

magistrate are only for an offence under section 5 of the Official Secrets Act read with section 120-B of the Indian Penal Code, Mehra cannot be examined as an approver in that court. There is no force in these appeals and they are hereby dismissed.

B.R.T.

The State
v.
Hiralal
Girdharilal
Kothari
and others

Wanchoo, J.

APPELLATE CIVIL

Before Dulat and Dua, JJ.

SHRIMATI DURGA DEVI,—*Appellant.*

versus

SHANTI PARKASH AND OTHERS,—*Respondents.*

Regular Second Appeal No. 594 of 1955.

Code of Civil Procedure (V of 1908) Section 11—Bar of Res Judicata—Legal representative—Whether can take plea not available to his predecessor-in-interest—Section 47—Bar to suit under—Whether available where the validity of the decree is challenged—Parties to the suit in which the decree was passed—Meaning of.

1959

Nov., 30th

Held, that the governing rule as to the applicability of the bar of *res judicata* is well settled; according to it a verdict against a man impleaded in one capacity will not affect his rights when proceeded against in other distinct capacity; in the latter capacity he would indeed be a different person. The true test is the identity of title in the litigations. If the present suit had been instituted against the mortgagor, it was clearly not open to him to deny his competence to mortgage the land in question, by setting up some one else's paramount title. It is also not open to his legal representative to raise a plea which his predecessor-in-interest could not raise as his liability is restricted to the estate which he represents in the suit.

Held, that the duty to raise the question for the purposes of attracting the provisions of section 11, Civil Procedure Code, and the bar in the later suit, on the basis of the applicability of section 47, Civil Procedure Code, seem to be co-extensive, each complementing the other. The

expression "parties to the suit in which the decree was passed in section 47, Civil Procedure Code, refers to the capacity in which the individuals concerned were impleaded in the suit. It is undoubtedly desirable to construe section 47, Civil Procedure Code, as liberally as its language would permit, so that the object of affording relief to the parties cheaply, speedily and finally is achieved, but in order to attract the bar created by this section, the parties should have been impleaded in the suit in the same capacity in which the objection is sought to be raised by them to the execution of the decree. Objections in other capacities would be as if they were objections by different persons. Sub-section 2 of section 47, Code of Civil Procedure, which authorises the Court executing the decree to treat proceedings under this section as a suit or a suit as a proceeding subject to the law relating to limitation and court-fee, is also suggestive of the intention of the legislature to secure an effective adjudication of the objections raised and not to allow forms of procedure to stand in the way but the parties must litigate in the same capacity.

Held, that a claim challenging the validity of the decree, not being entertainable by the executing Court, should be decided by a separate suit. It does not merely relate to the execution, discharge or satisfaction of the decree as passed, but it really seeks to get it modified. Section 47, Civil Procedure Code, would thus be inapplicable on this ground as well

Second Appeal from the decree of the Court of Shri T. C. Gupta. Additional District Judge, Amritsar, dated the 11th day of April, 1955, modifying that of Shri Chetan Dass Jain, Sub-Judge, 1st Class, Amritsar, dated the 21st June, 1954 (dismissing the plaintiff's suit and leaving the parties to bear their own costs) to the extent of granting the plaintiff a decree for declaration sought by him with respect to the land described in (a) of the heading of the plaint and affirming the decree of the trial Court with respect to the rest of the claim and leaving the parties to bear their own costs.

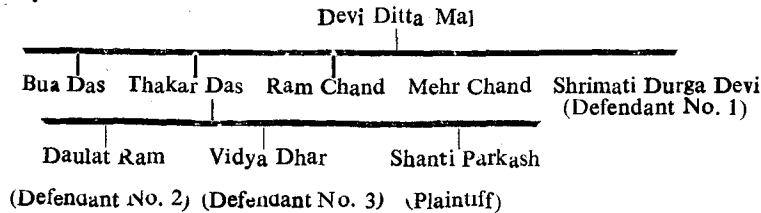
S. L. PURI, for Appellant.

