
(1961) 01 GUJ CK 0009
In the Gujarat High Court

Shah Nanalal Maneklal

APPELLANT

Vs

Patel Chhotabhai Desaibhai

RESPONDENT

Date of Decision : 25-01-1961

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 15(1), 19(1)
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9, Order 9 Rule 9

Citation : (1961) 2 GLR 601

Hon'ble Judges : P.N. Bhagwati, J

Bench : Single Bench

Judgement

P.N. Bhagwati, J.—The appellant filed Regular Civil Suit No. 400 of 1947 against the respondent and in that suit a consent decree was passed on 28th July 1948 whereby the respondent was ordered to pay certain amount to the appellant. The appellant thereafter filed a Darkhast No. 262 of 1948-49 for execution of the decree. In the meanwhile the Bombay Agricultural Debtors Relief Act 1947 (hereinafter referred to by me as the Act) was made applicable and the respondent therefore applied on 5th November 1949 for transfer of the Darkhast u/s 19(1) of the Act on the ground that he was a debtor within the meaning of the Act and that the total amount of debts due from him did not exceed Rs. 15,000/-. The Darkhast was thereupon transferred to the B.A.D.R. Court u/s 19(1) and was treated as an application made u/s 4. The application thereafter came up for hearing before the B.A.D.R. Court on 18th July 1952 when the appellant remained absent. Since the appellant was absent, the B.A.D.R. Court instead of proceeding ex parte to hear the application and to decide the preliminary issues, dismissed the application for default of appearance of the appellant. The appellant filed an application before the B.A.D.R. Court for restoration of the application which was dismissed for default of appearance, but this application was dismissed by the B.A.D.R. Court. The appellant carried the matter in appeal but the appeal was also dismissed on 19th January 1954. The result was that the Darkhast of the appellant which was transferred to the B.A.D.R. Court and treated as an application u/s 4 remained dismissed for want

of appearance of the appellant. During the pendency of the appeal against the order refusing to restore the application the appellant filed another Darkhast namely Darkhast No. 190 of 1953 on 19th October 1953 to execute the decree. In opposition to the Darkhast the respondent contended that the judgment-debt due and owing by the respondent to the appellant was extinguished under the provisions of Section 15(1) and that the appellant was therefore not entitled to execute the decree against the respondent. The respondent also contended that inasmuch as the previous Darkhast of the appellant which was transferred to the B.A.D.R. Court and treated as an application u/s 4 was dismissed by the B.A.D.R. Court for default of appearance of the appellant it was not competent to the appellant to prefer another Darkhast and that such Darkhast was barred by the provisions of Order IX Rule 9 of the Code of Civil Procedure. Both these contentions were negated by the learned Civil Judge (Junior Division) who held that the appellant was entitled to proceed with the Darkhast and to execute the decree against the respondent. The respondent thereupon filed an appeal before the District Court of Kaira at Nadiad. The learned Assistant Judge who heard the appeal accepted the contentions urged on behalf of the respondent and held that inasmuch as the appellant had allowed his previous Darkhast to be dismissed by the B.A.D.R. Court for want of appearance the position was the same as if no application u/s 4 had been made by the appellant within the time prescribed under the Act and that the provisions of Section 15(1) therefore applied and had the effect of extinguishing the judgment debt due and owing from the respondent to the appellant. The learned Assistant Judge also held that the provisions of the CPC applied to applications u/s 4 and that inasmuch as the previous Darkhast of the appellant was dismissed by the B.A.D.R. Court for want of appearance the dismissal of that Darkhast amounted to an order passed under Order IX Rule 8 of the CPC and that the appellant was therefore not entitled to file another Darkhast for execution of the decree in view of the provisions of Order IX Rule 9 of the Code of Civil Procedure. The learned Assistant Judge of course made it clear that the aforesaid consequences could ensue only if the respondent was a debtor within the meaning of the Act and the total amount of debts due from him did not exceed Rs. 15 0. The learned Assistant Judge therefore set aside the order of the learned trial Court and remanded the Darkhast to the trial Court for deciding the question as to whether the respondent was a debtor within the meaning of the Act and his total debts did not exceed Rs. 15 0 and directed that the trial Court should pass proper orders either for dismissing the Darkhast or for proceeding with it in the light of the observations made in his judgment. It is against this order of the learned Assistant Judge that the appellant has brought the present Second Appeal before this Court.

