

(1954) 02 BOM CK 0009
In the Bombay High Court
Case No : S.A. No. 50 of 1953

Virgonda Lingangonda

APPELLANT

Vs

Malgonda Virgonda and Others

RESPONDENT

Date of Decision : 10-02-1954

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 15, 15(1), 15(2), 19, 2(4)
Civil Procedure Code, 1908 (CPC) — Section 9

Citation : AIR 1955 Bom 148 : (1954) 56 BOMLR 607 : (1954) ILR (Bom) 1193

Hon'ble Judges : Vyas, J;Gajendragadkar, J

Bench : Division Bench

Advocate : M.V. Paranjpe, for the Appellant; G.R. Madbhavi, for the Respondent

Judgement

Gajendragadkar, J.—This appeal raises a short question u/s 15 of the Bombay Agricultural Debtors Relief Act. A decree passed in civil suit No. 82 of 1936 is sought, to be executed in the present darkhast proceedings and the execution is resisted by the judgment-debtor on the ground that the decretal rights which are sought to be enforced in the present execution proceedings amount to a debt within the meaning of the Bombay Agricultural Debtors Relief Act and the said debt has been extinguished by the operation of the provisions of Section 15(1) of the said Act.

2. The point thus presented is short and interesting, but the facts leading to it are somewhat complicated. The property in suit originally belonged to Singadi. On February 7, 1910, Singadi executed a mortgage over this property in favour of Mallappa for Rs. 200. It would appear that Mallappa had advanced several sums on money bonds to Singadi and the extent of these loans was about Rs. 500. In 1915 a dispute arose between Singadi and Mallappa in respect of these dealings. The matter was referred to arbitration and it resulted in an award on January 10, 1915. In terms of this award a decree was passed in civil suit No. 66 of 1915. This decree provided that Maliappa was to enjoy the property under mortgage for 20 years after paying Rs. 200 to Singadi.

Singadi in turn was given liberty to return Rs. 900 to Mallappa within 20 years, whereupon the property was to be returned to Singadi free of incumbrance. If Singadi failed to pay the aforesaid amount within the period specified to Mallappa, Mallappa was to be the owner of the property as from the 21st year after the date of the decree. It may be added that during this period of 20 years Singadi was liable to pay the assessment, and the decree provided that if he failed to pay the assessment, Mallappa should pay the same and should recover it from Singadi with interest at the rate mentioned in the decree.

3. On May 28, 1934, Singadi sold the equity of redemption to the present appellant. Mallappa's rights were likewise assigned by Mallappa in favour of Shri Shallappa on July 8, 1935. In his turn Shri Shailappa assigned his rights to the present respondent on June 21, 1949. Before this assignment took place, however, Shri Shailappa sued the purchaser of the equity of redemption for possession of the property in question, on March 21, 1936. This was civil suit No. 82 of 1936. Shri Shailappa alleged that the property in suit along with other properties had been let by Mallappa to Singadi and were in the possession of the purchaser of the equity of redemption subsequent to his purchase as a tenant. At the expiration of the period mentioned in the lease the other properties were surrendered to Shri Shailappa, but not the property then in suit. That is why he claimed to recover possession of the said property from the defendant.

The defendant disputed the title of the plaintiff-assignee, set up a compromise by which he was entitled to remain in possession of the property in suit and contended that the plaintiff was no more than a mortgagee. According to the defence the plaintiff could not claim to be the owner of the property in suit. On these pleadings appropriate issues were framed and a decree was passed in favour of the plaintiff. It may be added at this stage that during the pendency of the suit the plaintiff filed a purshis in which he expressed his willingness to obtain a decree for possession even on the basis that he was a mortgagee and not an owner if the Court came to the conclusion that he was not an owner but a mortgagee.

4. The defendant preferred an appeal to the District Court. His appeal was dismissed. He took the matter to the High Court of Kolhapur; but "the result was the same. The High Court of Kolhapur confirmed the decree passed by the lower Courts on June 1, 1948. It was after this decree was passed that Shri Shailappa assigned his rights to the present respondents and as assignees the present respondents filed the present darkhast No, 95 of 1950 on August 28, 1950, and they claim possession of the property as decree-holders. The defence was that the decree-holder is a mortgagee and in claiming possession by way of execution he is enforcing his rights as a creditor. According to the defence, his rights as a mortgagee to recover the mortgage amount are extinguished by virtue of Section 15(1) of the Bombay Agricultural Debtors Relief Act.

