APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas.

1952
Dec. 10

HIRAMAN RATAN GUJAR AND ANOTHER (HEIRS OF ORIGINAL DEBTOR), PETITIONERS *v.* PURUSHOTTAM DEORAO PATHAK (ORIGINAL CREDITOR), OPPONENT.*

Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), ss. 24; 25 (1), 56 (2)—Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1939), s. 45—Application under old Act challenging sale prior to 1927 to be in nature of mortgage—Application incompetent under old Act —New Act coming into force during pendency of application—Whether application is governed by substantive provisions of new Act—Previous suits between parties in which question as to nature of transaction raised but not adjudicated upon—Whether application is barred under s. 25 (1) of new Act.

The effect of the provisos to s. 56 (2) of the Bombay Agricultural Debtors Relief Act, 1947, is to make all the provisions of that Act—substantive as well as procedural—applicable to proceedings which had been filed under the Bombay Agricultural Debtors Relief Act, 1939, and which were pending at the time when the Act of 1947 came into force.

Vishwanath Mahadev Adhikari v. *Krishnaji Ramchandra Bodas*,[1] affirmed.

Bapu Babu Naik v. *Daji Keru Mandare*,[2] dissented from.

The clause 'under this Act' occurring in proviso (*a*) to s. 56 (2) after the words 'the Court' governs the expression 'shall be continued and disposed of' and does not go with the words 'the Court'.

Proviso (*a*) to s. 56 (2) refers to all proceedings pending; in order to give the words used their clear grammatical meaning, the clause must cover all pending proceedings whatever might have been the final result in those proceedings under the old Act.

Section 25 (1) of the Bombay Agricultural Debtors Relief Act, 1947, can be invoked only when there is an adjudication which is final and which determines the character of the transaction in question. It makes no difference whether the adjudication is by a decree in invitum or by consent. But in either event there must be a decision as to the nature of the transaction; a plea of constructive *res judicata* cannot be brought within the scope of the section.

Tukaram Shivram Lohar v. *Laxman Ramchandra Marwadi*,[3] *Gangaram Lilachand Gandhi* v. *Balku Sambhu Raite*,[4] and *Motilal Jasraj Marwadi* v. *Gopal Bala Patil*,[5] referred to.

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* Civil Revision Application No. 1563 of 1951.

[1] (1949) 51 Bom. L. R. 744.

[2] (1951) C. R. A. No. 459 of 1950, decided by Chagla C. J. on November 16, 1951 (Unrep.)

[3] (1950) C. R. A. No. 470 of 1950, decided by Chagla C. J. on November 27, 1950 (Unrep.).

[4] (1951) C. R. A. No. 38 of 1951 decided by Chagla C. J. on July 26, 1951 (Unrep.).

[5] (1952) C. R. A. No. 1139 of 1951, decided by Chagla C. J. on July 23, 1952 (Unrep.).

Two persons S. and G. agreed to sell certain lands to their creditor but when actually a deed of sale came to be executed on July 13, 1899, S. alone signed the document. Thereupon the creditor filed a suit for specific performance of the contract which was defended by G. on the ground that a condition of reconveyance agreed upon by the parties was not incorporated in the Deed of Sale. Ultimately the suit was compromised it being agreed *inter alia* that G. should sign the Deed of Sale and the creditor should be put in possession of the lands. In 1911, S. and G. filed another suit under the Dekkhan Agriculturists' Relief Act, 1879, for a declaration that the sale was in the nature of a mortgage and for consequential reliefs. That suit was dismissed on the ground that the Dekkhan Agriculturists' Relief Act was not extended to the place where the lands were situate at the date of the Deed of Sale. On October 15, 1945, G.'s son (petitioner) applied under the Bombay Agricultural Debtors' Relief Act, 1939, for adjustment of his debts and again contended that the Deed of 1899 was in the nature of a mortgage. The sale having been entered into before 1927 the application was incompetent when it was made, but it remained undisposed of until April 12, 1950, and in the meantime the Bombay Agricultural Debtors' Relief Act, 1939, was repealed and the Bombay Agricultural Debtors' Relief Act, 1947, came into force. At the hearing, the petitioner relied upon proviso (*a*) to s. 56 (*2*) of the new Act and contended that the effect of the proviso was to make all the provisions of the new Act applicable with the result that the application became maintainable under s. 24 of that Act. On the other hand, the creditor submitted that the effect of the proviso was merely to make the procedure laid down by the new Act applicable to the proceedings and no new rights were conferred on the petitioner which were not available to him under the old Act, and that even if the substantive provisions of the new Act applied, as the sale had been finally adjudged to be a transfer other than a mortgage in the two previous suits, the application was not maintainable in view of s. 25 (*1*) of the new Act;

Held, upholding the petitioner's contentions (*i*) that the application which was to be continued and disposed of by the Court administering the new Act was to be governed by all the provisions of that Act, substantive and procedural;

(*ii*) that in both the previous suits there was no occasion for deciding the character of the transaction, and, therefore, the plea that the application was barred by s. 25 (*1*) must also fail.

CIVIL REVISION APPLICATION against the decision of V. A. Naik, Esquire, District Judge, of West Khandesh at Dhulia confirming the decision of S. V. Borkar, Esquire, Joint Civil Judge, Junior Division, Nandurbar.

Govind Narayan and Sham Gulal agreed to sell their lands at Ubhad, taluka Shahada, district West Khandesh, to their creditor in satisfaction of their debts. However, when the deed of sale was actually passed on July 13, 1899, Sham Gulal alone signed the deed. Thereupon the creditor filed Suit No. 285

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of 1900 against Govind Narayan and Sham Gulal for specific performance of the contract. Govind Narayan defended the suit on the ground that the condition as to reconveyance which was agreed upon was not incorporated in the deed. Eventually on July 18, 1900, the parties arrived at a compromise by which it was agreed that Govind Narayan should sign the deed and the creditor should be put in possession of the lands.

In 1911, Govind Narayan and Sham Gulal filed Suit No. 224 of 1911 under the Dekkhan Agriculturists' Relief Act, 1879, for a declaration that the sale was in the nature of a mortgage, alleging that the creditor had assured them at the time of the compromise in the previous suit that the transaction would be treated as a mortgage. That suit was dismissed on the ground that the deed of sale was executed before the Dekkhan Agriculturists' Relief Act was extended to the West Khandesh district where the lands were situated. There was also a finding that the consent decree in Suit No. 285 of 1900 operated as *res judicata* for the claim set up in the later suit.

In 1945, a Debt Adjustment Board was established in Shahada taluka under the Bombay Abricultural Debtors' Relief Act, 1939. On October 15, 1945, Govind's son Ratan (petitioner) made an application to the Board for accounts and redemption of the mortgage underlying the deed of sale of 1899. That application was not competent under s. 45 of the Act, but it remained undisposed of until April 12, 1950, and in the meantime the Bombay Agricultural Debtors' Relief Act, 1939, was repealed and the Bombay Agricultural Debtors' Relief Act, 1947, came into force. At the hearing the petitioner contended that the provisions of the new Act applied to the proceeding and under s. 24 of that Act the application had become maintainable. The creditor pleaded that the proceedings were governed by the old Act and that even if the new Act applied the application was barred under s. 25 (*1*) of the new Act.