2. Mr. C.K. Shah learned Advocate on behalf of the appellant attacked the judgment of the learned Assistant Judge on both the grounds which were decided in favour of the respondent. Mr. C.K. Shah contended that when the appellants Darkhast was transferred to the B.A.D.R. Court u/s 19(1) the B.A.D.R. Court was

bound to proceed with the Darkhast as if it was an application u/s 4 and even if the appellant did not appear at the hearing of the Darkhast before the B.A.D.R. Court the B.A.D.R. Court was not entitled to dismiss the Darkhast for want of appearance but was bound to proceed ex-parte to hear the Darkhast as an application u/s 4 and to decide the preliminary issues namely:

(a) Whether the respondent was a debtor within the meaning of the Act; and

(b) Whether the total amount of debts due from the respondent exceeded Rs. 15,000/-.

3. The argument was that the Act did not contemplate any dismissal of an application u/s 4 for want of appearance of the party making the application and that the dismissal of the appellants Darkhast was therefore contrary to the provisions of the Act. According to Mr. C.K. Shah the wrongful dismissal of the appellants Darkhast by the B.A.D.R. Court did not result in the extinguishment of the appellants judgment debt against the respondent and the learned Assistant Judge was wrong in coming to the conclusion that the effect of the dismissal of the appellants Darkhast was as if no application had been filed by the appellant u/s 4 so as to attract the applicability of Section 15(1). Mr. C.K. Shah also relied on Section 36 and contended that under that section it was expressly provided that notwithstanding that the person for the adjustment of whose debts an application had been made u/s 4 or any of his creditors did not appear on the date fixed for the hearing of the application or on any date to which it might be adjourned the Court was bound to proceed ex parte to hear the application decide the preliminary issues and if necessary make the award on the evidence available. This express provision in Section 36 argued Mr. C.K. Shah excluded the applicability of Order IX of the CPC and the learned Assistant Judge was therefore wrong in holding that the appellants new Darkhast was barred by reason of the provisions of Order IX Rule 9 of the Code of Civil Procedure. Mr. B.K. Amin learned advocate on behalf of the respondent on the other hand supported the judgment of the learned Assistant Judge and the contentions urged by Mr. B.K. Amin followed the same line of reasoning as the judgment of the learned Assistant Judge.

4. In order to appreciate the rival contentions urged on behalf of the parties it is necessary to consider a few provisions of the Act which have a bearing on the determination of the questions arising in this appeal. Section 2(5) defines a debtor and provides certain conditions which must be fulfilled before an individual or an undivided Hindu family can be said to be a debtor within the meaning of the Act. Section 4 enacts that any debtor ordinarily residing in any local area for which a Board was established u/s 4 of the repealed Act on or after 1st February 1947 or his creditor may make an application before 1st August 1947 to the B.A.D.R. Court for the adjustment of his debts. Of course in Petlad which is the area with which I am concerned in the present appeal an application u/s 4 could be made upto 30th January 1950 for the Act was applied to that area sometime in July 1949. Then comes Section 15 which is the section relied on by

Mr. B.K. Amin in support of his contention that the judgment-debt was extinguished. Sub-section (1) of this section provides that every debt due from a debtor in respect of which no application is made u/s 4 within the period specified in that section shall be extinguished. This sub-section also provides for extinguishment of debts due from a debtor in certain other contingencies which are not relevant or material for the purpose of the present appeal. Sub-section (2) of Section 15 provides that nothing in that section shall apply to any debt due from any person who has by his declaration act or omission intentionally caused or permitted his creditor to believe that he is not a debtor for the purposes of the Act or that no application u/s 4 can be entertained in respect of any debt owned by such person to such creditor by reason of the provisions of Section 11. Section 17 imposes an obligation on the B.A.D.R. Court to decide the following points as preliminary issues on the date fixed for the hearing of an application made u/s 4:

(a) Whether the person for the adjustment of whose debts the application has been made is a debtor;

(b) Whether the total amount of debts due from such person on the date of the application exceeds Rs. 15,000/-.

