me by the learned Advocate Mr. Tarkunde.

5. The first point which, therefore, falls to be determined in this appeal is whether the Court of the learned Civil Judge who heard and decided the suit of the plaintiffs had jurisdiction to do so, and having heard the learned Advocate on both the sides and having considered the relevant provisions of the B.A.D.R. Act, I am of the view that Mr. Tarkunde's contention must be up-held, namely, that the Civil Court, in this case the Court of the learned Civil Judge, J.D. at Newasa, had no jurisdiction to entertain and proceed with the suit. Section 51A, B.A.D.R. Act, 1947, is in these terms:

"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 CD any matter pending before the Court under this Act, or etc. etc."

Now, in this case, it is to be borne in mind that at the date when the suit was filed, an application Ex. 48 which was made by Dhondiba, the father of the plaintiffs, under the provisions of the B.A.D.R. Act was pending before the Court established under the Act and in the disposal of it a question must arise whether this property, namely the property which is the subject-matter of the suit, was the property of the debtor. The point whether the property covered by the sale-deed was the property of the debtor or not would necessarily arise in the disposal of the application which was filed by Dhondiba before the Court under the B.A. D.R. Act. Now, whether a particular sale-deed is hit by the provisions of Section 40, B.A.D.R. Act or not is the same thing as saying whether the property covered by that sale-deed is the property of the debtor or not. Mr. Tarkunde has taken me through the provisions of the various sections of the B.A. D.R. Act and he has contended before me that the points whether a particular person is a debtor or not, what the total extent of his debts is, what the extent of his property is, what the value of his property is, would all be matters pending before a Court under the Act, once an application for the adjustment of his debts is made by that particular person. If we examine the scheme of the Act and turn to Section 27 of the Act, it reads

"After taking accounts u/s 22 the Court shall in the manner hereinafter provided determine (1) the particulars of the property belonging to the debtor ..."

It is, therefore, obvious that the B.A.D.R. Act contemplates that, once an application is made by a person for the adjustment of his debts, it would be

necessary for the Court before which the application is made to ascertain the extent of the property belonging to the debtor; In that way, it would be a matter pending before the Court before which Dhondiba had made an application under the B.A.D.R. Act for the adjustment of his debts to decide whether the suit property belonging to Dhondiba or belonging to somebody else, for instance in this case the defendants. Then again, if we turn to Section 29 (1), it provides

"Subject to the provisions of Sub-sections (2), (3) and (4), the value of the property and other assets of a debtor for the purposes of ascertaining the paying capacity of the debtor Section 27 shall be determined by the Court in the prescribed manner."

It is, therefore, clear that the Court before which an application for the adjustment of his debts is made by a person would have to consider the value of the property of that particular person provided the Court comes to the conclusion that he is a debtor. Now, there is no doubt in this case, that, if the Court established under the B.A.D. R. Act came to the conclusion that the property involved in the present suit was the property of the debtor Dhondiba, the paying capacity of the debtor would be more than otherwise would be the case. It is in this manner that the question whether the suit property belonged to the debtor Dhondiba or not would be a matter pending before the Court under the B.A.D.R. Act.

6. Then there is Section 30 of the Act which provides :

"The paying capacity of the debtor shall, for the purposes of this Act, be deemed to be sixty per cent. Of the value of all the property of the debtor."

Therefore, for the purpose of determining the paying capacity of the debtor, for instance Dhondiba in this case, it would, be essential for the Court before which the application for the adjustment of his debts under the Act was made by Dhondiba to ascertain the value of all the property belong to Dhondiba. From that point of view also it would be necessary for the Court under the B.A. D.R. Act to determine whether this particular property, which is the subject-matter of the present suit, was the property of Dhondiba or not. Finally, there is Section 32 of the Act and Section 32(1) says.

"After determining the amount of debts scaled down in the manner provided in Section 31, the Court shall, save as otherwise provided in Section 33, make an award"

and the Section goes on to say that

"the award shall be in the prescribed form and shall be drawn up subject to the following provisions: (1) (11) subject to clause (1) the amount of unsecured debts shall be charged on all the properties of the debtor unless ..etc. etc."

It would, therefore, be clear that the award passed by a Court under the B.A.D.R. Act after determining the amount of debts would have to lay down what

would be the amount of unsecured debts which would be charged on all the properties of the debtor. Thus it is clear that the Court under the Act would have to determine the extent of the properties of Dhondiba and, therefore, it would have to go into the question whether the suit property was the property really belonging to Dhondiba or to the defendants Sub-clause (v) of Clause (2) of Section 32 of the Act also says that the Court may pass an order for the delivery of possession of any property notwithstanding any law on contract to the contrary. Therefore, under the provisions of the B.A.D.R. Act, it would be open to the Court established under that Act to pass any order it considered fit regarding delivery of possession of the property which is the subject matter of the present suit, provided it came to the conclusion that it was the property belonging to Dhondiba Patil. I have referred to the provisions of these sections in order to point out that, on a careful examination of the scheme of the B.A.D.R. Act, it would be amply evident that the present suit which has been riled by the plaintiffs is in respect of matters pending before the Court established under the B.A.D.R. Act, once Dhondiba had filed an application before that Court for the adjustment of his debts.

7. If we were to hold that a Civil Court has jurisdiction to entertain a suit of the present nature, we would be confronted with a serious situation. Supposing the Court established under the B.A.D.R. Act came to the conclusion that the property covered by the sale-deed was the property belonging to -Dhondiba and supposing that the Civil Court came to a contrary conclusion there would be two conflicting decisions given by two different courts. Then again, supposing that the court established under the B.A.D.R. Act came to the conclusion that the sale-deed in question was not passed by Dhondiba before the discharge of his debts, the said Court might pass a particular order which might immediately come in conflict with the order passed by the Civil Court, in case the Civil Court came to a contrary conclusion on the point whether the sale-deed was passed by Dhondiba before the discharge of his debts or not For this reason also I am of the view that Mr. Tarkunde's contention must be upheld, namely that by virtue of Section 51A of the Act Civil Court would have no jurisdiction to entertain or proceed with a suit of this nature.

