

**(1962) 12 BOM CK 0005**  
**In the Bombay High Court**  
**Case No : A.F.A.D. No. 1203 of 1960**

|                                         |            |
|-----------------------------------------|------------|
| Kanayalal Hinal Agarwal and Another     | APPELLANT  |
| Vs                                      |            |
| Talabsha Maghbulsha Musalman and Others | RESPONDENT |

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**Date of Decision :** 10-12-1962

**Acts Referred:**

Bombay Agricultural Debtors Relief Act, 1947 — Section 19  
Civil Procedure Code Amendment Act, 1956 — Section 68, 69, 70, 71, 72  
Civil Procedure Code, 1908 (CPC) — Section 48, 68

**Citation :** AIR 1964 Bom 157 : (1963) 65 BOMLR 452 : (1963) ILR (Bom) 139 : (1963) MhLj 751

**Hon'ble Judges :** Shah, J

**Bench :** Single Bench

**Advocate :** G.N. Vaidya, for the Appellant;

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## Judgement

1. A somewhat interesting question has been raised in this appeal which arises out of an application for execution of a money decree presented more than 12 years after the date of the decree. On 24th of October, 1932, a decree for Rs. 444-8-0 was passed against the respondents in favour of the appellants. The respondents were granted certain installments for the purpose of paying up the decretal amount. The last of such installments was to be due in 1942. It appears that due to the defaults of the respondents in payment of the installments, the appellants had to file several darkhasts, the last of which was filed in 1941. By that darkhast the appellants prayed that an agricultural land bearing Survey No. 38, belonging to the respondents be attached and sold for the purpose of satisfying the balance of the decretal amount. The executing Court granted the prayer and sent the papers to the Collector for sale of the land. Some time after this was done, the B. A. D. R. Act came into force and by virtue of Section 19 of that Act, the papers which were with the Collector were transferred to the B. A. D. R. Court. In the B. A. D. R. Court, the respondents were not held "debtors" within the meaning of that Act and, therefore, on 18th September, 1953, the papers were sent back to the Collector. After the receipt of the papers, the

Collector, it appears, made several attempts to sell the property by public auction and the final attempt in that behalf was made on 12th January, 1957. As no person had come forward to offer a bid for the property at any of these sales, the Collector returned the papers to the Civil Court with the necessary report. The executing Court considered the Collector's report, and disposed of the darkhast on 9th February, 1957. The appellants thereafter filed the present darkhast on 19th September, 1958 and claimed recovery of the decretal amount by attachment and sale not only of Survey No. 38 which was the subject-matter of the prior darkhast but also of a house bearing City. Survey No. 3661-B, and some pronote security and also by arrest and detention in civil prison of respondents 2 and 4. To this darkhast an objection was raised on behalf of the respondents in the Executing Court that it was barred by time since it was filed more than 12 years after the date of the decree. The executing Court held that by provisions of Section 48 of the Civil Procedure Code, the execution of the decree in question was barred since more than 12 years had elapsed from the date of the decree. While so holding, it appears, that Court did not properly consider the effect of the CPC (Amendment) Act, 1956, which, while deleting Sections 68 to 72 and the IIIrd Schedule from the Civil Procedure Code, provided that nothing in that Act would affect pending proceedings. The executing Court accordingly dismissed the darkhast as barred by time. Against that decision, the appellants took an appeal to the District Court. The learned District Judge modified the order of the executing Court holding that the darkhast was not barred by time so far as the execution of the decree against Survey No. 38 was concerned but that it was so barred in so far as it was concerned with the execution of the decree against the person and other properties of the respondents. In the result, the appeal was partially allowed and the darkhast was ordered to proceed so far as the recovery of the decretal amount by attachment and sale of the land in Survey No. 38, was concerned. It is against this order that the appellants have filed the present second appeal in this Court.

2. In support of this appeal, it was urged by Mr. Vaidya, the learned Advocate for the appellants, that the Courts below had erred in refusing to allow to the appellants while deciding the question of limitation in respect of the present darkhast, the benefit of the provisions of Sub-para 3 of paragraph II of the Third Schedule of the Civil Procedure Code. Mr. Vaidya contended that during the pendency of the earlier darkhast in reference to Survey No. 38 before the Collector, his clients could not take any steps for further execution of their decree against the person of the respondents by or attachment and sale of any of their properties since by sub-para 2 of paragraph II of the Third Schedule, the Civil Court was barred during the pendency of the earlier execution proceedings from issuing any process of execution either against the respondents or against any of their properties in respect of any decree and that, therefore, the appellants were entitled to the benefit of the provisions of sub-para 3 of paragraph II so as to bring their present darkhast within the period of limitation. On a careful consideration of the provisions enacted in the several paragraphs of the Third

Schedule, however, I am of opinion that there is no substance in this contention.

