

delegated to the High Court. If the same or a different Legislature had subsequently withdrawn those powers, the act would, in effect, be an assumption to itself by the State of the judicial powers it had previously delegated. A Governor, acting under section 93, Constitution Act, for the time being embodies the State in all its aspects, and where, by legislative act, the Governor, in such circumstances, withdraws from the High Court a power which it previously possessed, being a judicial power delegated to such High Court by the State, it cannot be doubted that in effect the Governor has assumed to himself these powers.

For these reasons, I am clearly, of the opinion that the provisions of subsection (4) of section 15, Punjab Urban Rent Restriction Act, 1947, in so far as they exclude the revisionary jurisdiction of the Court in respect of acts of Controllers and Appellate Authorities, appointed under that Act, which are essentially judicial acts, are to that extent *ultra vires*. I am satisfied also that the order of the Appellate Authority in each of the cases before us is a judicial act performed in the exercise of powers conferred by the Rent Restriction Act, 1947, and as such, the proceeding in each such order was made, is subject to revision by this Court under section 115, Civil Procedure Code.

Per Curiam.—We hold that this Court has jurisdiction under section 115, Civil Procedure Code to deal with each of the four cases placed before us, and direct that those cases should now go back to the Single Bench for decision on merits. Under section 205, Government of India Act, 1935, we certify that these cases involve a substantial question of law as to the interpretation of section 93 of that Act.

A. H.

Orders accordingly.

P. L. D. 1949 Lahore 50

Division Bench

Before Sir Abdul Rashid, C. J. and Muhammad Sharif, J.

Sh. MOIZ-UD-DIN—Defendant-Petitioner

versus

UTTAM CHAND—Plaintiff-Respondent

Civil Revision No. 97 of 1948, decided on 29th March 1949, from the order of the Sub-Judge, 1st Class, Lahore, dated 8th October, 1946. This revision was referred to Division Bench by C. J. on 15th February, 1949.

(a) **The Transfer of Property Act (IV of 1882), S. 58—Claim based on mortgage of shops for a sum—Constitutes a claim to immovable property.**

As soon as Moiz-ud-Din created a mortgage for a sum in the property comprised in the mortgage, Uttam Chand secured an interest in this property (shops). I L R 51 All. 494 (D. B.) ; I L R 12 Rang. 370 (F B) ; I L R 29. Cal. 1 (F B). and I L R 44 Mad. 965 *relied on*.

(b) **The West Punjab Protection of Evacuee Property Act (VII of 1948), Ss. 11, 12—Civil Suit by mortgagee (Evacuee) is barred.**

The claim of the plaintiff *i. e.*, the recovery of a sum on the basis of a mortgage amounts to immovable property. The suit must, therefore, be regarded as a suit in respect of immovable property belonging to Uttam Chand Evacuee.

That Uttam Chand left Pakistan during the disturbances of August, 1947 and that he comes to Pakistan off and on for purposes of business. He was, therefore, rightly regarded as an Evacuee by the trial Court.

The present suit is not cognizable by a Civil Court, as the plaintiff

is not a claimant who has been referred to Civil Court under section 17 of the Act.

K. B. Muhammad Hussain and Abdul Aziz, for Petitioner.

N. Edmunds and Muhammad Din Jan, for Respondents.

Sir Abdul Rashid, C. J.—On the 26th of June 1943, Moiz-ud-Din mortgaged the property in suit to Uttam Chand for a sum of Rs. 1,20,000. The mortgage was a simple one. On the 20th of May, 1947, Uttam Chand instituted the present suit for recovery of Rs. 1,08,900 on the basis of the mortgage-deed. Para. 4 of the plaint is in the following terms :—

"It is, therefore, prayed that a decree in the sum of Rs. 1,08,900 be passed in favour of the plaintiff against the defendant and defendant be ordered to pay the amount with interest at $6\frac{1}{2}$ per cent per annum from the date of the suit till payment and in case of default the mortgaged premises be sold, and in case it is found insufficient a personal decree in favour of the plaintiff against the defendant be passed for the balance."

