contrary to what has been expressed above on the rule of interpretation that a specific provision prevails over a general provision in a statute, but ignore section 17-B, for, while there is reference to that section in paragraph 2 of the judgment, there is no discussion, with regard to it, in paragraph 3 where the learned Judges come to the conclusion that Executive Magistrates are not criminal Courts inferior to the Court of Session. So that this case is not helpful either.

When the provisions of section 6 and 6-A are considered with section 17-B, along with the 'Explanation' to sub-section (1) of section 435, no other conclusion is possible but that all Magistrates, whether Judicial or Executive are inferior criminal Courts *qua* the Court of Session, and that this conclusion is not a whit weakened by the omission in section 435 to say that where a revision application is entertained by a Sessions Judge or a District Magistrate, the other shall not entertain a similar further application. In this approach, the learned Second Additional Sessions Judge of Ferozepur has made reference in this case to this Court within jurisdiction.

The learned counsel for the respondents then says that this Bench should hear the reference on merits, but, the question of law having been answered, it is for the learned Single Judge to hear the reference as made by the learned Second Additional Sessions Judge of Ferozepur and to dispose of it on merits. The case will now go back for disposal of the revision application by the learned Judge.

K.S.K.

LETTERS PATENT APPEAL

Before Mehar Singh C.J., and Daya Krishan Mahajan, J.

PT. VISHNU DATT,—*Appellant*

versus

JAI NARAIN AND ANOTHER,—*Respondents*

Letters Patent Appeal No. 350 of 1962

August 23, 1966

Code of Civil Procedure (Act V of 1908)—Ss. 11 and 60(1)(ccc), (3) and (6)—Executing Court ordering attachment of property without satisfying itself

that the property was not exempt from attachment and sale—Objections to attachment by judgment-debtor dismissed for default—Objections by the judgment-debtor after sale on the ground that the sold property was his only residential house and therefore exempt from attachment and sale—Whether maintainable.

Held, that the language of clause (6) of section 60 of the Code of Civil Procedure, introduced by the Punjab Debtors Protection Act, XII of 1940, is peremptory and must be given full effect. If there is no compliance with this provision, there will be no valid attachment in the eye of law. If there is no attachment, there can be no question of sale in pursuance of the same. Even for the purposes of the rule of *res judicata* the pre-requisite would be a valid attachment and an absence of objection to that attachment before sale on the basis of section 60(1)(ccc). But if there was no attachment at all in the sense that there was no valid attachment in law by reason of non-compliance of clause (6) of section 60, Civil Procedure Code, the question of the applicability of the rule of *res judicata* will not arise. The first objection petition was dismissed for default and there was no decision on merits of that petition. Moreover, the sale was set aside on 13th August, 1960, in spite of the fact that the objections to attachment by the judgment-debtor had been dismissed for default. Objections were raised by the Judgment-debtor a second time after the re-sale of the property which was made in pursuance of the attachment effected in November, 1959, As the requirements of sub-clause (6) of section 60, Code of Civil Procedure, had not been satisfied, the attachment in November, 1959 would be no attachment in the eyes of law and as such, there could be no valid sale in pursuance of the same. In order that the rule of *res judicata* may apply, there has to be a valid attachment to which objections could be raised. In these circumstances the objection to the sale was competent and could not be dismissed on the ground of *res judicata* because of the dismissal of the earlier objections by the judgment-debtor to the attachment.

Letters Patent Appeal under clause 10 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice H. R. Khanna, dated 20th September, 1962, passed in E.S.A. No. 1688 of 1961.

J. K. Sharma, Advocate, for the Appellant.

R. N. Sanghi and I. S. Karewal, Advocates, for the Respondents.

JUDGMENT

Mahajan, J.—This is an appeal under Clause 10 of the Letters Patent and is directed against the decision of a learned Single Judge of this Court affirming on appeal the decision of the District Judge, Rohtak, which, in its turn, affirmed the decision of the executing Court.

On the facts, there is not much controversy. Jai Narain, respondent, obtained a money decree for Rs. 3,408/50 Paise against Vishnu Dutt, the present appellant, on 26th August, 1958. In execution of that decree, the house in dispute was attached on 13th November, 1959. The judgment-debtor filed objections under section 47 read with section 60 of the Code of Civil Procedure, for the release of the house on the ground that the property was exempt from attachment and sale. It may be mentioned that no specific objection was taken that the house was his only residential house and thus was exempt from attachment and sale in view of the provisions of section 60 of the Code of Civil Procedure. The objections filed by the judgment-debtor were resisted by the decree holder and accordingly the case was fixed for 8th October, 1960. On that date, the judgment-debtor was absent and his objections were rejected. The executing Court proceeded to sell the property. The property was sold by Court auction on 13th November, 1960. About a month thereafter, the judgment-debtor filed another application under section 47 read with section 60 of the Code of Civil Procedure on the allegation that the property in dispute was his sole residential house and as such was exempt from attachment and sale. This application was resisted by the decree-holder. On the pleadings of the parties, the trial Court framed the following issues:—

(1) Whether the property attached is not liable to be sold for reasons of section 60 of the Code of Civil Procedure ?

