

FA 139 / 1937

In His Majesty's High Court of Judicature,
Appellate Side, Bombay

(CIVIL JURISDICTION)



Appeal No. 139 of 1937 from Original Decree
~~Civil Revision Application~~ Appellate

(Appeal No. 28/39 under the
Letters Patent).

Mahadeo Surdar Melka
and others, legal representatives
of the deceased Surdar Vallabh
Melka (Original Decree-brokers
applicants)

Appellant
Applicant

versus

Khanderao Sitaram Tivnis,
legal representative of the deceased
Sitaram Ramchandra Tivnis
and another.

Respondent
Opponent

(Original Judgment) Claim Rs.

for Advocate's fee.

Advocate for Appellant Applicant Mr. H. N. Maharaj

Advocate for Respondent Opponent Mr. V. B. Kulkarni

In His Majesty's High Court of Judicature,
Appellate Side, Bombay

Just
APPEAL

CIVIL REVISION APPLICATION

No. 139 OF 193

District. *Thane*

No. of paper.

Particulars.

I. Papers to be preserved.

- ~~1~~ Copy of the Judgment of the lower appellate Court if printed.
- ~~2~~ Copy of the Judgment of the original Court (if printed).
- ~~3~~ Interlocutory Judgment of the High Court (if any).
- ~~4~~ Findings.
- ~~2~~ Judgment (Final) of the High Court.
- ~~3~~ Decree of the High Court.
- ~~7~~ Judgment in Review Petition.
- ~~8~~ Judgment of the High Court in the matter of leave to appeal to the Privy Council.
- ~~9~~ Judgment, decree and order of the Privy Council.
- ~~10~~ Printed copy of the Privy Council record.
- ~~4~~ Memo. of appeal in appeals or applications summarily dismissed.

II. Papers to be destroyed under the Rules.

- ~~1~~ Memo. of appeal (in admitted cases).
- ~~2~~ Manuscript copy of the Judgment of appellate Court.
- ~~3~~ Manuscript copy of the decree of appellate Court.
- ~~2~~ Manuscript copy of the Judgment of original Court.
- ~~3~~ Manuscript copy of the decree of original Court.
- ~~5A~~ Application for return of the above copies.
- ~~4~~ Vakalatnama of Mr. *K.N. Shinde* for the appellant.
- ~~7~~ Civil application for delay being excused with affidavit.
- ~~8~~ Application for copies.
- ~~9~~ Application for search.
- ~~10~~ Letter intimating dismissal where the order is of dismissal.
- ~~11~~ Notice.
- ~~12~~ Letter transmitting notice with District Judge's endorsement thereon, etc.
- ~~13~~ R. and P. writ.
- ~~14~~ Application No. _____ of 193 _____ for substitution of heirs. fresh notice.

No. of paper.

Particulars.

- 15 Fresh Notice (to heir).
- 16 Letter transmitting notice with District Judge's endorsement thereon, etc.
- 17 Vakalatnama of Mr. *V. B. Verma* for the respondent.
- 18 Memo. of cross-objections.
- 19 Application for copies.
- 20 Application for search.
- 21 Writ sending down issues when there is a separate Judgment.
- 22 Notice of receipt of findings.
- 23 Objections to findings.
- 24 Writ communicating final decree or order to the lower Court.
- 25 Receipt of R. and P. by the District Judge.
- 26 Review Petition.
- 27 Affidavit in support of do. if any.
- 28 Vakalatnama if any.
- 28A. Application for a certificate to appeal under the Letters Patent.
- 29 Application for leave to appeal to His Majesty's Privy Council.
- 30 Notice in do.
- 31 Writ for R. and P. in do.
- 32 Certificate granting leave to appeal.
- 33 Writ or letter of intimation in cases where rule is discharged.
- 34 Receipt of papers.

J. S. Shankar
Clerk.

S. S. Sharma
Assistant Sheristedar.
23/2/40

F.—196/37

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

~~day the~~

day of

193

APPEAL No. 139 OF 1937 FROM ORIGINAL DECREE.

(UNDER SECTION 47, CIVIL PROCEDURE CODE.)

