

(1899) 06 AHC CK 0008
In the Allahabad High Court

Parsotam Saran

APPELLANT

Vs

Sanahi Lal

RESPONDENT

Date of Decision : 13-06-1899

Acts Referred:

Citation : (1899) ILR (All) 408

Hon'ble Judges : Arthur Strachey, C.J.; Banerji, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Arthur Strachey, C.J. and Banerji, J.—This was a suit for sale of mortgaged property. The defendant-respondent was the purchaser at a sale in execution of a decree obtained by him upon a prior unregistered mortgage. The plaintiff's mortgage was a registered one, and it is found that he had no notice of the prior unregistered mortgage of the defendant-respondent. He is therefore prima facie entitled to priority for his mortgage and to enforce it against the property in the hands of the respondent. The respondent resists the claim upon the ground that the plaintiff-appellant's mortgage was executed pending the suit upon the prior unregistered mortgage, and that having regard to Section 52 of the Transfer of Property Act, the property could not, pending that suit, be dealt with by the mortgagor so as to affect the rights which the respondent obtained under the decree subsequently passed upon his mortgage, and in execution of which he purchased the property. The respondent's suit was instituted on the 17th of April 1893. The plaintiff's mortgage was executed on the 20th of April 1893, that is, pending the respondent's suit, It is alleged on behalf of the plaintiff that at the time of the execution of the mortgage of the 20th of April 1893, no summons had been served in the present respondent's suit upon the mortgagor, the defendant in that suit, and consequently, having regard to the ruling of the Calcutta High Court in Radhasyam Mohapatra v. Sibu Panda ILR (1888) Cal. 647, and of the Madras High Court in Abboy v. Annamalai (1888) ILR 12 Mad., 180, the mortgage was made before the suit became contentious, and therefore

was not affected by the rule contained in Section 52 of the Transfer of Property Act. We are prepared to follow the rulings in question, to which there is nothing contrary in any of the decisions of this Court. There is, however, no finding as to the date of the service of summons in the present respondent's suit. We must have such finding before we can dispose of this appeal. We therefore refer the following issue to the Lower Appellate Court u/s 566 of the Code of Civil Procedure:--On what date was the summons served upon the defendant mortgagor in the suit brought by the present respondent upon his mortgage of the 24th November 1891? The Lower Appellate Court may take such evidence as it may deem necessary for determination of this issue. Upon the return of the finding ten days will be allowed for objections.