8. Mr. Rele appearing for the respondents says that an issue on this point was not raised in the trial Court nor in the lower appellate Court & that none was suggested by the defendants before either of the Courts and that, therefore, this Court should not consider it. There is no substance in this objection. The point is purely a point of jurisdiction and it a well-settled principle of law that a jurisdictional point can be raised at any stage even in second appeal.

9. The second objection, which Mr. Rele has taken, is on the authority of a decision of this court in Himatsing Dhansing v. Sonu, 56 Bom LR 69 (A). I am unable to understand how the decision in Himatsing Dhansing v. Sonu (A) could apply to the facts of the present case. All that was decided in that case was that, if a transfer was made contrary to the provisions of Section 40, Bombay

Agricultural Debtors Relief Act, 1947, it was void and conveyed no title to the transferee. With respect there could be no dispute about the proposition laid down in that case and indeed the principle is not disputed by Mr. Tarkunde for the appellants. The point which is pressed by Mr. Tarkunde is as to the jurisdiction of a Civil Court to determine whether a particular sale-deed is or is not hit by the provisions of Section 40, B.A.D.R. Act. Mr. Tarkunde says that it is only this Court established under the B.A.D.R. Act which can go into the question whether a particular transaction of sale is or is not hit by the provisions of Section 40, B.A.D.R. Act. I have carefully gone through the judgment in *Himatsing Dhansing v. Sonu (A)* but I do not find anything therein to show that the point which is pressed before me by Mr. Tarkunde arose for consideration in that case. Therefore, that decision cannot avail Mr. Rele's clients.

10. Then there is one more point pressed before me by Mr. Tarkunde and that is this: Mr. Tarkunde says that if we turn to the application Ex. 48, which was made by Dhondiba for the adjustment of his debts before the Court established under the B.A."D.R. Act, we would find that it Was made by him in his individual capacity and not In his capacity as a Manager of the undivided Hindu family. Mr. Tarkunde says -- and he is right --that a debtor may be an individual or may be an undivided Hindu family. Now, if we turn to the application Ex. 48, it would be noticed straightaway that there is nothing in terms therein which would suggest that Dhondiba made that application on behalf of the family. On the other hand, If we turn to column 7 of the application, we would find that the answer furnished by Dhondiba to the question contained in that column was in the negative. The column is in regard to the other co-sharers. Surely, if Dhondiba had filed that, application not on his own individual behalf, but on behalf of his sons and himself, he would not have answered the question in that column in the negative. He would have stated in that case that three other co-sharers were there. If we read column 7, it would be apparent that the application Ex. 48 was made by Dhondiba as though the entire property belonged to himself alone and to nobody else which would be the same thing as saying that the application was made by Dhondiba in his individual capacity. Now, it is not disputed in this case that Dhondiba's share in this property would be one-fourth. In this connection, it would be necessary to turn to the provisions of Section 40, B.A.D.R, Act and Section 40 says:

"Notwithstanding any law or contract, but subject to the provisions of Sections 41 and 53, no alienation of any property belonging to a debtor who is a party to any proceedings etc. etc."

Now, if we come to the conclusion, as I think we must, upon a reading of the application Ex. 48 made by Dhondiba before the Court established under the B.A.D.R. Act, that the said application was made by Dhondiba in his individual capacity, then the property belonging to the debtor within the meaning of Section 40 of the Act would be only one-fourth share in the suit property and a challenge under the provisions of Section 40 of the Act could be made only in respect of

that share (one-fourth) in the suit property and that too by Dhondiba himself and not by his sons. The sons' share in the suit property would be to the extent of three-fourths, but that share would not be the property of the debtor Dhondiba. Therefore so far as the three-fourths share of the sons in the suit property is concerned, that at any rate would not be hit by the provisions of Section 40, B.A.D.R. Act, Even if it be held that the application Ex. 48 was made by Dhondiba on behalf of the undivided Hindu family of which he was a manager, even so I must uphold Mr. Tarkunde's contention that, so long as Dhondiba is alive, the suit must be filed by him and not by his sons. It is Dhondiba who received the monies under all the three transactions. For the first possessory mortgage, it was Dhondiba who obtained Rs. 400; under the second possessory mortgage, it was Dhondiba who received a sum of Rs. 300; and under the sale-deed in question it was Dhondiba who conveniently got for himself Rs. 900/-. Having regard to all these circumstances even if the application Ex. 48 be deemed to have been made by Dhondiba on behalf of the undivided Hindu family, I fail to see how the present suit filed by Dhondiba's sons and not by Dhondiba himself could be maintainable. For this reason also I am of the view that Mr. Tarkunde's objection, must prevail.

11. Mr. Rele says that this particular point -was not taken up by the defendants before the trial Court, but Mr. Rele is evidently misinformed. His attention has only got to be invited to issue No 6 of the issues framed by the trial Court and there Mr. Rele would find that his objection is amply met.

12. For the reasons stated above, the appeal succeeds as I hold that the Court of the learned Civil Judge, who entertained and proceeded to hear and decide the suit of the plaintiffs, had no jurisdiction to do so and as I hold further that the suit as framed by the plaintiffs is not maintainable. The suit would therefore stand dismissed. The respondents will bear their own costs as also the costs of the appellants throughout. There will be no order on the civil application.

13. Appeal allowed.