1 Mahadeo Sunder Metha; 2 Shankar Sunder Metha;
 3 Motiram Sunder Metha; 4 Chandulal Sunder Metha;
 5 Mohan Sunder Metha—All legal representatives of the } *Appellants.*
 deceased Sunder Vallabh Metha. ...
 (Original Decree-holders-Applicants) }

versus

1 Khanderao Sitaram Tipnis, legal representative of the }
 deceased Sitaram Ramchandra Tipnis; 2 Yeshwant Bal- } *Respondents.*
 krishna Tipnis, legal representative of the deceased }
 Dwarkanath Balkrishna Tipnis. ...
 (Original Judgement-debtor) }

Claim—Rs. 5,953-10-3 for jurisdiction and Advocate's fees.

The Plaintiff applied for execution of the decree in suit No. 59 of 1921.

The application in Original Darkhast No. 73 of 1931 was decided by the First Class Subordinate Judge of Thana, who directed the proceedings to be sent to the Collector of Kolaba, for sale.

An appeal has been admitted in the High Court from the decision of the lower Court. Notice was ordered to issue by the Honourable Mr. Justice Wassoodew on the 16th day of July 1937.

The grounds of objection to the decision appealed against are:—

1. That the lower Court erred in law in holding that Defendant No. 1 is an agriculturist.
2. That the lower Court erred in law in sending the Darkhast to the Collector, Kolaba, for execution.
3. That the evidence on record is not sufficient to hold that Defendant No. 1 is an agriculturist.
4. That the contention of the Defendant that he is an agriculturist is barred by principle analogous to the principle of *res judicata*.
5. That in any case the lower Court had no jurisdiction to go back on its own order.
6. That it was wrong in law to allow the Defendant to raise the contention long after the order of sale by the Civil Court had been made and particularly when proclamations of sale had been published and other procedure had been gone through.
7. That the lower Court erred in holding that the Defendant had not given up the contention.
8. That the contention had been raised by the Defendant in the written statement; but no issue on the point had been asked for and no evidence had been led.

9. That there was an adjustment between the parties by which the Defendant had agreed to give up all the contentions raised by him and the Plaintiff had given him six months time to pay the decretal debt.

10. That the adjustment had been notified to the Court by the Plaintiff and the Defendant had not objected to it in spite of notice.

11. That the Court had recognised the adjustment by giving time to the Defendant.

12. That the order passed by the lower Court is against law, justice and equity.

In the Court of the First Class Subordinate Judge
at Thana.

DARKHAST No. 73 OF 1931.

* * * * *

Notice.

(Signed) L. C. SHETH,

23rd January 1937.

First Class Subordinate Judge, Thana.

The Defendant No. 1's contention is that he is agriculturist. Defendant Khanderao has got his own lands and he also cultivates lands of others. Besides he also personally engages himself in agricultural labour. Defendant is supported by the witnesses including the Police Patil of Sav who all depose that the Defendant's only source of income is from agricultural produce and he has got no other source of income and that he also personally engages himself in agricultural labour. Plaintiff has failed to show that he has got any other source of income. Defendant No. 1 is therefore agriculturist.

Plaintiff's plea is that by a settlement before 1932 Defendants were given six months' time to pay as they gave up all contentions and Plaintiff relies on 3 exhibits, exhibit 16-17-19. No doubt the Darkhast-proceedings were postponed for six months but there is nothing in all these 3 *purshis* to show that Defendant No. 1 has given up his contentions about status. The estoppel therefore does not arise.

Besides Defendant No. 1 does not challenge the order for sale at all. He only pleads his status and if he succeeds in proving that he is agriculturist, as he appears to have succeeded, the next stage is of procedure only. If once it is proved that the Defendant is agriculturist, the Civil Procedure Code requires that the sale should take place at the hands of the Collector and not through Court.

I therefore hold that Defendant No. 1 is agriculturist. Darkhast should therefore be sent to the Collector, Kolaba, for execution.

(Signed) L. C. SHETH,

First Class Subordinate Judge, Thana.

13th February 1937.

[True copy]

(Illegible)

Clerk of the Court.

F.—196/37

APPEAL NO. 139 OF 1937 FROM ORIGINAL DECREE.

10 **IN THE COURT OF THE FIRST CLASS SUBORDINATE JUDGE
AT THANA.**

DARKHAST No. 73 OF 1931.

* * * * * *

Attach immoveables Order XXI, rule 54.

20 12th January 1932. (Signed) R. G. SHIRATE.

Ratable distribution to be given in the Darkhast no. 183 of 1929.

(Signed) R. V. BODAS,
6th July 1933. First Class Subordinate Judge, Thana.