On April 12, 1950, the trial Court held that there was a final adjudication by a competent Court on the issue as to whether the transaction of sale was a mortgage and, therefore, the application was not maintainable in view of s. 25 (*1*) of the new Act.

On appeal, the District Judge held that there was no bar under s. 25 (*1*) of the new Act but he found that the application was governed by the old Act and was not maintainable under

s. 45 (*ii*) of that Act. Therefore, on October 20, 1951, he dismissed the appeal.

The petitioner applied in revision to the High Court.

V. M. Tarkunde, for the petitioners.

M. G. Chitle, for the opponent.

GAJENDRAGADKAR J. The short point which arises in this civil revision application is whether the petitioners are entitled to have their debts adjusted in respect of the opponent. An application was made by the petitioners' father on October 15, 1945, for the adjustment of his debts due from him to three creditors. Amongst them opponent No. 1 was the first creditor. This application was made to the Board at the time when it was made, it would have been governed by the provisions of Bombay Act XXVIII of 1939. However, the application was not disposed of until April 12, 1950. Meanwhile, the present Act XXVIII of 1947 had come into operation on May 27, 1947. Before the learned trial Judge, two contentions were raised by the creditors against the petitioners' claim for adjustment. It was urged that the application was incompetent under s. 45 sub-s. (*2*) of the earlier Act of 1939. It was also contended that the application was barred under the provisions of s. 25 sub-s. (*1*) of the new Act of 1947. The learned trial Judge upheld the latter plea. In his opinion, the transaction now impeached had been finally adjusted to be a transaction other than a mortgage and so the application was barred under s. 25 (*1*) of the new Act. When the matter went in appeal, the lower appellate Court disagreed with this view. He held that in the earlier litigation no adjudication had really been made as to the nature of the transaction and so the provisions of s. 25 (*1*) of the new Act could not be invoked. He, however, upheld the other plea and came to the conclusion that since the transaction was prior to 1927, the application itself was incompetent under s. 45 sub-s. (*2*) of the earlier Act of 1939. I should have stated that the transaction between the petitioners and the opponent was an ostensible sale and it had taken place on July 13, 1899. Since the petitioners' claim for adjustment of the debts has been rejected by the learned District Judge, they have come to this Court in the present revisional application.

The principal point which arises on this application had in the meanwhile been decided by a Division Bench of this Court in *Vishwanath Mahadev* v. *Krishnaji*.[1] It was held by the

[1] (1949) 51 Bom. L. R. 744.

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learned Chief Justice and myself that the effect of the provisions of s. 56 of the new Act was to make all the provisions of the new Act applicable to proceedings which had been filed under the old Act and which were pending at the time when the new Act came into force. It is true that in this case we were not dealing with proviso (*a*) directly; but our decision was put on grounds which apply to all the provisos alike. In the ordinary course, the petitioners would have succeeded before the learned Chief Justice merely by referring to this decision of the Division Bench. But on behalf of the opponent the attention of the learned Chief Justice was invited to a contrary view which he had himself expressed sitting as a single Judge in *Bapa Babu Naik* v. *Daji Keru Mandare*.[1] That is why the learned Chief Justice has referred this matter to a Division Bench and it has now become necessary for us to examine the question afresh.

Section 56 sub-s. (*2*) of the new Act repealed the earlier Act of 1939 and it provided that all the Boards established under s. 4 of the repealed Act shall be dissolved. The sub-section was followed by an important proviso which dealt with matters which were governed by the old Act until the commencement of the new one. It is with proviso (*a*) with which we are directly concerned in the present revisional application. When the act was passed, this proviso read thus:

"Provided that all proceedings pending before any such Board shall be continued before the Court as if an application under s. 4 of this Act had been made to the Court."

By Bombay Act LXX of 1948, s. 24 sub-s. (*2*), this proviso was subsequently amended and in its amended form it reads thus:

"All proceedings pending before any such Board at the date when this Act comes into force shall be continued and disposed of by the Court under this Act as if an application under s. 4 had been made to the Court in respect therefor."

In the present revisional application, we are really concerned with this amended proviso.

Before proceeding to deal with the merits of the controversy between the parties, it would be convenient to set out the rival contentions. On behalf of the petitioners, Mr. Tarkunde contends that the effect of this proviso is to

[1] (1951) Civ. Rev. Appln. No. 459 of 1950, decided by Chagla C. J., on Nov. 16, 1951 (Unrep.).

make all the provisions of the new Act applicable to proceedings which were pending at the time when the new Act came into force. Mr. Tarkunde's argument is that, in applying the provisions of the new Act to the pending proceedings, no distinction can be made between provisions that relate to procedure and those that affect substantive rights. On the other hand, Mr. Chitale contends that the effect of this proviso is merely to make it clear that the procedure which should govern the decision of the pending proceeding is the procedure laid down by this Act. Mr. Chitale's case is that if the new Act has conferred some special and additional rights on the debtors which were not available to them under the earlier Act of 1939, it is not the intention of the Legislature in enacting this proviso to confer these new additional rights on the debtors whose applications would normally have been governed by the provisions of the old Act. It is common ground that if s. 24 of the new Act applies, the plea that the transaction in question is prior to January 1, 1927, would not prevail; on the other hand, if s. 45 (2) of the old Act applies, the said plea would be fatal to the petitioners' claim for adjustment.

The scheme of the proviso appears to me to be fairly clear. This proviso deals with all the matters and would have been governed by the earlier Act of 1939 if this new Act had not come into force and had not repealed the earlier Act. Sub-clause (*b*) of the proviso deals with the awards which had already been made, confirmed or modified under the repealed Act and it provides that the same should be deemed to have been made, confirmed or modified under this Act as if this Act was in force at the material date. Similarly, sub-cl. (*c*) and (*d*) deal with the appeals arising from decisions made under the earlier Act. Sub-clause (*d*) deals with appeals which could have been filed under the repealed Act against any decision, order or award, but which could not be filed only be reason of the fact that the said Act was repealed and it goes on to provide that such appeals shall, when filed before a competent Court, be deemed to have been filed under the provisions of this Act and shall be disposed of accordingly. In other words, this clause deals with appeals which had not been filed under the old Act and which could not have been filed by reason of the repeal of the old Act and in respect of such appeals it lays down that these appeals should be filed and shall be disposed of under the provisions of the new Act. Sub-clause (*c*) deals with appeals which had already been

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filed under the old Act and it lays down that they shall be continued and disposed of as if they had been filed under the provisions of the new Act. It would thus be noticed that the object underlying the provisions of sub-cls. (*b*), (*c*) and (*d*) is to make the provisions of the new Act applicable to matters covered by those sub-clauses in their entirety. Sub-clause (*a*) deals with the proceedings which were pending at the trial stage and which had not been decided before the new Act came into force and in respect of these proceedings this clause lays down that they shall be continued and disposed of by the Court under this Act as if an application under s. 4 had been made to the Court in respect therefor. The word 'Court' has been defined by s. 2 sub-s. (*3*) of this Act and so there would be no difficulty in interpreting the word 'Court' occurring in this sub-clause. It would necessarily mean the Court administering the provisions of the new Act. If an application which was made before the new Act came into force has to be continued and disposed of by the Court administering the new Act, *prima facie* it would appear that the new Act would govern the disposal of the pending proceedings. But this intention is emphasized by the use of the clause 'under this Act'. In my opinion, this clause governs the expressions 'shall be continued and disposed of' and does not go with the words 'the Court'. In other words, as I read this clause, it means that the Court established under the new Act shall continue and dispose of pending proceedings under this Act. That can only mean that in disposing of the pending proceedings, the Court shall apply the provisions of the new Act. Mr. Chitale contends that the clause 'under this Act' should govern the words 'the Court'. I do not think that this construction is reasonable. Having defined the expression 'the Court' by s. 2 sub-s. (*3*), wherever the particular Court thus defined is intended to be referred to by this Act, the expressions used is 'the Court' and not 'the Court under this Act.' Sections 4, 14, 17 and 19 afford an illustration of the use of the words 'the Court'. In fact, this clause itself uses the words 'the Court' in the second part of the clause where it provides that the pending proceedings shall be disposed of as if an application under s. 4 had been made to the Court in respect therefor. In this later part of this clause, the words used are 'the Court'. Therefore, in my opinion, the clause 'under this Act' cannot go with the words 'the Court'.

