In Re: Reference Under Order Xlvi, Civil Procedure Code, 1908

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Court : Mumbai

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Judge : John Beaumont, Kt., C.J. and Wassoodew, J.

Appeal No. : Civil Reference No. 2 of 1942

Appellant : In Re: Reference Under Order Xlvi, Civil Procedure Code, 1908

Judgement :

John Beaumont, Kt., C.J.

1. These are two references made by the Subordinate Judge of Khed through the District Judge of Poona under Order XLVI, Rule 1, of the Civil Procedure Code, 1908, raising certain questions of law which arise under the Bombay Agricultural Debtors Relief Act of 1939.

2. The first reference raises three questions : first, whether a sale-mortgage case can be transferred under Section 37 before the Court has found the transaction to be really in the nature of a mortgage; secondly, whether an account suit under Section 15D of the Dekkhan Agriculturists' Relief Act can be transferred unless it is converted into a suit for redemption by payment of the requisite court-fee; and thirdly, whether in view of Section 45(2) (i) of the Bombay Agricultural Debtors Relief Act, and of the fact that the transactions were entered into before 1927, the suits should be transferred to the Board, Those questions primarily turn on the

construction of Section 37 of the Act. But in order to appreciate that section, it is necessary to look at the earlier provisions of the Act, and to understand its general scheme.

3. Section 2 of the Bombay Agricultural Debtors Relief Act contains various definitions, including a definition of 'debt' as meaning 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 'debtor' as meaning an individual who fulfils certain qualifications including that of being indebted. Section 4 provides for the constitution by the Provincial Government of Debt Adjustment Boards, and explains the nature of the Boards. Section 6 contains a general power for the Board to decide all questions;, whether of title or priority or of any nature whatsoever, and whether involving matters of law or fact, which may arise in any case within the cognizance of the Board or which the Board may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete' adjustment of debts in any such case. Then there are provisions relating to the procedure to be adopted before the Board, to appeals, and . so forth. Then Section 17 (1) provides that within eighteen months from the date on which a Board is established under Section 4, any debtor may make an application to the Board for the adjustment of his debts under the Act as thereinafter provided. Sub-section (2) provides that unless the debtor has already made an application under Sub-section (1), his creditor may make an application to the Board for the adjustment of his debts within the period prescribed. Then there are' various provisions, consequential upon the making of any such application, dealing with the form of the application, and the evidence to be adduced, and with various special cases which may arise. Section 32 provides that the debts specified in respect of which no application for adjustment or settlement has been made are to be deemed to haVe been discharged]. Then Section 35(1) provides that on the date fixed for the hearing of an application made under Section 17, the Board shall decide the following points as preliminary issues :-(a) whether the person for the adjustment of whose debts the application has been made is a debtor; and (6) whether the total amount of debts claimed as being due from such person on January 1, 1939, does not exceed Rs. 15,000. Sub-section (2) provides that if the Board finds those issues in the negative, the

Board has to dismiss the application. Then comes Section 37, which is the section which we have to construe. That provides :-

All pending suits and applications for execution before any Civil Court in which the question involved is the recovery of any debt from a person who is a debtor under this Act and all proceedings arising in or out of such suits or applications, if such person ordinarily resides in any local area for which a Board is established under Section 4 or belongs to a class of debtors for which a Board is established under the said section shall, if the total amount of debts due from such debtor is not more than Rs. 15,000, be transferred to the Board to which an application for adjustment of debts of such person under Section 17 lies. The decision of the Court on the points whether such person is a debtor under this Act, and whether such amount of his debts is not more than Rs. 15,000 shall be final.

4. Now, the first question, which the learned Judge has raised, is whether a suit, in which the question arises whether the transaction in question is a mortgage or sale, can be transferred by the Court to the Board before determining that matter. In my opinion, on the language of Section 37, the answer to that question must be in the negative. Suits, which must be' transferred under that section, are pending suits in which the question involved is the recovery of debt from a person who is a debtor under the Act, and before any question as to the recovery of a debt can be said to be involved, there must be a debt, which the Court decides is recoverable from, a debtor within the terms of the Act, and the last sentence of the section shows that the decision of the Court on that point is final. Therefore, the Court must determine that a debt exists recoverable from: a person who is a debtor under the Act, and until that question is determined, it seems to me impossible to say that any question is involved as to the recovery of a debt. It is to be noticed that the Act contains no express provision as to how the Board is to deal with a case transferred under Section 37. The Board has general powers under Section 6 to deal with any case within its cognizance, and, no doubt, a case properly transferred to the Board by a Court of competent jurisdiction would be within the cognizance of the Board; but there are no express provisions as to how the debts are to be proved in cases transferred under Section 37; nor is there any direction that the question whether the person, the adjustment of whose debts is in question

