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nor for trimming. Regulation 51 would apply because the goods were handled on the square of that hatch which was covered. The learned Chief Presidency Magistrate has taken the view that regulation 51 at any rate was complied with, because one section of the hatch, viz. the aft or No. 4 section, was secured so as to afford a secure landing platform. But the learned Magistrate has obviously overlooked the provisions of regulation 55, sub-regulation (2), which directs : "The beams of any hatch in use for the processes, shall, if not removed, be adequately secured to prevent their displacement." It is, therefore, obvious that although a section of the hatch was secured so as to afford a secure landing platform, the other space of the hatch, which was not securely covered, ought to have been securely covered. As that was not done, regulation 51 also was not complied with in this case.

The result, therefore is that the respondent company, which is a firm of stevedores, started to disembark the cargo from the ship, although regulation 50 (1) and regulation 51 were not complied with. This resulted in a serious accident and injury to Mr. Waghchure. The respondent company are clearly guilty of an offence under regulation 5 read with regulations 50 and 51 of the regulations framed under the Indian Dock Labourers Act, 1934. We find the respondent company guilty of the said offence, convict them of the said offence and sentence them to pay a fine of Rs. 50.

Order accordingly.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar.

MAHARU BHIKA PATIL AND ANOTHERS, (ORIGINAL CREDITORS) APPLICANTS *v.* DAGA NATHU PATIL (ORIGINAL DEBTOR) OPPONENT.*

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Bombay Agricultural Debtors' Relief Act (Bom. XXVIII of 1947), s. 24 (1)—Transfer of Property Act (IV of 1882), ss. 55 (6) (b), 95, 100—Indian Limitation Act (IX of 1908) arts. 144, 148—Oral sale of immoveable property worth more than Rs. 100—Application by vendor for adjustment of debt on the ground that transaction was mortgage—Whether inquiry in nature of transaction can be made under Bombay Agricultural Debtors' Relief Act—Whether such claim made more than 12 years after transaction, barred by limitation.

A debtor made an application under the Bombay Agricultural Debtors' Relief Act, 1947, for adjustment of his debt, alleging that an oral sale

*Civil Revision Application No. 1342 of 1954.

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of his lands made in 1911 was in the nature of a mortgage. The lands were worth more than Rs. 100. On the question whether an inquiry about the nature of the transaction could be made under the Act and whether the claim made more than 12 years after the transaction was barred by limitation,

Held, (1) that the oral sale of immoveable property worth more than Rs. 100 was invalid and no inquiry about the nature of the transaction could be held under s. 24 (*1*) of the Bombay Agricultural Debtors' Relief Act, 1947. But a charge in favour of the buyer having been created under s. 55 (*6*) (*b*) of the Transfer of Property Act, 1882, for the purchase-price paid by him it was open to the vendor to offer the amount in question to the buyer and require him to release his property from the burden of the charge. A proceeding under the Bombay Agricultural Debtors' Relief Act, 1947, could, therefore, be entertained and the debt in question could be adjusted;

Jibhaoo Harising Rajput v. *Ajabsing Fakira Rajput*,[1] relied upon.

(2) that before the Transfer of Property Act, 1882, was amended in 1929 the position of a charge-holder was distinct and different from that of a mortgagee; a charge-holder could not be brought within the purview of art. 148 of the Indian Limitation Act, 1908;

Vasudev Bhikaji v. *Balaji Krishna*,[2] and *Munia Goundan* v. *Ramaswami Chetty*,[3] referred to.

(3) that the claim for adjustment of the debt on the ground that the charge amounted to a debt having been made more than 12 years after the transaction in question, it was barred by limitation.

CIVIL REVISION APPLICATION against the decision of A. A. Shaikh, Esquire, District Judge, West Khandesh, at Dhulia, reversing the decision of N. A. Sapre, Esquire, Second Joint Civil Judge, Junior Division, at Dhulia.

The facts are sufficiently set out in the Judgment.

