just cited is that in that case the goods were weighed. In this particular case the evidence is that the goods had been already weighed in the premises of the ginning factory of Motiram Raghavji. It is possible that the station master was told that the goods had been weighed, and that fact may have been accepted by the station master. Mr. Adarkar contended that unless there is something more than a mere possession of the goods by the railway authorities the delivery cannot be said to be complete, but I am unable to accept this argument. As I said, it is possible to read the words, "goods delivered to be carried" according to their natural meaning. If the natural meaning is given to these words, Mr. Adarkar has clearly no case. On the other hand, if something more must happen before the delivery can be legally constituted, then in that event, the evidence is clear in this case, I think, which goes to show that the goods were taken charge of by the railway authorities, that the consignment note was made, that an indent entry was made, that the wagons were sanctioned, but that the goods could not be despatched for want of wagons. It seems to me, therefore, that there was in this case a "delivery" within the meaning of s. 72 of the Railways Act.

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I agree, therefore, with the order proposed by my learned brother.

Appeal partly allowed.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Rajadhyaksha and Mr. Justice Vyas.

JIBHAOO HARISING RAJPUT (ORIGINAL CREDITOR), PETITIONER *v.* AJABSING FAKIRA RAJPUT (ORIGINAL DEBTOR), OPPONENT.*

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Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), s. 24 (1)—Invalid oral sale—Sale alleged to be in nature of mortgage—Power of Debt Adjustment Court to inquire into nature of transaction and give relief—"Transfer," meaning of—Whether includes inoperative sale—Charge for purchase money—Charge if lost by delivery of possession to creditor—Transfer of Property Act (IV of 1882), s. 55 (6) (b).

The word "transfer" in sub-s. (*1*) of s. 24 of the Bombay Agricultural Debtors Relief Act, 1947, means a transfer which is *ex facie* valid. Hence

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* Civil Revision Application No. 135 of 1951 (with C. R. A. No. 374 of 1951).

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the Debt Adjustment Court is not competent to inquire into the real nature of the transaction of an invalid oral sale, even though the debtor may ask that it may declared to be in the nature of a mortgage. Nonetheless the purchase money paid by the creditor to the debtor under the sale is a "debt" for which the creditor has a charge on the property, and the Special Court has jurisdiction to adjust that debt and give relief to the debtor by ordering restoration of the property to him.

Basappa v. *Tayawa*,[1] referred to.

Rama valad Limbaji v. *Yesu valad Hari More*,[2] distinguished.

The charge created under s. 55 (6) (b) of the Transfer of Property Act, 1882, exists even in cases where the buyer is in possession of the property intended to be sold, and is not lost by his accepting delivery of possession.

Balwant v. *Bira*,[3] *Karalia Nanubhai* v. *Mansukhram*,[4] and *Lalchand* v. *Lakshman*,[5] followed.

Narayan v. *Lakhmandas*,[6] *P. R. P. R. Somasundram Chettiar* v. *Y. P. N. Naciappa Chettiar*,[7] *Sir Hukumchand Keshwal* v. *Radha Kishen*,[8] *Phattechand* v. *Uma*,[9] *Narsing* v. *Pachu*,[10] and *Kapadvanj Municipality* v. *Ochhavlal*,[11] distinguished.

Shankri v. *Milkha Singh*,[12] approved.

CIVIL REVISION APPLICATION against the decision of V. A. Naik, Esquire, District Judge at Dhulia, in appeal from the order passed by P. K. Khaladkar, Esquire, Joint Civil Judge, (Junior Division), at Nandurbar.

On April 6, 1938, Ajabsing (debtor) sold a piece of land belonging to him to one Jibhaoo (creditor) for a sum of Rs. 1,065. No writing was executed to evidence the transaction but the transfer was effected by delivery of possession, an oral *vardi* to the village officers and a mutation in the village register.

In 1947, the debtor filed an application for adjustment of his debts under the Bombay Agricultural Debtors Relief Act, 1947, in the Court of the Joint Civil Judge (J. D.) at Nandurbar, contending that the sale in favour of the creditor was in the nature of a mortgage. He, therefore, prayed for taking of accounts and restoration of the land to him.

The trial Judge was of the view that the nature of the transaction could not be inquired into as there was no valid transfer. But he further held on the preliminary issues that

(1) (1929) 31 Bom. L. R. 1266.
(2) (1896) P. J. 284.
(3) (1897) 23 Bom. 56.
(4) (1900) 24 Bom. 400.
(5) (1904) 28 Bom. 466.
(6) (1905) 7 Bom. L. R. 934.
(7) (1924) 2 Rang. 429.
(8) (1929) 32 Bom. L. R. 533.
(9) (1933) 35 Bom. L. R. 1138.
(10) (1913) 15 Bom. L. R. 559.
(11) (1928) 30 Bom. L. R. 920.
(12) [1941] A. I. R. Lah. 407 (F. B.).

the consideration paid by the creditor for the sale was a debt which was liable to be adjusted under the Act, and that the debtor was entitled to an order for restoration of the property to him. Therefore, on October 28, 1948, he fixed the case for hearing on the remaining issues.

