

APPELLATE CIVIL.

Before Kapur and Dulat, JJ.

SAROOP SINGH, ETC.—Appellants.

versus

BHAGWAN DAS,—Respondent.

Execution Second Appeal No. 565 of 1952:

Administration of Evacuee Property Act (XXXI of 1950) as amended by Administration of Evacuee Property (Amendment) Act (XI of 1953)—Sections 2(f) and 17—Mortgagee rights vesting in non-evacuee in lands belonging to an evacuee—Whether exempt from attachment and sale in execution of decree—Practice—Second Appeal—Change of law at the time of the hearing of the appeal—Court, whether can take notice thereof.

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D. H. attached mortgagee rights in certain land. The non-evacuee J. D. objected that the land belonged to Muslims who had gone away to Pakistan and, therefore, being evacuee property was exempt from attachment and sale in the execution of the decree.

Held, that the mortgagee rights could be attached and sold in execution of the decree as they were not "evacuee property" as defined in section 2(f) of the Administration of Evacuee Property Act, 1950, as amended by Administration of Evacuee Property (Amendment) Act, XI of 1953.

Held further, that it is the property of the evacuee which is "evacuee property" and not any right or interest therein.

Held also, that the law to be applied at the time of the hearing of the second appeal is the law in existence at the time the appeal is decided.

Sheikh Mohammad Din v. Thakur Singh (1), distinguished from and *Lachmeshwar Prasad Shukul's case* (2), followed.

(Case referred to Division Bench by Hon'ble Mr. Justice Dulat, on 18th June, 1953, for decision.)

Execution Second Appeal from the order of Shri J. S. Bedi, District Judge, Ambala, dated the 19th April, 1952, affirming that of Shri J. N. Kapoor, Senior Sub-Judge, Ambala, dated the 25th January, 1952, dismissing the objections with costs.

SHAMAIR CHAND and P. C. JAIN, for Appellants.

H. L. SARIN, for Respondent.

ORDER.

Dulat, J. DULAT, J. In execution of a decree against Sarup Singh and others, the decree-holder, got certain mortgagee rights in a piece of agricultural land attached. The judgment-debtors objected on the ground that the property, i.e. the land itself belonged to certain Muslims who had gone away to Pakistan and it was therefore evacuee property and for that reason exempt from attachment and sale in execution of the decree. This argument has been repelled by the Courts below on the view that the property

(1) 54 P.L.R. 415

(2) 1940 F.C.R. 84

sought to be sold in execution of the decree is merely Saroop Singh the mortgagee rights, and as those mortgagee rights do not belong to any evacuee they cannot be called ^{etc.} ^{v.} ^a Bhagwan Das, evacuee property.

Dulat, J.

Mr. Shamair Chand contends that the whole property in this case, that is, the piece of land in question including the mortgagee rights, is evacuee property because certain persons, who are evacuees, have an interest in that piece of land. Left to myself, I would not be inclined to accept this line of reasoning, as I feel that such an interpretation might lead to extremely awkward and inconvenient results. Mr. Shamair Chand has, however, drawn my attention to a judgment by a Division Bench of this Court (Khosla and Harnam Singh JJ.), *Sheikh Mohd. Din v. Thakar Singh and Custodian of Evacuee Property for the State of Punjab* (1), in which although this matter was not directly decided, a clear opinion favouring Mr. Shamair Chand's present argument was expressed. In these circumstances, it is, I think proper, that this matter, now that it has arisen, should be authoritatively decided. Both counsel are of this view as the question is likely to arise in a large number of cases. I would, therefore, refer this case for decision to a Division Bench subject to the orders of my Lord the Chief Justice.

JUDGMENT OF THE DIVISION BENCH.

KAPUR, J. This is an appeal brought by the judgment-debtors against an appellate order of District Judge Jagjit Singh Bedi, dated the 19th April, 1952, dismissing the judgment-debtors' objections under section 47 of the Code of Civil Procedure and allowing the execution to proceed. Kapur, J.