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There is another clear indication provided by this clause itself which shows that all the provisions of the new Act must be applied to pending proceedings and that is afforded by the second part of this clause where it is laid down that the pending proceedings shall be disposed of "as if an application under s. 4 had been made to the Court". In other words, when a pending proceeding is taken on file by the Court administering this Act with a view to dispose of the said pending proceeding, the Court will deal with this proceeding as if an application had been made under s. 4 of this Act. Now, if further proceedings are continued on the assumption that an application had been made by the debtor under s. 4 of the Act, there would be no jusification for confining the application of only procedural provisions of the new Act to such a proceeding. This position becomes abundantly clear if we compare the words used in s. 19 sub-cl. (*3*) of this Act. Section 19 refers to pending suits, appeals and other proceedings and it lays down for the transfer of these matters to the Court administering the B. A. D. R. Act. Sub-clause (*3*) of s. 19 provides that when any such matter is transferred to the Court under sub-s. (*1*) of s. 19 or sub-s. (*2*) of s. 19, the Court shall proceed as if an application under s. 4 had been made to it. It is not suggested and indeed it cannot be suggested that when a suit or other proceeding is transferred under the provisions of sub-ss. (*1*) and (*2*) of s. 19 to the Court under the B. A. D. R. Act, it is only procedural provisions of the Act that are intended to be applied. It is obvious that when these matters are transferred to the B. A. D. R. Act Court, they have to be dealt with on the footing that an application had been made by the debtor and the adjustment of the debtor's debts has to be made by applying all the provisions of the new Act. Indeed it may be mentioned that Mr. Chitale did not seriously dispute this position. Now, if the use of the words 'as if an application had been made to the Court' clearly leads to one result under s. 19 sub-s. (*3*), it would be difficult to hold that the use of the same words would lead to another result in proviso (*a*) to s. 56 (*2*).

Mr. Chitale however contends that this proviso is inapplicable to the present application made by the petitioners because the application itself was incompetent when it was made. In other words Mr. Chitale's contention is that the pending proceedings which fall within the protection of proviso (*a*) to s. 56 sub-s. (*2*) must be valid pending proceedings. If the proceeding which was

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pending under the old Act was invalid, it cannot attract this proviso at all. The same argument can put in a different form. If the debtor had only certain benefits conferred upon him by the provisions of the earlier Act, it could not have been intended that on the same debtor additional and newer benefits should be conferred merely by reason of the accident that his application had not been disposed of before the new Act came into force. We are not prepared to accept this argument. It is well-known that the intention of the Legislature should be gathered from the words used by the Legislature and in our opinion the words used in the proviso in question are clear and unambiguous. Besides, we see no justification for confining the application of proviso (*a*) only to valid proceedings. The proviso refers to all proceedings pending and giving these words their clear grammatical meaning, this clause must cover all proceedings whatever would have been the final result in those proceedings under the earlier Act. Besides, it seems to me that there are very good reasons why the Legislature may have intended to confer upon debtors, whose application for adjustment of debts were pending, the additional benefits provided by the new Act. It may be that the Legislature realised that, under the earlier Act, some benefits which were intended to be conferred were defeated by the defective wording in some of the material sections. In this connection, Mr. Tarkunde has invited our attention to the provisions of s. 26 of the old Act. It would have been possible to take the view under the provisions of this section that, if a creditor claimed more than the specified amount from the debtor, the debtor's case would not fall within the scope of this Act. The present s. 17 has made a material change in that behalf. It puts the limit to the amount of indebtedness no doubt. But it provides that the amount must be found to be due from the debtor to the creditor. In other words, it is only after the Court adjudicates upon the extent of the debtor's indebtedness that in cases where the debt exceeds the statutory amount the debtor would fall outside the scope of the Act. Mr. Tarkunde has also referred us to the provisions of s. 45 sub-s. 2 (*iii*) and he has asked us to compare them with the provisions of s. 25 sub-s. (2) of the new Act. The change made in the latter section is also intended to give more effective benefit to the debtor. It may well be that the Legislature took the view that they could not touch the cases of debtors which had been finally disposed of under the old Act. They were

however disposed to bring within the protection of this new Act all pending cases and so they have dealt with all the pending cases in four categories under the proviso to s. 56 sub-s. (2). It seems to us that the words used in the proviso are not capable of the construction for which Mr. Chitale contends. If the intention of the Legislature was merely to provide that the procedure prescribed by the new Act should be applied in dealing with the proceedings pending under the old Act, it was hardly necessary to have laid down these detailed provisions in the proviso. Change of procedure would normally apply to pending cases. Legislature wanted to provide that even the substantive provisions of the new Act should be applied to pending proceedings and that, in my opinion, is the only justification for the detailed provisions contained in this proviso.

Incidentally, I must point out at this stage that the amendment made by the amending Act LXX of 1948 in the original proviso emphasizes the intention of the Legislature more clearly than before, because by the amendment the clause 'under this Act' has been newly introduced. In my opinion, therefore, the view which was expressed in *Vishwanath Mahadev* v. *Krishnaji*[1] is fully justified by the words used in the proviso and that the contrary opinion expressed by the learned Chief Justice in Civil Revision Application No. 459 of 1950 is, with very great respect, not in consonance with those words. Therefore, we must hold that the learned District Judge was wrong in applying the provisions of s. 45 sub-s. (2) to the application made by the petitioners. The petitioners are entitled to invoke all the provisions of the new Act and their application for adjustment of debts cannot be thrown out merely on the ground that the transaction was prior to 1927. As I have already mentioned, it is common ground that under the provisions of s. 24 of the new Act no such limitation of time has been imposed.

Mr. Chitale has then fallen back upon the finding of the trial Court in support of the order made by the learned District Judge. He contends that if the provisions of the new Act are going to be applied to the present application, the application must be held to be incompetent because the transfer in question has been finally adjudged to be other than a mortgage by a decree of a Court of competent jurisdiction. In dealing

[1] (1949) 51 Bom. L. R. 744.