On appeal, the District Judge of Dhulia at West Khandesh confirmed the order on October 31, 1950.

The creditor applied in revision to the High Court.

The application was heard along with a similar application filed by a creditor in another proceeding.

B. N. Gokhale, for the petitioner.
K. P. Karnik, for the opponent. } in C. R. A. No. 135 of 1951.

T. N. Walavalkar, for the petitioner.
V. M. Tarkunde, with *V. J. Gharpure*, for the opponent. } in C. R. A. No. 374 of 1951.

RAJADHYAKSHA J. These are two applications in revision against the orders passed by the District Judge of West Khandesh, and the applicants in both the applications are creditors. The debtors in each case made applications for an adjustment of their debts contending that the transactions of sale evidenced by the oral *vardi* given to the village officers were in the nature of a mortgage. They therefore claimed accounts on that basis and asked for adjustments of their debts. The creditors, on the other hand, contended that the transactions were sales out and out. The debt adjustment Court raised an issue in each case, "whether the transaction was in the nature of a mortgage". But the Court did not think it feasible to record any finding on that issue. The principal reason for this was that even if, on the evidence adduced by the debtors and from the surrounding circumstances, the Court came to the conclusion that the real nature of the transaction was that of a mortgage, still it could not proceed to grant any relief to the debtor because there could not be a valid mortgage in the absence of a registered instrument. It was further held that the oral sale was invalid and could not operate to convey any title in the property to the creditor. At the same time, the Debt Adjustment Court held that the amount of the purchase money paid by the creditor to the debtor was a debt for which the creditor held a charge on the property. In that view, the Court came to the conclusion that there was an existing debt which could be adjusted, and accordingly relief could be given

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to the debtor by taking accounts and by ordering restoration of the property to him.

Against that decision the creditors went in appeal to the District Court. The learned District Judge came to the conclusion that the oral sale evidenced by the *vardi* was neither a valid sale nor could it be declared as a mortgage. He was of the opinion that the transferee in possession, viz. the creditor, had a charge or a lien upon the property to the extent of the consideration of the transaction. He accordingly agreed with the view of the Debt Adjustment Court that the purchase money paid under the invalid sale amounted to a debt within the meaning of that word in the Bombay Agricultural Debtors Relief Act, and that the Special Court under that Act was competent to inquire into the question about the legal effect of the oral sale and the relief claimed by the debtor. The learned District Judge therefore agreed with the view of the Debt Adjustment Court on both the issues and dismissed the creditors' appeal. Against that order these applications have been filed in revision.

The question before us, viz. whether the Debt Adjustment Court is competent to inquire into the real nature of the transaction of an oral sale turns on the interpretation of s. 24 (*1*) of the Bombay Agricultural Debtors Relief Act, 1947. That sub-section is in the following terms:—

"Notwithstanding anything to the contrary contained in any law, custom, or contract, whenever it is alleged during the course of the hearing of an application made under 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, the Court shall declare the transfer to be a mortgage, if the Court is satisfied that the circumstances connected with that transfer showed it to be in the nature of a mortgage."

The principal contention advanced on behalf of the applicants-creditors by Mr. Gokhale in Application No. 135 of 1951 and by Mr. Walavalkar in Application No. 374 of 1951 is that the word "transfer" in this section means a valid transfer and not an invalid one. Any transfer of land, whether by way of a sale or a mortgage, must be effected by a registered instrument if the property is of the value of Rs. 100 and upwards. There is no dispute that, in the present case, the value of the property conveyed is more than Rs. 100. Any sale thereof therefore had to be effected by a registered instrument. In the present case the sale is said to have been effected by handing over of possession and by giving a *vardi* to the village

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officers. Apparently, such a practice prevails in the District of West Khandesh. In the cases before us, *vardis* were given and mutations effected as long ago as 1938 and 1940. There cannot, therefore, be any doubt that the transaction thus effected does not in law amount to a sale. The question therefore is whether such an invalid transaction is a "transfer" within the meaning of sub-s. (*1*) of s. 24.

