LETTERS PATENT APPEAL

Before A. N. Grover and H. R. Khanna, JJ.

AMAR KAUR,—*Appellant*

versus

SHIV KARAN AND OTHERS,—*Respondents*

Letters Patent Appeal No. 2 of 1961

1964

September, 2nd.

Code of Civil Procedure (Act V of 1908)—Order 21 Rules 58 and 63—Order on objections under Rule 58—When conclusive—Objections filed in execution of a decree of one decree-holder—Order dismissing the objections—Whether can be taken advantage of by other decree-holders—Application for rateable distribution by other decree-holders—Whether entitles them to take advantage of that order—Suit under Order 21, Rule 63, by objector dismissed—Effect of—S.11—Suit dismissed because plaintiff failed to pay adjournment costs and produce evidence—Whether operates as resjudicate—*Evidence Act (I of 1872)—S. 41—Order adjudicating a person insolvent set aside in appeal—Appellate order—Whether judgment in rem—Debtor making a gift of his property—Intention of the donor—At what time to be seen.*

Held, that Order 21, Rule 58, of the Code of Civil Procedure provides a summary remedy to third parties, i. e., persons other than judgment-debtors or their legal representatives for raising objections to the attachment of the property. Where a third party has a claim or an objection to the attachment of property attached in execution

(5) A.I.R. 1928 Cal. 410

of a decree, there are two courses open to him. He may straight-away file a suit claiming the appropriate relief, or he may file an objection-petition under Order 21, Rule 58 of the Code of Civil Procedure to the Court executing the decree. The remedy provided thus is not only summary but is also concurrent and results only in a summary investigation and not a full trial of the issues between the parties. The party aggrieved by an order passed after such investigation has to file a suit under Rule 63 within one year to establish the rights which he claims to the property in dispute. If the suit is instituted by the decree-holder, against whom an order has been passed on objections filed under Order 21, Rule 58 releasing the property from attachment, the right which he claims in the suit is the right to have the property attached in execution of the decree against the judgment-debtor. If, on the contrary, the plaintiff is the objector, who has been unsuccessful in the objection proceedings before the excuting Court, the right which he claims in the suit under Order 21, Rule 63 is the right to have the property in dispute released from attachment on the ground that it belongs to him and not to the judgment-debtor. Subject to the decision in that suit, the order passed by the executing Court is conclusive. It is, however, essential that the order on the application under Order 21, Rule 58 must be subsisting when the suit is filed. If the objections under Order 21, Rule 58 are dismissed and attachment is upheld and for some reason or the other the attachment subsequently comes to an end, the order upholding the attachment would, in the circumstances, becomes defunct and in such an event there is no purpose in filing a suit to have the attachment set aside.

Held, that the language of Rule 58 of Order 21 of the Code of Civil Procedure, goes to show that the basis of the objections under that Rule is "that such property is not liable to such attachment." The words "such attachment" in Rule 58 point to the conclusion that the order passed on the objections is operative only in respect of the particular attachment against which objections are filed and not with regard to the attachment which may be made in execution of some other decree against that judgment-debtor. Any other decree-holder, in whose decree the property was not attached, cannot take advantage of the order dismissing the objections to attachment made in the execution of the decree in which the property was attached, even if the suit under Order 21, Rule 63 has not been filed and the other decree-holders had applied for rateable distribution.

Held, that the dismissal of the suit filed by the objector under Order 21, Rule 63 C.P.C. enures only for the benefit of the decree-holder in the execution of whose decree the property was attached and cannot be taken advantage of by the other decree-holders of judgment-debtor even if they were impleaded as defendants in that suit because the relief sought was only about the non-liability of the property for

attachment and sale in execution of the attaching decree-holder's decree. Further, the aforesaid suit was dismissed because the plaintiff failed to pay costs of adjournment and produce evidence and as such the decision cannot be taken to be on merits.

Held, that the decision in the previous suit, which was dismissed, does not operate as *res judicata* in the subsequent suit.

