

The Commission-
er of Income-tax
v.

M/s Bharat In-
surance Co. Ltd.,
New Delhi

Khosla, C. J.

valuation. It is not denied that if the securities are to be valued at the figure stated by the Income-tax Officer, then a sum of Rs. 1,89,185 must be reduced from the permissible deductions.

I would, therefore, find that the Income-tax Officer was not obliged to consult the Controller of Insurance before he corrected the valuation of the the securities and that he had full jurisdiction to deal with the matter in the manner employed by him. The question referred to us, therefore, must be answered in the affirmative.

In the result, the petition (Income-tax Case No. 8-D of 1957) is dismissed and the question referred to us by the Tribunal is answered in the affirmative. The assessee will pay costs of these proceedings which we assess at Rs. 200.

A. N. GROVER, J.— I agree.

K.S.K.

APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

GURBAKSH SINGH,—Appellant.
versus

DR. DAYAL CHAND,—Respondent.

Regular Second Appeal No. 1403 of 1959.

1960

March 14th

Displaced Persons (Debts Adjustment) Act (LXX of 1951)—Sections 5, 16, 28 and 32—Debt secured by mortgage of property in Pakistan—Displaced creditor electing to retain the security in proceedings under section 5 before the Tribunal—Tribunal after scaling down the debt declaring the amount due to the creditor and making it a first charge on property allotted to the displaced debtor in India in lieu of mortgaged property left in Pakistan—Suit to enforce the charge—Whether competent.

Held, that under section 16 of the Displaced Persons (Debts Adjustment) Act, 1951 the option is given to the

secured creditor to either retain the security or to give it up when proceedings under the Act are taken. In case he gives up the security, he is treated like the other ordinary creditors of the judgment-debtor and is entitled to a decree for such amount as is determined after scaling down the debt according to the provisions of the Act. Thereafter, execution is levied against the attachable assets of the judgment-debtor and the compensation that may be paid to him either in the form of property or cash. In case the creditor decides to retain the security then all that the Tribunal is required to do is to determine the debt and to declare the amount due after scaling it down in accordance with the provisions of the Act. The moment the amount due is declared, it automatically becomes a charge by operation of law on the property allotted to him (debtor) in lieu of the property originally charged and left in Pakistan. No decree is passed in favour of the creditor, who has elected to retain his security, neither any machinery is provided in the act as to how he is to enforce his charge. Under section 28 only a decree passed under the Act is made executable. Section 32(2) excludes the secured creditor's debt in respect of which the creditor has elected to retain the security out of the categories of debts in regard to which a decree can be passed by a Tribunal. The only right that the Act gives to such a creditor is mentioned in section 32(4), that right being his right to be treated as a secured creditor with regard to that part of the property, which has been allotted to his debtor in lieu of the property that was left by him in Pakistan. Moreover, the proviso to section 32(9) abundantly makes it clear that nothing in subsection (9) of section 32 affects the right of any chargeholder. Thus a creditor, who elects to retain his security under section 16 of the Act, is left to the ordinary remedies under the law to enforce his charge and so far as the Act is concerned, his rights come to an end. No machinery is provided in the Act whereunder such a secured creditor can enforce his security. By operation of law, the amount determined under the Act becomes a charge on the property allotted to the debtor in lieu of the property left by him in Pakistan and a suit to enforce such a charge is competent.

Second Appeal from the decree of the Court of Shri B. L. Malhotra, Additional District Judge, Ferozepur, dated

the 24th June, 1959, affirming with costs that of Shri J. P. Gupta, Senior Sub-Judge, Ferozepur, dated the 9th January, 1959, granting the plaintiff a preliminary decree under order 34, Rule 4, Civil Procedure Code, for the recovery of Rs. 1,711-9-0, against the defendant with costs and directing the defendant to pay the decretal amount and the costs within a period of four months from the date of decree, i.e., 9th January, 1959, failing which the plaintiff would be entitled to apply to the trial Court for the sale of the land or a part thereof on which a charge of the said amount was created for realization of the decretal amount.