Two reasons were advanced before the learned District Judge for the purpose of holding that the word "transfer" in this section can include an invalid transfer. It was first contended before the learned District Judge that in s. 45 of the Bombay Agricultural Debtors Relief Act of 1939, which is repealed by the Act of 1947, the words were "any transaction purporting to be a sale of land belonging to a debtor." Under s. 24 of the Act of 1947, which replaces s. 45 of the repealed Act, the words are "any transfer of land". It was therefore argued that the change of the wording had the effect of giving jurisdiction to the Court to inquire into any transfer of land, whether such transfer was valid or invalid. The learned District Judge rejected this contention and, in our opinion, quite correctly. Section 45 of the repealed Act gave jurisdiction to the Debt Adjustment Court to inquire into transactions which purported to be sales of the property belonging to a debtor, and the Court had power of declaring whether the transaction was in the nature of a mortgage. The section gave no jurisdiction to the Debt Adjustment Court to go into a transaction which purported to be a lease, gift or exchange. In order therefore to empower a Debt Adjustment Court to examine such transactions also, s. 24 of the new Act used the wider expression "any transfer", which would include not only transfers purporting to be sales but also transfers purporting to be leases, gifts or exchanges.

The second argument that was urged before the learned District Judge was that the opening words of the section "Notwithstanding anything to the contrary contained in any law, custom or contract" govern the words "any transfer", and that therefore any transfer, whether valid or invalid, could be investigated by the Debt Adjustment Court if it was alleged that the transfer was in the nature of a mortgage. This contention was again rightly rejected by the learned District Judge Those words could not possibly govern the words "any transfer", but they govern the words "the Court shall declare". Mr. Tarkunde who appeared for the debtors has

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not pressed either of these arguments before us in support of the contention that the word "transfer" means an invalid transfer.

He has, however, urged that the words "Notwithstanding anything to the contrary contained in any law, custom or contract" in sub-s. (*1*) of s. 24 of the Act of 1947 give a wide discretion to the Court to declare any transfer to be a mortgage, whether such transfer in its inception was a valid transfer or not, and that it is competent to a Court to declare the transfer to be a mortgage, even if the transaction does not amount to a mortgage as required by law. So far as the second part of the submission is concerned, we are in agreement with the contention of Mr. Tarkunde. When the section says that the Court shall declare the transfer to be a mortgage, it does not mean that the transaction should have all the attributes of a mortgage and should be in a form which the law recognises to be a valid mortgage. This is obvious enough. A mortgage with respect to a property of the value of Rs. 100 or more has got to be effected by a registered instrument signed by the executor and duly attested. A sale-deed of such a property does not require any attestation. If it was argued that no declaration could be given that a transaction is a mortgage unless it is a mortgage both in form and substance, then s. 24 of the Act of 1947, s. 45 of the Act of 1939 and s. 10A of the Dekkhan Agriculturists' Relief Act would be entirely infructious, for, *ex hypothesi* the transaction is one which, on the face of it, is not in form and substance a mortgage as required by law. It is something other than a mortgage, and the debtor asks the Court to adjudge such a transaction to be in the nature of a mortgage. Similarly, transfer of a land under a lease for a period of 11 months need not be in writing. Yet it is competent to a debtor to say that the transaction by which the creditor obtained possession of the land and then leased it to the debtor was one in the nature of a mortgage. Illustration (*a*) to s. 10A of the Dekkhan Agriculturists' Relief Act refers to cases of this kind. Under that illustration, a landlord sues for possession of land leased by him to an agriculturist. The defendant alleges that he mortgaged the land with possession to the lessor who is entitled to its possession only as such mortgagee and not as owner, and asks that he may be allowed to redeem the mortgage without being ejected. The original transaction between the lessor and the lessee may or may not be in writing according to the value of the property conveyed. Even so, it is open to the Debt Adjustment Court to

come to the conclusion that the transaction is in the nature of a mortgage. In support of the argument that the Court can declare the transfer to be a mortgage only if all the requirements of a valid mortgage are satisfied, we have been referred to a decision of Mr. Justice Gajendragadkar in *Gonda Gosai* v. *Bhagwansinh Govan*,[1] where the learned Judge had to consider the same point. He says:—

> " . . . The word 'transfer' is not defined under the B. A. D. R. Act, but s. 24 indicates that this transfer must be a valid transfer, because as a result of the proceedings under s. 24 if the debtor's plea is accepted the Court has to make a declaration that the transaction in question was not a sale, but was a mortgage. If Mr. Patel's contention is right, it would lead to this result that a Court administering s. 24 will have to declare that an oral transfer is a valid mortgage under the law. I do not think that that was the intention of the Legislature in enacting the provisions of s. 24."