Notice, Order XXI, rule 66.

30 (Signed) R. V. BODAS,
28-8-33 First Class Subordinate Judge, Thana.

Ordered sale. Issue proclamation.

(Signed) R. V. BODAS,
10th October 1933. First Class Subordinate Judge, Thana.

40 Execution is stayed by the High Court, surety given is solvent—
Darkhast kept pending till the High Court matter is decided or the stay
is cancelled.

(Signed) M. C. K.,
4th July 1934. In-charge, First Class Subordinate Judge, Thana.

* * * * * *

50 Defendants are held to be agriculturists (*vide* exhibit 80) stop the sale
held through Court and send the papers to the Collector of Kolaba for sale.

(Signed) L. C. SHETH,
Thana, 13th February 1937. First Class Subordinate Judge.

[True copy]

(Illegible)
Clerk of the Court.

APPEAL No. 139 OF 1937 FROM ORIGINAL DECREE.

(UNDER SECTION 47, CIVIL PROCEDURE CODE.)

Mahadeo Sunder Metha; and others, legal representatives of }
 the deceased Sunder Vallabh Metha. (Original Decree- } Appellants.
 holders-Applicants) }

versus

Khanderao Sitaram Tipnis, legal representative of the }
 deceased Sitaram Ramchandra Tipnis; and another. } Respondents.
 (Original Judgment-debtors) }

Appeal against the decision of L. C. Sheth, Esquire, First Class Subordinate Judge at Thana, in Darkhast No. 73 of 1931.

Mr. K. N. Dharap for the Appellants.

Counsel Dr. B. R. Ambedkar with Mr. V. B. Virkar for the Respondents.

20th June 1939.

(Coram :—Lokur, J.)

Oral Judgment.—This is an appeal against an order passed in execution proceedings by the First Class Subordinate Judge of Thana.

The appellants obtained a money decree against the respondents, and presented Darkhast No. 73 of 1931 to recover the decretal amount by attachment and sale of the respondents' property. The Darkhast was presented on 12th February 1931, and when the notices were served on them, the respondent No. 1 put in his written statement (exhibit 13) on 8th September 1931 alleging *inter alia* that he was an agriculturist. Subsequently on 19th December 1931 the plaintiffs put in a *purshis* (exhibit 16) stating that under a compromise they had agreed to grant six months time to the judgment-debtors to pay off the decretal amount, and that the judgment-debtors had agreed to waive their contention raised by the respondent No. 1 in exhibit 13. The respondents' Pleader, however, stated on 12th January 1932 that he had no instructions regarding the alleged compromise. The property was attached on 8th March 1932, and then an order for its sale was passed under Order XXI, rule 64 of the Civil Procedure Code on 28th July 1933. Notices were issued to the judgment-debtors under Order XXI, rule 66, and on 10th October 1933 the following order was passed :—"Ordered sale. Issue proclamation." Thereafter some proceedings as regards the addition of parties went on and the execution was stayed by the High Court. Ultimately the papers were received back on 21st December 1936, and on 12th January 1937 the judgment-debtor Khanderao made an application (exhibit 80) stating that his contention in the written statement (exhibit 13) that he was an agriculturist had not been considered and requesting that as he was an agriculturist the proceedings should be transferred to the Collector for the sale of the property attached. The lower Court then recorded evidence regarding the status of the judgment-debtor Khanderao and held that he was an agriculturist. The Darkhast was, therefore, ordered to be transferred to the Collector of Kolaba for execution. It is against that order that the present appeal is filed by the decree-holders.

One of the contentions on behalf of the decree-holders, which was urged before the lower Courts, was that by reason of the alleged compromise mentioned in the *purshis* (exhibit 16) it was not open to the judgment-debtor, respondent No. 1, to put forward the plea that he was an agriculturist. The alleged compromise was not admitted on behalf of the judgment-debtors; nor has

it been proved. Moreover, even if Khanderao had then agreed to give up his contention regarding his status, still he cannot be regarded as having waived his right to claim the transfer of the proceedings to the Collector after the order for sale was passed, if he could prove that on the date of the order he was an agriculturist. Section 68 of the Civil Procedure Code and the rules made thereunder require that when an order for sale is passed and the judgment-debtor is an agriculturist the proceedings should be transferred to the Collector for execution of that order; in other words, the date at which the status of the judgment-debtor is to be considered is the date when the order for sale is passed. That is also clear from the ruling in *Sopana v. Dattatraya* (1934) 36 Bom.L.R. 804. It was, therefore, open to the judgment-debtors to contend that the proceedings should be transferred to the Collector after the order for sale was passed, and the Court was bound to transfer those proceedings if it found that at the date of the order for sale the judgment-debtors or any one of them was an agriculturist.

