

(1954) 02 BOM CK 0012**Bombay High Court****Case No:** F.A. No. 707 of 1952

Bapu Parashram Chandar and
Others

APPELLANT

Kanhayalal Mohanlal

Vs**RESPONDENT****Date of Decision:** Feb. 2, 1954**Acts Referred:**

- Bombay Agricultural Debtors Relief Act, 1947 - Section 17, 19(1), 19(3), 19(4), 2(4)
- Dekkhan Agriculturists Relief Act, 1879 - Section 15B

Citation: AIR 1955 Bom 145 : (1954) 56 BOMLR 633**Hon'ble Judges:** Shah, J**Bench:** Single Bench**Advocate:** R.W. Adik, for the Appellant; K.B. Sukthankar, for the Respondent**Judgement**

1. The plaintiff Kanhayalal Mohanlal filed Suit No. 25 of 1938 in the Court of the First Class Subordinate Judge at Ahmed-nagar against five defendants for a decree for sale on a mortgage dated May 31, 1926, executed by defendants Nos. 1 and 2. The defendants being agriculturists, the suit was tried under the Dekkhan Agriculturists' Relief Act, and on February 20, 1940, a decree was passed declaring that an amount of Rs. 5,000 was due to the plaintiff under the mortgage and providing that "defendants Nos. 1, 2, 4 and 5 do pay the same to the plaintiff together with costs of the suit and future interest on Rs. 3,000 at the rate of 6 per cent, per annum from the date of institution of suit till the amount is fully paid."

The defendants were directed to pay the amount decreed by annual instalments of Rs. 1,000. The first instalment was to be paid on October 1, 1940. It was provided in the decree that if any Instalment remained unpaid, for recovery thereof an application u/s I5B of the Dekkhan Agriculturists' Relief Act may be made for sale of the mortgaged property. The instalment due on October 1, 1940, not having been paid, the plaintiff applied by Darkhast No. 70 of 1941 for sale of the mortgaged

property. By order dated January 9, 1942, the proceedings were sent to the Collector of Ahmednagar for recovery of the amount due.

Thereafter on April 6, 1913, the plaintiff applied to add the amount of two instalments for the years 1941 and 1942 which had fallen due during the pendency of the darkhast, to the claim made in Darkhast No. 70 of 1941. The learned Judge granted the application and informed the Collector that two more instalments had fallen due and the judgment-debtors were liable for the same and that the same may be recovered in execution proceedings. Defendant No. 5 died during the pendency of the darkhast before the Collector, and the Collector returned the papers to the civil Court for bringing the heirs of the deceased defendant on record.

On August 9, 1946, the plaintiff informed the Court that he did not desire to bring on record the heirs of defendant No. 5. The papers were then returned to the Collector. On July 17, 1947, the plaintiff filed a purshis stating that the defendants were debtors and that the debts due by them were less than Rs. 15,000 and therefore the darkhast be transferred to the Debt Adjustment Court at Kopergaon. The learned Civil Judge transferred the darkhast to the Debt Adjustment Court at Kopergaon and sent a vadi to the Mamlatdar, Kopergaon, to send the papers of the darkhast pending before the Collector to the Debt Adjustment Court.

The Debt Adjustment Court made inquiry into the status of the defendants and came to the conclusion that they were not debtors and ultimately returned the papers to the Civil Judge's Court. On June 20, 1951, the plaintiff applied that two more instalments which had fallen due on October 1, 1943, and October 1, 1944 and interest and costs which were payable by the defendants should be added to the darkhast claim, and the Collector should be asked to recover the same in the proceedings pending before him.

2. The defendants resisted the application. They contended that the instalments having fallen due more than 3 years prior to the date on which the application was submitted by the plaintiff for adding the amount of those two instalments the civil Court had no Jurisdiction to allow the same to be added because a fresh darkhast for recovery of those instalments would be barred by limitation.

The plaintiff contended that the time during which the proceedings were pending before the Collector could be excluded under Clause (3) of para. 11 of Schedule III of the CPC and that in any case the period between July 17, 1947, and February 16, 1951, could be excluded u/s 52 of the Bombay Agricultural Debtors Relief Act, 1947, and that in either case the application was in time and the plaintiff was entitled to recover the amount in addition to the amount claimed in the darkhast.

The learned executing Judge accepted the contention of the plaintiff and ordered the darkhast to proceed and ordered that intimation be given to the Collector to sell the mortgaged property after including the amount of the two instalments. Against that order the present appeal has been preferred by defendants Nos. 1 and 2 and

the heirs of defendant 4.