Reliance has been placed on the words "is a valid mortgage under the law" for the purpose of advancing the contention that only a valid mortgage under the law can be so declared under s. 24. We don't think that the learned Judge intended to lay down by these observations that before a transaction can be declared to be a mortgage, it must satisfy all the requirements of a mortgage, both in form and in substance. As we have already pointed out, such an agreement would make s. 24 of the present Act, s. 45 of the repealed Act and s. 10A of the Dekkhan Agriculturists' Relief Act altogether inefficacious, because in the case of most sales there are no attesting witnesses, while a valid mortgage requires two attesting witnesses. If the submission made to us was correct, no sale could possibly be declared to be a valid mortgage under the law. But we do not think that that was the proposition which the learned Judge intended to lay down, viz., that the transaction declared to be a mortgage must constitute a valid mortgage under the law. The learned District Judge also appears to labour under the same impression. He says,

> "the Court cannot do under the provisions of s. 24 what the law declares to be illegal. If the law does not recognise an oral mortgage, the Court cannot recognise the existence of the same. A void mortgage has no existence in law and it cannot form the basis of any relief to be granted by the Court. The Court cannot act upon a void mortgage."

The learned District Judge appears to think that before a transaction is declared to be in the nature of a mortgage, it must

[1] (1950) Civ. Rev. Appln. No. 166 of 1950, decided by Gajendragadkar J., on October 11, 1950 (Unrep.).

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conform to all the requirements of law with regard to a valid mortgage, both in form and in substance. We do not think that can be the test which is required to be satisfied under s. 24 of the Bombay Agricultural Debtors Relief Act, 1947, before a declaration is given that the transaction is in the nature of a mortgage.

But we are not prepared to accept the first part of the submission of Mr. Tarkunde that the words "Notwithstanding anything to the contrary contained in any law, custom or contract" appearing in sub-s. (*1*) of s. 24 of the Bombay Agricultural Debtors Relief Act have the effect of enabling a Court to declare what in its very inception is an invalid transfer to be a transaction in the nature of a mortgage. Section 24 of the Act of 1947 and s. 45 of the Act of 1939 were intended to replace s. 10A of the Dekkhan Agriculturists' Relief Act. That Act also contained the words "notwithstanding anything contained in s. 92 of the Indian Evidence Act, 1872, or s. 49 of the Indian Registration Act, 1908, or in any other law for the time being in force," and it has been held that these words were intended to remove a procedural impediment. For instance, it was held in *Basappa* v. *Tayawal.*[1]

"that the expression 'any other law for the time being in force' enabled the Court not only to override s. 92 of the Indian Evidence Act to which a specific reference was made in that section, but also where necessary, also s. 91 of the Indian Evidence Act."

We think that the opening words of s. 24 in the Act of 1947 did not have the effect of enabling the Court to examine transactions which are in their inception invalid. The transaction must, in our opinion, be valid in its inception. The precise *nature* of the transaction can then be examined by the Debt Adjustment Court. There must be transfer of an interest in the property under the transaction in question, and it is then that the debtor can come to the Court and say that the transfer was in the nature of a mortgage. But when there is no transfer of an interest either by sale, lease, gift or exchange, it would not be competent for a debtor to come to the Debt Adjustment Court and say that although no interest in the property has passed, still the transaction should be treated to be in the nature of a mortgage. Such a prayer must proceed on the basis that there has been some transfer of interest. We therefore think that unless a transaction has *ex facie* resulted in the transfer of some interest in the property, a

(1) (1929) 31 Bom. L. R. 1266.

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debtor cannot come to the Debt Adjustment Court under s. 24 and ask it to determine that the transaction is in the nature of a mortgage, and that only a mortgagee's interest has passed.

Mr. Tarkunde referred us to the definition of the word "debtor" in sub-s. (5) of s. 2 of the Bombay Agricultural Debtors Relief Act, 1947. Under that section, a "debtor" means *inter alia* (*a*) an individual (*i*) who is indebted: (*ii*) who holds land used for agricultural purposes or has held such land at any time not more than 30 years before January 30, 1940, which has been transferred whether under an instrument or not and which transfer is in the nature of a mortgage although not purporting to be so. Mr. Tarkunde contended that, the words "which has been transferred whether under an instrument or not" indicate that an individual can be a debtor even if he holds no land, provided he has transferred a land used for agricultural purposes, whether under an instrument of mortgage or not, some time within 30 years before January 30, 1940, and that this suggests that a "transfer" may be either under an instrument or not. In our opinion this argument is not necessarily conclusive. Even under the ordinary law, a transfer has to be under an instrument duly registered, if the value of the subject-matter of the immoveable property conveyed under that instrument is Rs. 100 or more. If it is of the value of less than Rs. 100, neither a sale, nor a mortgage, nor a gift nor exchange thereof need be under an instrument. It is therefore legitimate to hold that when the section refers to transfers, "whether under an instrument or not", it presumably refers to these two kinds of transfers, depending upon the value of the subject-matter of the transfer.

