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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).*

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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

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B. A. D. R. Act made no provision corresponding to s. 97 of the Code of Civil Procedure.

Held, also that the failure of a party to appeal against an order passed under s. 24 of the B. A. D. R. Act like his failure to appeal against an order passed under s. 17 did not preclude him from challenging the correctness of such finding in an appeal against the award.

Held, however, that the appeal was incompetent inasmuch as the final order, dated April 8, 1952, being an order passed under s. 47 (2) was not appealable in view of the provisions of s. 51 of the B. A. D. R. Act.

CIVIL REVISION Application against the decision of B. D. Nadkarni, Esquire, District Judge, West Khandesh at Dhulia in appeal from the order passed by M. K. Chhatre, Esquire, Civil Judge, Junior Division at Shirpur.

The facts are sufficiently stated in the Judgment.

G. R. Madbhavi for the Applicant.

B. K. Kotwal for the Opponent.

Gajendragadkar J.—This revisional application raises a short question as to whether the appeal preferred by the petitioner before the lower appellate Court was competent. The lower appellate Court has held that the appeal was imcompetent and Mr. Madbhavi for the petitioner disputes the correctness of this finding.

The point arises in this way. On February 5, 1939, a sale-deed was executed in favour of the petitioner for Rs. 2,000. The property conveyed was Survey No. 12. In 1944 the vendor brought a suit No. 1 of 1944 under the Dekkhan Act. He claimed a decree for accounts and redemption. This suit was compromised. Under the terms of compromise the vendor was under an obligation to pay specific amounts within the period specified by the compromise decree. On his failure to comply with this order, the vendee was held entitled to obtain possession of the land. The vendor failed to comply with the directions issued by the compromise decree and the vendee filed an execution application and claimed possession of the property conveyed. These proceedings were transferred to the Bombay Agricultural Debtors Relief Act Court because the vendor again raised the question that he was a debtor inasmuch as the transaction in question was not a sale but a mortgage. In these proceedings the learned trial Judge found on February 22, 1952 that the transaction was in reality a mortgage. This finding was preceded by a preliminary finding as to status in favour of the debtor. As a result of this finding, the adjustment Court held an enquiry into the paying capacity of the debtor and on April 8, 1952 the adjustment Court was satisfied that the debtor was an insolvent. Accordingly an order was passed declaring the debtor insolvent. The adjustment Court also held that the properties of which the debtor was possessed were not enough to maintain him and so it was not possible to direct the sale of any portion of his properties under s. 47 (2). In the result, it

was declared that the properties were free from all encumbrances. It was against this last order that the creditor preferred an appeal and he was met by the plea that the appeal was incompetent. On the merits the learned appellate Judge has found that, if he had to deal with the evidence, he would have come to the conclusion that the transaction was a sale and not a mortgage.

Mr. Madbhavi contends that the view taken by the lower appellate Court on the question of the competence of the appeal is not justified by the provisions of s. 43 of the Bombay Agricultural Debtors Relief Act. The lower appellate Court has based its conclusion on the ground that the creditor did not make an appeal against the finding that the transaction was a mortgage which had been recorded on April 8, 1952. There is no doubt that against the order passed by the learned trial Judge determining the nature of the transaction under s. 24 an appeal was competent. But the lower appellate Court was in error in assuming that the failure to make an appeal against the said order created a bar against the petitioner in disputing the correctness of the said finding in his final appeal against the award. I may point out that the lower appellate Court has dealt with this question on the assumption that the final order passed by the learned trial Judge was an award. He, however, held that an appeal against the award was incompetent because the award was preceded by an order which was appealable and no appeal had been preferred against that order. In substance, the view taken by the lower appellate Court proceeds on considerations which flow from the provisions of s. 97 of the Code of Civil Procedure. Section 97 of the Code provides that, if an appeal has not been preferred against a preliminary decree, the party aggrieved by the preliminary decree shall be precluded from disputing the correctness of the preliminary decree in any appeal that he may make against the final decree. The learned District Judge thought that, since the petitioner had not challenged the correctness of the finding that the transaction was a mortgage by preferring an appeal against the said order, as he should have done under s. 43 of the Bombay Agricultural Debtors Relief Act, he was precluded from agitating that matter in his present appeal against the award. This view overlooks the fact that the Bombay Agricultural Debtors Relief Act makes no provision corresponding to the provisions contained in s. 97 of the Code, and so far as this Court is concerned, it may be taken to be fairly well settled that the failure of a party to make an appeal against an order passed under s. 24 of the Bombay Agricultural Debtors Relief Act, like his failure to appeal against an order passed under s. 17, does not preclude him from challenging the correctness of such finding in an appeal against the award. I

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must, therefore, hold that the only reason given by the learned District Judge in coming to the conclusion that the appeal preferred before him was incompetent is unsound.