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with this point, some more facts must be mentioned. The original sale deed, dated July 13, 1899, was intended to be executed by Sham Gulal and Govind Narayan. It appears that Sham Gulal signed the document, but Govind Narayan did not. Therefore, the purchaser had to bring suit No. 285 of 1900 for specific performance of the agreement. The suit ended in a compromise and Govind Narayan agreed to put his signature to the document. The signature was put to the document, the document was eventually registered, and possession of the property delivered to the ostensible purchaser. In suit No. 224 of 1911, Sham Gulal and Govind Narayan claimed that the transaction was a mortgage and they asked for appropriate reliefs under the provisions of the Dekkhan Act. Their suit was dismissed on the ground that the Dekkhan Act was not applicable at the time of the transaction and so it could not be invoked by them. It would appear that a finding was also made that the compromise decree passed in suit No. 285 of 1900 operated as *res judicata*. Mr. Chitale says that the effect of these two decisions is that the transaction of 1899 has been adjudged to be other than a mortgage. We are not prepared to accept this contention. In our opinion, s. 25 sub-s. (*i*) can be invoked only when there is an adjudication which should be final and which determines the character of the transaction in question. In the present case, in the first compromise decree of 1900, there was no occasion for deciding the character of the transaction at all and the compromise decree which was passed in the suit for specific performance merely compelled Govind Narayan to put his signature to the document. The nature of the transaction evidenced by the document was not in dispute and there was no occasion either for the parties to settle their disputes about the nature of the transaction or for the Court to decide upon it. In the second litigation again, the suit was dismissed on the ground that the Dekkhan Act was not applicable. If the Dekkhan Act was inapplicable, it was not open to the vendors to allege the oral agreement of reconveyance or to contend otherwise that the transaction which was ostensibly a sale was in reality a mortgage. The decision on the first issue that the suit was incompetent because the Dekkhan Act was not applicable was decisive of the litigation. The Court had not reached a stage in that litigation where it was called upon to consider the character of the transaction itself. Mr. Chitale argues that if the suit was dismissed, its result must be taken to be that the transaction

was held to be other than a mortgage. We do not think that even if such a far-fetched result is possible to be reached that it amounts to a final adjudication of the nature of the transaction within the meaning of s. 25 sub-s. (*i*). Under the Code of Civil Procedure, if the suit brought by a debtor is dismissed for default or is withdrawn without liberty to file a fresh suit, it may preclude the plaintiff from bringing a similar suit under the same cause of action. Under the provisions of s. 11 of the Civil Procedure Code, if a suit by a debtor is decided on some points and it would have been open to the debtor to make a plea as to the character of the transaction which had not been made, in appropriate cases the plea of constructive *res judicata* could be pleaded against him. But these cases cannot, in our opinion, be brought within the scope of s. 25 sub-s. (*i*) of the B. A. D. R. Act. This sub-section seems to exclude from the operation of the Act only such transactions which have been adjusted to be other than a mortgage. It may be that a compromise decree may adjudge the transaction to be other than a mortgage in clear terms and in that case the mere fact that the Court did not decide the character of the transaction on the merits may not help the debtor to escape the application of s. 25 sub-s. (*i*). In the present case however, there has been no adjudication about the nature of the transaction at all either in 1900 or in 1911 and as I have pointed out, there was no occasion to deal with this question at all.

In this connection, our attention has been invited to three unreported judgments of the learned Chief Justice. In *Tukaram Shivram Lohar* v. *Laxman Ramchandra Marwadi*,[1] the learned Chief Justice took the view that it does not make any difference if the decree which had adjudicated upon the nature of the transaction is a consent decree because he has pointed out, and with respect rightly, that it makes no material difference for the application of s. 25 sub-s. (*i*) whether the character of the transaction is adjudicated by the decree in invitum or by consent. In *Gangaram Lilachand Gandhi* v. *Balku Sambhu Raite*,[2] the learned Chief Justice was dealing with a compromise decree which itself recognised that the transaction in question was in the nature of a mortgage.

[1] (1950) Civ. Rev. Appln. No. 470 of 1950, decided by Chagla C. J., on Nov. 27, 1950 (Unrep.).

[2] (1951) Civ. Rev. Appln. No. 38 of 1951, decided by Chagla C. J., on July 26, 1951 (Unrep.).

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Naturally he did not accept the contention of the creditor that the compromise decree amounted to an adjudication such as is comtemplated by s. 25 sub-s. (*i*). It is true that in rejecting the creditor's plea, the learned Chief Justice has observed that the scheme of the Act is:—

"that if a competent Court on the evidence comes to the conclusion that a transfer is a sale and not a mortgage, then the same question should not be litigated in the Debt Adjustment Court."

With respect, these observations must be read in the light of the facts which had been found by the Courts below and to which the learned Chief Justice himself has referred in the earlier portion of his judgment. We do not read these observations as laying down that before the provisions of s. 25 (*1*) can be invoked by a creditor, it must always be shown that the Court itself has adjudicated upon the character of the transaction on the evidence taken by the Court. In our opinion, the view which the learned Chief Justice has himself taken in *Tukaram Shivram Lohar* v. *Laxman Ramchandra Marwadi*[1] is more in consonance with the words used in s. 25 (*1*). The third decision to which our attention has been invited is the judgment of the learned Chief Justice in *Motilal Jasraj Marwadi* v. *Gopal Bala Patil.*[2] In this case, the learned Chief Justice was dealing with facts very similar to the facts before us. In the earlier litigation, the suit by the debtor has been held to be incompetent. It was argued before the learned Chief Justice that the dismissal of the suit under those circumstances created a bar against the application of the debtor under s. 25 (*i*). This contention was rejected and with respect we think rightly. Therefore, in our opinion, on the facts of this case, it is impossible to hold that the transfer in question has been finally adjudged to be other than a mortgage by a decree of a Court of competent jurisdiction. If that be so, the plea that the application is barred under s. 25 (*i*) must fail.

VYAS J. A short question which has arisen for our consideration in this Civil Revision Application is whether an application for the adjustment of his debts which was made by a debtor under s. 17 (*1*) of the Bombay Agricultural Debtors Relief Act No. XXVIII of 1939 and which was pending before the Board when that Act was repealed and which, upon the

[1] (1950) Civ. Rev. Appl. No. 470 of 1950, decided by Chagla C. J., on Nov. 27, 1950 (Unrep.).

[2] (1952) Civ. Rev. Appln. No. 1139 of 1951, decided by Chagla C. J., on July 23, 1952 (Unrep.).

coming into force of the Bombay Agricultural Debtors Relief Act No. XXVIII of 1947, was transferred to a Court under the latter Act, is to be governed by the provisions of s. 45 of the old Act of 1939 or by the provisions of s. 24 of the new Act of 1947. It is clear that if the provisions of s. 45 of the old Act are to apply, the applicant-debtor must fail in his application for the adjustment of his debts as the transaction whose nature is sought to be determined was entered into on July 13, 1899, i.e., before January 1, 1927, (*see* s. 45 sub-s. (2) (*i*) of the old Act). On the other hand, if the application is to be governed by the provisions of s. 24 of the new Act, an enquiry into the nature of the transaction can be made irrespective of when it was entered into. This point, namely whether s. 45 of the old Act or s. 24 of the new Act must govern this application for the adjustment of the debt, was not raised in the trial Court but it was raised in the appeal Court; and in appeal, the learned District Judge held that s. 45 of the old Act would govern this application and that under sub-s. (2) of that section, the application must fail as the transaction was entered into before January 1, 1927. In the course of his judgment, the learned District Judge observed:

"The application however was made under s. 45 of the old Act. Section 24 relates to new applications being made under s. 4 of the Act of 1947. This section (meaning s. 24 of the new Act), is in terms prospective. There is nothing in s. 56 (meaning s. 56 of the new Act) which suggests that s. 24 should be given a retrospective effect."

