# Appellate Jurisdiction (a.)

*Special Appeal No.* 458 *of* 1867.

KUPPAIYA CHETTI..... ...*Special Appellant.*

THASAMATHASI CHETTI and another..... } *Special Respondents.*

A mortgagee is not entitled to be paid from the sale proceeds of property attached and sold in a suit instituted by a creditor of the mortgagor in preference to the judgment creditor at whose instance the property was attached.

The surplus, if any, may be paid to the mortgagee, there being no other unsatisfied decrees against the mortgagor, provided the sale was not made with notice that the right title and interest of the execution debtor was that of mortgagor.

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THIS was a Special Appeal against the decree of C. Latchmiah, the Principal Sadr Amin of Salem, in Regular Appeal No. 34 of 1867, reversing the decree of the Court of the District Munsif of Salem, in Original Suit No. 28 of 1866.

*Rama Ráu* for the special appellant, the plaintiff.

*Srínivása Cháriyár* for the 2nd special respondent, the 2nd defendant.

The facts sufficiently appear in the following

JUDGMENT:—The plaintiff in this suit seeks to obtain the discharge of the mortgage debt due to him by the 1st defendant out of the proceeds realised on the sale of the mortgaged property after attachment in execution of a decree in a suit by the 2nd defendant against the 1st defendant, the mortgagor. The Original Court decreed in favor of the plaintiff's prior right to be paid in full. But the Principal Sadr Amin, reversing that decree, has adjudged that the claim of the 2nd defendant, the execution creditor, should first be satisfied in full, and that the surplus, if any, should be paid to the plaintiff. This adjudication is based on the priority in date of the attachment in the suit by the 2nd defendant, and the appellant's (plaintiff's) ground of objection is, that the process of attachment, if looked at, would clearly prove the contrary to be the fact, and that being so the decree of the Lower Appellate Court is wrong.

(a) Present; Scotland, C. J. and Ellis, J.

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There is little doubt that the fact would turn out to be so. It was so considered by the Original Court, and the Principal Sadr Amin has found differently because of the non-production of any evidence in support of the statement in the plaint. But further inquiry on the point is unnecessary. It has been contended on the part of the respondent (2nd defendant) that though a prior mortgagee, the plaintiff has no preferential claim to the money, and we are of opinion that the contention is valid.

All that has been sold in execution of the 2nd defendant's decree, because all that could legally be sold, is the right, title, and interest of the 1st defendant, the execution debtor, and his proprietary right at the time was subject to the plaintiff's mortgage. If, then, the mortgage was a valid charge on the property before the attachment, it is unaffected by the sale and the purchase money cannot be treated as more than the value of the mortgagor's right of redemption. We are, therefore, clearly of opinion, that the plaintiff's claim is of no avail against the right of the 2nd defendant to be paid the full amount of his judgment debt, and on this ground the decree of the Lower Appellate Court in favor of the 2nd defendant must be upheld.

As to the surplus, if any, we think the plaintiff's claim may be upheld, there being no other unsatisfied decrees against the 1st defendant; but this opinion rests strictly on what we take to be the fact, that the sale was not made with notice that the right, title, and interest of the execution debtor was that of mortgagor, and the case therefore is not within Section 271 of the Code of Civil Procedure which expressly excludes the title of a mortgagee to share in the surplus of the proceeds of property sold subject to his mortgage.

On these grounds, we affirm the decree appealed from. The appellant must pay the costs of the 2nd respondent (2nd defendant) in this and both the Lower Courts, and he and the 1st respondent will each bear his own costs throughout.

*Appeal dismissed.*