R. A. Jahagirdar, with *K. J. Abhyankar*, and *M. B. Rao*, for the Applicants.

V. M. Tarkunde, for the Opponent.

Gajendragadkar J.—This revisional application arises from debt adjustment proceedings and it raises a short question of limitation. The property in suit consists of two Survey Nos. 186 and 187. The opponent alleged that these two fields had been conveyed to the two petitioners respectively by way of security for a loan borrowed by his grandfather Jairam. He accordingly claimed adjustment of the said debt and asked for possession of the two lands. The petitioners denied this allegation and claimed absolute title to the properties. The evidence disclosed that there was no registered document in respect of either transfer. A mutation entry of the year 1911, which was produced, however, showed that Survey No. 186 had been sold by an oral sale by Jairam to the father of Creditor No. 1 for Rs. 500. The said entry similarly showed an oral sale to Creditor No. 2 in respect of Survey No. 187. The entry did not indicate the amount of consideration for the said

1. (1952) 54 Bom. L. R. 971. 2. (1902) 26 Bom. 500.
3. (1918) 41 Mad. 650.

transaction. The opponent stated in his evidence that the allegations made by him in regard to the nature of the transaction were based upon information received by him from his mother. At the date of the application his mother was dead. The learned trial Judge held that oral transfers which were invalid could not attract the provisions of s. 24 of the Bombay Agricultural Debtors Relief Act. These oral transfers made the creditors charge-holders and since the transactions had taken place before 1911 the title of the charge-holders had become complete, so that it was not open to the applicant to allege that the persons in possession of the properties were his creditors and to ask for adjustment of the said debts. On appeal, the finding that the transactions were oral sales was confirmed, but the learned District Judge took the view that the claim for adjustment of the debts was not barred because he held that to such a claim art. 148 of the Limitation Act would apply. That is why he set aside the order passed by the learned trial Judge and remanded the case for disposal in accordance with law. It is this order which is challenged before me by Mr. Jahagirdar on behalf of the creditors.

The question of limitation which falls to be considered in the present revisional application will have to be dealt with in the light of the reported decision of a Division Bench of this Court in *Jibhaoo Harising Rajput* v. *Ajabsing Fakira Rajput*,[4] Mr. Justice Rajadhyaksha, who delivered the judgment of the Bench in that case, has held that an invalid transfer cannot invoke the provisions of s. 24 (*1*) of the Bombay Agricultural Debtors Relief Act. The learned Judges in this case were dealing with an oral sale and they came to the conclusion that it was incompetent to the Court administering the provisions of the Bombay Agricultural Debtors Relief Act to hold an enquiry about the nature of such an oral sale and that an oral sale of immovable property worth more than Rs. 100 is invalid and no enquiry about the character of this sale could be held under s. 24 (*1*). It was also held in this case that, though an oral sale may be invalid and its nature cannot be determined under s. 24, it nevertheless created rights in favour of the alleged purchasers under s. 55 (*6*) (*b*) of the Transfer of Property Act. In other words, even though the sale may be invalid, it created a charge in favour of the buyer for the purchase price paid by him unless the buyer forfeits the right by improperly declining to accept delivery of the property. Such a charge, according to the judgment, exists even in cases where the buyer may be in possession of the properties intended to be sold. In other words, the position with regard to oral sales would be that the nature of such transactions cannot be determined under s. 24 (*1*) of the Bombay

4. [1952] 54 Bom. L. R. 971.

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Agricultural Debtors Relief Act, but the buyer becomes a charge-holder and it would be open to the debtor to offer amount in question to the intending buyer and require him to release his property from the burden of the charge. In that sense, a proceeding under the Bombay Agricultural Debtors Relief Act can be entertained and the debt in question can be adjusted. It is in the light of this judgment that the question of limitation must be considered.

Mr. Jahagirdar concedes that, if his clients are in the position of charge-holders, it would have been open to the opponent to take steps to release his properties from the burden of the charge by offering the amount or initiating legal proceedings in that behalf within limitation; and according to Mr. Jahagirdar, the limitation prescribed for taking such steps is one of 12 years and no more. Mr. Jahagirdar contends that the view taken by the learned District Judge that art. 148 would cover such a case is erroneous.