This veiw is challenged by the original debtors in this revisional application.

The facts which have given rise to this revisional application are briefly these: A Board under the B. A. D. R. Act of 1939 was established in Shahada Taluka in the District of West Khandesh on May 1, 1945. On October 15, 1945, one Ratan Govind Patil made an application under s. 17 (1) of the Act of 1939 against 3 creditors of his for the adjustment of debts due to them. In this revisional application, we are concerned with creditor No. 1 only (opponent) and the debt to be considered is a debt in respect of a transaction (sale deed) dated July 13, 1899. It may be noted that pending these proceedings Ratan Govind died and his sons Hiraman and Devidas have been brought on record as his heirs. It would appear that Ratan's father Govind Narayan used to borrow moneys from the creditor. He had a khata in the creditor's shop. His four brothers also used to borrow moneys similarly from

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the creditor upon their separate khatas with him. Upon these 5 khatas, the creditor's Vahiwatdar was making a claim of Rs. 8,000. There was a compromise entered into between the 5 brothers and the creditor and it was settled that the 5 brothers should pay Rs. 2,500 to the creditor in full satisfaction of his claim; or in the alternative two sale deeds were to be passed in favour of the creditor. One sale deed for Rs. 1,000 was to be in respect of two houses and a land and the other sale deed for Rs. 1,500 was to be in regard to 4 lands situated at Ubhad. The applicants contend that the transaction of sale of two houses and a land was to be an out and out sale and that the other transaction was to be treated as a mortgage. The applicants say that it was in these circumstances that the sale deed, dated July 13, 1899, was written. In that document, there was no condition of reconveyance of the lands to Govind Narayan. So Govind Narayan refused to sign the document. That led to a suit by the creditor which was suit No. 285 of 1900 against Govind Narayan. There was a compromise in that suit and it was settled (1) that Govind Narayan should sign the sale deed and (2) that the creditor should be put in possession of the lands which were the subject-matter of the sale deed, dated July 13, 1899. The applicant-debtors contend that the creditor had assured Govind Narayan that the transaction would be considered as a mortgage, notwithstanding the form of the document. Subsequently, the creditor, it would appear, was unwilling to treat the transaction as a mortgage. So in 1911 Govind Narayan and another filed suit No. 224 of that year under the D. A. R. Act against the creditor for a declaration that the sale-deed, dated July 13, 1899, was in the nature of a mortgage and for accounts, redemption, etc. The trial Court took the view that as the transaction had been entered into before the D. A. R. Act had been made applicable to this District, the plaintiff of that suit No. 224 of 1911 could not be called an agriculturist, that, therefore, the suit was incompetent and accordingly dismissed the suit. The plaintiff's (Govind's) appeal was also dismissed by the appellate Court. On May 1, 1945, a Board under the B. A. D. R. Act of 1939 was established in Shahada Taluka and on October 15, 1945, Govind's son Ratan made an application under s. 17 sub-s. (*1*) of the Act of 1939, to that Board for the adjustment of his debts. By the B. A. D. R. Act of 1947, the Act of 1939 was repealed and the Boards set up under the said old Act were dissolved. Accordingly, Ratan's application was transferred

to the Court set up under the new Act, namely, the Court of the Joint Civil Judge, Nandurbar, sitting at Shahada and that Court held that the application was barred by s. 25 (*i*) of the Act of 1947 in view of the decision in suit No. 224 of 1911. In appeal, the learned District Judge held that the application was not barred by s. 25 (*i*) of Act XXVIII of 1947, but held further that the application was governed by s. 45 of the Act of 1939 and not by s. 24 of the Act of 1947 and was barred by sub-s. (*2*) of s. 45 of the Act of 1939. Consistently with that view, the learned District Judge dismissed the appeal of the applicants-debtors and hence this revisional application by the debtors. Normally the learned Chief Justice would have allowed this revisonal application in view of the decision of the Division Bench of this Court consisting of himself and my learned brother in the case of *Vishwanath Mahadev* v. *Krishnaji*,[1] in which it was held that the effect of the provisos to s. 56 (*2*) of the Act of 1947 was to make all the provisions of that Act—substantive as well as procedural—retrospective in respect of all proceedings and all appeals which were filed under the old Act of 1939 and which were pending when the said old Act was repealed and the new Act of 1947 came into force. But the learned Chief Justice's attention was invited to his decision, sitting as a single Judge in *Bapu Babu Naik* v. *Daji Keru Mandare*,[2] in which a contrary view was taken by him. That is how his Lordship has referred this revisional application to a Division Bench. Now, on the point whether the application of these debtors which was filed under the Act of 1939 and was pending before the Board when that Act was repealed and was transferred to the Court set up under the Act of 1947 would be governed by s. 45 of the Act of 1939 or by s. 24 of the Act of 1947, the provisions which help us to decide the point are to be found in proviso (*a*) to sub-s. (*2*) of s. 56 of the B. A. D. R. Act No. XXVIII of 1947. This sub-s. (*2*) of s. 56 has four provisos. Originally, s. 56 sub-s. (*2*) had three provisos and those were:

(1) Provided that all proceedings pending before any such Board shall be continued before the Court as if an application under s. 4 of this Act had been made to the Court; (2) Provided further that all appeals pending before any Court under the repealed Act shall be continued and disposed of as if they were appeals under this Act and (3) Provided

[1] (1949) 51 Bom. L. R. 744.

[2] (1951) C. R. Appn. No. 454 of 1950 decided by Chagla C. J. on Nov. 11, 1951 (Unrep.).

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also that all appeals against decisions, orders or awards of any Board established under the repealed Act which but for this Act would have lain shall when presented be deemed to be appeals from the decisions, orders or awards passed by a Court under this Act and shall be disposed of accordingly.

There was an amendment to the Act of 1947 by Act LXX of 1948 under which amending Act the present four provisos to sub-s. (*2*) of s. 56 were enacted. The present four provisos to sub-s. (*2*) of s. 56 are:—

> "(*a*) all proceedings pending before any such Board at the date when this Act comes into force shall be continued and disposed of by the Court under this Act as if an application under s. 4 had been made to the Court in respect therefor; (*b*) all awards made, confirmed or modified under the repealed Act shall be deemed to have been made, confirmed or modified under this Act as if this Act was in force at the date when the said awards were made, confirmed or modified, as the case may be; (*c*) all appeals pending before any Court under the repealed Act against the decision, order or award of such Board shall be continued and disposed of as if the said appeals were filed under the provisions of this Act, and (*d*) all appeals which could have been filed under the repealed Act against any decision, order or award of such Board but which could not be filed only by reason of the fact that the said Act was repealed by this Act shall when filed before a competent Court be deemed to have been filed under the provisions of this Act and shall be disposed of accordingly.'

As I have stated above, the proviso with which we are directly concerned in this revisional application is proviso (*a*).

