

APPELLATE CIVIL

Before Khosla and Harnam Singh, JJ.

SHEIKH MOHD DIN,—*J. D. Appellant.*

versus

SARDAR THAKAR SINGH, ETC.,—*Respondents.*

Letters Patent Appeal No. 45 of 1950.

Administration of Evacuee Property Act (XXII of 1951), Section 17—Scope of Section 17, whether ultra vires the Articles 19 (f) and 31 of the Constitution of India—Property mortgaged by a person, now an evacuee, to a person who is not an evacuee—Whether evacuee property—Mortgage decree directing sale of evacuee property—Mortgaging Court if barred under section 17 from conducting the sale—Code of Civil Procedure (Act V of 1908), Section 115—Revision of an order against which an appeal lies to the District Judge, whether competent.

Held—

- (i) that section 17 of the Administration of Evacuee Property Act is not **ultra vires** Articles 19 (f) and 31 of the Constitution.
- (ii) that it is immaterial that the mortgagee is a person who is not an evacuee as under the mortgage decree the whole property is to be sold and not only the mortgagee rights therein. Moreover from the definition of evacuee property in section 2 (f) of the Act it is clear that the evacuee has a right in the mortgaged property even if this right is deemed to be confined to the equity of redemption.

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(iii) that from the whole tenure of evacuee administration legislation it is clear that all kinds of sales whether they are ordered for the first time in execution proceedings or take place in pursuance of a direction contained in the decree itself are prohibited by section 17 of the Act. The sale of mortgaged property in pursuance of the mortgage decree falls within the expression "liable to be proceeded in any manner whatsoever in execution of any decree or order of any Court" in section 17 and is barred.

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M. B. Namazi v. Deputy Custodian of Evacuee Property, Madras (1), and Abdul Majid Haji Mohammed v. P. R. Nayak (2), followed.

Held also, that where an order was appealable to the District Court the aggrieved party could nevertheless move the High Court on the revision side.

Daw Min Baw v. A. V. P. L. N. Chettyar Firm and another (3), Gobardhan Dass v. Dau Dayal (4), and Tipan Prashad Singh and others v. Secretary of State (5), referred to.

Letters Patent Appeal, under clause 10 of the Letters Patent against the judgment of Hon'ble Mr. Justice Kapur, dated the 15th June 1950, in Execution First Appeal No.66 of 1949, affirming that of Shri Gobind Ram, Sub-Judge, 1st Class, Amritsar, dated the 28th February 1949, holding that section 8 (1) is no bar to the execution of this decree and the mortgaged property shall therefore be sold in the execution of the decree.

D. N. AWASTHY for TEK CHAND and A. M. SURI, for Appellant.

A. N. GROVER, for Respondents.

JUDGMENT

KHOSLA, J. It is convenient to deal with the following matters in this judgment. The facts of

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(1) A.I.R. 1951 Mad. 930.

(2) A.I.R. 1951 Bom. 440.

(3) I.L.R. 11 Rang. 134.

(4) I.L.R. 54 All. 573.

(5) A.I.R. 1935 Pat. 86.

Sheikh Mohd each case are different but many common questions
 Din of law are involved and the cases were all argued be-
 v. fore us at the same time :—
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- (1) F. A. O. No. 27 of 1951.
- (2) E. F. A. No. 292 of 1951,
- (3) L. P. A. No. 45 of 1950,
- (4) E. F. A. No. 19 of 1951,
- (5) E. F. A. No. 81 of 1951,
- (6) C. R. No. 304 of 1951,
- (7) E. F. A. No. 109 of 1950,
- (8) E. F. A. No. 105 of 1951,
- (9) E. F. A. No. 58 of 1951,
- (10) E. F. A. No. 101 of 1951, and
- (11) E. F. A. No. 115 of 1951.

