

(1955) 11 BOM CK 0015

Bombay High Court

Case No: Civil Revision Application No. 1342 of 1954

Maharu Bhika and
Another

APPELLANT

Vs

Daga Nathu

RESPONDENT

Date of Decision: Nov. 8, 1955

Acts Referred:

- Bombay Agricultural Debtors Relief Act, 1947 - Section 24(1)
- Limitation Act, 1908 - Article 144, 148
- Transfer of Property Act, 1882 - Section 100, 55(6), 95

Citation: AIR 1957 Bom 18 : (1956) 58 BOMLR 217 : (1956) ILR (Bom) 427

Hon'ble Judges: Gajendragadkar, J

Bench: Single Bench

Advocate: R.A. Jahagirdar, K.J. Abhyankar and M.B. Rao, for the Appellant; V.M. Tarkunde, for the Respondent

Judgement

1. This revisional application arises from debt adjustment proceedings and it raises a short question of limitation. The property in suit consists of two Survey Nos. 186 and 187. The opponent alleged that these two fields had been conveyed to the two petitioners respectively by way of security for a loan borrowed by his grandfather Jairam. He Accordingly claimed adjustment of the said debt and asked for the possession of the two lands.

The petitioners denied this allegation and claimed absolute tide to the properties. The evidence disclosed that there was no registered document in respect of either transfer. A mutation entry of the year 1911, which was produced however showed that Survey No, 186 had been sold by an oral sale by Jairam to the father of creditor 1 for Rs. 500/- . . The said entry similarly showed an oral sale to creditor 2 in respect of Survey No. 187.

The entry did not indicate the amount of consideration for the said transaction. The opponent stated in his evidence that the allegations made by him in regard to the nature of the transaction were based upon information received by him from his mother. At the elate of the application his mother was dead.

The learned trial Judge held that oral transfers, which were invalid could not attract the provisions of Section 24 of R. A. D. R. Act. These oral transfers made the creditors chargeholders and since the transactions had taken place before 1911 the title of the chargeholders had become complete so that it was not open to the applicant to allege that the persons in possession of the properties were his creditors and to ask for adjustment of the said debts.

On appeal the finding that the transactions were oral sales was confirmed but the learned District Judge took the view that the claim for adjustment of the debts was not barred because he held that to such a claim Article 148, Limitation Act would apply. That is why he set aside the order passed by the learned trial Judge and remanded the case for disposal in accordance with law. It is this order which is challenged before me by Mr. Jahagirdar on behalf of the creditors.

2. The question of limitation which falls to be considered in the present revisional application will have to be dealt with in the light of the reported decision of a Division Bench of this Court in -- [Jibhaoo Harisingh Rajput Vs. Ajab Singh Fakira Rajput](#), . Rajadhyaksha J. who delivered the judgment of the Bench in that case, has held that an invalid transfer cannot invoke the provision of Section 24 (1) of the B. A. D. R, Act

The learned Judges in this case, were dealing with an oral sale and they came to the conclusion that it was incompetent to the Court administering the provisions of the B. A. D. R. Act to hold an enquiry about the nature of such an oral sale and that an oral sale of immovable property worth more than Rs. 100/- is invalid and no enquiry about the character of this sale could be held u/s 24 (1).

It was also held in this case that though an oral sale may to invalid and its nature cannot be determined u/s 24, it nevertheless created rights in favour of the alleged purchasers u/s 55(6)(b), Transfer of Property Act, In other words even though the sale may be invalid it created a charge in favour of the buyer for the purchase price paid by him unless the buyer forfeits the right by improperly declining to accept delivery of the property. Such a charge according to the judgment exists even in cases where the buyer may be in possession of the properties intended to be sold.

In other words the position with regard to oral sales would be that the nature of such transactions cannot be determined u/s 24(1) of the B.A.D.R. Act, but the buyer becomes a chargeholder and it would be open to the debtor to offer the amount in question to the intending buyer and require him to release his property from the burden of the charge. In that sense a proceeding under the B.A.D.R. Act can be entertained and the debt in

question can be adjusted. It is in the light of this judgment that the question of limitation must be considered.

3. Mr. Jahagirdar concedes that if his clients are in the position of chargeholders it would have been open to the opponent to take steps to release his properties from the burden of the charge by offering the amount or initiating legal proceedings in that behalf within limitation and according to Mr. Jahagirdar the limitation prescribed for taking such steps is one of 12 years and no more. Mr. Jahagirdar contends that the view taken by the learned District Judge that Article 148 would cover such a case is erroneous.

4. Now in considering this point, it is necessary to remember that the position of a chargeholder with which I am concerned was governed by the provisions of the Transfer of Property Act prior to the amending Act of 1929. Both Sections 95 and 100 have been amended in 1929 and shortly stated the effect of the amendments is to place the chargeholder on the same footing as a mortgagee.

After Sections 95 and 100 were amended in 1929 it is clear that article which would apply to a proceeding like the present would be Article 148 and not Article 144. But before the amendment was made in 1929 a chargeholder could not be brought within the mischief of Article 148 because the said article applied only to a mortgagee and the position of a chargeholder was distinct and different from the position of a mortgagee under the unamended provisions of the Transfer of Property Act.

This position was illustrated by the decisions of our Court where the question of limitation arose between a redeeming mortgagor and his colleagues who took no part in the redemption. In such a case though the relationship between two was comparable to that between the chargeholder and the debtor it was held that Article 148 does not apply and that Article 144 would apply.

