

application to the facts of the present case. Again, according to my approach to the case, the question of the relaxation of the provisions of rule 9 (a) (i) by virtue of the power given to the Government under rule 15 of the 1958 Rules will not arise and, therefore, it is, needless to discuss the case of *Lehna Singh and others* (2).

(59) In view of what I have said above, I would accept these appeals, set aside the judgment of the learned Single Judge and dismiss the writ petition filed by Som Datt. In the circumstances of this case, however, I will leave the parties to bear their own costs.

K.S.K.

FULL BENCH

Before R. S. Narula, C.J., S. S. Sandhawalia and D. S. Tewatia, JJ.

BRIJ MOHAN LAL.,—Appellant.

versus

BAKSHI RAM ETC.,—Respondents.

S.A.O. No. 17 of 1969

October 18, 1974.

Provincial Insolvency Act (V of 1920)—Section 28(2)—Code of Civil Procedure (Act V of 1908)—Section 60(1) (ccc)—Main residential house of a debtor-insolvent—Independent and well demarcated portion thereof used by the debtor for purposes of business—Whether not attachable under section 60(1) (ccc) of the Code and consequently exempt from vesting under section 28(2) of the Act—Such house subject to charge with one of the creditors—Whether vests in the Insolvency Court.

Held, that even when an independent and well-demarcated portion of a main residential house of a debtor-insolvent is used and occupied by him for business purposes, it is exempt from attachment and sale in terms of provisions of section 60(1) (ccc) of Code of Civil Procedure, 1908 and consequently exempt from vesting under section 28(2) of Provincial Insolvency Act.

Held, that the application of general definition of the word property stands excluded in regard to the property dealt with in subsection (5) of section 28 of the Act, with the result that the property envisaged in this provision refers to the tangible property

Brij Mohan Lal v. Bakhshi Ram etc. (Tewatia, J.)

and not the extent of the right of the insolvent therein. If a property falls within the purview of sub-section (5) of section 23 it is exempt from vesting in the insolvency court under sub-section (2) of section 28 whatever may be the extent or the nature of the right of the insolvent therein. Having regard to the provisions of sub-section (5) of section 28 of the Act, the correct approach to find out as to whether a property is exempt from attachment or sale in execution of a decree by virtue of any provisions of the Code of Civil Procedure has to be, to extend the gaze, to the entire provision of the proviso to clause (ccc) of sub-section (1) of section 60 of the Code and not limit the same to the expression 'provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt', and leave out of consideration the remaining part of the provision i.e., 'sought to be recovered' which in fact holds the key to the correct understanding of the impact of the proviso on the provisions of clause (ccc) of section 60(1). When the provisions of sub-section (5) of section 28 of the Act are so viewed, the conclusion is unescapable that the main residential house of a debtor, even though under charge with one of the creditors does not vest in the Insolvency Court under section 28(2) of the Act.

(Paras 9 & 10)

Case referred by Hon'ble Mr. Justice S. S. Sandhawalia, on 29th March, 1971, to a Division Bench for decision of an important question of law involved in the case. Then the case was again referred by the Division Bench consisting of Hon'ble Mr. Justice S. S. Sandhawalia and Hon'ble Mr. Justice D. S. Tewatia to a larger Bench on 16th May, 1972 and the Full Bench consisting of Hon'ble the Chief Justice Mr. R. S. Narula, Hon'ble Mr. Justice S. S. Sandhawalia, and Hon'ble Mr. Justice D. S. Tewatia, finally disposed of the case on 18th October, 1974.

Second Appeal from the order of Shri Joginder Singh Mander, Additional District Judge, Ambala, dated 25th October, 1968, reversing that of Shri Parshotam Lal Sanghi, Insolvency Judge, Ambala dated 30th November, 1967, dismissing the application of the insolvent, and leaving the parties to bear their own costs.

S. K. Goyal, Advocate, for the appellant.

J. S. Chawla, S. K. Jain, and M. S. Liberhan, Advocates, for the respondents.

ORDER

Tewatia, J.—These two appeals (S.A.O's. Nos. 17 and 18 of 1969) at the instance of the insolvent Brij Mohan Lal arise from a common order and involve common questions of law and facts and, therefore, we propose to decide both, by a common order.

(2) The importance of the question of law involved, and a further circumstance of the same being bereft of any authority directly bearing thereon, necessitated the hearing of these two appeals, on a reference, by a Division Bench which, in turn, for the very reasons referred these appeals for decision by a larger Bench, and that is how these are before us.