In all these cases the meaning, scope and validity of section 17 of the Administration of Evacuee Property Act, XXII of 1951, are involved and in order to appreciate the point at issue it is necessary to state the facts of at least one case, and I choose L. P. A. No. 45 of 1950. In this case Thakar Singh held a mortgage upon a house and brought a suit for the recovery of the amount due on the basis of the mortgage. On the 23rd August 1948, he obtained a final decree for the recovery of the amount due on the mortgage by sale of the mortgaged property. On the 4th October 1948, Thakar Singh took out execution and prayed for the sale of the mortgaged property. Objection was taken by the Custodian, Evacuee Property, East Punjab, on the ground that the mortgaged property was not liable to sale in execution of a decree as such sale was barred by the provisions of section 8 of the

East Punjab Evacuee (Administration of Property) Act of 1947. The executing Court repelled this objection and ordered the sale of the property. Against this order two appeals were filed to this Court—one by the judgment-debtor who is an evacuee and the other by the Custodian, Evacuee Property. These appeals were heard by Kapur, J., who took the view that section 8 was no bar to the sale of the mortgaged property and dismissed both the appeals. The judgment-debtor appealed under clause 10 of Letters Patent. The question for decision in this case therefore is whether the sale of the mortgaged property in execution of a mortgage decree is barred by the provisions of section 8 of the Act of 1947, which is somewhat analogous in terms to section 17 of the Act now in force. A similar point is involved in E. F. A. No. 81 of 1951 and E. F. A. No. 109 of 1950. In both these cases the property has been ordered to be sold and the appeal is against the order rejecting the Custodian's objections. In some of the cases, for instance E. F. A. No. 105 of 1951 and E. F. A. No. 292 of 1951, the property has already been sold. In F. A. O. No. 27 of 1951, the executing Court ordered the appointment of a receiver and the Custodian appeals to this Court on the ground that a receiver in respect of evacuee property cannot be appointed. Execution First Appeal No. 292 of 1951 arises out of a money decree in execution of which evacuee property was sought to be sold. The objections of the Custodian were allowed and the execution application was filed. The appeal is by the decree-holder.

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There can be no doubt that evacuee property cannot be sold in execution of a money decree nor can a receiver be appointed in respect of evacuee property in the course of execution proceedings. On this point all parties are agreed and the provisions of section 17 of Act XXXI of 1950, as amended by Central Act XXII of 1951 are quite clear and in cases where evacuee property is sought to be sold in execution of a money decree or a receiver has been appointed

Sheikh Mohd no further point arises. I may therefore at once dis-
Din dispose of F. A. O. No. 27 of 1951 and E. F. A. No. 292
v. of 1951. F. A. O. No. 27 of 1951, must be allowed
Sardar Thakar and the appointment of a receiver set aside. The
Singh, etc., Custodian, who is the appellant before us, will con-
—
Khosla J. tinue to remain in charge of the evacuee property.
In the circumstances there will be no order as to
costs in this case.

With regard to E. F. A. No. 292 of 1951 the decree-holder sought to put up to sale evacuee property in execution of a money decree. This is clearly against the provisions of section 17 and the order of the Senior Subordinate Judge, Simla, allowing the Custodian's objections must be upheld. Mr Bishan Narain, who appears on behalf of the decree-holder, however, prays that the execution application should not be dismissed as he has still a remedy open to him, a remedy which he can claim in execution proceedings. He says that he can make a prayer to the executing Court that the Custodian be asked to make a declaration under rule 22 framed under the Act and make payment to him under section 10 (2) (m) of the Act. It may be that the Court has no power to compel the Custodian to make this payment but the decree-holder is not precluded from asking the executing Court to refer the matter to the Custodian and the Custodian may after considering the decree-holder's claim decide to make payment to him under section 10 (2) (m). Also there appears to be no objection to the executing Court calling upon the Custodian who is a party to these proceedings that he consider the matter under section 10 (2) (m). That being so, the order of the lower Court will be modified to the extent that the execution application will not be dismissed but will be kept pending and the decree-holder will be given an opportunity to seek any further relief to which he is under law entitled. The appeal is allowed to this extent and this extent only. In this case too, however, we make no order as to costs.