D. N. AWASTHY, for Respondents.

JUDGMENT

DUA, J.—The following pedigree-table would be helpful in understanding the dispute in the present appeal :—

Dua, J.



Thakar Dass mortgaged the land in dispute measuring 119 *kanals* and 16 *marlas* described in head-note (A) to the plaintiff by a registered mortgage-deed in favour of his sister Durga Devi defendant No. 1 for a sum of Rs. 2,500. After his death Durga Devi mortgagee instituted a suit on the 10th of July, 1946, against Shanti Parkash, Vidya Dhar, Daulat Ram, and their mother Khem Kaur, as the legal representatives of Thakar Dass deceased, for the recovery of mortgage money, which was decreed on the 21st of August, 1948, under a compromise, the amount decreed being Rs. 2,500 payable by instalments and in case of default the whole amount being recoverable by sale of the mortgaged property. Default having been committed, execution was sued out and in those proceedings the decree-holder mortgagee herself purchased the mortgaged land for a sum of Rs. 2,000 on the 11th of January, 1950. This sale was confirmed on the 20th of May, 1950, and sale certificate granted on the 7th of October of the same year. For the balance of the decretal amount she obtained a personal decree against the legal representatives of Thakar Dass and again took out execution; in these proceedings she attached the land described in head-notes (B) and

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(C) of the plaint as property belonging to Thakar Dass.

Shanti Parkash. objected that Thakar Dass had only one-fourth share in the property mentioned in the heading of the plaint, and that one-fourth share therein belonged to Mehr Chand, a brother of Thakar Dass, who mortgaged his share, in the entire land in dispute, to Shanti Parkash for a sum of Rs. 3,000 on the 5th of October, 1953, by means of a registered mortgage-deed. Durga Devi, it was contended, could not proceed against the one-fourth share of Mehr Chand, and that in any case he (Shanti Parkash) was entitled to keep his mortgagee rights in the entire land intact. The Court sale in favour of defendant No. 1, according to the plaintiff, could not affect his rights. These objections which were raised by Shanti Parkash under Order 21 rule 58, Code of Civil Procedure, were rejected with the result that he instituted the suit out of which the present second appeal has arisen. In the suit he sought a declaration to the effect that he is mortgagee with possession of one-fourth share of Mehar Chand in the entire land in dispute for a sum of Rs. 3,000 and that the sale of that share in the land described in head-note (A) should not affect his rights; it is further claimed that the execution against Mehar Chand's one-fourth share in the land described in head-notes (B) and (C) of the plaint without reserving his mortgage money is also null and void and should not affect his mortgagee rights.

Vidya Dhar defendant No. 3 did not put in appearance in spite of service and defendant No. 2 Daulat Ram appeared but did not file any written statement. Smt. Durga Devi defendant No. 1, however, repudiated the plaintiff's claim and did not admit that Mehar Chand had any share in the

land in question or that he had mortgaged it with the plaintiff as claimed by him. Bar of constructive *res judicata* as well as under section 47, Code of Civil Procedure, were also pleaded. Two main issues were framed by the trial Court:—

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- (1) Whether the plaintiff is a mortgagee of the property in suit; if so, for what amount? and
- (2) Whether the suit is barred by section 47, Code of Civil Procedure, or by constructive *res judicata* ?

The Court of first instance came to the conclusion that Mehar Chand had one-fourth share in the entire land in dispute and that he had mortgaged with possession his share of the land with the plaintiff for a sum of Rs. 3,000. Under issue No. (2) it found the suit not to be barred by the rule of constructive *res judicata*, but the bar under section 47, Code of Civil Procedure, was upheld. The Court placed reliance on *Muhammad Iqbal v. Labha Mal* (1), in support of its view.