The lower Court has found on the evidence that one of the judgment-debtors Khanderao is an agriculturist, but it is urged that there was no issue regarding his status on the date of the order for sale. But when his application (exhibit 80) is read with the evidence adduced on his behalf, it is evident that he wanted the contention raised by him in his written statement (exhibit 13) to be considered, and that related to his status in the year 1931, and the evidence is led that all along he has been an agriculturist. When the witnesses were examined there was no suggestion that Khanderao had changed his status at any time. Hence it must be deemed that the lower Court held Khanderao to be an agriculturist on the material date, namely, the date on which the order for sale was passed. No evidence was adduced by the decree-holders to rebut the evidence adduced on behalf of Khanderao, and the finding of fact recorded by the lower Court practically stands unchallenged.

But the most important objection against the order of the lower Court is that judgment-debtor No. 1 did not put forward his contention regarding his status at the proper time. The contention which was taken in the written statement (exhibit 13) was not then pressed, and no finding regarding the status of Khanderao was recorded before the order for sale was passed on 28th August 1933. After that order notices under Order XXI, rule 66, were issued for the settlement of the terms of the proclamation. It was at that stage that the judgment-debtors should have come forward to ask for the transfer of the proceedings to the Collector for execution of the order for sale. As observed by Broomfield, J., in *Sopana v. Dattatraya* (1934) 36 Bom.L.R. 804, when an order for sale is passed under Order XXI, rule 64, it is really a preliminary order, which may be subsequently modified if any of the judgment-debtors appear in reply to the notices under Order XXI, rule 66, and prove that they are agriculturists. In that case the proceedings would have to be transferred to the Collector. But this opportunity given to Khanderao was not availed of by him, and he remained absent on the date fixed in the notice issued to him under Order XXI, rule 66. The Court then made an order for sale and issue of proclamation. Such an order would not have been passed if any of the judgment-debtors had appeared and urged that the proceedings should be transferred to the Collector by reason of their being agriculturists. It is, therefore, urged on behalf of the appellants that by implication the Court then found that it had jurisdiction to proceed with the sale, and it is not necessary to send the proceedings to the Collector. When once such an order is passed, it is binding on the judgment-debtors unless they appeal from that order and get it set aside. On the other hand, it is pointed out that such an order is not a judicial order but merely an administrative order from which no appeal lies. In support of this view reference may be made to *Sivagami Achi v. Subramania Ayyar* (1904) I.L.R. 27 Mad. 259, and *Krishnarao Ambadas v. Krishnarao Raghunath* (1928) I.L.R. 52 Bom. 444. In both these cases it was held that the proceedings of a Court under Order XXI, rule 66 of the Civil Procedure Code and the rules made thereunder in relation to the proclamation of sale are not orders within the meaning of section 47 and are not appealable. It is true that

administrative directions relating to proclamation and other matter necessary for the carrying out of the sale cannot be regarded as orders falling under section 47 of the Civil Procedure Code; but an order as to whether the sale is to be held by the Court itself or by the Collector is a judicial order relating to the execution of the decree, and as such it falls under section 47 of the Civil Procedure Code. It has to be passed after a consideration of the question whether any of the judgment-debtors was an agriculturist at the date of the order of sale, and when a notice is given to the judgment-debtor under Order XXI, rule 66 for the settlement of the terms of the proclamation it is his duty to put forward his contention that he was an agriculturist on the date of the order of sale and therefore instead of issuing a proclamation, the Court should transfer the proceedings to the Collector. If he fails to raise such a contention at that time, and the Court passes an order that the sale should be held by itself, then that order is a judicial order which is binding on the judgment-debtor. If the judgment-debtor appears and contends that he was an agriculturist at the date of the order for sale and the Court holds that he was not, and proceeds to hold the sale itself, then it would be open to the judgment-debtor to appeal from that order. The same result would follow if he does not appear in reply to the notice issued to him and allows an *ex parte* order to be passed against him. In the present case not only did the judgment-debtors fail to appear on receiving the notices issued to them under Order XXI, rule 66, but even after the terms of the proclamation were settled they made an application (exhibit 29) on 22nd December 1933 asking for a fresh *panchnama* and a fresh valuation of the property. That application was granted and a fresh proclamation was issued on 11th January 1934. Thus even though they accepted the order passed by the executing Court and allowed the proceedings of sale to go on in the Court itself, it was nearly three years thereafter when the proceedings were received back from the High Court, that Khanderao came forward with his application (exhibit 80). But since already an order had been passed that the Court itself should proceed with the *Darkhast*, it was not open to him subsequently to put forward a contention which he ought to have put forward when the notice under Order XXI, rule 66 was issued. I, therefore, hold that the lower Court should not have gone into the question of the status of the judgment-debtor No. 1 at that stage.