Held, that there can be no manner of doubt that the adjudication of a person as an insolvent has the effect of taking away from that person his legal character of being not insolvent. An order by which such adjudication is made would thus be clearly covered by section 41 of the Indian Evidence Act. When on appeal the order adjudicating a person insolvent is set aside, the effect of the judgment of the appellate Court is to declare that person to be entitled to the legal character of being not insolvent. Such a judgment falls within the ambit of section 41 and is conclusive on the point that at the time of the taking of insolvency proceedings he was not insolvent.

Held, that the question, as to whether the gift was made with a view to defraud and delay the creditors, would have to be determined by the intention of the debtor at the time of making the gift and in the light of facts then existing and not in the context of subsequent period.

Appeal under clause 10 of the Letters Patent from the decree of the Hon'ble Mr. Justice D.K.Mahajan, dated the 19th October, 1960, passed in R. S. A. No. 176 of 1954, affirming that of Shri Gobind Ram Budhiraja, Additional District Judge, Ferozepur, dated the 28th October, 1953, who affirmed with costs the decree of Shri E. F. Barlow, Subordinate Judeg, 1st Class, Ferozepur, dated the 16th June, 1953, dismissing the plaintiff's suit with costs.

C. L. AGGARWAL, H. L. SARIN AND J. K. KHOSLA, ADVOCATES, for the Appellant.

J. N. SETH, AND MR. C. M. NAYAR, ADVOCATES, for the Respondents.

JUDGMENT

The judgment of the Court was delivered by:—

Khanna, J.

KHANNA, J.—This Letters Patent Appeal filed by Bibi Amar Kaur is directed against the judgment and decree of learned Single Judge, whereby he dismissed Regular Second Appeal filed by the appellant against the judgment

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and decree of Additional District Judge, Ferozepore, affirming on appeal the decision of the trial Court by which the suit of the appellant against Shiv Karan and other defendants-respondents was dismissed.

The present appeal is a sequel to a long-drawn litigation, the brief history of which is as under:—

In August, 1932, Lal Singh, defendant, who is husband of the plaintiff-appellant, made a gift of land measuring 1,238 Bighas and 7 Biswas, situated in village Sukhchain, district Ferozepore, in favour of the appellant. The gift was subject to a charge for, payment of maintenance amount which had been decreed in favour of Shrimati Pritam Kaur, who was the wife of the brother of Lal Singh. Mutation on the basis of the gift was sanctioned in favour of the appellant on 13th of May, 1934. Firm Behari Lal-Lashkari Mal obtained a decree for the recovery of Rs. 14,000 with future interest and costs against Lal Singh, defendant, on 27th of February, 1935. One Bhana Ram also obtained a decree for recovery of Rs. 20,000 and Rs. 1,164 as costs against Lal Singh on 17th of March, 1936. Bhana Ram filed an application for execution of his decree on 4th of July, 1936, and got the land situated in village Sukhchain, which had been gifted by Lal Singh in favour of the appellant, attached on 30th of October, 1936. The papers were then forwarded to the Collector for auction of the attached property in accordance with the notification issued under section 68 of the Code of Civil Procedure. Firm Behari Lal-Lashkari Mal applied for execution of its decree against Lal Singh on 18th of July, 1936, and made a prayer in that application for rateable distribution of the amount realized in Bhana Ram's execution application. The appellant filed objections on 23rd of February, 1937, under Order 21, Rule 58, of the Code of Civil Procedure in Bhana Ram's execution application claiming that the land attached belonged to her and as such was not liable to attachment and sale in execution of the decree against Lal Singh. The above objections were, however, dismissed the same day on the ground of being belated. The appellant thereupon filed suit on 10th of November, 1937, under Order 21, Rule 63, of the Code of Civil Procedure for a declaration that she was the owner of land measuring 1,237 Kanals and 7