3. Now, in Clause (1) of para. 11 of Schedule III of the CPC it is provided:--

"So long as the Collector can exercise or perform in respect of the judgment-debtor's im-moveable property, or any part thereof, any of the powers or duties conferred or imposed by him by paragraphs 1 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....."

There is a further provision made therein that the civil Court shall during that time be incompetent to issue any process against such property or part thereof in execution of a decree for the payment of money. In this case the civil Court is not asked to issue process against property in the management of the Collector in execution of a decree for payment of money. The amount which is sought to be added to the darkhast cannot be regarded as an amount to be recovered in execution of a decree for payment of money.

The decree sought to be executed is a mortgage decree and the application to the civil Court was not for issue of process against any property in the management of the Collector, but was an application to include the amount of two instalments which had fallen due, in the claim in the original darkhast, so that the same may be recovered by the Collector in execution. Clause (3) of para. 11 provides:--

"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."

The expression "same period" means the Period during which the Collector can exercise or per-form the powers or duties under paras. 1 to 10 of Schedule III. It is clear from Clause (3) that if, the decree-holder has by reason of the provisions of para 11, Clause (1), been temporarily deprived of any remedy to which he is otherwise entitled, in calculating the period of limitation for filing execution proceedings the period during which he has been so deprived of the remedy shall be excluded. In this case it cannot be said that the plaintiff has been temporarily deprived of any remedy under para 11 and therefore the time during which the darkhast is pending before the Collector cannot be excluded.

It is evident that para. 11, Clause (3), applies only to cases in which a decree-holder holding a decree for money is prohibited from applying for execution under Clause (1). It does not apply to cases in which under a mortgage decree instalments have fallen due subsequent to the date on which the proceedings were transferred to the Collector and attempt is made to enforce liability through the Collector for those instalments by sale of the mortgaged property. In my view, the learned trial Judge was in error in holding that under Clause (3) of para. 11 the period of limitation for

filing an application in execution for recovery of instalments under a mortgage decree could be extended by excluding the period during which the proceedings before the Collector were pending for recovery of instalments which had fallen due before the date of the application.

4. It is true that on July 17, 1947, the dark-hast proceedings were transferred to the Debt Adjustment Court u/s 19(1) of the Bombay Agricultural Debtors Relief Act, 1947, and those proceedings were re-transferred u/s 19(4) of that Act to the learned Civil Judge sometime in 1951. Section 52 of the Bombay Agricultural Debtors Relief Act, 1947, provides:

"In computing the period of limitation for the institution of any suit or proceeding in respect of any debt due from any person who is held not to be a debtor by the Court or the Court in appeal or an application relating to which has been dismissed by the Court or the Court in appeal, the period during which the proceedings in respect of such debt were prosecuted before the Court or the Court in appeal shall be excluded."

In the present case the darkhast was transferred to the Debt Adjustment Court and the defendants have been held not to be debtors. The proceedings were prosecuted before the Debt Adjustment Court from July 17, 1947, to some date in 1951, and, therefore in computing the period of limitation for the institution of any proceeding in respect of a debt due from the defendants that period during which the proceedings in respect of which the claim was prosecuted before the Debt Adjustment Court has to be excluded. The darkhast originally filed related only to three out of five or more instalments in which the amount of the decree was made payable, whereas the application filed on June 20, 1951, is in respect of the two instalments which fell due in the years 1943 and 1944.

It is contended by Mr. Adik on behalf of the appellants that there being no proceedings before the Debt Adjustment Court in respect of the two instalments which fell due in the years 1943 and 1944, in computing the period of limitation for filing an application for including those two instalments the time taken up in the Debt Adjustment Court cannot be excluded.

Now, the expression "debt" has been defined in Section 2(4) of the Act as meaning "any liability due from a debtor whether payable under a decree or order of any civil Court or otherwise...." The expression "debt" is not limited to an obligation to pay an ascertained or liquidated amount enforceable at the time when the proceedings are Instituted or commenced, but includes liability which has arisen but is not immediately enforceable. u/s 19(1) of the Act all suits, appeals, applications for execution and proceedings in respect of any debt pending in any civil Court shall be transferred to the Court, if they involve the question whether the person from whom such debt is due is a debtor.

Sub-section (3) of Section 19 provides that when any suit, appeal, application or proceeding is transferred to the Court under Sub-section (1), the Court shall proceed as if an application u/s 4 has been made to it. The effect of Sub-sections (1) and (3) read together appears to be that once a pending suit or application for execution is transferred to the Debt Adjustment Court, that Court must proceed as if an application u/s 4 has been made to it; and it is evident that when an application u/s 4 of the Act is made, the Debt Adjustment Court is required to adjust all debts of the debtor including liabilities which have accrued but are not immediately enforceable.