In all the remaining cases the decrees which are sought to be executed are mortgage decrees and the only question of law arising is whether the executing Court is barred from conducting the sale of the mortgaged property on execution being taken out by the decree-holder. There are three main lines of attack. In the first place it is argued that the provisions of section 17 do not cover the sale of mortgaged property because the sale of mortgaged property in pursuance of a mortgage decree cannot be said to be "a sale in execution of a decree." In the second place it is urged that mortgagee rights are not evacuee property within the meaning of section 2 (f) and therefore the sale of these rights is not prohibited by any provisions of the Act. In the third place it is urged that section 17 contravenes the provisions of Article 19 (f) and Article 31 of the Constitution

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The present section 17 as it stands after the enactment of Central Act XXII of 1951, is as follows :—

- "17. *Exemption of evacuee property from processes of Court, etc.* (1) Save as otherwise expressly provided in this Act, no evacuee property which has vested or is deemed to have vested in the Custodian under the provisions of this Act shall, so long as it remains so vested, be liable to be proceeded against in any manner whatsoever in execution of any decree or order of any court or other authority, and any attachment or injunction or order for the appointment of a receiver in respect of any such property subsisting on the commencement of the Administration of Evacuee Property (Amendment) Act, 1951, shall cease to have effect on such commencement and shall be deemed to be void.
- (2) Where, after the first day of March 1947, any evacuee property which has vested in the Custodian or is deemed to have vested

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in the Custodian under the provisions of this Act has been sold in execution of any decree or order of any court or other authority, the sale shall be set aside if an application in that behalf has been made by the Custodian to such court or authority on or before the 17th day of October 1950."

The relevant words are "liable to be proceeded against in any manner whatsoever in execution of any decree or order of any court." It is contended that the sale of mortgaged property in execution of a mortgage decree is really not a sale "in execution" of a decree because the decree itself orders the sale of the mortgaged property. The executing Court cannot go behind the decree, it cannot question the validity or otherwise of the decree nor can it on any ground whatsoever fail to comply with the direction contained in the decree. The sale must automatically take place on a mortgage decree for the sale is ordered by the decree. It cannot therefore be said (so runs the argument) that the sale is in execution of a decree. "In execution" really means that the executing Court passes a distinct and independent order directing sale. The executing Court has some discretion in the matter and may refuse to order sale and only in such cases can it be said that the sale is in execution of a decree. In cases where the executing Court has no discretion and is obliged to sell the property the sale is not strictly speaking in execution of the decree. This somewhat narrow interpretation of the expression "in execution of" may seem somewhat irrational, but it is contended that interpretation has been accepted and recognized in a number of cases arising under section 60 of the Civil Procedure Code and section 16 of the Punjab Alienation of Land Act. Counsel cited before us cases in support of their contention. With regard to section 60 of the Civil Procedure Code there are two important cases *Bhola Nath v. Mst. Kishori* (1), and

(1) I.L.R. 34 All. 25.

Chittar Mal v. Mst. Ram Devi (1). Section 60 of the Civil Procedure Code provides, *inter alia*, that the house belonging to an agriculturist and occupied by him "shall not be liable to such attachment or sale". This phrase has been interpreted to mean that where there has been a voluntary mortgage by the agriculturist of his residential house the sale of the house can be ordered by the executing Court in pursuance of a mortgage decree. In the Lahore case Young, C.J., observed—

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"Section 60 enacts that houses and other buildings belonging to an agriculturist and occupied by him shall not be liable to attachment or sale. This is a prohibition against forcible attachment or sale. There is nothing in this enactment to prevent an agriculturist voluntarily selling or otherwise alienating his house. Where an agriculturist voluntarily agrees to mortgage his house, it appears to us, this section does not apply. Inevitably it follows from the mortgage of a house that the house is liable to sale in certain eventualities. The voluntary nature of the mortgage must imply an agreement that the house may be sold under certain conditions. Therefore where an agriculturist mortgages his house he waives the privilege given to him by this section of the code."