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Marlas, situated in village Sukhchain, because of the gift made in her favour and as such the aforesaid land was not liable to attachment and sale in execution of the decree against Lal Singh. In the alternative it was prayed that she had a charge over the land to the extent of Rs. 4,410 which amount she had deposited in the Court of the Senior Subordinate Judge, Ferozepore, towards payment of the charge of Shrimati Pritam Kaur. Bhana Ram and other creditors of Lal Singh including Firm Behari Lal-Lashkari Mal were impleaded as defendants in the above suit. The suit was resisted by those creditors and was dismissed by Shri Mani Ram Khanna, Subordinate Judge, Ferozepore, on 15th of November, 1938, because the plaintiff failed to pay the costs of adjournment and produce any evidence. Lal Singh, defendant, was declared insolvent on an application filed by Firm Behari Lal-Lashkari Mal by Insolvency Judge, Ferozepore, as per order, dated 15th of July, 1938. Lal Singh filed an appeal against that order and the same was accepted by Mr. S.A. Rehman, District Judge, Ferozepore, on 22nd of November, 1938, on the ground that Lal Singh could not be held to be unable to meet his liabilities on the strength of his property. The adjudication of Lal Singh as insolvent was, accordingly, annulled.

It would appear that Bhana Ram's execution application, in the course of which the land in village Sukhchain had been attached, was consigned to the record room. Accordingly, on 16th of May, 1944, Firm Behari Lal-Lashkari Mal, applied for execution of its decree and got attached land measuring 54 Bighas and 18 Biswas situated in village Sukhchain, which is now in dispute and is a part of the land that had been gifted in favour of the appellant. After attachment of the land and after notice under Order 21, Rule 66 of the Code of Civil Procedure had been served on Lal Singh, the papers were forwarded to the Collector for sale of the land. The Collector sold the land in dispute by auction and the same was purchased by Pohlu Ram predecessor of Shiv Karan and Surja Mal, respondents for Rs. 20,300. Lal Singh filed objections to the sale under Order 21, Rule 90 of the Code of Civil Procedure on the ground that the auction sale was liable to be set aside because of irregularities. The appellant also filed objections on the basis that the land sold belonged to her. The Collector confirmed the sale, but on appeal

by Lal Singh, the Commissioner of Jullundur set aside the sale and remanded the case to the Collector for proceeding *de novo*. In proceedings by the auction purchaser for refund of the sale price an order was ultimately made in appeal by Harnam Singh, J. with the consent of the auction purchaser and Firm Behari Lal-Lashkari Mal, that the auction purchaser would continue to be in possession of the land sold till the amount paid by him was refunded. The appellant also filed an application for restoration of her possession, but she was told that, if affected, she should take steps in Execution Court. The appellant thereupon filed the present suit for possession of the land in dispute measuring 54 Bighas and 18 Biswas, situated in village Sukhchain, on the allegation that she was the owner of the land in dispute because of the gift made in her favour and that the same was not liable to attachment and sale in execution of the decree against Lal Singh. Injunction was also sought restraining Firm Behari Lal-Lashkari Mal, as well as Shrimati Attar Kaur, defendant No. 4, to whom Firm Behari Lal-Lashkari Mal was alleged to have sold the rights under the decree, from executing the aforesaid decree by attachment and sale of tha aforesaid land.

The suit was resisted by the defendants other than Lal Singh. They denied the validity of the gift in favour of the appellant and averred that the same had been made with a view to defeat and delay the creditors of Lal Singh. The present suit was stated to be barred by the rule of *res judicata* because of the dismissal of the appellant's earlier suit by Shri Mani Ram Khanna on 15th of November, 1938. There were some other pleas also, but we are not now concerned with them. As many as 12 issues were framed but for the purpose of the present appeal the material issues are 1, 2, 3 and 11 and are to the following effect:—

(1) Whether there is a valid gift by defendant No. 5 in favour of the plaintiff as alleged in the plaint?