That, however, is not an end of the matter. Mr. Kotwal contends that the appeal preferred by the petitioner in the District Court was incompetent for the simple reason that the final order against which the appeal has been preferred is not an award within the meaning of s. 43 of the Bombay Agricultural Debtors Relief Act. Section 43 provides for appeals. Section 43 (*1*) (*vi*) deals with appeals against awards. The effect of s. 43 (*1*) (*vi*) is that an appeal lies against every award except in the cases of awards which are specifically mentioned in the said sub-clause. It is common ground that the present order does not fall under any one of the exceptional cases. But before s. 43 (*1*) (*vi*) can be invoked by the petitioner, he must first satisfy the Court that the order under appeal is an award, and for determining the character of the order under appeal it is essential to consider the definition of the word "award" given by the Act. Section 2 (*1*) defines an "award" as meaning an award made under sub-s. (*4*) of s. 8 or ss. 9, 32 or 33 or as confirmed or modified by the Court in appeal. It is common ground that the order which was under appeal before the learned District Judge does not satisfy the definition given in s. 2 (*1*) and so the appeal preferred against the said order cannot be entertained as an appeal against an award. An examination of the provisions contained in Chapter III of the Bombay Agricultural Debtors Relief Act read with s. 43 (*1*) (*vii*) of the Act fortifies this conclusion. Chapter III deals with insolvency proceedings. Section 47 under this Chapter enables the Court to declare a debtor an insolvent in certain circumstances. Sub-s. (*2*) of s. 47 provides that, after the debtor has been adjudicated an insolvent the Court shall direct that such portion of the property of the debtor, liable to attachment and sale under s. 60 of the Code of Civil Procedure, excluding such portion thereof as the State Government shall from time to time notify in the *Official Gazette* as the minimum necessary for the maintenance of the debtor and his dependents, as may be required to liquidate all the debts of the debtor, shall immediately be sold free of all incumbrances in liquidation of all debts outstanding against such debtor. After a debtor is declared insolvent, it is open to the adjustment Court to come to the conclusion on facts that the debtor is unable to meet any of his liabilities and that on examining his assets and the income receivable by the debtor from those assets it is impossible to set apart any portion of his property for sale as contemplated by s. 47 (*2*). That is what has happened in this case. The Court found that the resources of the

debtor were so meagre that it was impossible to direct that any portion of the said resources could be sold for the satisfaction of the debts due from him. In some cases it may be possible for the Court to come to the conclusion that a part of the resources of the debtor can be sold free of incumbrances in liquidation of all debts outstanding against such debtor. But even where an order of this kind is passed under s. 47 (*2*), s. 48 has provided that the order passed shall have the force of an order made by a competent Court in the exercise of its powers under s. 27 of the Provincial Insolvency Act, and that it shall be executed as such. This position can be contrasted with the provisions contained in s. 38 which deal with the execution of awards. That incidentally shows that between the orders passed under s. 47 (*2*) and awards properly so-called a distinction has been made by Legislature. Then we have s. 51 which provides that save as provided by sub-cl. (*vii*) of cl. (*1*) of s. 43, no appeal shall lie from any order passed under Chapter III. In other words, the right to make an appeal against orders passed under Chapter III is a very limited right and the limitations are imposed by s. 43 (*1*) (*vii*) which provides for an appeal against an order made under s. (*1*) or (*1-A*) of s. 47, provided that no appeal shall lie from such order except on the ground that the insolvent has failed to disclose all the material facts relating to his assets and liabilities. This would show that proceedings taken under Chapter III are treated as falling under a different category altogether. The right of appeal is given only against specified orders and that too subject to the limitations which I have just indicated. These proceedings do not terminate with the making of an award and this is clear from the definition of the word "award" itself. Therefore, in my opinion, the view taken by the learned District Judge must be confirmed, not on the ground set out by him in his judgment, but on the ground that the appeal preferred by the petitioner before him had not been preferred against an award: it had been preferred against an order which was not an award and no appeal would lie against that order.

In the result, the order passed by the learned District Judge must be confirmed and the rule in the revisional application discharged. There will be no order as to costs.

Rule discharged.

G. N. V.