3. Paragraph I of the Third Schedule prescribes the powers of the Collector in cases where a decree is transferred to him for execution u/s 68 of the Civil Procedure Code, and by virtue of these powers the Collector may, under clause (c) sell the property of the judgment-debtor ordered to be sold by the Civil Court or so much thereof as may be necessary to satisfy the decree. The decree contemplated by this paragraph may be one purely for payment of money or one ordering the sale of an immovable property in pursuance of a contract specifically affecting such property.

4. Where the decree is one for payment of money simpliciter and is transferred for execution to the Collector by sale of a specific Immovable property of the judgment-debtor and the Collector, after such inquiry as he thinks necessary, sees reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, paragraph 2 of the Third Schedule empowers him to proceed to achieve that objective in the manner set out in the succeeding paragraphs of that Schedule.

5. By paragraph 3, the Collector in such cases is first required to publish a notice in the manner prescribed therein calling upon every person holding a decree for payment of money against the judgment-debtor capable of execution by sale of his immovable property and upon every person, having a claim upon such property to produce before him within sixty days a copy of the decree together with a certificate from the Court which passed or is executing the same declaring the amount recoverable thereunder and a statement of the claim together with the documents evidencing the same respectively.

6. On the expiration of, the period of sixty days the Collector, under paragraph 4 of the Schedule, is required to appoint a day for hearing any representations which the judgment-debtor, the decree-holders or the claimants may choose to make and eventually to draw up a statement, specifying the amount to be recovered for the discharge of such decrees and claims, the order in which they are to be satisfied and the immovable property available for that purpose.

7. The Collector may, instead of himself taking action and drawing up the statement as aforesaid, leave it to the District Court to issue the notices, hold the inquiry and draw up the statement as required by paragraphs 3 and 4 and retransmit such statement to him as provided in paragraph 5 of the Schedule. The decision by the District Court, however, of any dispute as to the fact or extent of liability of the judgment-debtor in respect of any of the decrees or claims is given the status of a decree and made appealable as such by paragraph 6 of the Schedule.

8. Then paragraph 7 of the Schedule enables the Collector to liquidate all the decrees and claims ascertained in pursuance of paragraph 4 or paragraph 5 by sale of the immovable property of the judgment-debtor available for the purpose or by raising the necessary amount, notwithstanding the original order for sale,

in any one or more of the modes specified in that paragraph as if he was the owner of such property. It is under this paragraph that the Collector would, for all practical purposes, assume the administration of the entire Immovable property of the judgment-debtor and make provisions for the satisfaction not only of the decree under execution, by him but of all other decrees irrespective of whether they are put in execution or not.

9. The next important paragraph for the purposes of this appeal is paragraph II of the Third Schedule and it provides as follows:

"(I) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs I to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process" against such property or part in execution of a decree for the payment of money.

(2) During the same period no Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived."

10. As stated earlier, Mr. Vaidya's contention was that his clients could not apply for execution of their decree either against the respondents or against any of their other properties during the pendency of their Darkhast before the Collector with reference to Survey No. 38 since the Civil Court, by virtue of sub-para (2) of paragraph II, would not issue any such process of execution, and that, therefore, while computing the period of limitation for the present darkhast, the period during which the earlier darkhast was pending before the Collector should be allowed to be excluded. Now, it is clear on the record of this case that the Collector, while executing the decree of the appellants by sale of Survey No. 38 which was ordered to be sold by the Civil Court was exercising his power only under clause (c) of paragraph I and not under paragraph 2 of the Third Schedule. In other words, he was attempting to satisfy only the appellants' decree by sale of Survey No. 38 and not any other decree or decrees for payment of money that might have been outstanding against the respondents either by sale of Survey No. 38 or any other Immovable property of the respondents. In such a case, by virtue of sub-para (I) of paragraph II neither could the respondents or their representative in interest mortgage, charge or alienate Survey No. 38 or any part thereof without the permission of the Collector nor could the Civil Court issue any process against that property or any part thereof in execution of the same or any other decree for payment of money. As regards any other immovable property of