(3) The two propositions of law, as formulated by the referring Bench, on the resolving of which depends the determination of the fate of these two appeals are—

- (1) Whether an independent and well demarcated portion of a residential building used and occupied by a debtor for business purposes would be exempt from attachment and sale in terms of provisions of section 60(1) (ccc) of the Code of Civil Procedure and consequently exempt from vesting under section 28(2) of the Provincial Insolvency Act (V of 1920)—hereinafter referred to as the Act;
- (2) As to whether or not a main residential house of an insolvent subject to a charge of debt would vest under section 28(2) of the Act in the insolvency Court.

The only facts that are relevant to the aforesaid questions and which are not in dispute can be stated thus: Appellant Brij Mohan Lal was adjudicated insolvent. He applied to the insolvency Court for the exemption of his main residential house from vesting under sub-section (2) of section 28 of the Act in the said Court or the Receiver appointed by it. The insolvency Court as also the trial Court, whose order is under challenge in these appeals, found as a fact that the building in question, which consisted of four rooms on the ground floor, four rooms on the first floor, and one room on the second floor, was the main residential house of the insolvent, of which the ground floor was exclusively used by him for carrying on his business and that the said building was under mortgage with the Punjab and Sind Bank Limited, Ambala City.

(4) The first question stands resolved authoritatively by the judgment of their Lordships of the Supreme Court rendered in *Ram Lal and others v. M/s. Piara Lal Gobindram and others* (1). The

(1) A.I.R. 1973 S.C. 2124.

Brij Mohan Lal v. Bakhshi Ram etc. (Tewatia, J.)

following observations of their Lordships may in this regard be noticed with advantage :

“The question for decision in this case is whether if a portion of the residential house is occupied by the judgment-debtor himself for the purposes of a shop that portion ceases to be part of the residential house. It appears to us clear that it does not. In the circumstances and social conditions of this country it would be difficult to justify the conclusion that where a part of a residential house is used in connection with the business or profession of the owner of that house that portion ceases to be part of the residential house. As is well-known, very often a lawyer might have his office room in his house, a doctor might have a consulting room in his house, an advocate's library might occupy one of the rooms of his house. The room where the lawyer works or his library is located cannot be said to cease to be part of his residential house. The Punjab High Court has taken the same view at least from the year 1951. In *Agha Jafar Ali Khan v. Radha Kishan*, (2), it was held that—

“where the whole building is being used for the purposes of residence, the mere fact that there is a shop on the ground floor will not convert the building into something different from a residential house.”

The judgment of the Full Bench mentions that it is not clear in that case whether the shop portion of the building was in the possession of the judgment-debtor or was rented out by him. A careful reading of the judgment shows that there was no question in that case of the shop portion of the building being in the possession of anybody except the owner. In *Firm Ganga Ram v. Firm Jai Ram* (3), where the ground floor of a building with three floors was being used for commercial purposes and the first and the second floors for residential purposes it was held that the judgment-debtors can claim immunity from attachment or sale, with respect to the entire house under the provisions of section 60(1) clause (ccc), where it is the only

(2) A.I.R. 1951 Pb. 433.

(3) I.L.R. 1957 Pb. 1588=A.I.R. 1957 Pb. 293.

residential house belonging to them and occupied by them. It is instructive to refer to a portion of the discussion:

"The conditions in our country are such which admit of a composite user of the same building. A part of the same house is used for dwelling, and the other part is meant for commercial or business purpose and sometimes even the latter portion, particularly after the business hours, is used for dwelling.

.....Having regard to the mode of living of the people in this country, their habits and customs, it is not possible generally to designate a particular building as one, which is used exclusively for a residential purpose in contradistinction to a commercial purpose.

.....On this basis, residential building of a medical practitioner, will not be exempt from liability to attachment or sale, if in a portion he receives or treats his patient.

Similarly, where in his house, an iron-smith works on his forge, a shoe-maker makes shoes on his last, a potter turns his wheel, or any other artisan spreads his tools, to make a living or a petty trader keeps his wares for sale, according to the interpretation, which the learned counsel for the respondent asks me to put on the words occurring in the Code, the provisions will be powerless in extending any effective protection. This construction will result in defeating the very purpose of the law'.

We completely agree with the learned Judge's observations. It is interesting to note that in *Punjab Mercantile Bank Ltd. (in liquidation) Jullundur City v. General Typewriter Co., Jullundur City* (4), Tek Chand, J. who gave the above judgment held that where the judgment-debtor was residing in the greater part of the house two chabaras on the first floor let out to tenants were not exempt from attachment and sale. To the same effect is the judgment of the Full Bench relied on by the

Brij Mohan Lal v. Bakhshi Ram etc. (Tewatia, J.)

