

the second of the two questions referred to the Court by the Commissioner's letter of reference, dated 26th January, 1934, should be answered in the affirmative. They will humbly advise His Majesty accordingly. The respondent will pay the appellants' costs of the reference in the High Court and of this appeal.

Solicitors for the appellant : *Nehra & Co.*

Solicitor for the respondent : *The Solicitor, India Office.*

1939
 THE TRUSTEE
 OF TRIBUNE
 PRESS,
 LAHORE
 v.
 THE
 COMMISSIONER
 OF INCOME-TAX
 PUNJAB.

LETTERS PATENT APPEAL.

Before Addison and Abdul Rashid JJ.

LLOYDS BANK, LTD., LAHORE (DECREE-HOLDER)
 AND THE MANAGER, THE LLOYDS BANK,
 LTD., LAHORE (RECEIVER) Appellants,
versus

1939
 Jan. 16.

MST. REHMAT BIBI (JUDGMENT-DEBTOR)
 Respondent.

Letters Patent Appeal No. 156 of 1938.

Mortgage decree — Execution of — Objection by Judgment-debtor's legal representative — Claiming a part of the mortgage property — whether cognizable by executing Court under S. 47 of the Code of Civil Procedure (Act V of 1908) — Mortgage decree and money decree — Distinction between.

In execution of a mortgage decree, the widow of the judgment-debtor was brought on the record as his legal representative. The Receiver, appointed to take over possession of the mortgaged property, wanted to dispossess her from a house, a part of the mortgaged property. She applied to the Court, stating that she could not be dispossessed as she had got the house in lieu of her dower. The question for determination was whether the executing Court was competent to entertain her application under S. 47, Civil Procedure Code.

Held, that there is a clear distinction between a money decree and a mortgage decree, even in cases where the legal

1939

LLOYDS BANK,
LTD., LAHOREv.
MST. REHMAT
BIBI.

representative of the judgment-debtor raises an objection, which was not open to the judgment-debtor, but which is based on an independent title of the legal representative.

In the case of money decrees it is for the executing Court to determine how the decretal amount is to be recovered from the judgment-debtor and which property, if any, has to be sold in execution of the decree. In the case of mortgage decrees the method of recovery is determined by the trial Court and forms a part and parcel of the decree itself.

Any claim by the judgment-debtor or his legal representative that certain property is not liable to sale in execution of the mortgage decree is a claim challenging the validity of the decree and such a claim cannot be entertained by the executing Court under S. 47 of the Code of Civil Procedure, though it would be open to the claimant to resist the delivery of possession by putting in an application under rr. 97 and 100, O. XXI, of the Civil Procedure Code.

Ganesh Prosad Bhagat v. Sakhina Bibi (1) and *Amrit Lal Seal v. Jagat Chandra Thakur* (2), relied upon.

Letters Patent appeal from the judgment of Dalip Singh J., dated 26th October, 1938, in Execution 1st Appeal No.85 of 1938, affirming that of Khan Ahmad Khan, Senior Subordinate Judge, Lahore, dated 1st March, 1938, ordering the parties to produce their evidence on issue No.3.

JAGAN NATH AGGARWAL and KARTAR SINGH, for Appellants.

ABDUL AZIZ, for Respondent.

The judgment of the Court was delivered by—

ABDUL RASHID J.—On the 19th June, 1935, Lloyds Bank, Ltd., obtained a decree on a mortgage for over a lac and a half of rupees against *K. S. Mistri Asmat Ullah*. This decree was made final on the 11th of February, 1936. The judgment-debtor died a few

(1) (1912) 14 I. C. 7.

(2) I. L. R. (1925) 4 Pat. 696.

days later, and on the 6th of March, 1936, his widow *Mst. Rehmat Bibi* was brought on the record as his legal representative. Execution then proceeded and a sum of about Rs.20,000 was realised by the decree-holder. On the 7th December, 1937, the Manager of the Bank was appointed as a Receiver of the mortgaged property. The whole of the property was handed over to the Receiver except one house which was retained by *Mussammât Rehmat Bibi* on the ground that she was in possession thereof in lieu of her dower which was fixed at Rs.50,000 at the time of her marriage in 1904. *Mussammât Rehmat Bibi* presented an application in the executing Court under sections 47 and 151 and Order 21, rule 58, of the Code of Civil Procedure, stating that as she was in possession of the house in dispute in lieu of her dower the Receiver was not entitled to dispossess her. The following issues were framed by the executing Court:—

(1) Whether the application is maintainable under sections 47 and 151 or under Order 21, rule 58 of the Civil Procedure Code?

(2) Whether this Court has jurisdiction to hear the application? and

(3) Whether the objector has a lien of her dower on the property, and is she entitled to remain in possession till the payment of the amount of her dower?

The executing Court held on issue No.1 that the question raised by *Mussammât Rehmat Bibi* could only be decided under section 47 of the Code of Civil Procedure. As regards issue No.2 it held that the executing Court had jurisdiction to hear the application.

The Bank appealed to this Court. This appeal was heard by Skemp J. Before the learned Judge it

1939

LLOYDS BANK
LTD., LAHORE
v.
MST. REHMAT
BIBI.

