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plaintiff had brought a suit in the court of a Munsif in which a question of title was raised. The question of title was decided against him and, on appeal to a Subordinate Judge, the decision was affirmed. Their Lordships held that the finding did not operate as *res judicata* when the same question was raised in the court of the Subordinate Judge in his original jurisdiction. From that it can only, in our opinion, be inferred that the competent court to which reference is made in section 11 of the Code of Civil Procedure is the trial court and that it does not affect the question whether the decision is a decision of an appellate court or whichever the appellate court may be. This view is supported by the decision of their Lordships of the Privy Council in *Misir Raghobar Dial v. Rajah Sheo Baksh Singh* (1) and by the view which was adopted by the Calcutta High Court in *Bharasi Lal Chowdhry v. Sarat Chunder Dass* (2) and *Shibo Raut v. Baban Raut* (3) and by the Bombay High Court in *Malubhai Ladhahbai v. Sursangji Jalamsangji* (4). We decide therefore that the question is not barred by *res judicata*. This was the only point before us. As the lower appellate court allowed the appeal on a preliminary point and the remaining points have not been decided, we set aside the District Judge's decree and send back the appeal to his successor to be reinstated under its original number and determined on its merits according to law. Costs here and hitherto will abide the result.

Before Mr. Justice Stuart and Mr. Justice Sulaiman.

ROSHAN LAL AND OTHERS (PLAINTIFFS) v. LALLU AND OTHERS  
(DEFENDANTS).\*

*Execution of decree—Attachment—Mortgage—Execution of mortgage pending attachment under a simple money decree—Civil Procedure Code, section 64; order XXI, rule 66.*

During the pendency of an attachment in execution of a simple money decree the judgment-debtors executed a mortgage of the attached property. The property was put up to sale and was purchased by the decree-holders. At the time of sale the mortgage was notified under order XXI, rule 66, of the Code of Civil Procedure. The mortgagees then brought a suit to enforce their mortgage against the decree-holders auction-purchasers.

*Held* that the notification of the mortgage at the time of sale did not prevent the auction-purchasers from disputing its validity, and that in view

\* Second Appeal No. 686 of 1921, from a decree of I. B. Mundle, District Judge of Cawnpore, dated the 29th of January, 1921, reversing a decree of Ganga Prasad Varma, Subordinate Judge of Cawnpore, dated the 30th of July, 1919.

(1) (1882) L. R., 9 I. A., 197.

(2) (1895) I. L. R., 23 Cal., 415.

(3) (1908) I. L. R., 35 Cal., 353.

(4) (1905) I. L. R., 30 Bom., 220.

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of section 64 of the Code of Civil Procedure the mortgage was of no effect as against them. *Dinobundhu Shaw Chowdhry v. Joymaya Dasi* (1) and *Abdul Rashid v. Gappo Lal* (2) distinguished.

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THE facts of this case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

STUART and SULAIMAN, JJ. :—This is a plaintiffs' appeal arising out of a suit for foreclosure on the basis of a mortgage-deed, dated the 30th of August, 1907. It appears that the defendant held a simple money decree, in suit No. 192 of 1898, which was in execution. On the 30th of July, 1907, the property in dispute in this case was attached in execution of the simple money decree; while this attachment was subsisting, the judgment-debtor, on the 30th of August, 1907, executed the mortgage-deed which is the subject-matter of dispute in this appeal. On the 20th of August, 1908, the subsequent mortgagee seems to have made an application to the execution court, praying that his mortgage should be notified. An order of the 14th of November, 1908, passed by the execution court, shows that inasmuch as no objection was preferred, notification was ordered. The property was put up for sale on two occasions, but those sales were set aside. On the 20th of August, 1909, the property was again put up for sale and was ultimately sold to the attaching decree-holder himself for a sum of Rs. 1,800. The subsequent mortgagee has now brought a suit to enforce the mortgage of the 30th of August, 1907, and, on behalf of the defendants, it was contended that inasmuch as this mortgage-deed had been executed at a time when the attachment under the decree in suit No. 192 of 1898 was in force, the mortgage was invalid and unenforceable as against the defendants.

The court of first instance held that the attaching decree-holder had in no way been prejudiced by the execution of this mortgage-deed and that the attachment was no bar to the validity of this mortgage.

