

appellate court in order that the plaintiffs may have an opportunity of producing further evidence. Ghulam Jilani stated that one of the attesting witnesses was still alive. The decision of BURKITT J. justified the plaintiffs in supposing that they had complied with law. There is before us an affidavit that the plaintiffs asked the District Judge to give them an opportunity of producing other evidence. We allow the appeal, set aside the decision of the lower appellate court and remand the case to that court in order that it may be disposed of according to law with reference to the above remarks. Costs in this Court to be costs in the cause.

Appeal allowed and cause remanded.

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BADRI PRASAD
v.
ABDUL KARIM.

MISCELLANEOUS CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Muhammad Rafiq.

JAIRAJ MAL (APPLICANT) v. RADHA KISHAN AND ANOTHER (OPPOSITE PARTIES.)*

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February, 22.

Civil Procedure Code (1908), section 287 (c)—Execution of decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction purchaser not estopped from questioning validity of mortgage.

In proceedings in execution of a decree a person alleging himself to be the mortgagee of property about to be sold asked the executing court to notify the existence of his prior incumbrance on the property to be sold, and the Court, without apparently making any inquiry as to the genuineness of the mortgage, did so, but did not sell the property subject to the prior incumbrance. The property was sold and purchased by the decree-holder.

Held on suit by the mortgagee that the decree-holder auction purchaser was not estopped from contesting the validity of the mortgage so notified. *Shib Kumwar Singh v. Sheo Prasad Singh (1)* followed.

THE facts of this case were as follows :—

Muhammad Mushtaq executed a mortgage on the 14th of January, 1895, in favour of Radha Kishan. The mortgage was unregistered. In execution of a decree against Muhammad Mushtaq, Jairaj Mal attached and put up to sale the property of Muhammad Mushtaq which had been mortgaged. Thereupon Radha Kishan applied, on the 19th of September, 1904, to the execution court that the amount due to him under the mortgage might be notified along with the decretal amount: and on the same day the court passed the order :—“ Let the amount be notified.” This was done.

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The property was put up to auction and purchased by Jairaj Mal. Subsequently, Radha Kishan sued on his mortgage, when Jairaj Mal raised the defence that the mortgage was fictitious and without consideration. The court of first instance gave effect to this plea, and dismissed the suit. The court of first appeal reversed this decision, being of opinion that Jairaj Mal was estopped from raising this plea, for the reason that he had not raised any objection when the mortgage was ordered to be notified. This view was upheld by the court of second appeal. Thereupon Jairaj Mal petitioned for a reference, and the case was referred to the High Court for opinion under rule 17 of the Kumaun Rules.

Mr. *Agha Haidar*, for the petitioner (defendant), contended that the application made by Radha Kishan was not a claim or objection coming under section 278 of the old Code of Civil Procedure. He merely asked that the amount of his lien might be notified in the sale proclamation. The court held no investigation into the matter and the property was not put up for sale subject to mortgage. If the court had intended to do that it would have said so. The order was not passed under section 282 of the Code. The mortgage was simply notified under section 287 (c). Under such circumstances the auction-purchaser was not debarred from raising the plea that the mortgage was fictitious and without consideration. He relied on the case of *Shib Kunwar Singh v. Sheo Prasad Singh* (1).

Dr. *Satish Chandra Banerji* (with him Mr. *J. M. Banerji*), for the opposite party (plaintiff), contended that the ruling cited by the applicant could not apply to the facts of the present case. Here the decree-holder himself, who eventually became the auction-purchaser, had acquiesced in the proclamation of the lien. If the mortgage was fictitious he should have opposed the application to have the lien notified. But he agreed to the notification being made, and thus joined in the representation that only the equity of redemption was being sold, with the result that he was able to purchase the property for a small price. His conduct estopped him. Besides, there was nothing to show that the court did not inquire into the validity of the mortgage, and every presumption should be made in favour of the regularity of the court's proceedings.