The facts of this case are given at great length in my judgment *Sarup Singh v. Bhagwan Das* (2), and

(1) 54 P.L.R. 415

(2) 53 P.L.R. 78

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it is not necessary to repeat them. Now the objections raised under section 47 of the Code of Civil Procedure are that the formalities required by law in regard to attachment have not been complied with and that the property is evacuee property and as such cannot be attached and sold in execution of the decree. The property in dispute which is sought to be sold are mortgagee rights in favour of the judgment-debtors in lands which belong to persons who are now evacuees.

The learned District Judge has held that the argument in regard to the non-compliance with the provisions of Order XXI rule 54 of the Code of Civil Procedure has not been made out and that the formalities required have been complied with.

When the matter was placed before my learned brother Dulat, J., the real question which arose for determination was whether mortgagee rights in lands, belonging to a person who has become an evacuee, are also exempt from attachment and sale. The mortgage had been created in favour of the present judgment-debtors by a Muslim who has now become an evacuee and it was this estate which was sought to be attached and sold in execution.

'Mortgage' has been defined in section 58 (a) of the Transfer of Property Act as "transfer of an interest in specified immovable property * * *", and this interest is itself capable of transfer. Thus a mortgagee can transfer by way of sub-mortgage or by way of sale his rights in property mortgaged to him. Therefore, according to the notions of property, there are two estates created in the same property, that is, equity of redemption and mortgagee rights. Although mortgage is a transfer of specific immovable property to secure a debt, the mortgagor nonetheless remains the owner of the specific property

charged although mortgagee rights are separate rights which vest in somebody else—the mortgagee. Salmund on Jurisprudence, p. 442 (10th Edition).

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Before the amendment of 1953 'evacuee property' was defined in section 2(f) of the Administration of Evacuee Property Act XXXI of 1950, as follows :—

"Evacuee property' means any property in which an evacuee has any right or interest whether personally or as a trustee or as a beneficiary or in any other capacity and includes any property.—"

and in section 2(i) 'property' was defined to mean property of any kind and includes any right or interest in such property.

The question for decision is whether mortgagee rights which are vested in a person who is not an evacuee are by themselves evacuee property. Mr. Shamair Chand submits that they are, and he relies on a Division Bench judgment, *Sheikh Mohammad Din v. Thakur Singh*, (1). In that case the mortgagee had brought a suit for enforcement of his mortgage by sale of the property and it was in that connection that it was held that the property was evacuee property because what was sought to be sold in that case was not mortgagee rights but the whole of the property as is provided for under Order XXXIV of the Code of Civil Procedure and in deciding that matter at page 421 Khosla J. observed—

"The next point to consider is whether mortgagee rights not being rights which belong to an evacuee can be deemed to be evacuee property. This argument really makes no difference to the case because it was the whole property which was ordered to be sold and not only the mortgagee rights therein * * *"

Saroop Singh and then the learned Judge went on to give his inter-
etc. pretation of section 2 (1) of the Administration of
v. Bhagwan Das. Evacuee Property Act. In my opinion that question
really did not arise.
Kapur, J.

In the present case what is sought to be sold, as I have said, are mortgagee rights as distinct from the specific immovable property mortgaged and also as distinct from the equity of redemption which vest in the mortgagor himself. As I read the section, it is not evacuee property which is being sold but the rights of the present judgment-debtors which are mortgagee rights which are not evacuee property.

The Legislature has now amended the Act by section 2 (c) of Act XI of 1953 and under the new definition 'evacuee property' means 'any property of an evacuee (whether held by him as owner or as a trustee or as a beneficiary or as a tenant or in any other capacity), and includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947, by any mode of transfer which is not effective by reason of the provisions contained in section 40.' And this definition makes it clear that it is the property of an evacuee which is evacuee property and not any right or interest therein. This really makes the position clearer and as was said in *Lachmeshwar Prasad Shukul's case* (1), the law to be applied at the time of second appeal is the law in existence at the time the appeal is decided and therefore the new definition would really be applicable and under this mortgagee rights which are vested in the judgment-debtors are not evacuee property. I would therefore dismiss this appeal with costs.

Dulat, J.

DULAT, J. I agree.