5. Section 17 then proceeds to declare that if the B.A.D.R. Court finds that such person is not a debtor or that the total amount of debts due from such person on the date of the application is more than Rs. 15 0 the B.D.A.R. Court shall dismiss the application forthwith. Section 19 provides for transfer of pending suits appeals applications and proceedings to the B.A.D.R. Court. It is significant to note that this section applies only to suits appeals applications and proceedings which were pending in any Civil or Revenue Court at the date of the coming into force of the Act and does not apply to suits appeals applications and proceedings which may be instituted subsequent to the coming into force of the Act. The next section to which reference must be made is Section 36. Sub-section (1) of this section provides that notwithstanding that the person for the adjustment of whose debts an application has been made u/s 4 or any of his creditors does not appear on the date fixed for the hearing of the application or on any date to which it may be adjourned the B.A.D.R. Court shall proceed ex parte to hear the application decide the preliminary issues and if necessary make the award on the evidence available. Sub-section (2) gives finality to the decision on the preliminary issues as also to the award of the B.A.D.R. Court even though the decision or the award may have been given on an application heard ex parte and rules that when an application made u/s 4 is heard and disposed of ex parte under Sub-section (1) the decision on the preliminary issues or the award shall not except for sufficient reasons be re-opened merely on the ground that any of the parties thereto did not appear at the hearing. The last section which requires to be noted is Section 46. Considerable reliance has been placed on this section by Mr. B.K. Amin and it provides that save as otherwise expressly provided in the Act the provisions of the CPC shall apply to all proceedings under Chapter II

which deals with the procedure for adjustment of debts.

6. The first ground on which the learned Assistant Judge decided against the appellant is based on the provisions of Section 15(1). Section 15(1) prescribes four different contingencies in which a debt due from a person who is a debtor within the meaning of the Act would stand extinguished under the provisions of that section. Mr. B.K. Amin relied only on the first of these contingencies in support of his contention that the judgment debt due and owing from the respondent to the appellant was extinguished and I am therefore concerned only with that contingency and need not discuss the scope and meaning of Section 15(1) in regard to the other contingencies. The first contingency is where no application is made u/s 4 within the period specified in that section and Section 15(1) provides that in such a contingency every debt due from a debtor in respect of which no such application is made shall be extinguished. The question which therefore arises is: can it be said in the present case that no application was made u/s 4 within the period specified in that section in respect of the judgment debt due and owing from the respondent? If no application was made in respect of the judgment debt due and owing from the respondent within the period specified in Section 4 the judgment debt would stand extinguished but it would be otherwise if such application was made. Now it is obvious that it cannot be said of the judgment debt due and owing from the respondent that no application was made u/s 4 in respect of the same within the period specified in that section. At the date when the Act came into force in the area in question the appellants Darkhast was pending before the Civil Court and since the respondent raised the question whether he was a debtor within the meaning of the Act and whether the total amount of debts due from him exceeded Rs. 15 0 the appellants Darkhast was transferred to the B.A.D.R. Court u/s 19(1) and by virtue of Section 19(3) the B.A.D.R. Court was bound to proceed with the Darkhast as if an application u/s 4 has been made to it. The Darkhast was therefore to be treated as an application made to the B.A.D.R. Court u/s 4 and all the consequences and incidents flowed from and accompanied the Darkhast which would have flowed from and accompanied an application u/s 4. There was no question of the appellant making any fresh application to the B.A.D.R. Court u/s 4 for adjustment of the debts of the respondent inasmuch as the Darkhast of the appellant was transferred to the B.A.D.R. Court and the B.A.D.R. Court was bound to dispose of the Darkhast as if it were an application made to it u/s 4. If the Darkhast was by virtue of the express provision of the Act to be treated as an application u/s 4 it is difficult to see how it can be contended that no application was made by the appellant u/s 4 in respect of the judgment debt due and owing from the respondent. The Darkhast itself became an application u/s 4 in respect of the judgment debt due and owing from the respondent and the contingency relied upon by Mr. B.K. Amin could not be said to have been fulfilled so as to attract the applicability of the provisions of Section 15(1). The argument of Mr. B.K. Amin which found favour with the learned Assistant Judge was that since the appellant allowed his Darkhast to be dismissed for want of appearance

the result was as if no application was made by him u/s 4 and the same consequences therefore ensued as if he had not made any application u/s 4 in respect of the judgment debt due and owing from the respondent. This argument seeks to equate dismissal of an application u/s 4 for want of appearance of the creditor with the non-making of the application itself. This argument is untenable and cannot be accepted by me for reasons which I shall immediately proceed to state.