Mr. Tarkunde invited our attention to the case of *Rama valad Limbaji* v. *Yesu valad Hari More.*[1] It was held in that case that the application of the expression "mortgaged property" as used in s. 3 of the Dekkhan Agriculturists' Relief Act was not limited by a technical consideration of what in a lawyer's point of view constituted a mortgage. It should be read in its ordinary popular sense. It was further held that the property given under a writing for enjoyment for a term of years in liquidation of an existing debt was a "mortgaged property" within the meaning of s. 3 of the Dekkhan Agriculturists' Relief Act. In our opinion, that case is clearly distinguishable. There was in that case a debt of Rs. 1,000. The plaintiff

(1) (1896) P. J. 284.

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who sued for redemption had passed a writing dated January 9, 1873, giving possession of the land in dispute to defendant No. 1, to be enjoyed by him for a term of 61 years, after which it was to be restored to the plaintiff. The trial Court held that the transaction was a mortgage and allowed redemption after 20 years had elapsed. The appellate Court thought that the suit land was not held as a security for the repayment of Rs. 1,000, but that it was assigned for certain number of years as a consideration of past dues, and that therefore it was not a mortgage which could be redeemed under s. 58 of the Transfer of Property Act. The High Court, however, held that the expression "mortgaged property" should be read in its popular sense and not from the lawyer's point of view of what constitutes a mortgage. The High Court accordingly reversed the decree of the lower appellate Court and remanded the appeal for disposal on merits. It is clear from what has been stated above that all the requirements of a formal mortgage were there. There was a debt which was to be liquidated in a particular manner from the profits of the land. There was a writing, presumably registered, and the parties themselves had described the property involved in the transaction as a mortgaged property. In its inception therefore it was a valid transaction, the precise nature of which, viz. whether it was in the eye of law a mortgage or not, had to be determined. We do not think that this case helps Mr. Tarkunde's argument that the transaction which in its inception is an invalid one,—not passing and not capable of passing any interests in the property—can be investigated under s. 24 of the Act to find out whether it is in the nature of a mortgage.

Mr. Gokhale for the applicant supported the decision of the lower appellate Court on this point by citing the observations of Mr. Justice Gajendragadkar in *Ganda Gosai* v. *Bhagwansinh Govan* referred to above. In the course of the judgment, the learned Judge stated as follows—

"There is also another point which has to be considered in construing the word 'transfer' in s. 24. S. 25, to which I have already referred, uses the same word under sub-s. (*1*). Now, it is a well-known rule of construction that the same word must have the same meaning in the different sections of the same Act. It is inconceivable, in my opinion, that s. 25 (*i*) could have intended to use the word 'transfer' in the general and wide sense for which Mr. Patel contends. It is not possible to assume a case in which a Court of competent jurisdiction would seriously consider whether an oral sale or an oral transfer amounts to a mortgage or not. In all proceedings in which such decisions would be arrived at by Courts of competent jurisdiction would be cases where transfers have

been made by registered documents if the property conveyed by the transfer in question is immoveable property worth more than Rs. 100. It seems to me plain that the word 'transfer' in s. 25 (*i*) must mean a transfer properly effected and if that is the meaning which this word must have under s. 25, I see no way out but to hold that s. 24 must be deemed to have used the same word in the same sense."

Mr. Tarkunde has, however, argued that s. 24 (*1*) merely says that the transfers which have been held not to be mortgages, by a decree of a Court of competent jurisdiction, shall not be called in question in proceedings under s. 24 of the Bombay Agricultural Debtors Relief Act and he has contended that from this it does not follow that other transfers (which have not been so held to be transactions other than mortgages), whether valid or invalid, cannot be considered under s. 24 of the Act. We think that there is some room for drawing the distinction which Mr. Tarkunde has pointed out. Section 24 (*1*) was merely intended to prevent the re-opening of a matter which has once been finally held not to be a mortgage, but it does not follow that in giving a declaration that the transaction is not in the nature of a mortgage, the Court is necessarily satisfied that it can take effect under the law as a sale, gift, exchange or a lease. If such an inference could have been drawn, then only could we assign to the word "transfer" the meaning that it must be a valid transfer. We do not think that the phraseology of s. 25 assists in the determination of the meaning of the word "transfer" in s. 24 of the Act.