(2) If issue No. 1 is proved in favour of the plaintiff, what is its effect on the rights of the decree-holder defendant No. 3 ?

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(3) Is the judgment dated 15th of November, 1938, of the Court of Shri Mani Ram, Sub-Judge, between the parties not *res judicata* ?

(11) If issues Nos. 1, 2 and 3 are decided in favour of the plaintiff, whether the gift was intended to delay and defeat the creditors and as such not binding on the creditors ?

The trial Court held on issues Nos. 1 and 2 that gift in favour of the appellant had been proved and was valid subject to finding on issue No. 11. On issue No. 3 it was held that the judgment of Shri Mani Ram Khanna, dated 15th of November, 1938, operated as *res judicata* against the plaintiff and her suit could not be decreed, but the question of possession between the parties was not barred by *res judicata*. On issue No. 11 it was held that the gift made in favour of the appellant was made by Lal Singh with a view to delay and defraud his creditors. On appeal learned Additional District Judge, Ferozepore, affirmed the findings of the trial Court on the above issues. When the appellant came up in second appeal the learned Single Judge referred to the judgment of Mr. S. A. Rehman, dated 22nd of November, 1938, wherein it had been found that Lal Singh was able to pay his debts on the basis of the property. It was held that in view of the aforesaid decision coupled with the fact that Firm Behari Lal-Lashkari Mal had failed to mention the property in dispute in the list of the properties of Lal Singh in the insolvency proceedings, the gift by Lal Singh in favour of the appellant could not be deemed to be void on the ground that it was made to defeat and delay the creditors. The decision of the Courts below that the gift in question was made to defeat and delay the creditors was, accordingly, not sustained. So far as the findings of the Courts below on issue No. 3 that the decision of Shri Mani Ram Khanna operated as *res judicata* are concerned, the learned Single Judge referred to various authorities in which it has been held that if a suit was dismissed in substance under Order 17, Rule 3, of the Code of Civil Procedure, it would not operate as *res judicata*, because there was no decision on the merits. It was further observed that the order of the Court dismissing the objections of the appellant under Order 21, Rule 58, of the Code of Civil Procedure would hold the field. The present suit was

held to be barred by *res judicata* because of the decision on the objections under Order 21, Rule 58 read with Rule 63 of the Code of Civil Procedure. The second appeal, in the circumstances, was dismissed.

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I may state that when this Letters Patent appeal first came up for hearing before Mehar Singh and Grover, JJ., they found that certain facts were not clear and that it was necessary to have complete history of the execution proceedings. As per order, dated 13th December, 1962, they accordingly directed the Senior Subordinate Judge, Ferozepore, to make a detailed report in the matter. Report, dated 30th of December, 1963, was thereafter submitted by the learned Senior Subordinate Judge.

Mr. Aggarwal, on behalf of the appellant has argued that the learned Single Judge was in error in holding that the present suit was barred because of the order of the Executing Court dismissing the objections of the appellant under Order 21, Rule 58 of the Code of Civil Procedure on 23rd of February, 1937. The learned Single Judge in holding that the order of the Executing Court on those objections had become conclusive, relied upon the provisions of Order 21, Rule 63 of the Code, which read as under:—

> "Order 21.
>
> Rule 63: Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

It is urged on behalf of the appellant that as she filed the objection-petition under Order 21, Rule 58 in the execution taken out by Bhana Ram, it is only Bhanna Ram, who can take advantage of the order dismissing the objections of the appellant for the execution of his decree in the course of which those objections were dismissed. Firm Behari Lal-Lashkari Mal, according to the learned counsel, cannot claim the aforesaid order to be conclusive for the execution of its own decree. After giving the matter my earnest consideration, I am of the view that there is