5. The executing Court upheld this plea and " dismissed the darkhast, but ordered the parties to bear their own costs. On appeal a different view has been

accepted. The learned District Judge has held that the claim of the decree-holder in the present execution proceedings does not amount to a claim of a creditor to recover his debt and as such the provisions of the Bombay Agricultural Debtors Relief Act are inapplicable to the present proceedings. In the result he has allowed the plaintiff's prayer for possession of the property in question. In respect to the claim for mesne profits, however, the learned Judge held that the provisions of the Bombay Agricultural Debtors Relief Act would apply. He has found that the Judgment-debtor is a debtor within the meaning of the Act and that his debts are less than Rs. 15,000.

Even so, he took the view that it was necessary to consider whether the plea raised by the judgment-debtor u/s 15(1) of the Bombay Agricultural Debtors Relief Act should succeed in view of the provisions of Section 15(2) of the said Act. According to him, there was not enough material to dispose of this issue and so he has remitted this issue to the executing Court with a direction that the claim of the decree-holder to recover mesne profits should be finally determined in the light of the finding of the executing Court on the issue remitted to him.

6. The first point which falls to be considered in the present appeal is whether it is open to the judgment-debtor to make a plea u/s 15(1) of the Bombay Agricultural Debtors Relief Act in execution proceedings. Mr. Madbhavi contends that a plea of this kind must be raised before the Court that administers the Bombay Agricultural Debtors Relief Act and cannot be raised in execution proceedings. This contention, however, cannot be accepted in view of the decision of this Court in -- Gurbasappa Mahadevappa Gunaki Vs. Neelkanthappa Shivappa Humberwadi, . In this case the learned Chief Justice and I had occasion to consider the scope and effect of the provisions of Sections 19 and 15(1) of the Bombay Agricultural Debtors Relief Act and we have held that a plea u/s 15(1) can be raised in execution proceedings and it has to be dealt with by executing Courts.

It would be noted that it is only when an application has not been made u/s 4 within the period specified in the said section or when no application has been made for recording a settlement in respect of the debt u/s 8 within the period specified in the said section that the question of applying the provisions of Section 15(1) would arise. Normally this question would arise not before the Courts that are administering the provisions of the Bombay Agricultural Debtors Relief Act, because as I have just indicated the penalty imposed by Section 15(1) is enforceable only when the jurisdiction of the Bombay Agricultural Debtors Relief Court was not invoked as it should have been, either by the debtor or by the creditor.

Therefore, the argument that the plea u/s 15(1) cannot be dealt with by Courts who are not administering the Bombay Agricultural Debtors Relief Act is obviously unsustainable.

7. Mr. Madbhavi then contends that in -- "Gurbasappa"s case (A)", the Court was

dealing with a money decree and in regard to such a decree there can be no difficulty whatever in holding that it was a debt. That undoubtedly is true. Section 15 provides that if the applications to which the said section refers have not been made as required by the Bombay Agricultural Debtors Relief Act in respect of a debt due from a debtor, then the debt must be deemed to be extinguished. When a plea under this section is raised in execution proceedings, the executing Court will have to be satisfied that the plea has been raised in respect of a debt which is due from a debtor. In other words, both these facts will have to be proved by the party raising the plea, and in adjudicating upon the plea the Court will have to inquire into the question as to whether the right which is sought to be enforced on the execution proceedings really amounts to a debt within the meaning of the Act and whether it is being enforced against a person who is a debtor within the meaning of the Act.

If both these points are answered in favour of the debtor and it is also shown that no steps had been taken in respect of the said debt as required by the Act, then subject to the provisions of Sub-section (2) of Section 15 the Court would have to hold that the debt in question is extinguished. In this connection, our attention has been invited by Mr. Madbhavi to a recent decision of the learned Chief Justice in -- Babibai Thakuji Vs. Fazluddin Usmanbhai Momin, , where the learned Chief Justice has held that the right which is given to the debtor to challenge a transaction between him and his transferee and to seek to prove that despite its appearance as an ostensible sale it is in reality a mortgage by taking recourse to the provisions of Section 24 of the Bombay Agricultural Debtors Relief Act is not available to him after the time prescribed to make an application in respect of the said debt u/s 4 has expired, as well as the extended period u/s 8 has expired.

