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**(1968) 04 P&H CK 0004**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Civil Revision No. 635 of 1965

Pt. Chuni Lal and another

APPELLANT

Vs

Ram Sarup and others

RESPONDENT

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**Date of Decision:** April 16, 1968

**Acts Referred:**

- Provincial Insolvency Act, 1920 - Section 28(2)

**Hon'ble Judges:** Gurdev Singh, J

**Bench:** Single Bench

**Advocate:** P.C. Jain, for the Appellant;

**Final Decision:** Allowed

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**Judgement**

Gurdev Singh, J.

The sole grievance in this petition is against the direction of the learned Insolvency Judge, Jullundur, that the house property of the insolvents mortgaged with possession to creditors Nos. 24 to 26 would not vest in the interim Receiver.

2. The petitioners' Learned Counsel Mr. P.C. Jain contends that since the whole of the property of the insolvents vests in the Court or the Receiver under sub section (2) of Section 28 of the Provincial Insolvency Act, 1920, the property mortgaged by them or any part thereof could not be excluded from vesting. The provision with regard to vesting of the property of the insolvent is contained in Section 28, sub-section (2) whereof provides:

28(2) "On the 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....

3. Mr. Jain lays emphasis upon the expression "the whole of the property of the insolvent" and contends that even the property which is mortgaged must vest in the Receiver. On perusal of Section 28, it will be seen that the rights of the secured

creditors have been safeguarded and reading that provision alongwith Section 47 of the Act, it is apparent that the mortgaged property is not available for distribution among all the creditors of an insolvent unless the mortgagee gives up his security. Sub-Section (6) of section 28 expressly provides:

Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." It is thus apparent that the provision with regard to vesting of the property contained in sub section (2) of section 28 is subject to the right of the secured creditor recognised by sub-section (6) thereof. This, however, does not mean that the mortgaged property in its entirety is excluded from vesting in the Court or the Receiver on adjudication of the mort(sic) sub section (6) of Section 28 merely safeguarded the rights of (sic)gagee to keep his security in tact, but the equity of redemptic(sic) vests in the mortgagor and admittedly constitutes property cannot be excluded from vesting in the Receiver under sub-section (2) of section 28. This opinion of mine finds support from Mokshagunam Subramania Aiyar v. S.V. Ranakrishna Aiyar 7I.C. 357 where a Division Bench of the Madras High Court ruled that in respect of properties belonging to an insolvent which are subject to mortgage or charge what vests in the Official Receiver upon an adjudication of insolvency and the making of a vesting order is the insolvent's equity of redemption, which at the time constitutes "the whole of the property of the insolvent" in such items. In Govinda v (Khansahib) Abdul Kadir AIR 1923 Nag 150, it was observed that where any part of the insolvent's property is subject to a mortgage, the value of the insolvent's right to redeem that property only is his assets available for distribution. In a subsequent decision of the Nagpur High Court in Kashinath Ganesh Teli and another v. Ganesh Bhola Teli AIR 1939 Nag 207 while dealing with the right of the secured creditor of an insolvent, it was observed that the power of the secured creditor to realise his security did not authorise him to secure an out and out sale of the equity of redemption in satisfaction of his own charge decree because the equity of redemption after adjudication vests in the Court u/s 28(2).

4. The observations of their Lordships of the Judicial Committee in AIR 1927 108 (Privy Council) , are fully consistent with the view that I have taken as it was observed in that case that though the rights of the secured creditor over a property were not affected by the fact that the mortgagor or his heir had been adjudicated as an insolvent, yet it did not imply that the secured creditor was entitled to deal with his security as though there had been no vesting in the. court or the receiver their Lordships were interpreting clause 5 of Section 16 of the Provincial Insolvency Act, 1907, which is in identical terms as sub-section (6) of section 28 of the Provincial Insolvency Act (5 of 1920), under which this case has arisen. [ thus find that the learned Insolvency Judge was wrong in directing that the property mortgaged by the insolvents to the creditors No. 24 to 26 shall not vest in the interim Receiver The learned Judge should have ordered that the possession of the property mortgaged

with possession with creditors 24 to 26 shall remain with the mortgagees, but the equity of redemption shall vest in the Receiver. I modify the impugned order accordingly. The petition is accepted to this extent There will be no order as to costs.