(2) Whether the objections are within time ?

(3) What is the effect of the earlier dismissal of judgment-debtor's objection petition, dated 30th August, 1960 ?

The executing Court held that the objection application, dated 10th December, 1960, was within time as it was filed within one month of the sale, dated the 13th November, 1960. The plea of the judgment-debtor, that he was an agriculturist, was rejected. But it was found on evidence that the house in dispute was the only residential house belonging to the judgment-debtor and, therefore, it was exempt from attachment under clause (ccc) of section 60(1) of the Code of Civil Procedure. But on the last issue, that is—"effect of the earlier dismissal of the judgment-debtor's objection petition, dated the 30th August, 1960"—it was held that the second objection petition, dated the 10th December, 1960, was not maintainable in view of the earlier dismissal of the objection petition, dated the 30th August, 1960. In other words, the rule of constructive *res judicata* was applied. The judgment-debtor appealed against this decision to the District Judge and the

learned District Judge confined himself only to the question of the maintainability of the second objection petition. No finding was given on the other matters decided by the executing Court. On the question of the maintainability of the second objection petition, the learned District Judge, agreed with the executing Court, with the result that the appeal was dismissed. Against this decision, a second appeal was preferred by the judgment-debtor to this Court. That appeal came up for hearing before a learned Single Judge of this Court and the learned Single Judge has also affirmed the decision of the Courts below holding that the second objection application was not maintainable and would be barred by the rule of constructive *res judicata*. The learned Judge, in support of this conclusion, relied upon the Full Bench decision of the Lahore High Court in *Gauri* v. *Ude and others* (1). It is against this decision of the learned Single Judge, on a certificate granted by him, that the present appeal under Clause 10 of the Letters Patent has been preferred.

The sole contention of the learned counsel for the judgment-debtor is based on section 60, clause (6) of the Code of Civil Procedure. This clause has been inserted in section 60 by Punjab Acts Nos. XII of 1940 and VI of 1942, along with clauses (3), (4) and (5) after sub-clause (2) to that section. Sub-clause (6) is in the following terms:—

> "No order for attachment shall be made unless the Court is satisfied that the property sought to be attached is not exempt from attachment or sale."

The contention of the learned counsel is that by reason of this sub-clause, a duty is cast on the Court, before attaching any property, to determine whether the property sought to be attached is not exempt from attachment or sale. This is a statutory duty cast on the Court and unless a finding to that effect is recorded, the order of attachment simpliciter would be without jurisdiction. This provision was brought to the notice of the learned Single Judge. But the learned Single Judge was of the view that the same did not take the case out of the rule laid down by the Full Bench in *Gauri's case*. We have no doubt that the decision of the learned judge would have been absolutely correct if there was material on the record direct or circumstantial which could lead to the inference that the attachment was ordered because the Judge was satisfied that the property was not exempt from attachment or sale. We have gone through the entire record

(1) A.I.R. 1942 Lahore 153.

and find that there is no material from which one could come to the conclusion that before ordering the attachment, the provisions of clause (6) had been complied with. In other words, the duty cast on the Court ordering attachment to satisfy itself that the property sought to be attached was not exempt from attachment or sale had been discharged. The language of clause 6 is peremptory and if it is read with clause (3) which is in these terms—

> "Notwithstanding any other law for the time being in force an agreement by which a debtor agrees to waive any benefit of any exemption under this section shall be void".

It will be apparent that the benefit conferred by the substantive provisions of section 60(1) (ccc) cannot voluntarily or otherwise be parted with. The rule of *res-judicata* is a rule of estoppel and would not, in my opinion, stand on a higher footing than the conscious waiver. If a conscious waiver is made void, it is hard to conceive that its place will be taken by legal waiver, or in other words, by *res judicata*. I may make it clear that I am casting no doubt on the correctness of the Full Bench decision in *Gauri's case*. When that decision was given, clause (6) was not there. This will be apparent from the following observations of Bhide J. in *Gauri's case* :—