Now, in considering this point, it is necessary to remember that the position of a charge-holder, with which I am concerned, was governed by the provisions of the Transfer of Property Act prior to the amending Act of 1929. Both ss. 95 and 100 have been amended in 1929, and shortly stated the effect of the Amendments is to place the charge-holder on the same footing as a mortgagee. After ss. 95 and 100 were amended in 1929, it is clear that the article which would apply to a proceeding like the present would be art. 148 and not art. 144 But before the amendment was made in 1929, a charge-holder could not be brought within the mischief of art. 148 because the said article applied only to a mortgagee and the position of a charge-holder was distinct and different from the position of a mortgagee under the unamended provisions of the Transfer of Property Act. This position was illustrated by the decisions of our Court where the question of limitation arose between a redeeming mortgagor and his colleagues who took no part in the redemption. In such a case, though the relationship between the two was comparable to that between the charge-holder and the debtor it was held that art. 148 does not apply and that art. 144 would apply. In *Vasudev Bhikaji* v. *Balaji Krishna*,[5] the Court was concerned with the question of limitation on similar facts. In 1872 two co-owners of a land—Vinayak and Ganesh —had mortgaged the property for Rs. 300. In 1882 a suit was brought by the mortgagee and it ended in a consent decree ordering redemption on payment by the mortgagors of Rs. 400. Vinayak alone paid the amount and redeemed the mortgage. Thereafter he went into possession of the land.

5. [1902] 26, Bom. 500.

This possession continued until 1898, in which year the heirs of Ganesh sued the heirs of Vinayak claiming to recover the moiety of the land. The defendants pleaded limitation. On the other hand, the plea of limitation was resisted by the plaintiffs by invoking the provisions of art. 148 of the Limitation Act. Jenkins C. J. has observed in his judgment that in the Transfer of Property Act the distinction is drawn between a charge and a mortgage, and what the redeeming mortgagor has is the charge and not the mortgage. It would, therefore, follow, said the learned Chief Justice, that the redeeming mortgagor would not be a mortgagee within the meaning of art. 148. The same view has been taken by the Madras High Court in *Munia Goundan* v. *Ramasami Chetty*.[6] In the present case, the transactions took place prior to 1911 and the present proceedings were commenced as late as 1947. Therefore, the claim made by the opponent for the adjustment of the debt on the assumption that the charge is still subsisting must be held to be barred by limitation.

This position is not seriously disputed by Mr. Tarkunde who appears for the opponent. He, however, contends that, before finally disposing of the present proceedings, it would be necessary in the interests of justice that an issue should be framed as to the real nature of the oral transaction between the parties; and in support of his request Mr. Tarkunde has invited my attention to a judgment delivered by Mr. Justice Bavdekar in *Devaji* v. *Jivanlal*[7]. It does appear from this judgment that Mr. Justice Bavdekar allowed a similar request and remanded the proceedings to the trial Court for determining the nature of the oral transaction. Mr. Justice Bavdekar appears to have taken the view that, in cases where the transfer purports to have been orally effected, it would be necessary to enquire what the nature of the transfer really was. It is shown by evidence that the oral transfer was intended to operate as a mortgage, it would enable the debtor to claim adjustment of the debt; if, however, it appeared on evidence that the oral transfer was intended to operate as a sale, then after a lapse of 12 years the alleged purchaser would be able to set up an adverse title and there would be no question of adjusting debts any longer. In the case before Mr. Justice Bavdekar, it had been urged by the applicant that the original transaction was not one of a sale but that of a mortgage and that the property had been transferred to the creditor by way of security; and Mr. Justice Bavdekar thought that this allegation had to be examined and so he was disposed to give an opportunity to the parties to lead evidence in that behalf.

6. [1918] 41, Mad. 650.

7. (1953) Civ. Rev. Appln. No. 1071 of 1952, decided by Bavdekar J., on August 3, 1953.