B. R. TULI, ADVOCATE, for the Appellant.

H. L. SARIN, for the Respondent.

JUDGMENT.

Mahajan, J.

MAHAJAN, J.—The only question involved in this second appeal is whether a creditor whose debt was secured by a mortgage of property now situate in Pakistan and who after the coming into force of the Displaced Persons (Debts Adjustment) Act (No. 70 of 1951)—hereinafter referred to as the Act—has elected to retain that security under section 16 of the Act as against the property allotted to the displaced person in lieu of the property left in Pakistan is entitled to enforce that charge by a separate suit?

In order to appreciate the entire controversy in this appeal, it is necessary to set out the facts in some detail. Gurbax Singh mortgaged his entire land measuring 225 *kanals* 17 *marlas* in favour of Dr. Dyal Chand to secure a debt of Rs. 4,000. After the partition of the country, both parties came to what is now India. An application was made by Dr. Dyal Chand under section 10 of the Act against Gurbax Singh for recovery of the debt secured by the mortgage. As soon as notice of section 10 application was

served, the debtor made an application under section 5 read with section 11(2) of the Act. During the trial of this application, the creditor decided to retain the security under section 16 of the Act and as required by that provision, the Tribunal declared that the creditor was entitled to Rs. 2167-9-0 and by force of that provision this amount became the first charge on the immovable property allotted to the debtor.

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The present suit has been filed by Dr. Dyal Chand to enforce the charge. The suit was for recovery of Rs. 1,711-9-0 by sale of the charged property. The trial Court decreed the suit and on appeal that decision has been upheld by the Additional District Judge, Ferozepur. Dissatisfied with this decision, the debtor has come up in second appeal to this Court.

The principal contention of Mr. Tuli, learned counsel for the appellant, is that a separate suit to enforce this charge is barred under the Act. The learned counsel relies on section 15 of the Act, which is in these terms:—

[His Lordship then read Section 15 and continued:]

In order to appreciate the learned counsel's contention, it is necessary to set out in detail the relevant provisions of the Act.

[His Lordship then read Sections 3, 9, 11, 16, 27, 28, 32 and 52 and continued:]

If these provisions are read together, it is abundantly clear that the option is given to the secured creditor to either retain the security or to give it up. In case he gives up the security, then he is treated like the other ordinary creditors of the

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judgment-debtor and is entitled to a decree for such amount as is determined after scaling down the debt according to the provisions of the Act. Thereafter, execution is levied against the attachable assets of the judgment-debtor and the compensation may be paid to him either in the form of property or cash. In case the creditor decides to retain the security then all that the Tribunal is required to do is to determine the debt and to declare the amount due after scaling it down in accordance with the provisions of the Act. The moment the amount due is declared, it automatically becomes a charge by operation of law on the property allotted to him (debtor) in lieu of the property originally charged and left in Pakistan. No decree is passed in favour of the creditor, who has elected to retain his security, neither any machinery is provided in the Act as to how he is to enforce his charge. Section 16(5) enjoins that where a creditor elects to be treated as unsecured creditor in relation to a debt (secured debt) the provisions of the Act shall apply indicating thereby that if he elects to retain the security, then the provisions of the Act will not apply. Section 27 contemplates what has to happen when a decree is passed. According to this provision, a complete schedule of creditors and of the assets and liabilities of the displaced person are to be shown in the decree that is prepared. This is not done in the case of a person, who elects to retain a charge under section 16. It is significant that only a decree that is passed under the Act is made executable under section 28 of the Act. The complete answer to the argument that no separate suit lies to enforce the charge is furnished by section 32 of the Act. Section 32(2) excludes the secured debt in respect of which the creditor has elected to retain the security out of the categories of debts in regard to which a decree can be passed by a

Tribunal. The only right that the Act gives to such creditor is mentioned in section 32(4), that right being his right to be treated as a secured creditor with regard to that part of the property, which has been allotted to his debtor in lieu of the property that was left by him in Pakistan. Moreover, the proviso to section 32(9) abundantly makes it clear that nothing in sub-section (9) of section 32 affects the right of any charge-holder.