> "* * * It may be incidentally mentioned here that this clause has been amended by section 34, Punjab Relief of Indebtedness Act and also by Punjab Act XII of 1940. But those amendments are not material for the purpose of this reference. The amendment made by section 34, Punjab Relief of Indebtedness Act, is not material in view of the findings of fact arrived at by the Courts below, while Act XII of 1940 came into force after the execution sale in the present case and does not, therefore, govern this case. * * *".

clause (6) was introduced by Punjab Act XII of 1940. I am, therefore, clearly of the view that the provisions of clause (6) have to be given full effect to and the result would be that there being no compliance with the said provisions, there would be no valid attachment in the eyes of law. If there is no attachment, there can be no question of a sale in pursuance of the same. It was conceded that there could be no valid sale of immovable property without attachment. Even for the purposes of the rule of *res-judicata*, the pre-requisite would be a valid attachment and an absence of objection to that attachment

before sale on the basis of section 60(1) (ccc). But if there was no attachment at all in the sense that there was no valid attachment in law by reason of non-compliance of clause (6) of section 60, Civil Procedure Code, the question of the applicability of the rule of *res-judicata* will not arise. This aspect of the matter seems to have escaped the notice of the learned Single Judge. In his opinion, *Gauri's case,* concluded the matter which, in fact, does not. In this view of the matter, it is difficult to sustain the decisions of the Courts below holding that the second objection petition was incompetent. The first objection petition was dismissed for default and there is no decision on merits of that petition. Moreover, the sale was set aside on 13th August, 1960, in spite of the fact that the objections to attachment by the judgment-debtor had been dismissed for default. Objections were raised by the judgment-debtor a second time after the re-sale of the property which was made in pursuance of the attachment effected in November, 1959. As the requirements of sub-clause (6) of section 60, Code of Civil Procedure, had not been satisfied, the attachment in November, 1959 would be no attachment in the eyes of law and as such, there could be no valid sale in pursuance of the same. In order that the rule of *res-judicata* may apply, there has to be a valid attachment to which objections could be raised. I am supported in this conclusion by the following observations in *Gauri's case*:—

> "The position would be, of course, different if the judgment-debtor were not duly served with notice about the intended auction sale. In that case, the judgment-debtor could not have taken the objection before the sale and consequently the principle of *res jujdicata* would not apply."

There has to be an attachment before the rule of *res judicata* could apply. If there is no attachment as in this case because attachment could only be if the provisions of sub-clause (6) of section 60 of the Code of Civil Procedure had been complied with, there would be no question of objecting to the attachment before sale. The objection to the sale would suffice and the sale could be set aside on the short ground that there was no attachment at all. I am, therefore, clearly of the view that the decision of the Courts below, that the objections under section 60(1) (ccc) by the judgment-debtor are not maintainable, is incorrect and must, therefore, be set aside.

It is contended by the learned counsel for the respondent decree-holder that the house in question was a "Khandar", that is dilapidated

and thus does not fall in the category of a residential house. The only allegation regarding this is in the application for attachment and that too in a different hand. In any case, in the warrant of attachment, this is not so stated. Moreover, when the judgment-debtor or his witnesses were in the witness-box, this matter was not put to them. After two months of the close of their testimony, when the decree-holder gave evidence, this fact is brought into prominence. In this situation, we are unable to hold that the house in dispute was a "Khandar" at the time of attachment.

The next question, that now remains to be settled, is whether the property in dispute is the only residential house of the judgment-debtor. The executing Court has given a clear finding on that matter. The finding is that it is the only residential house of the judgment-debtor. We have gone through the evidence on this part of the case and we are clearly of the view that on the evidence, as it stands, the finding is fully justified. The learned counsel for the respondent could not urge anything substantial against the decision of the executing Court on this part of the case. If this finding stands, the result would be that the so-called attachment and the consequent sale thereon would be bad in law. However, the judgment-debtor has claimed that he has only one-third share in the house. The entire house has been sold. No other person has come to object to the sale. In this view of the matter, the proper order to pass would be to set aside the sale with regard to one-third of the house in dispute which one-third belongs to the judgment-debtor.

The result, therefore, is that this appeal is partly allowed and the sale of the house, to the extent of one-third, is set aside. There will be no order as to costs.

MEHAR SINGH, C. J.—I agree.

B.R.T.

LETTERS PATENT APPEAL

Before Mehar Singh, C.J. and Daya Krishan Mahajan, J.

DIN DAYAL,—*Appellant*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents*

Letters Patent Appeal No. 134 of 1966

August 24, 1966

Punjab Gram Panchayat Act, 1952 (IV of 1953)—Ss. 95 and 102—Inquiry against a Sarpanch for his removal—Whether must be held by the Government