On appeal the learned District Judge was of opinion that ~~the~~ plaintiffs were not entitled to enforce their mortgage as against the defendants who have purchased this property in execution of a decree under which the property was under attachment at the time when the mortgage-deed was executed.

(1) (1901) I. L. R., 29 Calc., 154.

(2) (1898) I. L. R., 20 All., 421.

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The plaintiffs have come up to this Court in second appeal, and, on their behalf, it is argued that the finding of the learned District Judge is not correct. It is contended on their behalf that inasmuch as the defendants had full notice of the existence of the plaintiffs' mortgage, they are estopped now from saying that that mortgage is not valid. In the first place, there is nothing on the record to show that any notice was actually issued to the decree-holder on the application of the 20th of August, 1908. In order to succeed on a plea of estoppel, it was obviously incumbent on the plaintiffs to prove this. In the second place, the proceeding relating to the notification of the mortgage-deed was merely a proceeding under order XXI, rule 66 of the Code of Civil Procedure, and the order passed in that proceeding can in no way be conclusive as to the validity of the mortgage which was going to be announced.

It is next contended that under section 64 of the Code of Civil Procedure the mortgage is not absolutely void, but that it is valid so long as the attaching decree-holder was not prejudiced. It is true that under the new Act this section has been slightly altered. In the old section 276, the words "during the continuance of the attachment" were too wide and might have made all transfers "during the pendency of the attachment" absolutely void. Under the new Code, however, that expression has been substituted by the expression "contrary to such attachment." It is clear, therefore, that a transfer during the pendency of the attachment would be void only as against all claims enforceable under the attachment. It cannot be disputed that it was open to the attaching decree-holder to ignore the subsequent mortgage and to proceed to sell the whole property and not only the equity of redemption, and that if he did so, the auction-purchaser would get the whole property free from the incumbrance, the mortgage not creating any lien on the property sold. There is nothing to show that the property sold was anything less than the absolute interest in it, and there is nothing to show that it was only the equity of redemption, subject to the subsequent mortgage, which was put up for sale and purchased by the defendants.

The learned advocate for the appellants has strongly relied on the case of *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1). In that case there were, first of all, two previous mortgage-deeds and the equity of redemption was attached in

(1) (1901) I. L. R., 29 Calc., 154.

execution of a money decree. While the property was in the course of being sold, a third mortgage was created by the mortgagor in lieu of the amount due under the previous mortgages. The auction-purchaser, in execution of the mortgage-decree, claimed that the provisions of section 276 of the Code rendered the subsequent mortgage wholly void as against him. Their Lordships of the Privy Council, however, held that inasmuch as the intention of the parties was to keep alive the earlier mortgages, it was impossible to hold that the effect of that section was to give an execution creditor an unincumbered fee simple, instead of an equity of redemption, against the intention of the parties. In our opinion that case is clearly distinguishable from the present case. The case of *Abdul Rashid v. Gappo Lal* (1) is also clearly distinguishable because in that case the subsequent mortgage was held to be valid only in respect of that excess share which was not legally saleable in execution of a prior decree. The case of *Lala Bhagwan Das v. Ahmad Jan* (2) was a case where ultimately the subsequent mortgage was not upheld. But it was clearly pointed out in that case that under order 21, rule 66 of the Civil Procedure Code, if a mortgage-deed is notified, that notification is in no way conclusive, as between the decree-holder or the purchaser on the one hand and the holder of the incumbrance on the other, as to its validity, and it was pointed out that where a sale is not effected subject to a mortgage, but the mortgage is simply notified at the time of the sale, the auction-purchaser is not estopped from questioning the validity of the mortgage.

It is next contended that the mortgage-deed in dispute was executed in order to pay off the money due to another attaching creditor, namely, Sheo Mukh Rai, and that, therefore, this mortgage was valid. In the first place, this point was not taken before the learned District Judge, and we have no pronouncement of his opinion on this point. In the second place, Sheo Mukh Rai did not hold any decree for sale. He was a simple-money decree-holder, and as soon as his amount was paid out of court, the attachment ceased to exist, and we are of opinion that that fact cannot in any way help the appellants. In our opinion the view taken by the learned District Judge on this point was correct. The appeal therefore fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1898) I. L. R., 20 All., 421.

(2) (1915) 36 Indian Cases, 732.