1939

LLOYDS BANK,
LTD., LAHORE
v.
MST. REHMAT
BIBI.

was objected on behalf of the respondent that no appeal lay. This objection prevailed and the appeal was dismissed. The Bank preferred an appeal under the Letters Patent against the dismissal of its appeal by the learned Single Judge. This appeal was accepted by the Letters Patent Bench, and the ordinary appeal was remitted to a Single Judge for decision on the merits.

On remand the appeal was heard by Dalip Singh J. who upheld the decision of the executing Court and dismissed the Bank's appeal with costs. The Bank has, therefore, preferred the present appeal under clause 10 of the Letters Patent.

The learned Single Judge has held that there is no real distinction between a money decree and a mortgage decree in cases where an objection to execution is preferred by the legal representative of a judgment-debtor provided the legal representative does not derive his title, so far as the objection is concerned, from the judgment-debtor but relies on his own independent title. According to the learned Judge as the legal representative in the present case was raising an objection to the sale of the property based on her own right such objection could be dealt with—and probably only dealt with under section 47 of the Code of Civil Procedure and a separate suit was barred.

It appears to us that there is a clear distinction between a money decree and a mortgage decree, even in cases where the legal representative of the judgment-debtor raises an objection which was not open to the judgment-debtor but which is based on an independent title of the legal representative. In the case of money decrees it is for the executing Court to determine how the decretal amount is to be recovered from the judgment-debtor and which property, if any, has to be

sold in execution of the decree. In the case of mortgage decrees the method of recovery is determined by the trial Court, and forms a part and parcel of the decree itself. Any claim by the judgment-debtor or his legal representative that certain property is not liable to sale in execution of the mortgage decree is a claim challenging the validity of the decree and such a claim cannot be entertained by the executing Court under section 47 of the Code of Civil Procedure. Even if the objection of the legal representative of the judgment-debtor, claiming exemption from sale with respect to a certain property, is based on his own independent title, such a claim must be put forward by means of a separate suit and is not entertainable by the executing Court. Reference may be made in this connection to a Division Bench ruling of the Calcutta High Court reported as *Ganesh Prosad Bhagat v. Sakhina Bibi* (1). In this case a mortgage decree was obtained against the mortgagor. He died and his widow was brought on the record as his legal representative. She put forward a claim that she was entitled to the property independently of her husband for whom she was substituted, and under a title derived from her father and her uncle, and she prayed that the property should be exempted from execution sale. It was held that the claim could not be made under section 47 of the Civil Procedure Code, because if the claim is taken to be one under section 47, it is a claim for deduction of something from the decree. The decree has been made in respect of the mortgaged property and it could not be withheld from execution without in so far nullifying the effects of the decree a course which is not open to the applicant under section 47

1939

LLLOYDS BANK
LTD., LAHORE
v.
MST. REHMAAT
BIBI.

1939

ALLOYS BANK,
LTD., LAHORE
v.
MST. REHMAT
BIBI.

to adopt. It was laid down in *Amrit Lal Seal v. Jagat Chandra Thakur* (1) that an objection that a property is not saleable may, in certain circumstances, be made by the judgment-debtor in the case of a money decree, either before or even after the confirmation of the sale; but in the case of a mortgage decree such an objection cannot be taken in an execution proceeding because it is an attack upon the validity of the decree, and it is not open to the executing Court, where its jurisdiction is based on a decree for sale, to refuse to carry out the sale so long as the decree exists in full force and effect.

We are of the opinion that in the present case the executing Court is bound to sell the house in dispute. *Mussamat* Rehmat Bibi is not entitled to challenge the order for the sale of the property. It would, however, be unjust to oust *Mussamat* Rehmat Bibi from the possession of the house in question by giving possession to the Receiver at the present stage. Under the law it is obligatory on the executing Court to dismiss the application of *Mussamat* Rehmat Bibi under section 47 of the Code of Civil Procedure, and to sell the property. As soon as the property is sold and the auction-purchaser applies for possession of the property it would be open to *Mussamat* Rehmat Bibi to resist the delivery of possession by putting in an application under rules 97 and 100 of Order 21, of the Civil Procedure Code. It would then be incumbent on the Court to investigate the claim of *Mussamat* Rehmat Bibi and if the Court is satisfied that *Mussamat* Rehmat Bibi was in possession of the property on her own account it must direct that she shall continue to be in possession of the property.

(1) I. L. R. (1925) 4 Pat. 696.

We accordingly accept this appeal, set aside the orders of the learned Single Judge and of the executing Court and dismiss the application preferred by *Mussammat* Rehmat Bibi under section 47 of the Code of Civil Procedure. The case will now be remitted to the executing Court for decision in accordance with law in the light of the observations made above.

Parties will bear their own costs throughout.

The learned counsel for *Mussammat* Rehmat Bibi agreed that the road marked * * on plan, Ex. D. P., shall be kept open by *Mussammat* Rehmat Bibi for the purposes of bungalows Nos.2, 3 and 4 and that this road shall be at least 16 feet in width. It was further agreed that *Mussammat* Rehmat Bibi will keep this road open for the use of bungalows Nos.2, 3 and 4, even if she is held to be in possession of the entire plot marked red in plan, Ex. D. P., and entitled so to remain.

A. N. K.

Appeal accepted.

1939

LLOYDS BANK,
LTD., LAHORE
v.
MST. REHMAT
BIBI.