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claim any cost of the improvements made by him; but if he has rebuilt any fallen portion in order to retain the income which was derivable from the same, he can legitimately get the cost thereof and charge the same on the property in connection with which such expense was incurred. In other respects the mortgagee can only claim a right to remove the materials of any improvements which may have been made by him, unless the portions so improved are such as can be allotted to him when a partition takes place, without impairing the rights of the plaintiff. But in no event he can claim the cost thereof from the persons who have acquired the rights of the mortgagors therein.

The appeal is, therefore, allowed and the suit remanded to the lower appellate court with a direction to readmit the appeal under its original number and to dispose of it in accordance with the directions above given. The costs here and hitherto will abide the result.

Appeal decreed.

Before Mr. Justice Stuart and Mr. Justice Sulaiman.

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June, 2.

KAMMU AND OTHERS (DEFENDANTS) *v.* MUSAMMAT FAHIMAN AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), *section* 11—Res judicata—*First Court not competent to try second suit.*

In order that the doctrine of *res judicata* may apply it is necessary that the trial court which passed the earlier decision should have been competent to try the suit subsequently brought.

Rajah Run Bahadoor Singh v. *Mussumut Lachoo Koer* (1) and *Misir Raghobar Dial* v. *Rajah Sheo Baksh Singh* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Narain Prasad Ashthana*, for the appellants.

Mr. *Muhammad Yusuf*, for the respondents.

STUART and SULAIMAN, JJ. :—This appeal arises out of a suit for damages brought in the following circumstances :—The plaintiffs, who alleged themselves to be successors in interest of a certain Badlu, claimed title to a house in Agra city. This house had been sold to the predecessors in interest of the defendants in 1884. The plaintiffs contested the validity of the transfer. A previous suit had been brought by the plaintiffs against the defendants to obtain an injunction to

* Second Appeal No. 664 of 1921, from a decree of T. K. Johnston, District Judge of Agra, dated the 4th of February, 1921, reversing a decree of Govind Sarup Mathur, Officiating Subordinate Judge of Agra, dated the 19th of November, 1919.

(1) (1884) L. R., 12 I. A., 23.
(2) (1882) L. R., 9 I. A., 197.

restrain them from pulling down his house. This suit was brought in the court of the Munsif of Agra. An appeal was filed in the court of the District Judge who, by his appellate decree, found in favour of the plaintiffs' title. The suit out of which this present appeal arises was filed subsequently by the plaintiffs on the allegation that the defendants had nevertheless pulled down the house. They therefore claimed for damages against them. This suit was filed in the court of the Subordinate Judge, Agra, the valuation being beyond the jurisdiction of a Munsif. The defendants asserted title to the house as against the plaintiffs. The plaintiffs objected that the question was one of *res judicata* decided in their favour. The Subordinate Judge repelled this plea. In appeal the District Judge has allowed it. The defendants in second appeal question the correctness of the view taken by the District Judge.

The sole point for decision is whether the previous finding that title lay with the plaintiffs is a finding arrived at on an issue in which the matter has been directly and substantially in issue in a former suit between the same parties, litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised and has been heard and finally decided by such court. There is no doubt as to the fact that this issue was directly and substantially in issue in a former suit between the same parties, litigating under the same title, and that it was heard and finally decided. The only question is, can the Munsif's court be held to be a court competent to try the suit in which such issue has been subsequently raised? It is clear that it is not. The view which appealed to the learned District Judge was, however, that inasmuch as the District Judge on appeal was responsible for the decision, the decision must be taken to be the decision of the District Judge, and as the District Judge was a court of appeal in the subsequent suit, no question of *res judicata* could arise. He quoted in favour of his view the decision of the Full Bench in *Balkishan* v. *Kishan Lal* (1). But we cannot find anything in that decision which supports his view. The matter in our opinion is concluded by the authority of their Lordships of the Privy Council in *Rajah Run Bahadoor Singh* v. *Mussumut Lachoo Koer* (2). There a

(1) (1888) I. L. R., 11 All., 148.
(2) (1884) L. R., 12 I. A., 23.

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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 Ladhabhai* 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.

1922
June, 2.

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

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* 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 Calc., 415.
(3) (1908) I. L. R., 35 Calc., 353.
(4) (1905) I. L. R., 30 Bom., 220.