

(1886) 12 AHC CK 0009
In the Allahabad High Court

Man Singh

APPELLANT

Vs

Muhammad Sami-ud-din

RESPONDENT

Date of Decision : 04-12-1886

Acts Referred:

Citation : (1887) ILR (All) 125

Hon'ble Judges : Tyrrell, J;Straight, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Straight and Tyrrell, JJ.—The only plea relied upon by the learned Counsel in his argument for the appellant is the fourth, and his contention, to put it into clear terms, is that as the defendant-appellant was a puisne incumbrancer in the village of Pulwa, now sought to be redeemed by the plaintiff-respondent, at the date of the suit brought by the latter against the mortgagors in 1877, and was not made a party thereto, he ought by any decree passed in the present litigation to have reserved to him the right to pay off the plaintiff's charges and retain possession of the property.

2. It almost goes without saying that had the plaintiff desired to bind the defendant by proceedings in this suit of 1877, it was incumbent on him, if he had notice of the latter's mortgages, to make him a party thereto; and this principle, which is really not disputed by the plaintiff's learned Counsel, has not only been recognized by all Courts in India in a long course of rulings, but has now found expression in Section 85 of the Transfer of Property Act. Not having done so, the defendant stands in no better nor worse position than he would have stood had he been a party to that suit, and his right as a puisne incumbrancer to pay off any prior mortgage is untouched by the decree of the 17th March 1877. It was contended for the respondent that the defendant had not in the Court below, either in his written statement of defence or orally, expressed his willingness to redeem the plaintiff's mortgage, and that the suggestion to that effect has been made for the first time in this Court. It is true that this matter does not appear to

have been pressed on the learned Subordinate Judge's attention, for no reference to it occurs in the course of his judgment; but upon examining the sixth paragraph of the written statement of defence, the defendant undoubtedly did say that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money. No doubt it would have been more regular had the defendant asked in terms to be allowed to redeem the plaintiff's mortgage, and brought into Court what he alleged to be due under it, or expressed his willingness to pay such amount as might be found to be due on taking the accounts; but we are not disposed to be too technical in a matter of this kind, where the defendant has the undoubted right which he now asserts, and on which, if we did not recognize such right, but upheld the decree of the Court below simpliciter, the effect of our doing so would be to extinguish his security. We think that, under the circumstances, the defendant should be placed in the same position he would have held if the decree of the 17th March 1877, had never been passed: for, looking to the facts that he was in possession of the village of Pulwa at the time of the suit, and that his mortgages were registered instruments, it must be presumed that the plaintiff had notice of their existence, and should therefore have made him a party thereto.

3. The appeal is decreed to this extent, and the decree of the Subordinate Judge will be so far modified that the defendant will be declared entitled to retain possession of mouza Pulwa, if within ninety days from the date of our decree he pays into this Court the amount of the plaintiff-respondent's mortgage-debt, with interest, otherwise the decree as passed by the Subordinate Judge will stand.

4. The costs of the plaintiff-respondent throughout will be paid by the defendant-appellant.