Now, Mr. Tarkunde for the applicants-debtors contends that these provisos to s. 56 sub-s. (*2*) give retrospective effect to all the provisions of the Act of 1947—substantive provisions and the procedural provisions—and that therefore although the application of these debtors was not tenable under s. 45 sub-s. (*2*) of the Act of 1939, it would be s. 24 of the Act of 1947 which would retrospectively govern and the applicants would, therefore, be entitled to have an enquiry made into the nature of the transaction dated July 13, 1899. On the other hand, Mr. Chitale for the opponent-creditor submits that the provisos to s. 56 sub-s. (*2*) of the Act of 1947 make only the procedural provisions of the new Act of 1947 retrospective, that the substantive provisions of law contained in the Act of 1947 are not given a retrospective effect by these provisos, that the provisions of s. 24 of the Act of 1947 are substantive provisions of law, that therefore the said provisions would not apply retrospectively to this application, but that the application must be governed by s. 45 of the Act of 1939.

In our view, Mr. Tarkunde's contention must prevail. The language used in all the provisos—we are more particularly concerned here with proviso (*a*)—is clear and explicit and leaves no doubt in our minds that what the Legislature has intended by enacting for instance provisos (*a*) and (*c*) is that all applications pending before the Boards, which were constituted under the Act of 1939, at the date when the Act of 1947 came into force and all appeals pending before the Courts under the repealed Act of 1939 against the decisions, orders and awards of such Boards shall be continued and disposed of as if they were applications and appeals made and filed under the Act of 1947. Proviso (*b*) deals with all awards made, confirmed or modified under the repealed Act and lays down that such awards shall be deemed to have been made, confirmed or modified under the Act of 1947 as if the Act of 1947 was in force at the date when those awards were made, confirmed or modified. Then there is proviso (*d*) which deals with all appeals which could have been filed under the repealed Act against any decision, order or award of the Board established under the Act of 1939, but which could not be filed only by reason of the fact that the Act of 1939 was repealed and lays down that such appeals, shall, when filed before a competent Court, that is to say the Court set up under the Act of 1947, be deemed to have been filed under the provisions of the Act of 1947 and shall be disposed of accordingly. In provisos (*a*), (*b*) and (*c*), the words 'as if' occur and in proviso (*d*) the words 'shall be deemed to have been made under the provisions of this Act' occur. Furthermore, and this is quite significant, the Legislature has deliberately used the words 'under this Act' after the words 'by the Court' in proviso (*a*). The above-mentioned language of the provisos (*a*), (*b*), (*c*) and (*d*) clearly shows that the provisos give a retrospective effect to all the provisions of the Act of 1947 and not merely to the procedural provisions thereof. In our view, the words 'under this Act' occurring after the word 'Court' in proviso (*a*) are to be read with the words 'shall be continued and disposed of'. In other words, proviso (*a*) would appropriately read thus:

> "All proceedings pending before any such Board at the date when this Act comes into force shall be continued and disposed of under this Act by the Court as if an application under s. 4 had been made to the Court in respect therefor."

We are fortified in this interpretation of the words 'under this Act', for the simple reason that the term 'Court' is defined in s. 2 sub-s. (*3*) of the Act of 1947; and therefore if the words

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'under this Act' were to be read with the word 'Court', they would be redundant and the Legislature could hardly be charged with having used superfluous words. Moreover, the word 'Court' is used in several other sections of the Act of 1947 and in none of those sections do we find the use of the words 'under this Act' after the word 'Court'. For instance, the word 'Court' is used in ss. 4, 14, 17 and 19 (it is hardly necessary to reproduce entirely the language of these sections in this context) and in none of these cases do we find the expression 'under this Act' following the word 'Court'. We have therefore no doubt that the Legislature had a special purpose in using the words 'under this Act' after the word 'Court' in proviso (*a*) and that purpose, in our view, was to enact in unmistakable manner that all the proceedings pending before any Board at the date when the Act of 1947 came into force shall be continued and disposed of under the Act of 1947 as if an application under s. 4 had been made to the Court in respect therefor. In our opinion, therefore, as I have already stated above, the words 'under this Act' in proviso (*a*) go with the words 'shall be continued and disposed of' and the natural meaning of the expression 'shall be continued and disposed of under this Act' is that all the provisions, substantive and procedural, of the Act of 1947 are to be given a retrospective effect in the disposal of all proceedings which were filed under the old Act and pending before the Board at the time of the repeal of the old Act and were transferred for disposal to the Court set up under the new Act of 1947.

Not only has the Legislature used the words 'shall be continued and disposed of...under this Act,' but it has also used the words 'as if an application under s. 4 had been made to the Court in respect therefor'. Now, there is no doubt as to the meaning of the words 'as if an application under s. 4 had been made to the Court in respect therefor'. The words 'as if an application under s. 4 had been made to it' occur in s. 19 sub-s. (*3*) of the Act of 1947. Now, s. 19 sub-ss. (*1*) and (*2*) refer to suits, appeals, applications for execution and proceedings which were filed under the old Act of 1939 and were pending when that Act was repealed and the new Act of 1947 came into force. Sub-ss. (*1*) and (*2*) of s. 19 lay down that such suits, appeals, applications and proceedings shall be transferred to the Court set up under the new Act and sub-s. (*3*) enacts how the said Court shall proceed to deal with them. It says: —

"When any suit, appeal, application or proceeding is transferred to the Court under sub-s. (*1*) or sub-s. (*2*), the Court shall proceed as if an application under s. 4 had been made to it."

Now, it would be difficult to hold that what the Legislature intended while framing sub-s. (3) of s. 19 of the Act of 1947 was that the provisions of the new Act were to apply only partially, that is, that the procedural part only of the new Act was to apply and that the substantive law which was to govern such suits, appeals, applications and proceedings was the law contained in the repealed Act of 1939. Quite conceivably, in many such suits, appeals, applications or proceedings, the transactions concerned may be transactions prior to January 1, 1927, and if we are to accept Mr. Chitale's contention that the substantive provisions of the Act of 1947 are not made retrospective by the provisos to sub-s. (2) of s. 56, no enquiry could be made by the Court into the nature of those transactions, whereas the transactions entered into after January 1, 1927, could be enquired into by the same Court although they also might be the subject-matter of the suits, appeals, applications and proceedings filed under the old Act and transferred to the Court established under the new Act. Now, such could not have been the intention of the Legislature and this is clear from the words 'as if an application under s. 4 had been made to it' in s. 19 sub-s. (3) of the Act of 1947. Section 4 of the Act of 1947 says that an application made under it shall contain the amount and particulars of all debts, i. e. debts irrespective of the year to which they relate, i.e. debts prior to or subsequent to January 1, 1927. In our view, the use of the words 'as if an application under s. 4 had been made to it' in s. 12 sub-s. (3) shows that the suits, appeals, applications and proceedings referred to therein are to be disposed of under the provisions—substantive and procedural—of the Act of 1947, irrespective of the year to which the debts relate. When an application is normally made under s. 4 of the new Act of 1947 for the adjustment of a debt, naturally all the law contained in the new Act governs the disposal of the said application, and there would be no justification for supposing that when the Legislature used the words 'as if an application under s. 4 had been made to it' in s. 19 sub-s. (3), they used them with a mental reservation that in the case of applications initially made under s. 17 (1) of the Act of 1939 and transferred to the Court set up under the Act of 1947, only the procedural part of the Act of 1947 was to apply. It may be that as a matter of coincidence, an application which was untenable under the Act of 1939 becomes tenable under the Act of 1947; but such a position often becomes inevitable when legislative changes take place and