On appeal the learned Additional District Judge upheld the view of the trial Court with respect to the applicability of section 11, Code of Civil Procedure, but as regards section 47 of the Code also he held that the suit was not barred under the said provision. In support of his view the learned Judge relied on *Fazal Ali and another v. Firm R. B. Sabel and Co., etc.* (2), *Lloyds Bank Ltd., Lahore v. Mst. Rehmat Bibi* (3), and *Dareppa Alagouda v. Mallappa Shivalingappa* (4).

Smt. Durga Devi has preferred the present second appeal and her counsel Shri S. L. Puri has

(1) A.I.R. 1930 Lah. 1068
(2) A.I.R. 1935 Lah. 549
(3) A.I.R. 1939 Lah. 178
(4) A.I.R. 1947 Bom. 307

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challenged the decision of the Court below on both the grounds. He has repeated his reliance on *Muhammad Iqbal v. Labha Mal* (1), with respect to the applicability of section 47, Code of Civil Procedure ; it has, however, been contended that in so far as the bar under section 11, Code of Civil Procedure, is concerned, this decision does not lay down the correct rule of law. In the reported case *Jai Lal, J.*, observed that in a suit for the recovery of money on the basis of a mortgage, the legal representatives of the mortgagor can raise only those objections which the original mortgagor could. The counsel submits that this observation does not represent the correct legal position. He contends that where a person has been impleaded as a defendant, he must put forth all defences open to him irrespective of the capacity in which he has been impleaded. In my opinion this submission is without substance and is clearly unsustainable ; it finds support neither from the language of section 11, Code of Civil Procedure nor from the general principles of *res judicata*, nor from those rules, which determine the rights and liabilities of legal representatives of parties, against whom relief is claimable in their representative capacity. The governing rule as to the applicability of the bar of *res judicata* is well settled ; according to it a verdict against a man impleaded in one capacity will not affect his rights when proceeded against in another distinct capacity ; in the latter capacity he would indeed be a different person. The true test is the identity of title in the litigations. It must be borne in mind that if the present suit had been instituted against Thakar Dass, mortgagor, then it was clearly not open to him, to deny his competence to mortgage the land in question, by setting up some one else's paramount title. Shanti Parkash having been impleaded as a legal representative of Thakar Dass and his liability in the

(1) A.I.R. 1930 Lah. 1068

suit being restricted to the estate which he represented in the suit, obviously it would not be open to him to raise a plea, which his predecessor-in-interest could not raise. I would, therefore, repel the contention that section 11, Code of Civil Procedure, operates as a bar to the present suit. I must, however, not be understood to lay down that in no case can a party to a mortgage suit plead his own paramount title, a point on which opinions may and perhaps do differ though such a joinder of parties can only tend to confusion and, therefore, may generally speaking be considered irregular. My decision is, therefore, confined only to the facts of the present case.

Coming to the bar of section 47, Code of Civil Procedure, a Division Bench of the Lahore High Court in *Lloyds Bank, Ltd., Lahore v. Mst. Rehmat Bibi* (1), took a view different from that taken by Jai Lal, J., in *Muhammad Iqbal v. Labha Mal* (2). The following observations by the Division Bench are pertinent :—

“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 decree, 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

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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, Civil Procedure Code. 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."

In support of their view the Bench referred to *Ganesh Prasad Bhagat v. Sakhina Bibi* (1), and *Amrit Lal Seal v. Jagat Chandra Thakur* (2).