the respondents, however, the respondents would not be precluded by anything contained in that sub-para from mortgaging, charging or alienating the same nor would the Civil Court be barred from issuing process against such property either in execution of the appellants' own decree or any other decree for payment of money. The same proposition would hold good also with regard to execution of any such decree by arrest and detention in Civil prison of the respondents. If this is the true construction of sub-para (I) of paragraph II of the Third Schedule in so far as it is relevant to the facts of the present case, the appellants, could not be said to have been temporarily deprived of their remedy for execution of their decree by way of attachment and sale of some other property of the respondents and their arrest and detention in Civil prison so as to attract the provisions of sub-para (3) of paragraph II. At best, they as well as any other holder of a decree for the payment of money could be said to have been deprived of their remedy against Survey No. 38 only so long as it was under the control, and management of the Collector under paragraph I of the Third Schedule, in the sense that neither could they nor any other decree-holder ask the Civil Court to re-attach that land or make another order for sale thereof. In the present case, the appellants' fresh darkhast inter alia seeks attachment and sale of the same land since the Collector in the earlier darkhast did not succeed in selling it and returned the papers to the Civil Court with the necessary report and the Civil Court had disposed of that darkhast. Obviously, therefore, the appellants would be entitled to the benefit of the provisions of sub-para (3) of paragraph II and their fresh darkhast, though filed more than twelve years, after the date of the decree, would not be barred by time, so far as execution was sought by attachment and sale of Survey No. 38.

11. Mr. Vaidya however, relied upon the provisions of sub-para (2) of paragraph II in order to avail of the benefit of sub-para (3) for the whole of the darkhast. It is clear from the terms of this sub-para, however, that the Civil Court is debarred from issuing any process of execution either against the judgment-debtor or any of his property in respect of any decree for payment of money where the Collector while, exercising his power under paragraph 2 has drawn up a scheme for liquidation of all money decrees outstanding against the judgment-debtor under paragraph 7 of the Schedule and has made provision therein for satisfaction of such decree. The principle underlying this sub-paragraph is not far to seek. It would obviously be incongruous and also superfluous to issue any warrant for arrest of the judgment-debtor or for attachment of any of his properties in execution of a money-decree when the Collector has made provision for satisfaction of such decree in his scheme under paragraph 7. If as a result of such provisions, however, the decree is not fully satisfied, the decree-holder can certainly, file a darkhast for the recovery of the balance by arrest of the judgment-debtor or attachment and sale of any of his properties or both even though more than twelve years might have elapsed since the date of the decree and the decree-holder would be entitled to the benefit of the provisions of sub-para (3). In such a case, the decree-holder can certainly be said to have

been deprived of his remedy to execute the decree in this manner during the time that the question of the satisfaction of his decree was pending before the Collector in exercise of his power under paragraph 2, and, therefore, the period during which the Collector was exercising such power in connection with that decree would be excluded while computing the period of limitation for his darkhast in respect of such decree. In the present case, however, it is clear from the record that neither the Collector had exercised his power under paragraph 2 nor had he drawn up any scheme for liquidation of the money-decrees against the respondents under paragraph 7 nor made any provision for satisfaction of the appellants' decree in such scheme. There was, therefore, nothing in sub-para. 2 of paragraph II to debar the Civil Court from issuing process of execution against the respondents or any of their properties other than Survey No. 38 in execution of the appellants' decree if they had chosen to file a darkhast for the purpose within twelve years from the date of the decree. Since, however, they did not do so, and filed the present darkhast long after the expiration of twelve years from the date of the decree for recovery of the decretal amount by arrest of the respondents and attachment and sale of their house and other properties, it is clearly barred u/s 48 of the CPC and the benefit of the provisions of Sub-para 3 of paragraph II is not available to them to save it from that bar.

12. A reference in this connection may be made to the decision in AIR 1945 239 (Nagpur) . The facts in that case appear to be almost identical with those in the present case and after a close scrutiny and analysis of the relevant paragraphs of the Third Schedule of the Civil Procedure Code, it was held that "when the Collector does not exercise his power under paragraph 2 of the Schedule whereby he is seized of the authority to execute the decree in respect of some specified property only of the judgment-debtor;" the Civil Court has jurisdiction to execute the decree against the person of the judgment-debtor or other property of the judgment-debtor which is not under the management of the Collector and the judgment-debtor is not entitled to invoke clause (3) of paragraph II of the Schedule to overcome the bar of limitation by seeking to exclude the time during which the sale proceedings in respect of the attached property were pending before the Collector. The learned District Judge in the present case relied upon this decision of Nagpur High Court and held that the present darkhast of the appellants was barred by time, save as regards Survey No. 38. In my opinion, the decision is perfectly justified in law and accordingly the appeal is dismissed with no order as to costs.

13. Appeal dismissed.