in the suit, is a debtor within the meaning of the Act is to be tried as a preliminary issue, because Section 35 only applies to applications made under Section 17. I have no doubt, therefore, reading the: whole of the Act together, that the scheme is that pending suits should not be transferred under Section 37, until the Court has determined that the debtor is a debtor within the meaning of the Act, and in a suit relating to a transaction which is said by one side to be a mortgage and by the other side to be a sale, that question must be determined before the Court can say that the alleged debtor is a debtor.

5. The second question, which arises on the first reference, is whether a suit can be transferred which is a suit merely for accounts under Section 15D of the Dekkhan Agriculturists' Relief Act. Mr. Desai's argument is that if the suit asks only for an account, and does not ask for the recovery of a debt, it is not a suit within Section 37. But it is to be noticed that the language of Section 37 does not require that the' suit to be transferred should be a suit for the recovery of a debt; it is only necessary that it should be a suit in which the question involved is the recovery of a debt, and, to my mind, if the suit is a suit for an account between a debtor and a creditor, it can be said to involve a question as to the recovery of a debt, because it is apparent that a suit for an account is preliminary to the debt being recovered in some manner or the other. Usually after accounts have' been taken, the suit is converted into a mortgage suit or a redemption suit, and a decree is ultimately made. But I feel myself no doubt that a mere suit for accounts, where a debt is admitted or established, and the only question is as to the amount, is a suit involving a question as to the recovery of a debt, and, therefore, falls within the compulsory provisions for transfer contained in Section 37.

6. The third question relates to Section 45 of the Bombay Agricultural Debtors Relief Act, because the transactions in question in the suit involved in this reference took place before January 1, 1927, and Section 45 provides that whenever it is alleged during the course of the hearing of an application made under Section 17 that any transaction purporting to be a sale of land belonging to a debtor was a transaction in the nature of a mortgage, the Board shall declare the transaction to be so, if the Board is satisfied that the circumstances connected with that sale-deed showed it to be in the nature of a mortgage. Then there is a proviso

that nothing in the section shall apply to any transaction entered into before January 1, 1927. So that, where the Board is dealing with an application under Section 17, it can determine the question whether the transaction involved is a mortgage or a sale, provided that the transaction was not entered into before January lr, 1927. On our decision upon the first question, the third question does not really arise, because we have held that the Court must determine the question whether the transaction is a sale or a mortgage before it orders a transfer. But the fact that Section 45 imposes a limitation on the powers of a Board which does not exist in the case of the ordinary Courts, suggests an additional reason for saying that it was not intended that suits of this nature should be transferred to a Board until the question as to whether the transaction is a sale or a mortgage has been determined. It can hardly have been intended that by transferring a case from the Court to the Board a limitation was to be imposed on the creditors' rights which would not exist apart from such transfer; or that a Board was to have wider powers in dealing with a question arising in a suit transferred under Section 37 than it would have in dealing with a similar question arising on an application under Section 17. However, on the construction which we have placed on Section 37, the third question does not really arise.

7. The second reference relates to certain suits for possession of land on tenancy, alternatively on title, and for rent and damages, and the first difficulty in the way of the' reference is that in so far as the suits are suits for possession, they are appealable, and, if that is so, a reference in respect of difficulties cannot be made under Order XLVI, Rule 1, of the Civil Procedure Code. We have not got the actual plaints before us. In so far as a suit is a suit purely for recovery of rent as a debt, it must be dealt with on the same footing as other suits for debt and in so far as a suit is a suit for damages, it is difficult to see how it can be regarded as a suit for a debt, until the liability is ascertained. However on the questions actually raised on the reference, I think, we are bound to hold that the reference does not lie, and, therefore, it is unnecessary for us to express any opinion on the questions raised on that reference.

8. We are indebted to Mr. Desai for having argued the case as amicus curiae, and for the assistance which he has rendered to the Court.

Wassoodew, J.

9. I agree.