Mr. Puri has placed his reliance principally on *Muhammad Iqbal v. Labha Mal* (3), *Roshan v. Nigahia and others* (4), *Nand Kishore v. Sultan Singh and another* (5), *Chinnathayee v. Lakésmi Achi and others* (6) and *Nemathanpatti M. M. Pl. Annadana Chatram v. P. K. P. R. M. Raman Chettiar* (7). *Muhammad Iqbal v. Labha Mal* (3), is undoubtedly completely in Mr. Puri's favour and the other decisions also lend some support to his contention, though in *Nand Kishore v. Sultan Singh* (5), it was observed that whether or not section 47, Code of Civil Procedure, applied to the case, the suit there was barred by Order 21, rule 92(3). *Roshan v. Nigahia* (4), is not a case of representatives of a mortgagor ; *Nemathanpatti M. M.*

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- (1) 14 I.C. 7
 (2) I.L.R. 4 Pat. 696
 (3) A.I.R. 1930 Lah. 1068
 (4) A.I.R. 1926 Lah. 162
 (5) A.I.R. 1926 Lah. 165
 (6) A.I.R. 1936 Mad. 675
 (7) A.I.R. A.I.R., 1946 Mad. 209

v. *P. K. P. R. M. Rama Chettiar* (7), is also not of much assistance, the facts being clearly distinguishable.

In addition to *Lloyds Bank Ltd., Lahore v. Mst. Rehmat Bibi* (1), already cited the contrary view has also been taken in (*Vedlamannati Venkatakrishnayya and others v. (Vadlamannati Venkatanarayan Rao and others* (2), and *Dareppa Aulagouda v. Mallappa Shivalingappa* (3). In the Madras case, the Division Bench observed that the bar of section 47, Civil Procedure Code, could only apply to cases where there is a duty to raise the question in the earlier proceedings and where the impleading of a party in the suit was in one capacity and questions are raised in execution objecting to the decree in another capacity. They are not matters falling under section 47, Civil Procedure Code, and should be decided in a regular suit. In the Bombay case, Lokur, J., agreed with the view adopted in *Lloyds Bank Ltd., Lahore v. Mst. Rehmat Bibi* (1).

After considering the views expressed in the various authorities cited at the Bar, as at present advised, I am inclined to agree with the reasoning adopted by the Madras High Court in (*Vadlamannati Venkatakrishnayya and others v. (Vadlamannati Venkatanarayan Rao and others* (2), and also with the view taken in *Lloyds Bank Ltd., Lahore v. Mst. Rehmat Bibi* (1). The duty to raise the question for the purposes of attracting the provisions of section 11, Civil Procedure Code, and the bar in the later suit, on the basis of the applicability of section 47, Civil Procedure Code, seem to me to be co-extensive, each complementing the other. The expression "parties to the suit in which the decree was

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(1) A.I.R. 1939 Lah. 178
(2) A.I.R. 1936 Mad. 733
(3) A.I.R. 1947 Bom. 307

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passed" in section 47, Civil Procedure Code, would in this view refer to the capacity in which the individuals concerned were impleaded in the suit. It is undoubtedly desirable to construe section 47, Civil Procedure Code, as liberally as its language would permit, so that the object of affording relief to the parties cheaply, speedily and finally is achieved, but in order to attract the bar created by this section, the parties should have been impleaded in the suit in the same capacity in which the objection is sought to be raised by them to the execution of the decree. Objections in other capacities would, as already noticed, be as if they were, objections by different persons. Sub-section 2 of section 47, Code of Civil Procedure, which authorises the Court executing the decree to treat proceedings under this section as a suit or a suit as a proceeding, subject to the law relating to limitation and court-fee, is also suggestive of the intention of the legislature to secure an effective adjudication of the objections raised and not to allow forms of procedure to stand in the way but the parties must litigate in the same capacity. There is also force in the contention that the claim advanced by Shanti Parkash in the instant case is one challenging the validity of the decree and, therefore, not being entertainable by the executing Court should be decided by a separate suit. It does not merely relate to the execution, discharge or satisfaction of the decree as passed, but it really seeks to get it modified. Section 47, Civil Procedure Code, would thus appear to be inapplicable on this ground as well.

For the reasons given above, the appeal fails and is hereby dismissed. In the circumstances of the case, however, there would be no order as to costs in this Court.

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Dulat, J.—I agree.

R. S.