7. Section 15(1) is a section which has the effect of extinguishing debts due from a debtor to creditors and it is well-settled rule of construction that the language of such an enactment which deprives a citizen of his rights in property should be strictly construed. The court should not bring within the scope and ambit of the enactment that which is not clearly covered by the words used. The words used in the enactment are in respect of which no application has been made u/s 4 within the period specified in the said Section 4 and it is difficult to see how these words can be reasonably construed so as to include within their scope and ambit a case in which an application has been made u/s 4 but has been dismissed for want of appearance of the creditor. Such a case cannot possibly fall within the language of the enactment. To include such a case as covered by the language of the enactment would be to re-write the section. Apart from that it is obvious that such a case could not possibly be within the intendment of the Legislature inasmuch as the Act does not contemplate the dismissal of any application u/s 4 for want of appearance of the creditor. Section 36 in express terms provides that even if the creditor is absent the B.A.D.R. Court shall proceed ex-parte to decide the preliminary issues and if necessary to make the award on the evidence available. If therefore the Legislature expressly provided that the application u/s 4 should not be dismissed for want of appearance but that the B.A.D.R. Court should proceed ex-parte to hear the application I do not see how it can be contended that a case where an application might be wrongly dismissed by the B.A.D.R. Court for want of appearance of the creditor would be covered by the language of Section 15(1). The learned Assistant Judge appears to have been troubled by the position which may arise if a creditor filed an application u/s 4 and then allows it to be dismissed for default of appearance and after such dismissal files a suit or an application for execution if he has already obtained a decree against the debtor. The learned Assistant Judge appears to think that in such a case a creditor would be entitled to get round the provisions of the Act and would succeed in achieving that which the Legislature has sought to prohibit in the interests of debtors whose total debts do not exceed Rs. 15 0 The argument which found favour with the learned Assistant Judge may be put in the following form: if a creditor does not file an application u/s 4 within the period specified in that section the debt due to him from the debtor would be extinguished; but if he files an application u/s 4 and then allows it to be dismissed for want of appearance he will be in a better position for his debt will remain outstanding and he will be entitled to file a suit to recover the amount of the debt or if it is a judgment debt he will be entitled to file an application for

execution and the beneficent provisions of the Act which are enacted for the benefit of the debtors would be defeated. I do not think there is any substance in this argument. In my opinion the apprehension of the learned Assistant Judge is entirely unjustified. As already pointed out by me Section 36 in express terms requires the B.A.D.R. Court to hear the application u/s 4 even if the debtor or any of the creditors is not present and the B.A.D.R. Court is bound to hear the application ex-parte decide the preliminary issues and if necessary make the award on the evidence available. The application u/s 4 would never be dismissed for want of appearance and even if the creditor remains absent the application would be proceeded with and if it is held by the B.A.D.R. Court that the person against whom the application is made by the creditor is a debtor within the meaning of the Act and that his total debts do not exceed Rs. 150 the debts of the debtor would be adjusted in accordance with the provisions of the Act. The difficulty in this case has arisen because the B.A.D.R. Court wrongly in the face of Section 36 dismissed the Darkhast of the appellant for want of appearance. If the B.A.D.R. Court had acted in accordance with the provisions of the Act and heard the appellants Darkhast ex-parte and decided the preliminary issues and made the award if necessary no difficulty would have arisen. If the B.A.D.R. Court had held that the respondent was a debtor within the meaning of the Act and that the total amount of his debts did not exceed Rs. 150 the B.A.D.R. Court would have proceeded to adjust the debts due from the respondent. If however the B.A.D.R. Court had come to the conclusion that the respondent was not a debtor within the meaning of the Act or that the total amount of his debts did not exceed Rs. 150 the Darkhast would have been retransferred to the Civil Court and the Civil Court would have proceeded with the Darkhast. I am therefore of the opinion that the judgment debt due and owing from the respondent to the appellant was not extinguished under the provisions of Section 15(1).

