

(1979) 06 KAR CK 0018
In the Karnataka High Court
Case No : WP. 1954 & 1957/77

Bhimrao Tukaram

APPELLANT

Vs

Sub-divl. Magistrate, Belgaum and Others

RESPONDENT

Date of Decision : 13-06-1979

Acts Referred:

Karnataka Debt Relief Act, 1976 — Section 4

Citation : (1980) 1 KarLJ 74

Hon'ble Judges : Swami, J

Judgement

1. In these writ petitions, under Art. 226(1)(b) and (c) of the Constitution, the petitioners have challenged the validity of the order passed by the Sub-Divisional Magistrate, Belgaum Sub-Division, Belgaum, in No. KDR. HKR. 517/76, dated 28-1-1977 allowing the application filed by the 2nd respondent under S. 4 of the Karnataka Debt Relief Act, 1976 (hereinafter referred to as "the Act".)

2. Out of the two lands in question, one land bearing Sy. No. 22216 of Matiwade village was mortgaged to the petitioner in W.P. No. 1954/77 and the other land bearing Sy. No. 222/3 of the same village, according to the case of respondents 2 and 3, was mortgaged in favour of the petitioner in W.P. No. 1957 of 1977. In respect of these two mortgages, the 2nd respondent made an application under S. 4 of the Act for discharge of the mortgage debts and for delivery of possession of the lands in question. The Sub-Divisional Magistrate recorded the joint statement of respondents Nos. 2 and 3 and separate statements of the petitioners. Thereafter, by the impugned order, the Sub-Divisional Magistrate has allowed the application and has ordered for delivery of possession of the lands in question to respondents 2 and 3.

3. Sri W.K. Joshi, the learned Counsel appearing for the petitioners in both the writ petitions, submitted that the application filed under Sec. 4 of the Act, was not the one filed by respondent No. 3 who was the owner and mortgagor of the lands in question but it was filed by respondent No. 2, who is the wife of respondent No. 3. The learned Counsel further submitted that it is the person

who has mortgaged the lands in question or his successor in interest, namely, the heirs or the purchaser of equity of redemption alone could file the application and not any other person and the wife of respondent No. 3 cannot be said to have title to the lands in question during the lifetime of her husband and as such, the entire proceeding is vitiated. He also further submitted that the Sub-Divisional Magistrate has not held an enquiry in accordance with law and has also not recorded the finding as to whether respondent-3 can be said to be the debtor within the meaning of the Act.

4. Sri G.D. Shirgurkar, the learned Counsel appearing for respondents 2 and 3, submitted that though there was no application filed by respondent-3, but nevertheless, he was examined in the case and he has supported the application filed by respondent-2; that even otherwise, the Sub-Divisional Magistrate was entitled to initiate the proceeding suo motu; that being so, the non-joining of respondent 3 in the application as an applicant is not fatal to the application. He also further submitted that the case of respondent No. 2 as made out in the application is that she does not own or possess any property and respondent No. 2 and her children do not have anything for their maintenance and this case of respondent No. 2 has not been denied by the petitioners, therefore, the Sub-Divisional Magistrate was justified in allowing the application filed under Section 4(f) of the Act.

5. No doubt, S. 4(f) of the Act, empowers the Sub-Divisional Magistrate to initiate the proceeding suo motu. But this is not a case in which the Sub-Divisional Magistrate has exercised the jurisdiction suo motu. He has taken action on the application filed by respondent No. 2. Undisputedly, respondent No. 2 has no right title or interest in the lands in question which are said to have been mortgaged by respondent-3 to the petitioners in both the writ petitions, therefore, respondent No. 2 herself could not have filed the application for seeking relief under S. 4(f) of the Act. Mere examination of her husband during the course of the enquiry cannot cure the defect in the application. Respondent No. 2 is neither an executant of the mortgage nor she is a successor in interest either as an heir of the mortgagor or as a purchaser of the equity of redemption. During the life time of her husband Respondent No. 2 alone could not have maintained the application under S. 4(f) of the Act.

6. Further, the impugned order is also vitiated as the Sub-Divisional Magistrate has not held an enquiry in accordance with law. The enquiry that is required to be held under the Act, is a formal enquiry in which the statements of the parties and their witnesses are to be recorded, the parties are to be afforded an opportunity to cross-examine if they desire to do so. That being so, it was not at all possible to record a joint statement. The Sub-Divisional Magistrate, as already pointed out, has recorded a joint statement of respondents 2 and 3. Thus, it is clear that the enquiry held by the Sub Divisional Magistrate was not in accordance with law.

7. The impugned order of the Sub-Divisional Magistrate suffers from one more

infirmity inasmuch as it does not contain any finding as to whether respondent No. 3 can be said to be a debtor within the meaning of the Act. The Act provides that only certain class of persons can be declared as debtors viz. those who satisfy that they are small farmers or landless agricultural labourers or persons belonging to the weaker sections of the people. Before granting the relief under Sections 4(e) and (f) of the Act, it is necessary for the Sub-Divisional Magistrate to record a finding that the applicant fails in any one of the aforesaid categories mentioned in the Act. Such a finding is a condition precedent for the exercise of the jurisdiction by the Sub-Divisional Magistrate under Section 4(e) and (f) read with Section 5 of the Act. That being so, apart from the question of maintainability of the application filed by respondent-2, the impugned order is not sustainable on the aforesaid two other grounds. Consequently, both the writ petitions are entitled to succeed.

8. Accordingly, these writ petitions are allowed. The impugned order bearing No. KDR. HKR. 517/76, dated 28-1-1977, passed by the Sub-Divisional Magistrate, Belgaum Division, Belgaum, is hereby quashed. However, it is made clear that it is open for respondent No. 3 to file a fresh application under the provisions of the Act for appropriate relief.