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All that remains to be examined is the scope and effect of section 15(c) of the Act. Section 15(c) has been reproduced in the earlier part of the judgment. It bars fresh suit or other proceedings against displaced debtor in respect of any debt mentioned by him in the relevant schedule to the application. Once the amount is determined under the Act on the basis of that debt, it cannot be said that it is the debt mentioned by him in the relevant schedule to that application. What comes into being after the scaling down of that debt is a fresh obligation and it is not the debt mentioned by him in the relevant schedule. If the matter is viewed in this perspective, it cannot be said that a suit to enforce the charge created on the immovable property under section 16 of the Act cannot be enforced by a separate suit, because under the Act all proceedings in respect of the debt come to an end after the debt had been scaled down and the amount due arrived at after that scaling down. By operation of law the amount so determined becomes a charge on the property allotted to the debtor in lieu of the property left by him in Pakistan. It will be further clear from the fact that the relief granted by section 15(c) is to a displaced person. Take a case where the displaced person sells the charged property to a non-displaced person and the charge-holder brings a suit to enforce the charge against the transferee,

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can it be said in these circumstances that the suit is barred by reason of section 15(c)? Mr. Tuli was unable to contend that it would be so barred.

Take also another case of a sale contemplated by the Act under section 32(9). The creditors who have obtained decrees under the Act can get the allotted property put to sale in execution of their decrees. Whatever the auction purchaser will purchase would be subject to the charge created under the Act. Can it be said that a suit against the auction purchaser to enforce the charge is barred by section 15(c) of the Act ?

If the matter is viewed in this light, it can admit of no doubt that moment a creditor elects to retain his security under section 16 of the Act, he is thereafter left to the ordinary remedies under the law and so far as the Act is concerned, his rights come to an end. It is significant that no personal decree can be passed against the debtor and the amount of charge can only be recovered from the property charged. The other property of the debtor is not liable for the amount of the debt due which is made a charge on the property under section 16 of the Act. I have already said that no machinery is provided in the Act whereunder such a secured creditor can enforce his security. I cannot read section 15(c) in the isolated manner as the learned counsel would want me to. Read along with the other provisions of the Act, it presents no difficulty, as I have already indicated. I, therefore, repel the argument of Mr. Tuli that no separate suit lies to enforce the charge created under section 16 of the Act.

For the reasons given above, I would dismiss this appeal, but in view of the fact that the matter

involved was not free from difficulty, I leave the parties to bear their own costs throughout.

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APPELLATE CIVIL

Before Tek Chand and Shamsher Bahadur, JJ.

LAL CHAND,—Appellant.

versus

ATMA RAM AND ANOTHER,—Respondent.

Regular First Appeal No. 82 of 1954.

Transfer of Property Act (IV of 1882)—Section 58(c) Proviso—Whether applicable to Punjab—“Conditional mortgage” and “Conditional sale”—Distinction between—Deed of conveyance absolute on its face—Presumption as to—Burden of proving the contrary—On whom lies—Intention of the parties—How gathered—Principles as to, stated—Circumstances in favour of mortgage or sale enumerated.

1960

April 18th

Held, that the proviso to section 58(c), Transfer of Property Act, has not been treated as applicable to Punjab because it does not embody any rule of equity, justice or good conscience, but is only a technical rule as to proof.

Held, that the basic distinction between a “conditional mortgage” and a “conditional sale” is that “mortgage” leaves title to property, in the grantor and gives to the grantee only a lien on it, by means of which the grantee is authorised to appropriate the property mortgaged to the extent of its value, to the payment of the debt thus secured. The “conditional sale” confers on the grantee title to the property giving the grantor the right to repurchase it at a certain price within the period stated. The effect of a mortgage is to charge the moneys secured upon the mortgaged property and to make it answerable for the repayment of such moneys. The right of redemption is an essential and inseparable attribute of a mortgagor.