It will be at once apparent that this reasoning cannot apply to the provisions of section 17 of the Act under consideration, for here, there is no question of a person having voluntarily mortgaged his property and therefore accepted the consequence of its being put on sale in execution of the mortgage decree. The

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object of evacuee property law is not to give protection to the judgment-debtor; its object is the preservation and administration of evacuee property and this is so, irrespective of the fact whether the property is under mortgage or not. The evacuee legislation is directed to the property and not to the individual. I shall have occasion to say more on this matter presently, but here it is sufficient to say that the reasoning applied by Young, C.J., will not hold good in the case of section 17. In the Allahabad case two Judges out of three took the view that section 60 was intended to apply only to simple money decrees. Banerji, J., took a different view and expressed the opinion that—

“The Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause (c) of the proviso to section 60, Code of Civil Procedure, and it makes no difference in the powers of the Court, whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged.”

The cases arising out of section 16 of the Punjab Alienation of Land Act proceed on somewhat similar reasoning. The most recent of these cases is Full Bench decision of this Court in *Pirji Safdar Ali v. The Ideal Bank, Ltd.*, (1). Almost the entire case law on the subject was considered by the Hon'ble Judges in this case and Mahajan, J., who delivered the main judgment, observed—

“Section 16 was not intended to empower the executing Court to question the validity of the decree during execution proceedings. If the decree contravened the provisions of the Punjab Alienation of Land Act, the Legislature had provided ample remedy.”

(1) A.I.R. 1949 E.P. 94.

under section 21-A for that. This section was meant to have application only to those cases where the contravention of the Punjab Alienation of Land Act was going to be committed for the first time by reason of any order of the execution Court or during the execution proceedings. It is not therefore right to hold in spite of these remedies the Legislature intended that the executing Court should ignore a decree, which contravenes the provisions of the Punjab Alienation of Land Act in spite of the fact that neither the Deputy Commissioner nor the judgment-debtor has taken advantage of the remedies that existed to cure the defect contained in the decree. What the Legislature intended by enacting section 16 was that wherever property had to be sold by the order of the executing Court and that can only happen in cases of money decrees then the executing Court will not order sale of any land belonging to an agriculturist and will not actually sell it, while in the case of mortgage decrees ordering sale of the property belonging to agriculturist—judgment-debtor the Legislature intended that the matter should be dealt with at the suit stage and any contravention of the Act by the Court passing the decree should be corrected by the remedies provided in the Act or in the general law.”

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Here again the reasoning cannot apply to section 17. Evacuee property law is intended to deal with the peculiar circumstances out of which the very notion of evacuee property arose. No question of the validity of the mortgage itself can arise. In all cases the mortgages were effected before the partition of India and therefore before the property was evacuee property. At that time the owner was under no disability to effect a mortgage such as an agriculturist

Sheikh Mohd under the Punjab Alienation of Land Act. On the
Din basis of a perfectly good mortgage a mortgage decree
v. could be passed, but after the 15th of August 1947, it
Sardar Thakar became necessary to make some provision for the
Singh, etc., protection of the property of those persons who were
 — compelled to leave India and the Legislature, *inter-*
Khosla J. *alia*, provided that such property could not be sold
 in execution of a decree and it is clear that the Legis-
 lature did not intend to make any distinction between
 money decrees or mortgage decrees, for the object
 was not as I have said before to protect the rights or
 give any special privilege to the owner but to protect
 the property itself in respect of which the Custodian
 was a kind of trustee. There is no provision similar
 to section 21-A and indeed there could not be and
 the only way in which the evacuee property could be
 kept intact was to save it from being "proceeded
 against in any manner whatever" by the executing
 Court or by any other authority. It is interesting to
 trace the history of the provisions of section 17.
 The first enactment dealing with evacuee property
 was the East Punjab Evacuee Ordinance IV of 1947.
 This Ordinance did not contain any provision regard-
 ing the attachment and sale of evacuee property.
 Then came the East Punjab Act XIV of 1947. Sec-
 tion 8 of this Act provided :—

"All property which vests in the Custodian shall be exempt from attachment, distress or sale in execution of the decree of a Civil or Revenue Court or in pursuance of the order of any other authority."