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considerable force in the above contention. Order 21, Rule 21 Rule 58 of the Code provides a summary remedy to third parties, i.e., persons other than judgment-debtors or their legal representatives for raising objections to the attachment of the property. Where a third party has a claim or an objection to the attachment of property attached in execution of a decree, there are two courses open to him. He may straightaway file a suit claiming the appropriate relief, or he may file an objection-petition under Order 21, Rule 58 of the Code of Civil Procedure to the Court executing the decree. The remedy provided thus is not only summary but is also concurrent and results only in a summary investigation and not a full trial of the issues between the parties. The party aggrieved by an order passed after such investigation has to file a suit under Rule 63 within one year to establish the rights which he claims to the property in dispute. If the suit is instituted by the decree-holder, against whom an order has been passed on objections filed under Order 21, Rule 58 releasing the property from attachment, the right which he claims in the suit is the right to have the property attached in execution of the decree against the judgment-debtor. If, on the contrary, the plaintiff is the objector, who has been unsuccessful in the objection proceedings before the executing Court, the right which he claims in the suit under Order 21, Rule 63 is the right to have the property in dispute released from attachment on the ground that it belongs to him and not to the judgment-debtor. Subject to the decision in that suit, the order passed by the executing Court is conclusive. It is, however, essential that the order on the application under Order 21, Rule 58 must be subsisting when the suit is filed. If the objections under Order 21, Rule 58 are dismissed and the attachment is upheld and for some reason or the other the attachment subsequently comes to an end, the order upholding the attachment would, in the circumstances, become defunct and in such an event there is no purpose in filing a suit to have the attachment set aside. As observed by Rankin, J. in *Najimunnessa Bibi v. Nacharaddin Sardar* (1)—

> "The meaning of the words 'shall be conclusive' is that the act of the Court is to be valid unless

(1) A.I.R. 1924 Cal. 744.

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> there is a suit. It means that the attachment held valid in the claim case shall be valid and the attachment removed shall be as though it never was, so far as the parties are concerned. The rule seems to mean that subject to a suit *factum valet* the act of the Court shall not be questioned save in that way. The effect of the decision as to possession in other proceedings in which that question may again arise is not the matter to which "shall be conclusive" are directly addressed. The principle is that the object of making a claim in execution is to remove the attachment, that when the attachment is withdrawn that object is gained and that if there exists no attachment, or proceeding in execution on which the order in the claim case can take effect, one is not bound to bring a suit complaining of such order."

The above observations were followed by a Division Bench of Bombay High Court in *Radha bai Gopal Joshi v. Gopal Dhondo Joshi and another* (2).

Apart from the proposition enunciated above about the order on objection under Order 21, Rule 58 ceasing to be conclusive because of the attachment coming to an end, there is another aspect of the matter about the extent of the conclusive nature of the order and it is this aspect which is of importance in the present case. Before dealing with this aspect it may be observed that the objections, which were filed by the appellant under Order 21, Rule 58, were to the attachment of the property in dispute in execution of the decree obtained by Bhana Ram, against Lal Singh. No attachment was effected in the execution of the decree obtained by firm Behari Lal-Lashkari Mal, and no objections under Order 21, Rule 58 were consequently filed in the proceedings relating to the execution of the decree of firm Behari Lal-Lashkari Mal. In the circumstances, the order made on the objection-petition would enure only for the benefit of Bhana Ram, and cannot be taken advantage of by firm Behari

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(2) A.I.R. 1944 Bom. 50.

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Lal-Lashkari Mal. The effect of the dismissal of the objection-petition of the appellant was to uphold the attachment only in the decree of Bhana Ram, and the order could operate as conclusive subject to the suit under Order 21, Rule 63 only *qua* that decree and not in respect of the decrees obtained by the other decree-holders. The language of Rule. 58 goes to show that the basis of the objections under that Rule is "that such property is not liable to such attachment." The words "such attachment" in Rule. 58 point to the conclusion that the order passed on the objections is operative only in respect of the particular attachment against which objections are filed and not with regard to the attachment which may be made in execution of some other decree against that judgment-debtor. In *Kanadai Narasimhachariar* v. *Raghava Padayachi and others* (3), a Full Bench of Madras High Court had occasion to deal with the question as to whether an order passed dismissing an objection preferred to an attachment under Order 21, Rule 58, no suit having been filed under Rule 63, operates beyond proceedings in execution of the particular decree. It was observed—