8. The second ground on which the learned Assistant Judge decided against the appellant is based on the provisions of Order IX Rule 9 of the Code of Civil Procedure. On this part of the case Mr. B.K. Amin found it difficult to support the judgment of the learned Assistant Judge; but he faintly argued that inasmuch as the appellants Darkhast was dismissed by the B.A.D.R. Court for want of appearance a fresh Darkhast was barred under the provisions of Order IX Rule 9 of the Code of Civil Procedure. The argument is without substance and I cannot accept the same. u/s 46 the provisions of the CPC apply to all proceedings under Chapter II and one of the proceedings under that Chapter is an application by a creditor u/s for adjustment of the debts of the debtor-save as otherwise expressly provided in the Act. If therefore there is any express provision of the Act on any particular point such express provision would apply and exclude the operation of the provisions of the CPC as regards that point. Now when we turn to Section 36 we find that an express provision is enacted in that section as to what the B.A.D.R. Court should do when the person for the adjustment of whose debts an application has been made u/s 4 or any of his creditors does not appear on the date fixed for the hearing of the application or on any date to which it

may be adjourned. That section requires the B.A.D.R. Court to proceed ex parte to hear the application decide the preliminary issues and if necessary make the award on the evidence available. In view of this express provision. I do not see how the provisions of Order IX Rules 8 and 9 can possibly apply to an application u/s 4. Section 36 excludes the application of the provisions of Order IX Rules 8 and 9 of the Code of Civil Procedure. Even if the creditor who has made an application u/s 4 remains absent on the date fixed for the hearing of the application or on any date to which it may be adjourned the B.A.D.R. Court cannot dismiss the application for default of appearance and there is therefore no question of any fresh application being barred if the B.A.D.R. Court dismisses the application for default of appearance erroneously and contrary to the express terms of Section 36. There is also another objection to the argument urged on behalf of the respondent. After the Darkhast was transferred to the B.A.D.R. Court u/s 19(1) the Darkhast was treated as an application made u/s 4 and it was as an application made u/s 4 that the Darkhast was dismissed by the B.A.D.R. Court. Even if the provisions of Order IX Rule 9 of the CPC applied to an application made u/s 4 they could bar only an application of the same nature namely an application made u/s 4. The bar could not possibly apply to a totally different proceeding which was not instituted under the Act. The present Darkhast is not an application u/s 4 and I do not therefore see how it can be contended that the present Darkhast is barred under the provisions of Order DC Rule 9 of the Code of Civil Procedure. The wrong dismissal of the appellants Darkhast by the B.A.D.R. Court cannot have the effect of de-barring the appellant from maintaining the present Darkhast. This argument of Mr. B.K. Amin must therefore be rejected.

9. It appears from the judgment of the learned Assistant Judge that at the hearing of the appeal before him it was contended on behalf of the respondent that the present Darkhast was time-barred and the learned Assistant Judge therefore directed that it would be open to the respondent to urge the point of limitation if the trial Court held that the respondent was not a debtor within the meaning of the Act or that his total debts exceeded Rs. 15 0 Since I am taking the view that the judgment debt is not extinguished and that the present Darkhast is not barred under the provisions of Order IX Rule 9 of the CPC I asked Mr. B.K. Amin as to what was the ground on which the respondent contended that the present Darkhast was time-barred.

10. Mr. B.K. Amin informed me that it was not possible for him to press the plea of limitation as an independent plea apart from the aforesaid arguments relating to the maintainability of the present Darkhast. The present Darkhast filed on 19th October 1953 is obviously within the period of limitation and I do not see how it can be said to be time-barred.

The result is that the appeal is allowed. The order of the learned Assistant Judge is set aside and the order of the learned trial Judge is restored. The respondent will pay the costs of the appeal to the appellant.