Section 15 of the East Punjab Ordinance IX of 1949, promulgated on the 10th of July 1949, similarly provided :—

"No property which has vested in the Custodian shall be liable to attachment, distress or sale in execution of a decree or order of a Court or any other authority, and no injunction in respect of any

such property shall be granted by any Court or other authority.”

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The subsequent legislation was entirely by the Central Government and Central Ordinance XII of 1949, contains section 15 which provided :—

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“ Save as otherwise expressly provided in this Ordinance, no property which has vested in the Custodian shall be liable to attachment, distress or sale in execution of a decree or order of a Court or any other authority * * * * * ”

Then came Central Ordinance XXVII of 1949 and section 17 of that Ordinance was in the same terms as section 15 of Ordinance XII of 1949, and finally came Central Act XXXI of 1950 which was later amended by Act XXII of 1951 and section 17 of this Act dealing with this matter was in slightly different terms. I have already quoted this section in the earlier part of this judgment and it will be remembered that instead of saying that “ evacuee property shall not be liable to attachment, distress or sale in execution of an order of a Court ” the new phraseology was intended to afford complete protection to evacuee property and words “ liable to be proceeded against in any manner whatsoever ” were used.

From what I have said above it is clear that the purpose of the evacuee legislation from the very beginning was to keep evacuee property intact and safe from any orders of a Court or other authority. The wording was gradually altered so as to make it more and more comprehensive. Even the appointment of a receiver is prohibited by section 17 as it finally stands. With regard to the purposes of evacuee legislation I may with advantage quote a passage from a recent decision of the Bombay High Court. Chagla, C.J., observed in *Abdul Majid Haji Mohamed v. P. R. Nayak* (1) :—

“ Now looking to the various provisions of this Act, it is clear that the object and purpose

(1) A.I.R. 1951 Bom. 440 at p. 444.

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of the Legislature in enacting this Ordinance (XXVII of 1949) was to deal with the custody, management and administration of evacuee property. The evacuee was to be prevented from exercising any rights as an owner in respect of his property, and the property was to vest in the Custodian. But the property was not to vest in him as an owner with the right of an owner; it was to vest in him for the purposes of the Ordinance; his powers and rights were confined to the provisions contained in the Ordinance itself. A further significant feature of the Ordinance that has to be noticed is that the Ordinance did not provide for the ultimate destination of the property which was taken away from the evacuee and vested in the Custodian."

Rajamannar, C.J., made similar observations in *M. B Namazi v. Deputy Custodian of Evacuee property, Madras* (1).

In my view the expression "liable to be proceeded against in any manner whatsoever in execution of any decree or order of any court" is much wider in its scope than the expression "liable to attachment and sale in execution of a decree." If the latter expression is held not to cover the case of a mortgage decree it cannot be said that the phraseology of section 17 also excludes a mortgage decree. It seems to me from the whole tenure of the evacuee administration legislation that all kinds of sales whether they are ordered for the first time in execution proceedings or take place in pursuance of a direction contained in the decree itself are prohibited by section 17. The reasonings upon which the decisions relating to section 60 of the Civil Procedure Code and section 16 of the Punjab Alienation of Land Act are based are

really irrelevant when interpreting section 17 and I am therefore of the view that section 17 clearly bars the sale of mortgaged property in execution of a decree despite the fact that the decree itself contains a direction for the sale of the property.

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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. But the definition of evacuee property given in section 2 in my view covers property which is under mortgage for section 2 (f) defines evacuee property as "any property in which an evacuee has any right or interest" and it is clear that the evacuee only has a right in mortgaged property even if this right is deemed to be confined to the equity of redemption. Mortgaged property is therefore clearly evacuee property and its sale is prohibited by section 17.

Lastly there is the objection with regard to section 17 being ultra vires the Article 19 (f) and Article 31 of the Constitution. This matter was considered by the Madras and Bombay High Courts in the two cases referred to above—A.I.R. 1951 Mad. 930 and A.I.R. 1951 Bom. 440. It cannot be said that section 17 imposes any restrictions upon the right of any citizen to hold property and these restrictions are in any case reasonable and in the interest of the general public. It is scarcely necessary for me to dilate on this matter further and it is sufficient to draw attention to the reasons given in the two decisions of the Bombay and Madras High Courts, respectively.