Division Bench in this case. Tek Chand, J. has kept clear in his mind the distinction between a case where a portion of the residential house is let out and a portion used by the owner himself, though for a purpose other than residential. Such use does not make the residential house cease to be a residential house or the portion so used as not part of the residential house.

There is no doubt that this was the main residential house of the insolvents and it was occupied by them. The facts of the case bring it squarely within the scope of the section and the whole building is, therefore, exempt from attachment."

In regard to the second question, while the simple and straight stand taken by the appellant is that by virtue of the provisions of sub-section (5) of section 28 of the Act the residential house in question did not form part of his property for the purpose of the provisions of the Act and thus it was not liable to vest in the insolvency Court under sub-section (2) of section 28 of the Act. On behalf of the respondents, Mr. S. K. Jain, their learned counsel, has advanced two-fold contention—

- (1) that on the date of adjudication what the insolvent possessed was only the equity of redemption and not the residential house. The equity of redemption not being a property which is exempt from attachment or sale in terms of sub-section (5) of section 28 of the Act, the same vested in the insolvency Court under sub-section (2) of section 28; and
- (2) that the expression 'exempt from attachment and sale in execution of a decree' appearing in sub-section (5) of section 28 of the Act refers to complete exemption in contradistinction to partial or qualified exemption. That since by virtue of the proviso to clause (ccc) of sub-section (1) of section 60 of the Code of Civil Procedure the exemption to the main residential house from attachment and sale stood lifted, although *qua* only the secured creditor having a charge thereon, so the house in question thus being liable to attachment or sale in execution of a decree, the same fell outside the purview of the provisions of sub-section (5) of section 28 of the Act and thus

became liable to vest in the insolvency Court under sub-section (2) of the said section.

Before proceeding with the consideration of the rival contentions advanced on behalf of the parties, the relevant provisions of the Act and the Code of Civil Procedure may be noticed here.

(5) Clause (d) of sub-section (1) of section 2 of the Act defines 'property'—

“‘property’ includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;”

Sub-section (2) of section 28 of the Act reads:

“(2) On making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.”

Sub-section (5) of section 28 of the Act is as follows :

“(5) The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or any other enactment for the time being in force from liability to attachment and sale in execution of a decree.”

The relevant provision of section 60 of the Civil Procedure Code as amended by Punjab Acts XII of 1940, and VI of 1942 (with effect from 19th April, 1935) reads as under :—

“(60) (1) * * * * *

(ccc) One main residential house and other buildings attached to it (with the material and the sites

Brij Mohan Lal v. Bakhshi Ram etc. (Tewatia, J.)

thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him :

'Provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered.' [Substituted for the words 'Provided that the protection afforded by this sub-section shall not extend to property which has been mortgaged' by Punjab Act VI of 1942, section 5(ii)].

* * * * *

As to the first contention of the learned counsel for the respondents, it may be observed that the application of the general definition of the word 'property' stood excluded in regard to the property dealt with in sub-section (5) of section 28 of the Act, with the result that the property envisaged in this provision refers to the tangible property and not the extent of the right of the insolvent therein and, therefore, if a property falls within the purview of sub-section (5) of section 28 it is exempt from vesting in the insolvency Court under sub-section (2) of section 28 whatever may be the extent or the nature of the right of the insolvent therein.

(6) Now coming to the second contention of the learned counsel, the problem, as to whether under the Code of Civil Procedure the property is or is not exempt from attachment or sale in execution of a decree, does not admit of resolution by one word answer in the negative or affirmative as has been sought by the respondents' learned counsel. And therefore to decide whether the property in turn is or is not exempt by virtue of the provisions of sub-section (5) of section 28 of the Act from vesting in the insolvency Court under sub-section (2) thereof, we shall have to refer ourselves to the exempting provisions of the Code of Civil Procedure and a little history thereof.

(7) The provisions of proviso to clause (ccc) of sub-section (1) of section 60 of the Code of Civil Procedure, as it stood prior to its amendment by Punjab Act VI of 1942—section 5(ii)—was as under :

“(ccc) one main residential house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him:

Provided that the protection afforded by this sub-section shall not extend to property which has been mortgaged.”