I set aside the order of the lower Court and direct that it should proceed with the proceedings for sale, instead of sending them to the Collector. The respondents shall pay the costs of the appellants and bear their own.

By order of the Court,

Exd. by: M.S.A.

M. S. A.

Registrar.

MSA

Appeal No.139 of 1937 from Original Decree.
(Under Section 47, Civil Procedure Code)

Mahadeo Sunder Metha; and others -
Legal representatives of the deceased
Sunder Vallabh Metha. (Original
Decree-holders-Applicants).....Appellants.

Vs.

Khanderao Sitaram Tipnis, legal representative
of the deceased Sitaram Ramchandra Tipnis;
and another. (Original Judgment-debtors)
. Respondents.

Appeal against the decision of L.C.
Sheth, Esquire, First Class Subordinate Judge at
Thana in Darkhast No.73 of 1931.

Mr.K.N.Dharap for the Appellants.

Counsel Dr.B.R.Ambedkar with Mr.V.B.
Virkar for the Respondents.

20th June 1939.

(Coram: Lokur J.)

Oral Judgment :-

x

x

x

By order of the Court,

89. BVB.

Registrar.

Appeal No. **139** of 193**7** from Original
Appellate Decree.

Date of decision **20/6**

For approval and signature

The Hon'ble *Mr* Justice *Lokur* *nee*

~~The Hon'ble Mr. Justice~~

Whether Reporters of Local Papers may be allowed to see the judgment? **Yes**

To be referred to the Reporter or not? **BLR**

Whether Their Lordships wish to see the fair copy of the judgment? **No**

Mr. K.N.Dharap for the appellants.

Dr. Ambedkar with Mr. V.B.Virkar for the respondents

Coram: Lokur J.

Oral Judgment
20th June 1939

This is an appeal against an order passed in execution proceedings by the First Class Subordinate Judge of Thana.

The appellants obtained a money decree against the respondents, and presented Darkhast No 73 of 1931 to recover the decretal amount by attachment and sale of the respondents' property. The Darkhast was presented on 12th February 1931, and when the notices were served on them, respondent No 1 put in his written-statement (Ext 13) on 8th September 1931, alleging inter alia that he was an agriculturist. Subsequently on 19th December 1931 the plaintiffs put in a purshis (Ext 16) stating that under a compromise they had agreed to grant six months time to the judgment-debtors to pay off the decretal amount, and that the judgment-debtors had agreed to waive their contention raised by respondent No 1 in Ext 13. But the respondents' Pleader, however, stated on 12th January 1932 that he had no instructions regarding the alleged compromise. The property was ~~also~~

attached on 8th March 1932, and then an order for its sale was passed under Order XXI rule 64 of the Civil Procedure Code on 28th July 1933. Notices were issued to the judgment-debtors under Order XXI rule 66, and on 10th October 1933 the following order was passed:- "Ordered sale. Issue proclamation."

Thereafter some proceedings as regards ^{the addition of} additional parties went on and the execution was stayed by the High Court. Ultimately the papers were received back on 21st December 1936, and on 12th January 1937 the judgment-debtor Khanderao made an application (Ext 80) stating that his contention in the written statement (Ext 13) that he was an agriculturist had not been considered and requesting that as he was an agriculturist the proceedings should be transferred to the Collector for the sale of the property attached. The lower Court then recorded evidence regarding the status of the judgment-debtor Khanderao and held that he was an agriculturist. The Darkhast was, therefore, ordered to be transferred to the Collector of Kolaba for execution. It is against that order that the present appeal is filed by the decree-holders.