By reason of the transfer, therefore, on July 17, 1947, to the Debt Adjustment Court at Kopergaon that Court became competent to deal with the entire liability of the defendants under the mortgage decree -- whether the liability had then become enforceable or was to become enforceable in future. Reference may also be made to Section 5IA of the Act, Which in so far as it is material provides:--

"Except as otherwise provided by this Act no Civil Court shall entertain or proceed with any suit or proceeding in respect of-

(i) any matter pending before the Court under this Act...."

By reason of Sub-section (3) of Section 19 the question as to the liability of the defendants to satisfy the two instalments of the years 1943 and 1944 was a "matter pending before that Court", and the civil Court had no jurisdiction to entertain any proceeding u/s 51A of the Act in respect of that liability. Even though an application for including the instalments which fell due in 1943 and 1944 was not made to the civil Court or the Debt Adjustment Court, the liability in respect thereof could be adjusted by the Debt Adjustment Court under the combined operation of Sub-sections. (1) and (3) of Section 19, and therefore the liability for those instalments was "a matter pending before the Debt Adjustment" Court" within the meaning of Section 51A: and the execution proceeding transferred to the Debt Adjustment Court became a proceeding in respect of the entire liability under the decree, and the period during which that proceeding was pending before the Debt Adjustment Court was by reason of the provision of Section 52 of the Act liable to be excluded in computing the period for filing an application for execution for recovery of the two instalments. Therefore, in computing the period of limitation for filing an application for including the two instalments in the darkhast pending before the Collector, the period during which the proceedings were pending before the Debt Adjustment Court and in which it was ultimately found that the defendants were not debtors has to be excluded.

5. In a recent Judgment of this Court "reported in -- Hasansaheb Nabisaheb Vs. Virupaxappa Mahantappa and Others, a question arose whether the expression "total amount of debts due from the person making an application u/s 4" appearing in Section 17 of the Bombay Agricultural Debtors Relief Act, 1947, means only the amount of debts enforceable against the debtor at the time of the application or

whether it includes liabilities which were to be enforceable at a future date, and it was held that where a debt is payable by instalments, the whole amount of such debt and not the amount of the instalment due and payable on the date of the application is to be taken as the amount of the "debt due."

The Court in an enquiry u/s 17 is primarily concerned with ascertaining whether the quantum or extent of liability of the person who claims or is alleged to be a debtor exceeds Rs. 15,000; and in making that enquiry the Court must have regard to the liability which is immediately enforceable and liability though existing is not immediately enforceable. Section 52 deals with exclusion of the period during which proceedings were prosecuted in a Debt Adjustment Court, in computing the period of limitation for filing a suit or an application for execution and has to be strictly construed. But the Legislature has provided for exclusion of the period during which proceedings "in respect of a debt" have been prosecuted, in computing the period of limitation for filing a suit or an application for execution of the debt. Even though the darkhast filed by the plaintiff related only to three instalments, by reason of Section 19(3) the proceedings when transferred to the Debt Adjustment Court became proceedings in respect of the entire liability under the decree, and by reason of Section 51A the plaintiff was prevented from taking any steps in respect thereof in a civil Court. Having regard to the provisions of Sections. 2(4), 4, 51A and Sub-sections (1) and (3) of Section 19, I am of the view that the time during which the darkhast proceedings were prosecuted before the Debt Adjustment Court must be excluded.

6. In deciding whether the application for adding the two Instalments to the claim in the pending darkhast could be entertained, the Court must consider whether an application for execution of those instalments would be barred by the law of limitation at the date when the application was filed on June 20, 1951. It appears that the application in so far as it relates to the instalment of the year 1943 would *prima facie* be beyond the period of limitation. It is not clear from the record as to what was the period during which the darkhast proceedings were prosecuted in the Debt Adjustment Court. It appears that on July 16, 1951, the learned Civil Judge passed an order for issuing notice to the parties that the papers had been returned by the Debt Adjustment Court. It also appears that the Debt Adjustment Court passed an order on February 16, 1951, to return the papers; but there is no clear evidence as to when the papers were actually despatched by that Court. It need hardly be observed that the only period that can be excluded is the period during which the proceedings were prosecuted.

7. The order passed by the learned Judge is, therefore, set aside and the learned Judge in the Court below is directed to proceed to deal with the darkhast in the light of the observations made herein. As there are not sufficient materials before me to ascertain whether the Instalment of the year 1944 is within time, I direct that the learned trial Judge do proceed to deal with the application according to law. The

learned trial Judge in passing the final order will deal with the costs of this appeal.

8. Case remanded.