In other words, according to this decision, if the debtor has made no application in respect of the debt in question and no statement has been filed in response to a notice issued to him either, it would not be open to the debtor subsequently to challenge the character of the transaction and to say that it is a mortgage though in form it is a sale, because the scheme of the Act assumes that there must be some finality to these transactions and it is the duty of the debtors to take appropriate steps as provided by the Act if they want to impeach their own transactions. Mr. Madbhavi contends that this decision and more particularly the general observations made by learned Chief Justice in this judgment are inconsistent with the view which was taken in -- "Gurbasappa"s case (A)"

We do not think that there is any inconsistency between the two judgments or even between the observations made by the learned Chief Justice and the earlier decision. In -- "Gurbasappa"s case (A)", we were dealing with a decree which on the face of it was a money decree and there was no occasion to invoke the provisions of Section 24 to decide whether the right sought to be enforced by the decree-holder in execution proceedings amounted to a debt or not. In -- "Babibai Thakuji"s case (B)", the position was substantially, different. The debtor in the

said case wanted to challenge the character of the transaction, and in doing so he wanted to take recourse to the provisions of Section 24 of the Bombay Agricultural Debtors Relief Act; and in repelling this plea the learned Chief Justice has observed, and, with respect, we think rightly, that the debtor could not invoke Section 24 in subsequent proceedings at all.

Apart from the considerations of general policy of the Act to which the learned Chief Justice has referred in his judgment, it seems to us that the provisions of Section 24 themselves are very clear on this point. Section 24 which confers upon the Court wider powers in determining the true character of the transaction applies and can be invoked.

"whenever it is alleged during the course of the hearing of an application made u/s 4 that any transfer of land by a person whose debts are being adjusted under this Act or any other person through whom he inherited it was a transfer in the nature of a mortgage."

It is, therefore, clear that these provisions can be invoked only when an allegation about the character of the transaction is made during the course of the hearing of an application made u/s 4. It is also clear that the powers conferred by Section 24 can be exercised by "the Court" administering the provisions of the Bombay Agricultural Debtors Relief Act. If that be so, it would clearly not be open to the debtor to invoke the provisions of this Section before the executing Court when no application had been made under Section. 4 and no inquiry on such an application is pending.

With respect, the decision of the learned Chief Justice lays down exactly the same, position. When the learned Chief Justice observed that there must be some finality in the matter of titles to lands and the challenge to such titles must, therefore, be made in the manner and within the time prescribed by the Act, he was referring to and dealing with the plea which invoked the jurisdiction of the Court u/s 24 of the Act. The general observations made in this judgment must, we think, be read in the context of the plea which was raised before the learned Chief Justice. Therefore, in our opinion, Mr. Madbhavi is not right when he contends that the decision in this case is inconsistent with the earlier judgment in --"Gurbasappa"s case (A)".

8. in the present case if we were called upon to determine the character of the transaction by exercising the powers u/s 24, we would clearly have refused to act u/s 24, because the condition precedent for the exercise of those powers is obviously lacking in the present case. But Mr. Madbhavi"s difficulty is that the judgment-debtor does not seek to invoke the provisions of Section 24 in support of his plea at all. He relies as he is entitled to on the decree which is sought to be executed by the decree-holder. It is, therefore necessary to consider the effect of this decree. If this decree itself makes the decree-holder the creditor of the appellant, then it would be open to him to contend that an application should have been made in respect of this debt within the time stipulated by the material

Section of the Act, and since no application has been made, the debt is extinguished.

9. in suit No. 82 of 1935, the trial Court had framed several issues. The first issue was in respect of the title of the assignee and the fourth issue was in respect of the defendant's claim that he was in possession of the property as an owner. Some other issues were also framed on the allegation of the defendant that the mortgage had been satisfied and a compromise had been entered into between the parties subsequent to the passing of the award decree. In dealing with the title of the assignee the learned trial Judge expressly found that the assignee was no more and no better than a mortgagee, and he made it perfectly clear in his judgment that the decree for possession was being passed in "the suit on the basis that the decree-holder was a mortgagee and that the judgment debtor was entitled to redeem within the time allowed by law.

Indeed, the learned Judge in his judgment has observed that if and when the defendant exercises his right of redemption, he would be the owner of the property and until then the plaintiff was entitled to obtain possession as a mortgagee. The same view was taken by the learned District Judge and apparently by the High Court. It is perfectly true that in both the appellate judgments more attention has been devoted to the plea of the compromise on which the judgment debtor relied; but there are observations made in both the judgments which show that the view taken by the trial Court in respect of the status and title of the plaintiff was confirmed even by the appellate Courts. Therefore, there can be no doubt that the decree which the respondents seek to execute in the present proceedings gave them the right to obtain possession as mortgagees in possession.

It may be that this view was taken because of the construction which the Courts put upon the earlier award decree. Whether that view is right or not, it is not for us to consider in execution proceedings. In execution proceedings both the parties are bound by the finding recorded in the suit itself, and on these findings it is not open to the respondents now to contend that they are the owners of the property and as such they want to recover possession of the property from the judgment-debtor. Therefore, "if on the decree which is passed and which is the subject matter of execution it clearly appears that the decree-holder was given the right to recover possession as a mortgagee, then without any further inquiry it must be held that the right which the decree-holder seeks to enforce is the right of a creditor-mortgagee and no other.