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need not deter us from putting a natural construction on plain words, a construction in keeping with the intention of the Legislature which was to enact the new Act for the better benefit of the community of agricultural debtors. In our view, the Legislature must have anticipated but not minded the result, which must follow when the prior legislation on the same subject is liberalized, that a certain section of the agricultural debtors who would have failed under the Act of 1939 would succeed under the new Act by reason of the accident that their applications happened to be pending when the Act of 1939 was repealed. Of course, if those applications had been disposed of before the new Act came into force, nothing could have been done. But if they were pending, we do not think that the Legislature had intended that the Court set up under the new Act was to apply one substantive law to one set of applications (those filed under the old Act and pending when that Act was repealed) and different substantive law to another set of them (those filed under the new Act). Such a position would have been undoubtedly cumbrous to a certain extent and we do not think that the Legislative intended to introduce unnecessary complexity in the machinery of judicial administration by enacting s. 19 sub-s. (*3*) of the Act of 1947. Clearly, therefore, the words 'as if an application under s. 4 had been made to it' occurring in s. 19 sub-s. (*3*) mean that all the provisions of the new Act, substantive and procedural, are to apply to the disposal of suits, appeals, applications and proceedings filed under the old Act of 1939 and transferred to the Court set up under the new Act of 1947 under s. 19 sub-s. (*1*) and (*2*) of the new Act. A recognized canon of construction is that the same expression 'as if an application under s. 4 had been made to it (i. e. to the Court)' must have the same meaning wherever it occurs in the same Act. Now this same expression which occurs in s. 19 sub-s. (*3*) also occurs in proviso (*a*) to sub-s. (*2*) of s. 56 and therefore we have come to the conclusion that the words 'continued and disposed of...under this Act as if an application under s. 4 had been made to the Court in respect therefor' occurring in proviso (*a*) to sub-s. (*2*) of s. 56 clearly show that the intention of the Legislature in enacting proviso (*a*) was to make all provisions of the Act of 1947, substantive and procedural, retrospective in effect in respect of all proceedings which were filed under the old Act and were pending before the Board at the date of the repeal of that Act and were transferred to the Court established under the new Act for disposal.

In this context, let us now turn to s. 26 of the Act of 1939. It says:—

"No application under s. 17 or s. 23 shall be entertained by the Board on behalf of or in respect of any debtor, unless the total amount of debts claimed as being due from him on January 1, 1939, is not more than Rs. 15,000."

Clearly thus, under the old Act, it was possible that if a creditor merely alleged that the debt due to him exceeded the amount of Rs. 15,000, the application of the debtor was liable to be defeated. But the scheme of the Act of 1947 on this point is materially different and in our view it is deliberately different because the framers of the new Act appear to have intended to give larger benefit to all agricultural debtors-litigants, not only those who might apply under the new Act, but also those who had applied under the old Act but whose applications by chance had come to be dealt with under the new Act. In this connection, let us also turn to ss. 11 and 17 of the new Act of 1947. Section 11 lays down:—

"No application under s. 4 or 8 shall be entertained by the Court on behalf of or in respect of any debtor, unless the total amount of debts due from him on the date of the application is not more than Rs. 15,000."

And s. 17 (*1*) enacts:—

"On the date fixed for the hearing of an application made under s. 4, the Court 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 (*b*) whether the total amount of debts due from such person on the date of the application exceeds Rs. 15,000."

Under the Act of 1947, therefore, the Court has to decide as a preliminary point whether the amount of debt is more or less than Rs. 15,000, and only if it comes to the conclusion that the debt exceeds Rs. 15,000, the application will be held untenable under the Act. In our view, the Legislature could not have intended, while enacting Act XXVIII of 1947, to provide for such a differential treatment to debtors-litigants approaching the Court for the adjustment of their debts as that to which they would be subjected if only the procedural provisions of the Act of 1947 were made retrospective by the provisos to sub-s. (2) of s. 56 of the Act of 1947.

Let us next compare s. 45 of the Act of 1939 with s. 25 (*ii*) of the Act of 1947. Under s. 45 of the Act of 1939, complete protection from an enquiry into the nature of a transaction could be

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claimed by a third party purchaser from the transferee of a debtor, irrespective of whether the third party did or did not have notice of the transaction between the debtor and his transferee. This was obviously a provision detrimental to the debtors and the Legislature removed the defect by enacting s. 25 sub-s. (*ii*) under which the protection could only be claimed by and given to the third party purchasers who had no notice of the dealings between the debtors and their transferees. Here again, we are of the view that the Legislature, while enacting the Act of 1947, could not have intended to subject one section of the litigating agricultural debtors (i.e. those whose applications were made under the Act of 1939, but were pending when that Act was repealed and were therefore transferred to the Court set up under the new Act) to the law which was less advantageous to the debtors and extend the benefit of a more beneficent provision to another section of the debtors who applied under the new Act. It is for these reasons that we have come to the conclusion that the provisos to s. 56 sub-s. (*2*) of the Act of 1947 have given retrospective effect to all the provisions, substantive and procedural, of the Act of 1947.

Whether the intention of the Legislature was to make the Act of 1947 retrospective in regard to all its provisions or only in respect of its procedural part can also be gathered from a comparison of the provisions of s. 45 of the Act of 1939 and s. 24 of the Act of 1947. Under s. 45 sub-s. (*2*) cl. (*i*), enquiry into the nature of transactions entered into before January 1, 1927, was barred. Under s. 24 of the Act of 1947, when a debtor applies under s. 4 of the Act for the adjustment of his debts, enquiry can be made into the nature of a transaction irrespective of the time when it was entered into. Now, if the procedural part only of the Act of 1947 is to have retrospective effect and if the substantive law contained in the Act of 1947 was to have effect only from the date on which that Act came into force, the result would be that if an application for the adjustment of a debt was filed under the old Act of 1939 wherein the transaction concerned was entered into before January 1, 1927 and if that application was pending when the Act of 1939 was repealed and was accordingly transferred to the Court set up under the Act of 1947, it would necessarily be defeated. On the other hand, if in respect of the same transaction a debtor happened to apply under s. 4 of the Act of 1947, instead of under s. 17 sub-s. (*1*) of the Act of 1939 for the adjustment of his debt, an enquiry into the nature of the transaction could be

made. Now the Legislature, whose object in amending the prior Act of 1939 was to liberalise the law for the relief of agricultural debtors, could not have intended, while enacting the Act of 1947, to create and maintain such a marked disparity or discrimination in the treatment of debtors asking for the adjustment of their debts. Evidently, the object of the new Act (of 1947) was to confer an additional right upon the debtors, namely, the right to have an enquiry made into the nature of a transaction which might have been entered into at any time and a natural construction would be that the intention could not have been to exclude a section of the debtors from that benefit just because in their case the transaction might have been entered into before January 1, 1927. When the Legislature was amending the existing law for the greater relief of the agricultural debtors, they could not have intended that the same transaction, i. e. the transaction prior to January 1, 1927, should be dealt with differently by the Court just because in one case the application was made under the repealed Act (i.e. before May 27, 1947) and in the other case after the new Act came into force (i. e. after May 27, 1947). In our view, while enacting the Act of 1947, the Legislature seems to have realised that the barrier of the date January 1, 1927, was an artificial barrier for the continuance of which there was no justification, and the intention in framing s. 24 of the Act of 1947 was obviously to remove that barrier and we have no doubt that the advantage of the said removal of barrier must have been intended by the Legislature to be extended even to the applicants who had made their applications under the old Act of 1939.