In "Vasudeo v. Balaji" ILR 26 Bom 500, the Court was concerned with the question of limitation on similar facts. In 1872 two co-owners of a land Vinayak and Ganesh Had mortgaged the property for Rs. 300/-. In 1882 a suit was brought by the mortgagee, and it ended in a consent decree ordering redemption on payment by the mortgagors of Rs. 400/-. Vinayak alone paid the amount and redeemed the mortgage. Thereafter he went into possession of the land. This possession continued until 1898, in which year the heirs of Ganesh sued the heirs of Vinayak claiming to recover the moiety of the land.

The defendants pleaded limitation. On the other hand the plea of limitation was resisted by the plain-tiffs by invoking the provisions of Article 148, Limitation Act. Jenkins C. J. has observed in his judgment that in the Transfer of Property Act the distinction is drawn between a charge and a mortgage and what the redeeming mortgagor has is the charge and not the mortgage. It would therefore follow, said the learned Chief Justice, that the redeeming mortgagor would not be a mortgagee within the meaning of Article 148.

The same view has been taken by the Madras High Court in "Murajalli Hunia Goundan v. Rama-sami Chetti" ILR 41 Mad 650: AIR 1918 Mad 19 (CJ. In the present case", the transaction took place prior to 1911 and the present proceedings were commenced as late as 1947. Therefore the claim made by the opponent for the adjustment of the debt on the assumption that the charge is still subsisting must be held to be barred by limitation.

5. This position is not seriously disputed by Mr. Tarkunde who appears for the opponent. He, however, contends that before finally disposing of the present proceedings it would be necessary in the interests of justice that an issue should be framed as to the real nature of the oral transaction between the parties; and in support of his request Mr. Tarkunde has invited my attention to a judgment delivered by Bavdekar J. in "Civil Revn. Appln. No. 1071 of 1952, 3-8-1953 (Bom) (D)."

It does appear from this judgment that Bavdekar J. allowed a similar request and remanded the proceedings to the trial Court for determining the nature of the oral transaction, but Bavdekar J. appears to have taken the view that in cases where the transfer purports to have been orally effected it would be necessary to enquire what the nature of the transfer really was.

If it is shown by evidence that the oral transfer was intended to operate as a mortgage it would enable the debtor to claim adjustment of the debt; if however it appeared on evidence that the oral transfer was intended to operate as a sale then after the lapse of 12 years the alleged purchaser would be able to set up an adverse title and there would be no question of adjusting debts any longer,

In the case before Bavdekar J. it had been urged by the applicant that the original transaction was not one of a sale but that of a mortgage and that the property had been transferred to the creditor by way of security and Bavdekar J. thought that this allegation had to be examined and so he was disposed to give an opportunity to the parties to lead evidence in that behalf. Mr. Jahagirdar argues that the order of remand passed by Bavdekar J. and the reasons set out by the learned Judge in support of this order are substantially inconsistent with the view taken by Rajadhyaksha and Vyas JJ. in "Jibhaos case (A), to which I have already referred.

According to Mr. Jahagirdar it is not easy to understand how a Court would be justified in holding an enquiry in regard to an invalid transaction. Once it is held to be an invalid transfer the provisions of Section 24 of the B.A.D.R. Act cannot be invoked. The only logical consequence in such a case is to treat the oral purchaser as a chargeholder and proceed to deal with the matter on that footing. In the said case the question of limitation was not raised.

But it was held that the relationship between the intending purchaser and the intending vendor was that of a debtor and a charge-holder. By necessary implication the learned Judges did not think it necessary to enquire further into the question as to whether the

said purported oral transfer was in the nature of a mortgage or a sale.

I do not think proper to express any opinion on this part of the controversy between the parties before me. In the present case however I am not disposed to adopt the course suggested by Mr. Tarkundo because the lower appellate Court has made a definite finding that both the transactions were in fact and were intended to be oral sales.

It is true that in the trial Court issues were framed on the lines suggested by the judgment of Mr. Rajadhyaksha and Mr. Tarkunde is therefore able to make a grievance of the fact that an opportunity was not given to his client to show the real nature of the transaction that took place between the parties prior to 1911. But I am disposed to think that this argument is purely technical in the circumstances of this case.

Mr. Tarkunde's client expressly admitted in his evidence that the sole basis for his alleging that the transfers were mortgages was the information received by him from his mother. He also added that he had made the application according to the information given to him by his mother and that there were no other witnesses.

It is not therefore surprising that both the learned Judges below were not inclined to attach any importance to this version. The evidence given by the opponent was purely hearsay and he had no other evidence to adduce in support of his plea and that the nature of the said oral transaction was that of a mortgage and not a sale.

Besides the documentary evidence which is available on the record shows that both the transfers were reported to the revenue authorities by the parties as oral sales. The mutation entry to which I have already referred is clear and unambiguous. That being the only evidence trustworthy on the record the learned trial Judge assumed that the transfers were oral sales and the appellate Court has made a definite finding to that effect.

Even if I were to agree with the view taken by Bavdekar J., I would not be disposed to prolong the life of this litigation by framing an issue as suggested by Mr. Tarkunde because I am satisfied that any further enquiry would be purely infructuous. Besides as I have just indicated there are clear findings of fact recorded by the lower appellate Court and in the circumstances of this case I do not think that even for the technical reasons urged before me by Mr. Tarkunde I would be justified in asking the Courts below, to try the same issues over again.

6. In the result the revisional application must be allowed, the order passed by the lower appellate Court must be set aside and that of the trial Court restored. Rule absolute. There will be no order as to costs throughout.

7. Rule made absolute.