(1) (1906) I L. R., 28 All., 418.

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GRIFFIN and MUHAMMAD RAFIQ, JJ.:—This is a reference made to this Court under the Kumaun Rules. Jairaj Mal, in execution of a decree against one Muhammad Mushtaq, applied for sale of certain property. In the course of the execution proceedings one Radha Kishan, on the 19th of September, 1904, put in an application to the effect that a mortgage of the 14th of January, 1895, be notified at the time of the sale of the property. On the same date the court executing the decree passed the order:—"Let the mortgage be notified." We have no information as to whether any inquiry took place in that court as to the genuineness of the mortgage set up by Radha Kishan. The property was sold and was purchased by Jairaj Mal. In the year 1910, Radha Kishan sued to recover principal and interest on this document of the 14th of January, 1895. The defendant No. 2, Jairaj Mal, pleaded that the mortgage sued on was altogether a fictitious document. His defence was upheld by the court of first instance, which dismissed the plaintiff's suit. The plaintiff appealed. The court of first appeal held that, as the mortgage deed of 1895 was proclaimed as a lien on the property, Jairaj Mal cannot now claim that "this mortgage is to be as if it had never been. As he has taken no steps to set it aside, it seems to me that he is bound by it and must either satisfy the mortgage or suffer the land to be sold." That court allowed the plaintiff's appeal. On a further appeal by the defendant that court upheld the decision of the first appellate court. The Commissioner held that "it has been rightly held that he (defendant) is now estopped from putting forward an allegation that this mortgage-deed is not a genuine document." Jairaj Mal then petitioned the Local Government, with the result that we have before us this reference. The question as to which our opinion is invited is whether the Commissioner was wrong in law in holding that the appellant was estopped in questioning the mortgage deed. In our opinion, on the facts stated, the appellant is not estopped from questioning the mortgage deed in suit. The mortgage deed was notified in the proceedings of 1904 on the application of Radha Kishan. There was no declaration, act or omission on the part of Jairaj Mal which would operate as an estoppel. The ruling of this Court in *Shib Kunwar Singh v. Sheo Prasad Singh* (1)

(1) (1906) I. L. R., 23 ALL., 418.

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lays down that a person in the position of Jairaj Mal is not debarred from proving that the mortgage set up by the plaintiff was fictitious and without consideration. This being our opinion on the question of law involved, we think that the proper course to be adopted is to send the case back to the first appellate court for disposal of the other pleas in the appeal. We are further of opinion that costs of this reference should be costs in the cause, and that costs should abide the result.

Answer accordingly.

APPELLATE CRIMINAL.

1913

February, 24.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

EMPEROR v. GULABU.*

Act No. 1 of 1872 (Indian Evidence Act), section 91—Evidence, admissibility of—Confession made to inquiring magistrate, but not recorded by him in writing—Criminal Procedure Code, sections 364 and 533.

Held that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Indian Evidence Act, 1872, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364 of the Code of Criminal Procedure. Section 533 of the Criminal Procedure Code has no application to a case where no record whatever has been made of such a confession.

THIS was an appeal on behalf of the Local Government against an order of acquittal passed by the Sessions Judge of Saharanpur. The accused in this case made a confession before a Tahsildar who was holding an inquiry as a Magistrate. The Tahsildar did not record the confession in writing. At the trial the Tahsildar offered oral evidence of what the accused had stated to him in the confession. The Sessions Judge held that this evidence was inadmissible, and, there being no other evidence upon which much reliance could be placed, acquitted the accused.

The Government Advocate (Mr. A. E. Ryves), for the Crown, contended that oral evidence of the confession was admissible. A confession made to a private individual might be proved by the oral evidence of that individual, and there was no provision of law which prohibited such a course when the individual to whom the confession was made was a magistrate holding an inquiry.

*Criminal Appeal No. 37 of 1913 by the Local Government, from an order of W. J. D. Burkitt, Sessions Judge of Saharanpur, dated the 13th of September, 1912.