There is one other point which arises in Civil Revision No. 304 of 1951. In this case the property was sold and purchased and the Custodian's objections were dismissed. The Custodian moved this Court on the revision side and a preliminary objection was taken that no revision was competent because the

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order under revision was an order passed under section 47 of the Civil Procedure Code and the Custodian could have appealed against it. It is conceded that no appeal lies to this Court and if an appeal lies at all it lay to the Court of the District Judge. Section 115 gives an aggrieved party the right to file a petition for revision to the High Court in a case where no appeal lies thereto. This means that if the order by which a party is aggrieved is not appealable to the High Court he can file a petition for its revision. This question arose and was considered in a number of cases and it was held in A. I. R. 1938 All. 6 that where an order was appealable to the District Court the aggrieved party could nevertheless move the High Court on the revision side and a similar view was expressed in *Daw Min Baw v. A. V. P. L. N. Chettyar Firm and another* (1), *Gobardhan Dass v. Dau Dayal* (2) and *Tipan Prashad Singh and others v. Secretary of State* (3). As the order under revision is not appealable to this Court a revision lies.

On these findings the matters before us will be disposed of as follows :—

L. P. A. No. 45 of 1950 is allowed. As a consequence of this the sale will be set aside and the Custodian will take possession of the property. There will be no order as to costs.

E. F. A. No. 19 of 1951. In this case the appeal was against an order directing sale and this order will be set aside. The Custodian will take charge of the mortgaged property. There will be no order as to costs.

E. F. A. No. 81 of 1951. This is an appeal by the Custodian against an order directing the sale of the property. The order will be set aside and the execution application will be kept pending to enable the decree-holder to take such further steps for the realization of his decretal amount as he is advised to take. There will be no order as to costs.

(1) I.L.R. 11 Rang. 134.
(2) I.L.R. 54 All. 573.
(3) A.I.R. 1935 Pat. 86.

Civil Revision No. 304/51. In this case the property was sold and purchased by an auction-purchaser and the objections of the Custodian were rejected. The revision petition will be allowed and the sale will be set aside. The Custodian will take possession of the property. There will be no order as to costs.

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E. F. A. No. 109 of 1950. In this case the property was ordered to be sold and the Custodian's objections were dismissed. The appeal by the Custodian will be allowed and the Custodian will take possession of the property. There will be no order as to costs.

E. F. A. Nos 105 and 58 of 1951. Both these appeals arise out of the same order, E. F. A. No. 58 is by the evacuee and E. F. A. No. 105 is by the Custodian. In both these cases there is a prayer by the auction-purchasers Jagjit Singh and Daulat Ram that they should be made parties. The appeals are directed against an order of the executing Court directing the sale of the mortgaged property. Subsequently the sale did take place and the property was purchased by Jagjit Singh and Daulat Ram but inasmuch as the appeal relates to an order prior to the sale the auction-purchasers are not necessary parties. We have, however, heard Mr Iqbal Singh in support of the auction-purchasers' case and have taken into consideration whatever he had to urge. The applications to be brought on record are dismissed but the appeals of the Custodian and the evacuee are allowed. The order directing sale is set aside and as a consequence of this the sale will also be set aside. There will be no order as to costs.

E. F. A. No. 101 of 1951. In this case in execution of a money decree the property of an evacuee was sought to be sold. The executing Court ordered attachment of the property. The order of attachment will be set aside but there will be no order as to costs.

E. F. A. No. 115 of 1951. In this case also execution followed upon a money decree. The executing

Sheikh Mohd Court ordered the attachment of evacuee property.
Din . This order is liable to be set aside and will be set aside.
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Sardar Thakar The appeal is allowed but there will be no order as to
Singh, etc., costs.

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HARNAM SINGH, J. I agree.