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Mr. Jahagirdar argues that the order of remand passed by Mr. Justice Bavdekar and the reasons set out by the learned Judge in support of this order are substantially inconsistent with the view taken by Rajadhyaksha and Vyas JJ. in *Jibhaoo's* case to which I have already referred. According to Mr. Jahagirdar, it is not easy to understand how a Court would be justified in holding an enquiry in regard to an invalid transaction once it is held that an invalid transfer cannot invoke the provisions of s. 24 of the Bombay Agricultural Debtors Relief Act. The only logical consequence in such a case is to treat the oral purchaser as a charge-holder and proceed to deal with the matter on that footing. In the said case, the question of limitation was not raised. But it was held that the relationship between the intending purchaser and the intending vendor was that of a debtor and a charge-holder. By necessary implication, the learned Judges did not think it necessary to enquire further into the question as to whether the said purported oral transfer was in the nature of a mortgage or a sale. I do not propose to express any opinion on this part of the controversy between the parties before me. In the present case, however, I am not disposed to adopt the course suggested by Mr. Tarkunde because the lower appellate Court has made a definite finding that both the transactions were in fact, and were intended to be, oral sales. It is true that in the trial Court issues were framed in the lines suggested by the judgment of Mr. Justice Rajadhyaksha, and Mr. Tarkunde is, therefore, able to make a grievance of the fact that an opportunity was not given to his client to show the real nature of the transaction that took place between the parties prior to 1911. But I am disposed to think that this argument is purely technical in the circumstances of this case. Mr. Tarkunde's client expressly admitted in his evidence that the sole basis for his alleging that the transfers were mortgages was the information received by him from his mother. He also added that he had made the application according to the information given to him by his mother and that there were no other witnesses. It is not, therefore, surprising that both the learned Judges below were not inclined to attach any importance to this version. The evidence given by the opponent was purely hearsay and he had no other evidence to adduce in support of his plea that the nature of the said oral transaction was that of a mortgage and not a sale. Besides, the documentary evidence which is available on the record shows that both the transfers were reported to the revenue authorities by the parties as oral sales. The mutation entry to which I have already referred is clear and unambiguous. That being the only evidence trustworthy on the record, the learned trial Judge assumed that the transfers were oral sales

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and the appellate Court has made a definite finding to that effect. Even if I were to agree with the view taken by Mr. Justice Bavdekar, I would not be disposed to prolong the life of this litigation by framing an issue as suggested by Mr. Tarkunde, because I am satisfied that any further enquiry would be purely infructuous. Besides, as I have just indicated, there are clear findings of fact recorded by the lower appellate Court and in the circumstances of this case I do not think that even for the technical reasons urged before me by Mr. Tarkunde I would be justified in asking the Courts below to try the same issues over again.

In the result, the revisional application must be allowed, the order passed by the lower appellate Court must be set aside and that of the trial Court restored. Rule absolute. There will be no order as to costs throughout.

Rule absolute.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar.

AKBARALLI ABEDALLI BOHARI, APPLICANT (ORIGINAL CREDITOR) *v.* GODHA LAHANU DHANGAR, OPPONENT (ORIGINAL DEBTOR).*

1955 *Nov.* 24

The Bombay Agricultural Debtors' Relief Act (Bom. Act XXVIII of 1947), ss. 2 (i), 24, 43, 47, 48 and 51—Civil Procedure Code (Act V of 1908), s. 97—Insolvent Debtor—Order that a sale was really in the nature of a mortgage followed by a final order that the Debtor was an insolvent and he had not enough means for maintenance and hence that his properties were free from all encumbrances—No appeal filed against the decision that the transaction was in the nature of mortgage—Whether the decision could be challenged in an appeal against the award—Whether appeal lies against the order declaring the debtor an insolvent—Whether such an order an 'Award'.

A Deed of Sale, dated Feb. 5, 1939, was challenged by a debtor under the Bombay Agricultural Debtors' Relief Act as a transaction in the nature of a mortgage. On Feb. 22, 1952, the transaction was held to be in reality a mortgage. On enquiry into the capacity of the debtor to pay, the B. A. D. R. Court held on April 8, 1952, that the debtor was insolvent and his properties were free from all encumbrances. The creditor appealed to the District Court against the order, dated April 8, 1952, challenging the decision that the sale was in reality a mortgage as well as the adjudication as to insolvency. The District Court dismissed the appeal holding that the appeal was incompetent as the creditor had not appealed against the decision, dated Feb. 22, 1952.

Held, that the appeal was not incompetent on the ground that creditor had not appealed against the previous order inasmuch as the

*Civil Revision Application No. 712 of 1954.