In the case of *Vishwanath Mahadev* v. *Krishnaji*[1] a question arose whether the appeal Court set up by Act XXVIII of 1947 must dispose of the appeals pending before it in accordance with the provisions of law laid down in the new Act, and the Division Bench of this Court consisting of the learned Chief Justice and my learned brother examined the point whether the provisos as they then stood to s. 56 (2) of the Act No. XXVIII of 1947 gave retrospective effect to all the provisions of the new Act, substantive as well as procedural. The first proviso as it then stood to s. 56 (2) of the Act No. XXVIII of 1947 was:

"Provided that all proceedings pending before any such Board shall be continued before the Court as if an application under s. 4 of this Act had been made to the Court,"

[1] (1949) 51 Bom. L. R. 744.

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and it was not disputed even by the opponent-creditor's learned Advocate in that case that it gave retrospective effect to the provisions of Act XXVIII of 1947 so far as pending applications were concerned. The second proviso as it then stood was:

"Provided further that all appeals pending before any Court under the repealed Act shall be continued and disposed of as if they were appeals under this Act,"

and in that connection a contention was advanced for the opponent that it only dealt with the procedural aspect of appeals and not with regard to the substantive law that had got to be applied to appeals which were pending when the new Act was passed. Dealing with that contention, the learned Chief Justice observed (p. 745):—

"...In our opinion, the language used in the second proviso is fairly clear and explicit and makes this proviso retrospective in its effect. What the Legislature says is that the appeals shall be continued and disposed of as if they were appeals under this Act, which clearly means that all the provisions of this Act shall apply to the appeals which are pending. The appeal Court is asked to treat the appeals as if the new Act was in force and not the old Act, and in disposing of those appeals the appeal Court has to consider the substantive law as well as the procedural law brought into force by Act XXVIII of 1947. Therefore, in our opinion, the appeal Court set up by Act XXVIII of 1947 must dispose of the appeals pending before it in accordance with the provisions of law laid down in the new Act."

The language of the present proviso (*a*) to s. 56 (*2*) with which we have already dealt above is even clearer than that of the original first proviso, and with very great respect we are of the opinion that the view of my Lord the Chief Justice in *Bapu Babu Naik* v. *Daji Keru Mandare*[1] is not in consonance with that language.

Next Mr. Chitale has raised another point before us and that is that even if all the provisions of Act XXVIII of 1947 are given retrospective effect, this application of the applicants-debtors must fail as it is barred by the provisions of s. 25 (*1*) of the new Act by reason of the decision in Govind's suit No. 224 of 1911. Section 25 (*1*) lays down:—

"Nothing in s. 24 shall apply to any transfer which has been finally adjudged to be a transfer other than a mortgage by a decree of a court of competent jurisdiction or by a Board established under s. 4 of the repealed Act."

[1] (1951) Cr. Rev. Appn. No. 459 of 1950 decided by Chagla C. J. on Nov. 16, 1951 (Unrep.).

The contention of Mr. Chitale is that there was a final adjudication as to the nature of the transaction dated July 13, 1899, in suit No. 224 of 1911 which was filed by Govind Narayan and was dismissed by the Court and therefore the present application is barred. The contention has no force. Suit No. 224 of 1911 was dismissed on the ground that the D. A. R. Act was not applicable to that suit and therefore it was not competent to the plaintiff to claim an enquiry into the nature of the document of ostensible sale. In other words, the suit was thrown out as being incompetent. The stage had not been reached at which in that case for an examination of the circumstances connected with the transaction dated July 13, 1899, and therefore by no stretch of imagination could it be contended that there was an adjudication, much less a final adjudication, in that case and that the said adjudication was that the transaction was a sale. There was no adjudication one way or the other in that suit in respect of the nature of the transaction dated July 13, 1899.

Mr. Chitale has invited our attention to an unreported decision of the learned Chief Justice in *Tukaram Shivram Lohar* v. *Laxman Ramchandra Marwadi.*[1] It is true that in that case the learned Chief Justice held that the consent decree amounted to a final adjudication within the meaning of s. 25 (*1*) of the Act of 1947. With great respect, the learned Chief Justice was right, because in that case the parties had come to an agreement as to the nature of a sale deed and that agreement was incorporated in the consent decree. In those circumstances, the learned Chief Justice held, rightly with respect, that the decree was an adjudication, no matter whether it was a decree in invitum or by consent. In another unreported decision of the learned Chief Justice in *Gangaram Lilachand Gandhi* v. *Balku Sambhu Raite,*[2] it was held, rightly with respect again, that the consent decree did not amount to an adjudication within the meaning of s. 25 (*1*) of the Act of 1947 and the reason was that the consent decree in that case was based on the view of the parties themselves that the transfer was in the nature of a mortgage. Such a decree cannot amount to an adjudication within the scope of s. 25 (*1*) of the Act of 1947. For an adjudication to fall under s. 25 (*1*), it must be an adjudication that the transfer was other than a mortgage. It is true that in the course

[1] (1950) Civ. Rev. Appln. No. 470 of 1950, decided by Chagla C. J., on Nov. 27, 1950 (Unrep.).

[2] (1951) Civ. Rev. Appln. No. 38 of 1951, decided by Chagla C. J., on July 26, 1951 (Unrep).

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of his judgment in *Gangaram Lilachand Gandhi* v. *Balku Sambhu Raite*[1] the learned Chief Justice said:—

"the scheme of the Bombay Agricultural Debtors Relief Act is that if a competent Court on the evidence comes to the conclusion that a transfer is a sale and not a mortgage, then the same question should not be litigated in the Debt Adjustment Court."

These observations were made and meant in the context of the facts of that case and we are of the opinion that they were not intended to lay down a principle that unless evidence is recorded in a proceeding, there can be no adjudication in any case. In another unreported decision in *Motilal Jasrai Marwadi and another* v. *Gopal Bala Patil and another*,[2] the learned Chief Justice held that the dismissal of a prior suit on a preliminary ground that it was incompetent created no bar under s. 25 (*1*) of the Act of 1947. With respect, we take the same view and hold that the contention of Mr. Chitale that the present application of the debtors is barred under s. 25 (*1*) of the Act of 1947 by reason of the fact that Govind's suit No. 224 of 1911 was dismissed has no substance.

P. C.—The result is that the application succeeds, the orders passed by the Courts below are set aside and the application is sent back to the trial Court for disposal in accordance with the law. The petitioners would be entitled to their costs in this Court and in the lower appellate Court. The costs in the trial Court will be costs in the cause.

Rule absolute.

M. W. P.

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[1] (1951) Civ. Rev. Appln. No. 38 of 1951, decided by Chagla C. J., on July 26, 1951 (Unrep.).

[2] (1952) Civ. Rev. Appln. No. 1139 of 1951, decided by Chagla C. J., on July 23, 1952 (Unrep.).