On the 19th of August, 1948 an objection was taken on behalf of Moiz-ud-Din defendant to the effect that the mortgage debt constituted immovable property within the meaning assigned to that term in section 22 of the West Punjab Protection of Evacuee Property Act, 1948, and that, consequently, by virtue of section 11 of the Act, no Civil Court could entertain or adjudicate on such a claim. On behalf of the plaintiff it was urged that the mortgage-deed did not constitute immovable property, that the mortgage amount was to be regarded as a simple debt under clause (iii) of section 22 (c) of the Act and that the present suit was, therefore, entertainable by the Civil Court. The trial Court accepted the contention put forward on behalf of the plaintiff and held that the jurisdiction of the Civil Court was not barred. Against this decision the defendant has preferred a petition for revision to this Court.

Section 22 of the Act is in the following terms :—

"In this Act unless the context otherwise requires....."

- (c) 'Property' means all kinds of movable or immovable property but does not include—
- (i) cash deposits in Bank ;
 - (ii) any actionable claims, otherwise than in relation to any undertaking or business of which the Custodian assumes possession or control ;
 - (iii) debts other than those towards which payment is tendered voluntarily by debtors."

It was urged by the learned counsel for the petitioner that the mortgage debt which is the subject-matter of the present suit amounts to immovable property, belonging to an evacuee, namely, Uttam Chand plaintiff and that, therefore, by virtue of section 11 of the Act a Civil Court cannot entertain or adjudicate on this claim. Section 58 of the Transfer of Property Act, lays down that a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The section deals with five different types of mortgages, but one feature is common to all mortgages and that is that a mortgage amounts to a transfer of an interest in specific immovable property. As soon as Moiz-ud-Din created a mortgage for a sum of Rs. 1,20,000 in the property, comprised in the mortgage, Uttam Chand secured an interest in this property. The mort-

gaged property consisted of shops. Therefore, Uttam Chand secured an interest in these shops.

According to section 3 of the Transfer of Property Act, actionable claims do not include mortgage debts. The only question for determination, therefore, is whether mortgage rights in immovable property constitute immovable property. It was held by a Division Bench of the Allahabad High Court in the case of *Bank of Upper India Limited v. Fancy Skinner and others* I L R 51 All. 494 that the interest of a simple mortgage is immovable property, as defined by the General Clauses Act, and within the meaning of the provisions of the Transfer of Property Act; and a transfer of such interest can only be effected by means of a registered instrument, as required by section 54 of the Transfer of Property Act. The following observation from this judgment may be reproduced in *extenso* :—

"In the first place a mortgagee's interest may come in within the meaning of the expression "benefits to arise out of land" in the General Clauses Act. In the second place, the Indian Legislature appears to have intended that all rights to immovable property should fall within the category of immovable property. Mortgagees of immovable property have priority over all subsequent transfers and subsequent transferees are presumed to have notice of the previous charge. Such presumption cannot be made unless there is a registered document. It seems to be against the general policy of the Transfer of Property Act that subsequent transferees should be bound by a mortgage, although that mortgage need not be made by a registered instrument. The mortgagee's interest is not a mere right to recover the debt due but to have a charge on the property and to follow it wherever it goes. His claim is excluded from the definition of "actionable claim" in section 3 of the Transfer of Property Act."

