

**(1926) 07 AHC CK 0046**  
**In the Allahabad High Court**

Nageshwar Tewari

APPELLANT

Vs

Rup Narain Shukul and Tirjagi Narain Tewari

RESPONDENT

---

**Date of Decision :** 06-07-1926

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 57, 64

**Citation :** 97 Ind. Cas. 547

**Hon'ble Judges :** King, J

**Bench :** Single Bench

**Final Decision :** Dismissed

---

## Judgement

King, J.—Tirjagi Narain Tevrarii defendant No. 2, instituted a suit for possession of property against Rup Narain Shukul, the plaintiff. The suit was dismissed and Rup Narain Shukul got a decree for costs. In execution of his decree he applied for the attachment of the property now in suit and the attachment of that property was ordered on the 22nd of September, 1916. While that attachment was still subsisting Tirjagi Narain Tewari, the owner of the property, hypothecated it on the 3rd of June, 1917, to Nageshar Tewari his uncle defendant No. 1.

2. The plaintiff's application for execution was struck off, for reasons with which we are not concerned, on the 23rd of February, 1918, but the plaintiff made a fresh application for attachment on the 10th September, 1918, and the property was re-attached and was sold on the 20th of February, 1920, and bought by the decree-holder himself.

3. The plaintiff-decree-holder now sues for a declaration that the mortgage executed by the judgment-debtor on the 3rd of June, 1917, is not binding on him and does not affect the property which he purchased at the auction sale.

4. The trial Court dismissed the plaintiff's suit but the lower Appellate Court has decreed the claim on the finding that the mortgage which was executed on the 3rd of June, 1917, when the property was under the prior attachment did not affect the property which was sold in pursuance of the subsequent attachment.

The lower Appellate Court also found that the mortgage was executed fraudulently and without consideration and for that reason also it was not binding upon the plaintiff.

5. I am unable to agree with the view of the lower Appellate Court on the first point. It is true that the mortgage was executed by the judgment-debtor during the subsistence of the first attachment and u/s 61 of the C.P.C. that mortgage would be void as against all claims enforceable under that attachment. If the property had been sold by the decree-holder in pursuance of that attachment then, undoubtedly, the mortgage would have been void as against him. But in the present case the attachment which was in force at the time when the mortgage was made ceased, under Order XXI, Rule 57, when the decree-holder's application was dismissed. The property was reattached after the mortgage had been already executed and was sold in pursuance of the second attachment. In my opinion Section 64 will not apply to the present case. The mortgage was void against claims enforceable under the prior attachment but was not void against claims enforceable under the second attachment. This view has been taken by a Bench of this Court in the case of Gobind Singh v. Zalim Singh 6 A. 33 : A.W.N. (1883) 183 : 3 Ind. Dec. (N.S.) 588. In that case it was held that "where property attached in execution of a decree was alienated, and was after such alienation again attached, the first attachment having expired, and was brought to sale in pursuance of the second attachment, and the purchaser sued for possession of the property claiming on the ground that the alienation of the property was void under the provisions of Section 276 (which now corresponds to Section 64) that as no claim was enforced or was enforceable under the first attachment, under which the property was alienated, but the purchaser was claiming under the second attachment, such alienation could not be assailed under the provisions of Section 276."

6. Following the ruling in that case I hold that the mortgage in question was not void, under the provisions of Section 64 of the C.P.C. as against a claim enforceable under the second attachment.

7. It remains to be seen whether Section 53 of the Transfer of Property Act applies to the present case so as to render the mortgage voidable at the option of the decree-holder. The mortgage was made by a judgment-debtor in embarrassed circumstances and the property mortgaged was at that time actually under attachment in the execution of a decree. The mortgage was made in favour of the mortgagor's own uncle and the lower Appellate Court has held that it was executed without consideration and that the mortgagee was not a bona fide transferee. The actual result of this mortgage has been to defraud the decree-holder who bought the property subject to the liability of paying the mortgage-money. Also the mortgage has been made without consideration, as found by the Court below, so u/s 53 it may be presumed to have been made with fraudulent intention as required by Section 53. In the circumstances of this case I have no hesitation in applying this presumption. The defendant has not been

able to show that the mortgage was made bona fide for consideration and that it was not made with the intention of defrauding the mortgagors-creditors. I hold, therefore, that the mortgage was voidable at the option of the decree-holder u/s 53. On this ground I affirm the decree of the lower Appellate Court and dismiss the appeal with costs.