It was argued by Mr. Tarkunde that if s. 10A of the Dekkhan Agriculturists' Relief Act could apply to transactions which were not evidenced by documents, it would be unreasonable to say that under s. 24 of the Bombay Agricultural Debtors Relief Act the transaction should in its inception be a valid one. This argument would undoubtedly be plausible provided the assumption on which it proceeds is a correct one. We have not referred to a single case where it has been held that s. 10A of the Dekkhan Agriculturists' Relief Act applied to transactions which are in their inception invalid and convey no title to the transferee. The case in *Rama valad Limbaji* v. *Yesu valad Hari More*, to which I have already referred, lays down no such proposition. Illustrations (*b*), (*c*) and (*d*) to s. 10A of the Bombay Agricultural Debtors Relief Act clearly contemplate the existence of a document—either a lease or a sale-deed—with respect to a transaction which is alleged to be a mortgage. Illustration (*a*), it is true, does

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not refer to a deed of lease. That may be because a lease for less than a year need not be in writing. Under that illustration the allegation of the defendant that he mortgaged the land with possession to the lessor who is entitled to possession as such mortgagee may or may not be evidenced by a document depending upon the value of the property dealt with in that transaction. It is therefore not correct to assume that s. 10A of the Dekkhan Agriculturists' Relief Act contemplates inquiry into transactions which are initially invalid according to law.

On the whole therefore, we are of the opinion that the word "transfer" in s. 24 of the Bombay Agricultural Debtors Relief Act means a transfer which is *ex facie* a valid one, though the debtor may ask it to be declared as being in the nature of a mortgage. With respect, we think the view taken by Mr. Justice Gajendragadkar in *Ganda Gosai* v. *Bhagwansinh Govan*—which is the same as that taken by the learned District Judge in the present case—is correct.

That being so, the question arises whether the Debt Adjustment Court can examine the transaction of an oral sale which is alleged to be a mortgage. The existence of a debt is the very basis of the jurisdiction of the Debt Adjustment Court, and the facility given to an agriculturist debtor to prove an ostensible sale to be in the nature of the mortgage is to enable him to establish that a debt exists, for securing which the property has been conveyed, although ostensibly, by means of a sale-deed. The learned District Judge has taken the view that the oral transaction by delivery of possession, a *vardi* and a mutation in the village register, though ineffectual as a sale for want of a registered instrument, can still be regarded as an inchoate transaction creating a debt in respect of the purchase price received by the debtor (seller), for which debt the creditor (buyer) holds a lien under s. 55 (6) (*b*) of the Transfer of Property Act. Mr. Gokhale for the applicant has challenged the correctness of this interpretation of s. 55 (6) (*b*) of the Transfer of Property Act.

Section 55 (*6*) (*b*) of the Transfer of Property Act is in these terms:

"The buyer is entitled—

(*b*) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property,

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for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission."

Mr. Gokhale's argument was that this section does not come into operation where the buyer has come into possession of the property, and that therefore in such cases no charge in his favour is created by the section. His further argument is that the section deals with two cases where the buyer does not accept delivery of the property—in one case improperly and in the other case properly—and that the section did not contemplate creation of a charge where the buyer accepts delivery of the property. We are not satisfied that this argument is correct. We do not think that the creation of a charge under this section is at all dependent upon the buyer not coming into possession of the property intended to be sold. Under the section, a charge arises immediately the purchase price is paid by the buyer to the seller, and it has been so held in *Balvanta* v. *Bira*.[1] The head-note to that case is:

"From the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his part of the contract."

The section in terms creates a charge in anticipation of the delivery of the property, and the question to be considered in such cases is whether he has forfeited his right to the charge by improperly declining to accept delivery of the property. If he has improperly declined to accept delivery, he loses the charge for the amount of the purchase-money paid by him. On the other hand, if he properly declined to accept delivery, he has a charge not only for the purchase-money paid by him, but also in respect of the earnest, if any, and for the costs awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission. Accepting delivery of the property cannot possibly be regarded as a circumstance under which he can forfeit a charge created in his favour by operation of law.

It is easy to imagine what difficulties may possibly arise if this was not the interpretation to be placed on s. 55 (6) (*b*) of Transfer of Property Act. The section was undoubtedly enacted in order to protect the rights of a buyer who has parted with his money in anticipation of the delivery of the

[1] (1897) 23 Bom. 56.

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property. If for some reason the sale is not effectuated or by reason of some technical defect it falls through, it was undoubtedly the intention of the Legislature that the buyer should have a charge on the property in respect of the purchase price paid by him. If in such cases no charge arises under s. 55 (6) (b) of the Transfer of Property Act, it would be open to a creditor of the seller to attach this property (as the property of the seller) and have it sold for the payment of the seller's debts, because *ex hypothesi* the interest in the property has not passed to the buyer. If a charge is created in favour of the buyer, then the possession of the property by the buyer would be a notice of that charge to third parties. But if no charge arises, as Mr. Gokhale has contended, there would be no protection to the buyer in respect of the purchase price which he has paid. The section is designed to protect his interest, and we think that the circumstance that the buyer is in possession of the property intended to be sold in any way affects the charge. If he has accepted delivery, the charge created by the statute continues to exist, but even if he has not accepted delivery, the charge is not lost unless the refusal to accept delivery is improper.