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 which was urged before the lower Court, was that by
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those proceedings if it found that at the date of the order for sale the judgment-debtor^{or} ^{or} any of them was an agriculturist.

The lower Court has found on the evidence that one of the judgment-debtors Khanderao ^{is} ~~was~~ an agriculturist, but it is urged that there was no issue regarding his status on the date of the order for sale. But when his application (Ext 80) is read with the evidence adduced on his behalf, it is evident that he wanted the contention raised by him in his written statement (Ext 13) to be considered, and that related to his status in the year 1931, and the evidence is led that all along he has been an agriculturist. When the witnesses were examined there was no suggestion that Khanderao had changed his status at any time. As well ^{as} ~~as impliedly~~ it must be deemed that the lower Court held Khanderao to be an agriculturist on the material date, namely, the date on which the order for sale was passed. No evidence was adduced ^{by} ~~on behalf of~~ the decree-holder to rebut the evidence adduced on behalf of Khanderao, and the finding of fact recorded by the lower Court practically stands unchallenged.

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have been passed if any of the judgment-debtors had appeared and urged that the proceedings should be transferred to the Collector by reason of their being ~~an~~ agriculturists. It is, therefore, urged on behalf of the appellants that by implication the Court then found that it had jurisdiction to proceed with the sale, and it is not necessary to send the proceedings to the Collector. When once such an order is passed, it is binding on the ~~judges~~ judgment-debtors unless they appeal from that order and get it set aside. On the other hand, it is pointed out that such an order is not a judicial order but merely an administrative order from which no appeal lies. In support of this view reference may be made to ~~the ruling in~~ Sivagami Achi Vs Subramania Ayyar (1904) I.L.R. 27 Mad 259, and Krishnarao Ambadas Vs Krishnarao Raghunath (1928) I.L.R. 52 Bom 444. In both these cases it was held that the proceedings of a Court under Order XXI rule 66 of the Civil Procedure Code and the rules made thereunder in relation to the proclamation of sale are not ~~an~~ orders within the meaning of section 47 and are not appealable. It is true that administrative directions relating to proclamation and other matters necessary for the carrying out of the sale cannot

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I set aside the order of the lower Court, and direct that it should proceed with the proceedings for sale,

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I set aside the order of the lower Court, and direct that it should proceed with the proceedings for sale instead of sending them to the Collector. The respondents shall pay the costs of the appellants and bear their own.

(24) FA 139/37
20-6-39

18 copies

1 B.L.R

312

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F.—196/37

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Tues- day the 20th day of June 1939 .

APPEAL No. 139 OF 1937 FROM ORIGINAL DECREE.

(UNDER SECTION 47, CIVIL PROCEDURE CODE.)

1 Mahadeo Sunder Metha; 2 Shankar Sunder Metha; }
3 Motiram Sunder Metha; 4 Chandulal Sunder Metha; }
5 Mohan Sunder Metha—All legal representatives of the } *Appellants.*
deceased Sunder Vallabh Metha. }
(Original Decree-holders-Applicants)

versus

1 Khanderao Sitaram Tipnis, legal representative of the }
deceased Sitaram Ramchandra Tipnis; 2 Yeshwant Bal- }
krishna Tipnis, legal representative of the deceased } *Respondents.*
Dwarkanath Balkrishna Tipnis. ... }
(Original Judgement-debtor)

Claim—Rs. 5,953-10-3 for jurisdiction and Advocate's fees.

The Plaintiff applied for execution of the decree in suit No. 59 of 1921.

The application in Original Darkhast No. 73 of 1931 was decided by the First Class Subordinate Judge of Thana, who directed the proceedings to be sent to the Collector of Kolaba, for sale.

An appeal has been admitted in the High Court from the decision of the lower Court. Notice was ordered to issue by the Honourable Mr. Justice Wassoodew on the 16th day of July 1937.

The grounds of objection to the decision appealed against are :—

1. That the lower Court erred in law in holding that Defendant No. 1 is an agriculturist.
2. That the lower Court erred in law in sending the Darkhast to the Collector, Kolaba, for execution.
3. That the evidence on record is not sufficient to hold that Defendant No. 1 is an agriculturist.
4. That the contention of the Defendant that he is an agriculturist is barred by principle analogous to the principle of *res judicata*.
5. That in any case the lower Court had no jurisdiction to go back on its own order.
6. That it was wrong in law to allow the Defendant to raise the contention long after the order of sale by the Civil Court had been made and particularly when proclamations of sale had been published and other procedure had been gone through.
7. That the lower Court erred in holding that the Defendant had not given up the contention.
8. That the contention had been raised by the Defendant in the written statement; but no issue on the point had been asked for and no evidence had been led.