> "As we have pointed out, Rule 58 of Order 21, only applies to a claim preferred or an objection made to the order of attachment in the particular execution proceedings. The statement in Rule 63, that an order passed ~~on the claim~~ on the claim or objection shall, subject to a suit, be conclusive must be read in conjunction with 58, which speaks of "such attachment". We think that it would be unreasonable to hold that the intention of the Legislature was to make the order conclusive for all purposes inside and outside the particular execution proceedings."

The Court, accordingly, held—

> "Subject to the operation of the doctrine of *res judicata* in any particular case, we hold that an order on a claim petition filed under Order 21, Rule 58 or a decree in a suit filed under Rule 63, does not extend beyond the execution of the decree which has given rise to those proceedings."

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(3) A.I.R. 1945 Mad. 333.

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Reference in this connection may also be made to *Radhabai Gopal Joshi's case* (supra) (2), wherein it was held that under Order 21, Rule 63, what is conclusive is the order passed under Rule 60 or Rule 61 which only decides the liability or non-liability of the particular property to the attachment already effected. I would, accordingly, hold that the order dated 23rd of February, 1937, made on the objections under Order 21, Rule 58 filed by the appellant would enure only for the benefit of the decree of Bhana Ram, and not for that of firm Behari Lal-Lashkari Mal.

Mr. Seth, on behalf of the contesting respondents, has argued that even if the attachment of the property in dispute had been effected only in execution of the decree of Bhana Ram, when the above objections under Rule 58, were dismissed, firm Behari Lal-Lashkari Mal, can take advantage of the dismissal of those objections because the firm had applied for rateable distribution of the amount realised in execution of Bhana Ram's decree. Our attention in this connection has been invited to Section 64 of the Code of Civil Procedure which reads as under:—

> "Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.
>
> *Explanation.*—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

Particular stress has been laid by Mr. Seth, on the Explanation to the Section. The effect of the above provision is to render void private transfers of property after attachment as against all claims enforceable under the attachment including those for the rateable distribution of assets. It would not, however, in my opinion, follow from the above that the order made on objections under Order 21, Rule 58 is to have a wider scope so as to cover not only the decree in execution of which it is made, but also other decrees. The Explanation makes it clear that

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the wider meaning given to the words "claims enforceable under the attachment" by that Explanation is for the purpose of Section 64, only. There is no provision in Rules 58, and 60 of Order 21 corresponding to the Explanation to Section 64 of the Code. In the circumstances, I am of the view that the respondents can derive no benefit from the provisions of Section 64 in this case.

Mr. Seth, has also referred to Rule, 11 of the Rules issued by the Punjab Government as per notification No. 2420-R, dated the 26th July, 1940, in exercise of the powers conferred by Section 70 of the Code of Civil Procedure. Those Rules provide for the procedure to be adopted by the revenue authorities where the same land is ordered to be sold in execution of two or more decrees and, in my opinion, have no bearing so far as the present case is concerned.

Argument has then been advanced by Mr. Seth, that as the suit brought by the appellant under Order 21, Rule 63, of the Code of Civil Procedure was dismissed by Shri Mani Ram Khanna, and as firm Behari Lal-Lashkari Mal, was a party to that suit the decision in that suit would operate as *res judicata.* The short answer to this argument is that this was a suit under Order 21, Rule 63 arising out of the order made against the appellant on her objections under Order 21, Rule 58 in the execution proceedings of the decree obtained by Bhana Ram, against Lal Singh. The prayer made in the suit was that the land gifted in favour of the appellant was not liable to attachment and sale in execution of decree of Bhana Ram, against Lal Singh. The dismissal of that suit as of the objections under Order 21, Rule 58 would enure only for the benefit of Bhana Ram, and cannot be taken advantage of by the other decree-holders of Lal Singh, for the execution of their decrees. The fact that other decree-holders were also impleaded as defendants in that suit would not make any material difference because the relief sought was only about the non-liability of the property for attachment and sale in execution of the decree of Bhana Ram. As observed by the Full Bench of the Madras High Court in *Kandadai Narasimhachariar's* case (supra) (3), the decree in a suit filed under Order 21, Rule 63 does not extend beyond the execution of the decree which has given ~~rights~~ rise to those proceedings.