This unamended provision of the said proviso was interpreted by the Courts to mean that if the property (in this case main residential house) happened to be the subject of a charge of mortgage, then the protection accorded to it by clause (ccc) of sub-section (1) of section 60 of the Code against attachment or sale in execution of a decree stood completely lifted, with the result that even an unsecured creditor could get the same attached or sold in execution of his decree against the judgment-debtor. The fact that the interpretation put by the Courts was not in accord with the true intent of the framers of the legislation led to the amendment of the said proviso to what it now exists which expressly provides that the exempted property is liable to attachment and sale in execution of a decree by virtue of the proviso only at the instance and in execution of a decree of a creditor whose debt had been specifically charged thereon.

(8) The following statement of objects and reasons accompanying the amending bill leaves no doubt as to the real intention of the legislature even in regard to the intended true scope of unamended provisions of the said proviso :

“Since the passing of the Punjab Relief of indebtedness (Amendment) Act, 1940, the High Court has held that it is open to a civil court to question the validity of a finding of a Debt Conciliation Board as to whether a particular loan is or is not a debt. Civil courts have further held in a number of cases that a property which has been mortgaged, whether belonging to an agriculturist or a non-agriculturist judgment-debtor is not exempt from attachment and sale in execution of a decree under the law as

Brij Mohan Lal v. Bakhshi Ram etc. (Tewatia, J.)

at present laid down in the Punjab Relief of Indebtedness Act. According to the interpretation of civil courts a property which is mortgaged is liable to attachment and sale for the realisation of any debt irrespective of the fact whether that debt is specifically secured by the mortgage or not and whether that property is owned by an agriculturist or a non-agriculturist. The present Bill is being introduced in order to set at rest the doubts which have arisen in consequence of the present trend of judgments in civil courts and also to remove certain defects which have since come to notice."

The aforesaid statement of the reasons and objects completely exposes as fallacious the argument advanced by the learned counsel for the respondents that the amendment of the proviso by the amending Act VI of 1942 instead of limiting the adverse impact of the proviso on the immunity of the property from attachment and sale rather enlarged the same in that while earlier to the amendment such inviolate character of the property stood tampered with only if it was under mortgage while now after the said amendment the exemption from attachment or sale in execution of a decree stood lifted not only when such exempted property carried a charge of mortgage, but also when such a charge happened to be even other than that of a mortgage debt.

(9) So having regard to the provisions of sub-section (5) of section 28 of the Act, the correct approach to find out as to whether a property is exempt from attachment or sale in execution of a decree by virtue of any provisions of the Code of Civil Procedure has to be, to extend our gaze, to the entire provision of the proviso to clause (ccc) of sub-section (1) of section 69 of the Code and not limit the same to the expression "provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt" and leave out of consideration the remaining part of the provision i.e. 'sought to be recovered' which in fact holds the key to the correct understanding of the impact of the proviso on the provisions of clause (ccc) of section 60(1).

(10) When the provisions of sub-section (5) of section 28 of the Act are so viewed, no conclusion other than the one that the main residential house in question is exempt from vesting in the insolvency Court under sub-section (2) of section 28 of the Act is

possible. The soundness of this conclusion is reinforced when it is tested on the touch-stone of common sense view expressed by Sulaiman, J. with characteristic simplicity in the following words in *Net Singh and others v. The Receiver of the Estate of Gajraj Singh and another* (5).

“The policy of the legislature obviously seems to be that properties which cannot be attached and sold do not vest in the receiver. There is no injustice in this for when creditors cannot recover their debts by sale of the properties, they suffer very little if their representative, the receiver, cannot realise the debts out of such properties

For the reasons abovesaid, we allow these appeals (S.A.Os. 17 and 18 of 1969), but in view of the complex question of law involved we leave the parties to bear their own costs.

R. S. NARULA, C.J.,—I agree.

S. S. SANDHAWALIA, J.,—I agree.

K.S.K.

FULL BENCH

Before Bal Raj Tuli, S. S. Sandhawalia and D. S. Tewatia, JJ.

DEVINDER KAUR,—Petitioner.

versus

LUDHIANA IMPROVEMENT TRUST, ETC.,—Respondents.

LUDHIANA ETC.,—Respondents.

C. W. No. 3276 of 1969.

March 13, 1975.

Land Acquisition Act (I of 1894)—Section 23—Punjab Town Improvement Act (IV of 1922)—Section 59 and para 10 of Schedule—Amendment of section 23, Acquisition Act by section 59, Improvement Act—Whether results in discrimination—Clause (2) of para 10 of the Schedule and clauses (a), (d) and (f) added to sub-section 3 of section 23, Acquisition Act—Whether ultra vires Article 14, Constitution of India—Non-provision of the right of appeal under section 59, Improvement Act against the award made by the Tribunal—Whether hits Article 14, Constitution of India.

(5) A.I.R. 1925 All. 467.