9. That there was an adjustment between the parties by which the Defendant had agreed to give up all the contentions raised by him and the Plaintiff had given him six months time to pay the decretal debt.

10. That the adjustment had been notified to the Court by the Plaintiff and the Defendant had not objected to it in spite of notice.

11. That the Court had recognised the adjustment by giving time to the Defendant.

12. That the order passed by the lower Court is against law, justice and equity.

(Coram: Lokur J.)

For the reasons stated in the accompanying Judgment, the Court allows the appeal, sets aside the order of the lower Court, and directs that it should proceed with the proceedings for sale, instead of sending them to the Collector.

The respondents shall pay the costs of the appellants and bear their own.

20th June 1939.
BVB.

Roanfield
R e g i s t r a r .
W

G.R., J.D., No. 4998 dated 3-7-16

CIVIL APPLICATION No. ~~OF 193~~ IN APPEAL No. **139** OF 193 **7**FROM ORIGINAL DECREE
APPELLATE

(Under § 4), etc.)

Bill of Costs in the High Court.

	By the Appellant or Applicant	By the Respondent or Opponent	By the Respondent or Opponent
	Rs. a. p.	Rs. a. p.	Rs. a. p.
Stamps for Memorandum of <u>Appeal</u> <u>Application</u> ...	2-00 ✓		
Stamps for Copies of Decrees and Judgments with Order of execution & orders ...	3-00 ✓		
Stamps for Vakalatnama ...	2-00	2-00	
Stamps for applications to enter the names of the heirs of the deceased ...			
Stamp for application for calling for additional papers ...			
Bhatta for Process ...	9-00		
Sectioner's Fee ...	2-15-4 ✓		
Advocate's Fee (<u>one fourth</u>) ...	52-4-4	52-4-4	
Printing Charges ...	3-00 ✓		
Copying Charges for preparing paper-books ...	4-4-0 ✓		
Stamp for affidavit ...			
Search Fee ...			
Stamp for Memorandum of Cross-objections ...			
Advocate's Fee in the matter of Cross- objections ...			
Costs at the trial of issue sent down ...			
Translation Fee ...			
Copying Fee under Rule 82 or 111 of the High Court, Appellate Side Rules, 1936 ...			
Total ...	78-7-8	54-4-4	

K. B. Viskar
Taxing Officer.
8.7.39

me. Rao

Deputy Registrar.

The **20** day of **June** 193 **9**

K. N. Dharg
11.7.39

132
(23/10/19)

के लव धारक
M. K. N. Shera V

h V. B. Vinker V
भरकर 2-2-52 2-2-52
2-2-52 2-2-52

28-7-8 24-7-8



CIVIL DEPARTMENT.

INWARD NO. 6029 OF 1939

The District Judge of *Thana*
No. 3573 dated 29-9-1939

Certifies full execution of the High Court's
Writ No. 4183 dated 5-8-1939
forwarding copy of the decree or order in

Appeal No. 139 of 1937 from ~~Appellate~~
Original
Decree

Record.

[Signature] 4/10
Assistant Registrar.
[Signature]

Received on the 30-9-1939

Sent to the Record-keeper with all papers
complete on the 29th February 1940

[Signature]
Assistant Sheristedar.

Received and entered in Catalogue of
Appeals.

Placed on the Shelf,

[Signature]
Record Keeper.
1/3/40

The Honble Mr. C. J.
4

In His Majesty's High Court of Judicature, at Bombay.

L. P. Appeal No. 28 of 1939.

Under the Letters Patent, against the Decree passed by the Honourable Mr. Justice Lokur in the First Appeal No. 139 of 1937 in the execution Proceedings.

1. Khanderao Sitaram Tipnis.)
2. Yeshwant Balkrishna Tipnis both of)
Mahad, District Kolaba.)Appellants (Original
Judgment Debtors).

vs.

1. Mahadeo Sunder Mehta.)
2. Shanker Sunder Mehta.)
3. Motiram Sunder Mehta.)
4. Chandulal Sunder Mehta.)
5. Mohan Sunder Mehta.)
all of Mahad Taluka Mahad, District)
Colaba.)Respondents (Original
Decree-holders).