It was next argued by Mr. Gokhale that s. 100 of the Transfer of Property Act indicates that a charge can arise only when the buyer is not in possession of the property. The argument is this. Section 100 enacts:—

"Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

The argument of Mr. Gokhale is that charges are placed on the same footing as simple mortgages, and as in simple mortgages the possession of the mortgaged property remains with the mortgagor, the charge can arise only if the property intended to be sold remains with the seller and does not go into the possession of the buyer. We do not think that this argument is correct. Charges and simple mortgages have been placed on the same footing in respect of all the provisions antecedent to s. 100 only so far as such provisions may be applicable. We think that s. 55 (6) (b) of the Transfer of Property Act creates a charge in favour of the buyer for the purchase price paid by him, unless he forfeits it by improperly declining to accept delivery of the property and that

such charge is not lost by accepting delivery of the property. We think that when s. 100 enacts that the preceding provisions which apply to simple mortgages shall, so far as may be, apply to such charges, the section refers to provisions relating to the enforcement of charges, marshalling, etc., We are, therefore, of the opinion, that the charge under s. 55 (*6*) (*b*) of the Transfer of Property Act exists even in cases where the buyer may be in possession of the property intended to be sold.

In fact there have been one or two decisions of this Court where it has been held that a charge arises even though the intended purchaser may be in possession of the property. In *Karalia Nanubhai* v. *Mansukhram*[1] the facts were these. The plaintiff sought for a declaration that the fields in dispute could be attached and sold as the property of the judgment-debtor Jivanlal. But Jivanlal had in 1893 sold those very fields to the defendant for Rs. 900 which sum was paid at the time possession was given to the purchaser. Transfer, however, was not effected, as the necessary registered conveyance had not been executed. The learned Chief Justice in giving judgment observed (p. 402):

> ". . . here reliance is not placed on the contract of sale alone: there is something more: there is possession and payment of the whole of the purchase-money; and that this makes a material difference is manifest from s. 55 (*6*) (*b*), which entitles the purchasers to a charge on the property for the amount of any purchase-money properly paid by him."

Thus even though the purchaser was in possession of the property, it was held that s. 55 (*6*) (*b*) created a charge in his favour. Another case much to the same effect is that of *Lalchand* v. *Lakshman*.[2] In that case the plaintiff executed a conveyance of immoveable property of the value of upwards of Rs. 100 which was not registered according to law, received the purchase-money and delivered possession of the property to the vendee. For a specific performance of this contract, defendant No. 1 brought a suit which was dismissed. Then the plaintiff sued to recover possession of the property as its owner. It was held by this Court:

> " . . . that the suit should be decreed in plaintiff's favour and that all that the defendant No. 1 was entitled to was the benefit which he could claim under s. 55 (*6*) (*b*) of the Transfer of Property Act (IV of 1882)."

This case, therefore, is, in our opinion, clear authority for holding that a charge does arise in favour of the purchaser

[1] (1900) 24 Bom. 400, s. c. 2 Bom. L. R. 220.

[2] (1904) 28 Bom. 466, s. c. 6 Bom. L. R. 510.

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under s. 55 (6) (b) of the Transfer of Property Act, even though he may be in possession of the property. In the present case, therefore, there is a charge in favour of the creditor in respect of the purchase price which has been paid by him to the debtor and that therefore there is clearly a debt.

Mr. Gokhale then referred us to several cases where although a transaction had failed as a mortgage owing to some technical defect, it was held by Courts that no charge arose. These cases are *Narayan* v. *Lakshmandas*,[1] *P. R. P. R. Somasundram Chettiar* v. *Y. P. N. Nachiappa Chettiar*,[2] *Sir Hukumchand Kasilwal* v. *Radha Kishen*[3] and *Phattechand* v. *Uma*.[4] In all these cases it was sought to be argued that a charge was created by the act of parties. In each case a document of mortgage was passed, but it proved to be defective, and it was held that failure to comply with the provisions, for example, of attestation, did not convert a mortgage transaction into a charge. The facts before us, however, are different. We are considering the case of a creation of a charge, not by the act of parties but by operation of law. Secondly, the transaction in respect of which a charge is said to arise was prima facie one of sale, although the debtor has tried to say that it was in the nature of a mortgage. The provisions of s. 55 (6) (b) of the Transfer of Property Act apply in cases of sales which are not finally effectuated and therefore in all the abovementioned cases the Courts did not have to consider the applicability of s. 55 (6) (b) of the Transfer of Property Act. Section 55 (6) (b) is a special provision for the protection of a purchaser who has parted with his money in anticipation of delivery in the event of the transaction not resulting in a valid and effective sale. We, therefore, think that all these authorities which were cited by Mr. Gokhale have really no application to the point which we have to consider.