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Apart from the above I find that the suit brought by the appellant was dismissed because she failed to pay costs of adjournment and produce evidence. In the circumstances I am inclined to agree with the learned Single Judge that the previous decision should not be taken to be a decision on merits. Looking to all the facts I would, accordingly, hold that the judgment of Shri Mani Ram Khanna, dated 15th of November, 1938, does not operate as *res judicata*.

Mr. Seth, has next argued that both the trial and the first appellate Courts had found that the gift of the land in dispute by Lal Singh, in favour of the appellant had been made with a view to defraud and delay the creditors of Lal Singh, and that the learned Single Judge was in error in setting aside those concurrent findings of fact of the Courts below in second appeal. The learned Single Judge in setting aside the aforesaid finding based his decision on the judgment dated 22nd November, 1938, of Mr. S. A. Rahman, District Judge, whereby he accepted the appeal of Lal Singh, against the order of the Insolvency Judge adjudicating Lal Singh, as insolvent. It was held that the total assets of Lal Singh, were Rs. 2,04,040 odd and his total liabilities were to the tune of Rs. 1,94,664 or at the most Rs. 2,02,664. The finding given by Mr. Rahman was that it could not be contended that Lal Singh, was unable to meet his liabilities on the strength of his property. Relying upon the above finding as well as the fact that the suit property was not included by firm Behari Lal-Lashkari Mal, in lists of assets of Lal Singh, in insolvency proceedings the learned Single Judge held that the gift in question could not be deemed to have been made to defeat and delay the creditors. The trial Court had also referred to the judgment of Mr. Rahman and had held that the aforesaid judgment could not be regarded as a judgment *in rem* with respect to the question of gifted land and its ownership. It was further observed that the finding arrived at in that judgment could not be borrowed and allow to take the place of positive proof so far as the capacity of Lal Singh, to pay his debts was concerned. The trial Court, accordingly, remarked that the plaintiff in the present case could not be allowed to utilize the findings in insolvency proceedings to take the place of positive evidence and thereby indirectly defeat the presumption raised under the circumstances that the gift in

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favour of the plaintiff had been made to defeat and delay the creditors. No reference appears to have been made by the learned Additional District Judge when deciding the appeal, to the judgment of Mr. Rahman. The first question which arises for consideration in this context is whether the judgment of Mr. Rahman is a judgment *in rem*, and if so in respect of what matter. Section 41 of the Evidence Act reads as under:—

> "41. A final judgment, order or decree of competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person, but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.
>
> Such judgment, order or decree is conclusive proof—
>
> that any legal character which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person ;
>
> that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."

The judgment of Mr. Rahman was given in proceedings in which the adjudication of Lal Singh, as insolvent was

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sought and the finding given was that Lal Singh's assets exceeded his liabilities and as such he was not insolvent. There can be no manner of doubt that the adjudication of a person as an insolvent has the effect of taking away from that person his legal character of being not insolvent. An order by which such adjudication is made would thus be clearly covered by Section 41 reproduced above. When on appeal the order adjudicating a person insolvent is set aside, the effect of the judgment of the appellate Court is to declare that person to be entitled to the legal character of being not insolvent. In this view of the matter the judgment of Mr. S. A. Rahman should be deemed to fall within the ambit of Section 41 of the Indian Evidence Act.

