
(1964) 07 GUJ CK 0004
In the Gujarat High Court

Parmar Teja Kama and Another

APPELLANT

Vs

Gadhecha Manilal Shavchand and Others

RESPONDENT

Date of Decision : 07-07-1964

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 17, 17
Criminal Procedure Code, 1898 (CrPC) — Section 97

Citation : (1964) 5 GLR 978

Hon'ble Judges : B.J. Divan, J

Bench : Single Bench

Judgement

B.J. Divan, J.—The petitioners in this Civil Revision Application are the original debtors who applied to the Additional Subordinate Judge, Rahpar for adjustment of their debts alleging that opponents Nos.7, 8 and 9 in this Civil Revision Application were the successors of the original mortgagees in whose favour the ancestors of the debtors had created a mortgage in 1896-97 A.D. equivalent to S.Y. 1953 for 60 Kories equivalent to Rs. 20/-. The learned trial Judge decided the preliminary issues as required by Section 17 of the Bombay Agricultural Debtors Relief Act 1947 (hereinafter referred to as the Act) and he held that the present petitioners were debtors within the meaning of the Act and that their total debts did not exceed Rs. 15 0 Thereafter there was no appeal against the finding recorded on this preliminary issue though an appeal could have been filed under the provision of Section 43 Sub-section (1) Clause (ii). When the matter proceeded on the merits the trial Court found that the mortgage debt in respect of which the adjustment was claimed as between the present petitioners and present opponents Nos. 7 8 and 9 had not been proved by the debtors and therefore the trial Court dismissed the application of the debtors. Against this finding of the trial Court there was an appeal and the lower appellate Court confirmed the finding of the trial Court and the present Civil Revision Application has been filed against the judgment and order of the lower appellate Court dismissing the appeal filed by the debtors.

2. Mr. R.C. Mankad appearing on behalf of the petitioners contended before me

that as no appeal had been filed against the order passed u/s 17 of the Act though such an appeal could have been filed u/s 43(1)(ii) of the Act it was not open to opponents Nos. 7 8 and 9 to contend at the stage of the appeal against the final award that the petitioners were not debtors within the meaning of the Act. It is true that under the scheme of the Act on the date fixed for the hearing of the application made u/s 4 of the Act the Court has to decide two preliminary issues:- (1) whether the person for the adjustment of whose debt application has been made is a debtor within the meaning of the Act and (2) whether the total amount of debts due from such person on the date of the application exceeds Rs. 15 0 If both these issues are answered in favour of the debtor viz. that he is a debtor within the meaning of the Act and that the total amount of debts due from him does not exceed Rs. 15 0 the Court has to proceed to take accounts as provided in the Act. As I have already indicated an appeal lies u/s 43(1)(ii) from that order passed u/s 17. Prima facie and considering the matter apart from any authorities on the point it is clear that Section 43(1)(ii) is an enabling provision under which the party against whom the order has been passed under the provisions of Section 17 can file an appeal notwithstanding the fact that the finding has been recorded on a preliminary issue. However there is no provision similar to the provision of Section 97 CPC in the Act u/s 97 where any party aggrieved by a preliminary decree does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decrees In the absence of any provision analogous to Section 97 CPC it cannot be said that the party against whom the order u/s 17 has been passed cannot agitate the questions which have to be decided u/s 17 of the Act as preliminary issues when the appeal is filed against the final award.

3. This conclusion of mine is fortified by the two judgments of the Bombay High Court. The first judgment is in the case of *Chatrapa Tippanna v. Dastgirsahab* 53 Bom. L.R. 793. In that case a Division Bench of the Bombay High Court consisting of Rajadhyaksha and Dixit JJ. held that an appeal lies u/s 43 of the Act against a decision of the Court on the preliminary issues u/s 17(1) of the Act. The Division Bench in that case further held that a decision u/s 17(1) of the Act is an appealable order u/s 43 of the Act and a mere failure to appeal from that order does not prevent a party from challenging its correctness when an appeal is filed against the final award made u/s 32 of the Act. I have come independently to the same conclusion on an analysis of the section and I am in respectful agreement with the ratio decidendi of this decision of the Division Bench of the Bombay High Court in 53 Bom. L.R. 793.

4. The next decision is the decision in the case of *Akbarali Abedalli v. Godha Lahanu* 58 Bom. L.R. 335. There Gajendragadkar J. (as he then was) dealing with an order passed u/s 24 of the Act held that the failure of a party to make an appeal against an order passed u/s 24 of the Act does not preclude him from challenging the correctness of such finding in an appeal against the award. It may be pointed out that u/s 43(1)(iii) of the Act an appeal can be filed from an order passed u/s 24 of the Act and thus there is no difference between an order

passed u/s 17 of the Act and an order passed u/s 24 of the Act so far as the appealability is concerned. The decision in 53 Bom L.R. 793 does not seem to have been considered by Gajendragadkar J. but the reasoning which I have set out has also appealed to Gajendragadkar J. in that case and he held that a party was not precluded from challenging the correctness of the order passed u/s 24 when an appeal had been filed against the final award.

5. As against these two decisions one of the Division Bench and the other of the Single Judge there is the judgment of Raju J. in the case of Bai Dhuli v. Motibhai 4 G.L.R. 143 where my learned Brother has held that it is not open to a creditor in an appeal against an award u/s 32 of the Act to go into the question whether the applicant is a debtor or not. If an appeal is to be filed against the finding that the applicant is a debtor it is to be done by filing an appeal against the order u/s 17 of the Act. It appears from the report that the decision in 58 Bom. L.R. 335 was pointed out to my learned brother but his attention was not drawn to the decision in 53 Bom. L.R. 793. At page 144 in IV G.L.R. my learned brother Raju has pointed out as follows:

Moreover, the facts are distinguishable because in the instant case the appeal had actually been filed. In the instant case there was no failure to file an appeal u/s 17.

Therefore the observations made by my learned brother Raju in 4 G.L.R. 143 are obiter and in view of the two decisions of the Bombay High Court one of them being a Division Bench ruling I am unable to follow the reasoning of my learned brother Raju as set out in IV G.L.R. 143. Under these circumstances I have come to the conclusion that it was open to opponents 7, 8 and 9 to urge at the stage of the appeal against the final award that the present petitioners were not debtors within the meaning of the Act.

6. It has been held by a Division Bench of this Court that the heirs of the original-flaortgagor cannot be said to be debtors within the meaning of the Act and that being the case I am bound to follow that Division Bench ruling and under these circumstances the present petitioners cannot be said to be debtors within the meaning of the Act and therefore the Courts below were right in dismissing the application of the present petitioners so far as the trial Court was concerned and in dismissing the appeal so far as the lower appellate Court was concerned. The result therefore is that this Civil Revision Application must fail. This Civil Revision Application therefore fails and is dismissed with costs. Rule discharged.