Claim Rs. 5,953-10-3,
for jurisdiction and Advocate's
Fees.

The Grounds of appeal.

It is contrary to law in that:-

1. The status of an agriculturist being a changing one, no principle of "Res Judicate" is applicable to an issue as to such a status.
2. The Status of the Judgment Debtor at the time when the sale is to be carried out has got to be considered and not his status at the time when order of sale was made by the Court.
3. That the procedure relating to the sale of property is prescribed and governed by the resolution of the Local --- Government and not by the Civil Procedure Code.
4. That the Jurisdiction of the Civil Court in the matter of effecting the sale of property of an agriculturist in accordance with the Civil Procedure Code is ousted by the -- notification of the Local Government.

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5. The mode, by which the sale is to be carried out, being a matter of procedure only, is determined by the judgment-debtor's status existing at the time when the sale is held and completed and not at the time when the sale is ordered.

6. The Lower Court erred in law in holding that the First Court should not have gone into the question of the status of the judgment-debtor No.1 at that stage, namely when the sale is to be carried out and completed.

7. The case in 36 Bom. Law Reporter 804 being under some other section of the D.A.R. Act, has no application to this case where the wording of the Government Resolution has to be considered and construed.

8. The decision is contrary to law, equity, and --- justice.

Bombay, th
Dated 24 July 1939 }

V. B. Virkar

Advocate for the Appellants.

PRESENTATION FORM

(DUPLICATE) to be given to party or Advocate.

App No. of 193

Stamp No. District

Advocate Mr.

Received Court Fee Stamps and a spare copy of
memo as follows:—

Rs. as.

On the Memo of Appeal or Application.
Cross-objection.

On the Vakilpatra ...

On the copies ...

Total Rs. ...

Total Rs. and annas only.

This day of 193

Person presenting for Appellant or Applicant.
Respondent or Opponent.

Receiving Clerk.

Stamp No.

Paid additional Court Fee Stamps of
Rs. () only

on (memo, etc.)

This day of 193

Person paying.

Receiving Clerk.

Bhatta Register No.

Paid for Bhatta Court Fee Stamps of
Rs. () only.

This day of 193

Person paying.

Receiving Clerk.

Paid printing charges Rs.

on

193

Person paying.

Clerk.

20-6-39

PRESENTATION FORM (ORIGINAL)

App^{al} No. 28 of 1939

Stamp No. 3607 District Thane

Advocate Mr. ~~P. B. Virkar~~ V. B. VirkarPresented with Court Fee Stamps and a spare copy
of memo as follows:—

Rs. as.

On the Memo of Appeal or Application.
Cross-objection. 2-0

On the Vakilpatra ...

On the copies ...

Total Rs. ... 2-0

Total Rs. Two and annas nil only.

This 24th day of July 1939Person presenting for Appellant or Applicant.
Respondent or Opponent.

R. B. Virkar
Assistant Sheristadar.

Stamp No.

Received additional Court Fee Stamps of

Rs. () only

on memo
copies

This day of 193

Receiving Clerk.

Stamp No. 3607
District Maner
Advocate Mr. V. B. Verkar
Office Note has 139/37 received
by Lokur on 20-6-39

Printing charges:—

Memo.

Judgment

Pages

Clerk.

Received printing charges

Rupees

only

on

193 .

Clerk, Nazir's Deptt.

Nazir.

Claim Rs.

No. of Respondents

Receive Bhatta Rs.

As.

Clerk.

Assistant Sheristedar.

Bhatta Register No.

Received for Bhatta Court-fee Stamps of
Rs. () only.

This day of 193 .

Clerk, Nazir's Deptt.

Actual pages printed

Refund Rupees only.

Deficit Rupees only.

Received deficit printing charges

Rupees

only,

on

193 .

Clerk, Nazir's Deptt.

Nazir.

Received in Record

Record Keeper.

APPEAL

No. 28 of 1939.
under the Letters Patent
(under § 47 C.P.C. Code)
To be admitted to the File.

13 September 1939.

Deputy Registrar.

Dismissed.

Farad prepared on

Entered in the Register on

Notice prepared on

Date of hearing

R. and P. Writ prepared on

Letter intimating dismissal prepared on

Decree under Order XLI, rule 11, cl. (1), C.P.C.