Mr. Seth, has referred to a Single Bench case of Calcutta High Court, *Punjab National Bank* v. *Balikram Kissenchand and others* (4) wherein it was held the order of an insolvency Court refusing to adjudicate certain person insolvent, on the ground that he was not a partner of an insolvent firm, was not a judgment *in rem*. Perusal of that judgment goes to show that the basis of that decision was that an order holding a person as not a partner of a firm has not the effect of declaring his status or legal character; and that its effect is merely to declare his position with respect to the particular firm. It would thus appear that the point arising for determination in that case was quite different and in my opinion the respondents can derive no benefit from that case.

Qestion then arises as to how far is the judgment of Mr. Rahman conclusive. The latter part of Section 41 declares that the judgment is conclusive for conferring and taking away the legal character. It would follow from the above that the judgment of Mr. Rahman was conclusive on the point that at the time of the taking of insolvency proceedings Lal Singh, was not insolvent. The question, however, as to whether the gift by Lal Singh, in favour of the appellant was made with a view to defraud and delay the creditors did not arise for adjudication before Mr. Rahman, and so far as this matter is concerned the judgment of Mr. Rahman cannot operate as a judgment *in rem*. The judgment is no doubt relevant to show that

(4) A.I.R. 1940 Cal. 225.

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Lal Singh, was not insolvent at the time proceedings to adjudicate him insolvent took place and would have to be given its due weight, but it cannot, in my opinion, form the sole basis or outweigh all other considerations for determining whether the gift in favour of the appellant was made with a view to defraud and delay the creditors. Both the trial Court and the first appellate Court found that Lal Singh, owed considerable amounts of debts from 1925 onwards. It was, accordingly, held that Lal Singh, was in financial embarrassed circumstances when he made the gift in favour of the appellant, who was the wife of Lal Singh. The appellant was further found not to have come into the witness box to rebut the evidence of the creditors and to show the circumstances under which the gift was made in her favour. In my opinion the concurrent findings of the Courts below on the question as to whether the gift in favour of the appellant had been made with a view to defraud and delay the creditors could not be reversed on the sole basis of the judgment of Mr. Rahman, and the omission of firm Behari Lal-Lashkari Mal, to mention the property in dispute in the list of assets of Lal Singh, in the insolvency proceedings. The above two factors could no doubt be taken into consideration, but at the same time the other factors, which had been referred to by the Courts below, could not be altogether ignored. It may also be mentioned that the gift in favour of the appellant was made on 5th of March 1932, while the order adjudicating him insolvent was made on 15th of July, 1938 and the appeal against that order was accepted on 22nd of November, 1938. The question as to whether the gift was made with a view to defraud and delay the creditors, would have to be determined by the intention of Lal Singh, at the time of making the gift and in the light of facts then existing and not in the context of subsequent period. The finding of Mr. Rahman must be held to relate to the time when the proceedings to adjudicate Lal Singh, as insolvent took place and not to the state of affairs as they existed six years before that finding was given, and as such cannot form a good basis for upsetting the finding of facts of the Courts below. No case was set up in the plaint by the appellant that the gift should be held to have been made not with a view to defeat and delay the creditors because of the judgment of Mr. Rahman. Indeed, there was no reference to that

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judgment in the plaint. Consequently, no evidence appears to have been led one way or the other on the point that the financial status and assets of Lal Singh, were the same at the time of the insolvency proceedings as they were at the time of the making of the gift. So far as the omission of the creditor-firm to include the property in the list of the assets of Lal Singh, in insolvency proceedings is concerned, it would create some estoppel against the firm only if it is shown that such a representation was acted upon, and of that there appears to be no proof on the record.

After giving the matter my earnest consideration I am of the view that the material on record does not justify interference in second appeal with the concurrent finding of fact of the Courts below that the gift in question had been made with a view to defeat and delay the creditors.

The appeal, consequently, fails and is dismissed, but, in the circumstances of the case, I would leave the parties to bear their own costs.

B.R.T.