A Full Bench of the Rangoon High Court took the same view in the case of *V. E. R. M. N. C. T. Chattvar v. A. R. A. R. R. M. Chattvar Firm* I L R 12 Rang. 370. It was pointed out in this case that mortgage debts fall within the definition of immovable property in England and in India, and that it was manifest that a mortgage debt is immovable property in view of the provisions of section 58 of the Transfer of Property Act. The mortgage in the Rangoon case was a mortgage by deposit of title deeds. It was, however, observed by the learned Judges that a mortgage by deposit of title-deeds, in which the mortgagee prays for a decree for sale of the mortgaged property, cannot be distinguished from a simple mortgage. Similar views were expressed by a Full Bench of the Calcutta High Court in *Paresh Nath Singha v. Nabogopal Chattopadhyaya* I L R 29 Cal. 1 and by the Madras High Court in *Alumalsi Chatty and another v. P. Balakrishna Mudaliar* I L R 44 Mad. 965. I have, therefore, no hesitation in coming to the conclusion that the claim of the plaintiff in the present case constituted a claim to immovable property.

It was argued by Mr. Norman Edmunds on behalf of the respondent that the plaintiff was merely trying to sell shops belonging to Moiz-ud-Din defendant who was a Muslim and was a resident of Pakistan and that the present suit could not, therefore, be regarded as a suit in respect of immovable property belonging to an evacuee. In my opinion this contention cannot be acceded to. The claim of the plaintiff i.e., the recovery of a sum of Rs. 1,08,900 on the basis of a mortgage amounts to immovable property. The suit must, therefore, be regarded as a suit in respect of immovable property belonging to Uttam Chand an evacuee. It is open

to Uttam Chand not to sue on the basis of the mortgage debt, but to ask to a simple money decree against the person of Moiz-ud-Din. That appears to me to be the only way whereby he can convert his claim in the present suit to movable property. The question whether such a suit is also not barred by section 11 of the Act, does not arise for consideration at the present stage.

It has been laid down by section 11 of the Act that "no Court shall entertain or adjudicate on a claim in any suit, appeal, execution application or other proceeding as to whether any property is or is not evacuee property or as to what interests, if any, an evacuee has in such property, except in the case of a claimant who has been referred to the Civil Court under section 17 of this Act for establishment of his title". In view of the findings given above, the present suit is not cognizable by a Civil Court. It is not contended that the plaintiff is a claimant, who has been referred to the Civil Court under section 17 of the Act for the establishment of his title. It would be open to the plaintiff to take any measures that he desires to take to bring his case within the exception mentioned in section 11 of the Act.

It was admitted by Mr. Edmunds in the trial Court that Uttam Chand left Pakistan during the disturbances of August 1947 and that he comes to Pakistan off and on for the purposes of business. He was, therefore, rightly regarded as an evacuee by the trial Court.

For the reasons given above, I would accept this petition for revision and set aside the order of the learned Sub-Judge, dated the 8th October 1948. I would hold that the present suit as laid cannot be continued in the trial Court. It would be open to the plaintiff, if he is so advised, to take any steps to make the suit-entertainable by a Civil Court in Pakistan. I would leave the parties to bear their own costs in this Court.

Muhammad Sharif, J.—I agree.

Revision allowed.

K. M. A.

P. L. D. 1949 Lahore 53

Single Bench

Before Cornelius, J.

MUHAMMAD HAYAT and others—Defendants-Appellants.

versus

GHULAM MURTAZA—Petitioner-Respondent

Second Appeal No. 1635 of 1946, decided on 31st March, 1949, from the order of Senior Sub-Judge, Gurdaspur, dated 6th June, 1946.

(a) Punjab Pre-emption Act, 1913, S. 15—Right of pre-emption in favour of whole line of descendants and so no question of succession—Plaintiff and vendee had equal right of pre-emption—Suit dismissed.

By clause (a) of section 15 of the present Act also, it must be held that the right of pre-emption is reserved in favour not of any particular individuals in existence at the date of the sale or suit but in favour of "the whole line of descendants would be heirs". Learned counsel for the respondents posed the question how would the order of succession be fixed inside one of these lines of heirs, if ascendants and descendants in several degrees were in existence? The answer to my mind is to be found in two considerations namely, firstly, that any two lines which derive from the same common ancestor with the vendor would be placed on an equal footing, and secondly, as between the members or representatives or any such line, the failure of any member to sue for pre-emp-