Mr. Gokhale then referred to the case of *Narsing* v. *Pachu*.[5] The head-note to that case is as follows:

"The defendant, believing himself in good faith to have the title to sell certain immoveable property, sold it to the plaintiff in 1903. The plaintiff received its possession and retained it until 1909, when the true owner recovered its possession from him. The plaintiff sued to recover the purchase money from the defendant. The first Court held the suit barred by limitation under Article 62 of the Limitation Act for the money paid to the defendant was money had and received for the plain-

(1) (1905) 7 Bom. L. R. 934.
(2) (1924) 2 Ran. 429.
(3) (1929) 32 Bom. L. R. 533.
(4) (1933) 35 Bom. L. R. 1138.
(5) (1913) 15 Bom. L. R. 559.

tiff's use. The lower appellate Court held that the suit was governed by Article 97 and the claim was in time."

It was held by this Court:

"Article 97 applied to the case, because possession of property given under a purchase was an existing consideration as long as it lasted.

In the case of purchased property the whole consideration contemplated is the property. Where the purchaser is placed into possession, he has all the consideration that he is by law entitled to, so long as the possession remains. Whether that consideration be actually lawful or unlawful it makes no difference; for it is only where the possession which is the consideration turns out to be unlawful that the question can ever be raised in a practical form."

Mr. Gokhale relied on this case for submitting that a charge cannot arise so long as the purchaser is in possession, because he has all the consideration that he is by law entitled to, so long as the possession remains. That case again, in our opinion, has no application to the facts before us. In that case the essential point involved was one of limitation. The vendor had no title and both the vendor and the vendee had lost possession of the property. No question therefore of a charge could arise. The purchaser could only have a money claim against the vendor. In that case no question of charge was raised or could possibly be raised. So far as Mr. Gokhale's contention goes, viz. that no charge can arise so long as the purchaser is in possession of the property, I have already referred to two cases of this Court where it has been held that the charge did arise in favour of the purchaser even though he was in those cases found to be in possession of the property intended to be sold.

The last case that Mr. Gokhale relied on was *Kapadvanj Municipality* v. *Ochhavla.*[1] In that case the Kapadvanj Municipality had sold a plot by auction on February 21, 1918, and the purchaser had paid the price on July 2, 1918. The sale required the Commissioner's sanction which was not forthcoming till July 10, 1919. The purchaser obtained possession of the property on March 8, 1920, and the formal deed of conveyance was executed on July 18, 1920. The purchaser in that case merely sued for interest on the money which was paid by him on July 2, 1918, for the period up to July 18, 1920, on which date he obtained a conveyance in his favour. It was argued by Mr. Gokhale that no question was raised in that case about a charge arising in favour of the purchaser. But

[1] (1928) 30 Bom. L. R. 920.

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it is clear from what I have stated above, that though there may have been a charge in favour of the purchaser from the moment he paid the price for the plot on July 2, 1918, there could be no possible occasion for the enforcement of the charge, because at the date when he filed the suit for interest the charge had merged in the full title which the purchaser had obtained on July 18, 1920. The observations of Mr. Justice Fawcett at page 928 are quite clear. He says:

> "I agree with my learned brother that clause (b) of sub-s. (6) of s. 55 does not apply in the present case so as to give the plaintiff, under its terms, a right to recover interest on the amount of the purchase money he had paid. That clause, I think, is intended to meet mostly cases where there has been an actual failure of the contract for sale, the contract having fallen through on account of some default on the part of one or other of the two parties; and then this clause provides that in proper cases the buyer can recover interest of his purchase money. But, in the present case, there was, in fact, a sale carried out, and there has been delivery of possession."

We are, therefore, of the opinion that none of the cases cited by Mr. Gokhale supports his contention that in the present case the charge in favour of the creditor does not arise under s. 55 (6) (b) of the Transfer of Property Act.

There is one case of the Lahore High Court, *Shankri* v. *Milkha Singh*,[1] which, we think, is in point, and the learned District Judge has relied upon it. There also the purchaser had obtained possession of the property under an unregistered, and consequently inoperative, sale-deed, after there had been first an oral agreement to sell, and after the whole of the consideration had been made good under the mistaken belief on both sides that the transaction was complete. In fact the transaction had remained incomplete for want of registration of the instrument purporting to effect the transfer. The full bench of the Lahore High Court held that in such a case—

> "the position of purchaser . . . [must be regarded to be the same] as that of a purchaser under a contract for sale which has not yet been completed or rescinded with the consent of both parties and the purchaser cannot claim any title as owner in the property, whether as legal or as equitable owner."

They, however, held that the

> " . . . purchaser . . . has a charge on the property for the amount paid by him in advance as purchase money. The lien [that they held] is not created by any agreement between the parties, but arises by operation of law, on payment of the purchase money independently of the sale deed."

[1] [1941] A. I. R. Lah. 407.