10. If that be the true position, then it would be difficult to resist the conclusion that this right is a debt within the meaning of Section 2(4), Bombay Agricultural Debtors Relief Act, The word "debt" as defined by this sub-section means any liability in cash or kind, whether secured or unsecured, due from a debtor, whether payable under a decree or order of any civil Court or otherwise, and includes mortgage money the payment of which is secured by the usufructuary mortgage of immovable property, but does not include arrears of wages payable

in respect of agricultural or manual labour. As I have just indicated, it is not for us in execution proceedings to see whether the award decree had been properly construed in the suit or not.

We have merely to- find what was decided between the parties in the said suit, and if it was decided that the plaintiff was a mortgagee and by virtue of his rights as a mortgagee he was given possession of the property in suit, then it would be open to the mortgagor to contend that since no application was made in respect of the mortgage debt within time, the debt is extinguished.

11. Mr. Madbhavi wanted to contend that at the time, when these findings were made in civil suit No. 82 of 1936 and in the appeals arising therefrom the period stipulated in the award decree had not expired, and Mr. Madbhavi's contention was that these findings are no better than obiter. According to Mr. Madbhavi under the award decree the mortgagor was allowed liberty to pay Rs. 900 within 24 years and not 20, and if that had been the true position, perhaps different considerations would have arisen in this case. Unfortunately for Mr. Madbhavi, however, the award decree does not justify his assumption that a period of 24 years was given to the mortgagor to repay the amount of Rs. 900. It is undoubtedly true that in the judgment of the High Court in the appeal which went before the High Court from civil suit No. 82 of 1936 it has been observed that the award was made on January 10 and that on January 11 an agreement was arrived at between the parties by which the period of 20 years was extended to 24 years.

Apart from the question as to whether such an agreement would need registration, we do not see how we can give effect to this agreement when subsequent to the agreement a decree was passed and the decree does not refer to the period of 24 years, but refers only to the period of 20 years. Parties are now bound by the decree and it was in the light of this provision of the decree that the question as to the status and rights of the plaintiff had to be considered by the Courts in civil suit No. 82 of 1936. It is somewhat remarkable that in this suit the plaintiff passed a purshis virtually conceding the position that he was no more and no better than a mortgagee. Therefore, in our opinion, it would not be possible for us to accept Mr. Madbhavi's contention that the period, for redemption given to the mortgagor by the award decree had not expired when the suit of 1936 was filed and so the findings made in that suit should be treated as obiter.

It cannot be disputed that if the period was really one of 20 years", it had clearly expired in 1936 when the suit was filed, and even so it was held by all the Courts that the plaintiff was a mortgagee and not an owner of the property. Indeed, it may be pointed out that in dealing with the status of the plaintiff and his rights the learned trial Judge referred to the clog on the equity of redemption introduced in the award decree and held that after the application of the Transfer of Property Act, such a clog would be illegal, and he observed that it was by no means clear that even before the Transfer of Property " Act was applied " such a

clog would be legally enforced.

Mr. Madbhavi contends that at the time of the award decree the Transfer of Property Act had not been made applicable in Kolhapur and so it was wrong to have held that the clause imposing 20 years limitation on the right of redemption was a clog and therefore void. There may be some force in this contention. It may perhaps be that the said clause in the decree was binding between the parties. But we are not concerned to see, and indeed we have no jurisdiction in execution proceedings to consider, whether the said finding recorded in civil suit No. 82 of 1936 is right or wrong. It is clear that in the said suit the learned Judges held that despite the clog on the equity which had been introduced by the award decree, the mortgagor's right of redemption would subsist until the ordinary period of limitation expired; and it was on this view that a decree for possession was passed in favour of the plaintiff on the basis that he was a mortgagee.

If the decree under execution was passed on the basis that the plaintiff was entitled to possession as a mortgagee and the defendant's right to redeem was alive, there can be no doubt that the judgment-debtor or the decree-holder could have applied for adjustment of the mortgage debt u/s 4 of the Act. Therefore, in our opinion, the lower appellate Court was in error in holding that this decree & the rights & the liabilities created under it are outside the Bombay Agricultural Debtors Relief Act. In our opinion, the position of the decree-holder is that of a creditor, & since no application was made in respect of the debt which is sought to be enforced in execution proceedings, the debt must be deemed to be extinguished u/s 15 (1) of the Bombay Agricultural Debtors Relief Act. The result is that the mortgage debt in question is extinguished and the decree-holder is not entitled to any relief in execution proceedings.

12. The appeal, therefore, succeeds, the order passed by the lower appellate Court is set aside and that of the executing Court restored. Parties to bear their own costs throughout.

13. Appeal allowed.