

(1957) 03 BOM CK 0041

In the Bombay High Court

Case No : Civil Revision Application No. 43 of 1957

Chaturbhai Mathubhai Patel

APPELLANT

Vs

Ramanlal Maganlal Shah

RESPONDENT

Date of Decision : 26-03-1957

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 46
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2

Citation : (1957) 59 BOMLR 689

Hon'ble Judges : Bavdekar, J

Bench : Single Bench

Judgement

Bavdekak, J.—This is an application for revision arising from execution of an award passed under the Bombay Agricultural Debtors Relief Act. When the respondent-executor made an application to the Court under the provisions of Section 38(3) of the Act, the applicant met him with a contention that he had made payment of the installments which the respondent contended had not been paid. The applicant said that all the installments which were due had been paid, because after the award he used to hand over the whole of the produce of the land of the applicant which had been mortgaged to the opponent. It was with regard to the debt due upon this mortgage that the award had been passed. The applicant said that after he had handed over the whole produce of the land to the opponent, he paid to him only half the price of the produce, and he, the applicant, paid towards the debt due upon the award the other half of the price of the produce each year since the passing of the award. The opponent then raised a contention that the payment which the applicant alleged could not be taken notice of, because of the provisions of Order XXI, Rule 2, of the Code of Civil Procedure. This contention of his has been upheld by the trial Court as well as by the appellate Court, and the applicant has come in revision.

2. Now, it is common ground that u/s 46 of the Bombay Agricultural Debtors Relief Act, save as otherwise expressly provided by the Act, the provisions of the Code apply. Consequently, the provisions of Order XXI, Rule 2, will apply, unless

there is express provision in the Act otherwise. So far as Order XXI, Rule 2(1), is concerned, it calls upon the decree-holder to certify payment or adjustment to the Court whose duty it is to execute the decree. It is obvious that there is no express provision upon this subject in the Act. Order XXI, Rule 2, is a provision enabling a judgment-debtor also to inform the Court of the payment or adjustment, and apply to the Court to show cause why the payment or adjustment should not be certified. There is no provision upon this subject either in the Act, and consequently this Sub-rule applies. What is contended, however, is that there is provision on the subject-matter of Order XXI, Rule 2, in the Act, inasmuch as Section 38(3)(ii) says :

If the Court on receipt of such application is satisfied that the debtor has made default in the payment of the installment the Court shall transfer the award for execution to the Collector.

The argument is that inasmuch as Section 38(3)(ii) requires the Court to be satisfied, which the Court can only do after it allows both the parties to lead evidence upon the subject-matter of the payment, there is a provision contrary to the provision contained in Order XXI, Rule 2(3), in Section 38(3).

3. Now, it is quite true that Section 38(3)(ii) requires the Court to be satisfied, before it transfers the award to the Collector, that the debtor has made default in the payment of the installment. It is also true that when the word "satisfied" has been used, what is meant thereby is the satisfaction of the Court obtained after due inquiry. It is obvious that when one party alleges payment, but the other party denies it, no authority whose duty it is to be satisfied that payment has not been made can possibly come to the conclusion as to whether the payment has been made or not, unless it makes inquiry into the matter and allows parties to lead evidence. The result of Order XXI, Rule 2(3), also definitely is that if it applies, then no Court can take cognizance of the payment; in the result, it is useless to allow evidence to be led upon the subject. But the first point which has to be noticed is that Section 46 says that the provisions of the Code apply, unless there is express provision to the contrary in the Act, and it is not easy to see how it can possibly be said that there is express provision upon the subject-matter of Order XXI, Rule 2(3), in Section 38(3)(ii) of the Act. Mr. Oza argues that if the Court were to take cognizance only of payments recorded as certified then there could be no question of the Courts being satisfied of the default. But if the payment is recorded as certified, then the Court must necessarily be satisfied that there was no default. On the other hand, if the creditor does not certify the payment, but the debtor informs the Court of it, the Court must necessarily make an inquiry under Order XXI, Rule 2(2), or Section 38(3). As the Code is made applicable, there was no necessity for providing for an inquiry, but Section 38(3)(i) does not provide for one specifically.

4. In the second instance, as has been pointed out on behalf of the opponent, the Bombay Agricultural Debtors Relief Act has repealed except to a certain extent the Dekkhan Agriculturists' Relief Act. Now, Section 71 of the Dekkhan

Agriculturists" Relief Act contained a provision which made Section 258 of the CPC of 1882, which corresponded to Order XXI, Rule 2(3), inapplicable to payments out of Court made in any proceeding under the Dekkhan Act, in a case where an acknowledgment by the judgment-creditor for the same has been produced, or when the payment was either admitted by him or proved. It was consequently open to a judgment-debtor to prove a payment by leading evidence. This provision has not been incorporated in the Bombay Agricultural Debtors Relief Act.

5. It is said, however, that the Legislature probably did so, because it thought that the words of Section 38(3)(ii) were sufficient to expressly enact Section 71.

6. Now, in my opinion, it is not likely that when there was an express provision upon the subject in the Act repealed, the Legislature, in the face of a provision like that in Section 46 of the Act, could be content to omit the provision from the Act of 1947 relying upon the words used in Section 38(3)(ii) to serve the same purpose as Section 71 of the repealed Act if it wanted the provision to continue. It seems to me, therefore, that the intention was that Order XXI, Rule 2(3), should apply to payments alleged to have been made towards awards passed under the Act.

7. Rule will, therefore, be discharged with costs.