

1880  
 THAKUR OF  
 MASUDA  
 v.  
 THE WIDOWS  
 OF THE  
 THAKUR OF  
 WANDWARA.

STRAIGHT, J.—I think that this reference was properly made by the Chief Commissioner of Ajmere and that it should be disposed of by this Court.

The case having been again laid before the Division Bench (SPANKIE, J., and STRAIGHT, J.) the following opinion was given by the Division Bench:

STRAIGHT, J.—The Chief Commissioner appears to be right in his view, that the appeal of the Thakur of Masuda lies to Her Majesty in Council from the Commissioner's Court in this particular case.

1880  
 April 5.

## APPELLATE CIVIL.

*Before Mr. Justice Spence and Mr. Justice Oldfield.*

LACHMIN NARAIN (DEFENDANT) v. KOTESHAR NATH (PLAINTIFF) \*

*Mortgage—Condition against alienation—Lis pendens.*

The proprietor of certain immoveable property mortgaged it in July, 1875, to *K* and in September, 1875, to *L*. In October, 1878, he sold the property to *K*. In November, 1878, *L* obtained a decree on his mortgage-bond for the sale of the property. The suit in which *L* obtained this decree was pending when the property was sold to *K*. *K* sued *L* to have the property declared exempt from liability to sale in the execution of *L*'s decree on the ground that the mortgage to *L* was invalid, it having been made in breach of a condition contained in *K*'s mortgage-bond that the mortgagor would not alienate the property until the mortgage-debt had been paid,

*Held*, that the purchase by *K* of the equity of redemption did not extinguish his security, it being his intention to keep it alive, and that the purchase of the property by *K* while *L*'s suit was pending did not prevent *K* from contesting the validity of *L*'s mortgage, so far as it affected him, on the ground that it was an infringement of the stipulation in the contract between him and the mortgagor.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Munshis *Havaman Prasad* and *Sakh Ram*, for the appellants.

\* Second Appeal, No. 1126 of 1879, from a decree of R.G. Currie, Esq., Judge of Gorakhpur, dated the 25th July, 1879, affirming a decree of Maulvi Nazar Ali, Munsif of Banis, dated the 6th June, 1879.

Munshi *Kashi Prasad* and *Lala Lalta Prasad*, for the respondent.

The following judgments were delivered by the Court :

OLDFIELD, J.—The plaintiff held a mortgage of the property in suit under a deed dated 9th July, 1875, whereby the obligor stipulated that he would not make any mortgage of the property till the plaintiff's debt was satisfied, and on the 10th October, 1878, the property was conveyed to plaintiff under a deed of sale in consideration of the debt secured by the mortgage. The defendant obtained a mortgage of the same property under a deed dated the 5th September, 1875, from the obligor, notwithstanding the stipulation made to plaintiff, and having brought a suit on his bond he obtained a decree on 9th November, 1878, this suit being still pending when the sale-deed was executed in favour of plaintiff. The object of the suit now brought by the plaintiff is to have the property declared exempt from liability to be sold in execution of the defendant's decree. The lower Courts have decreed the claim and the decrees are not open to objections.

There is no doubt that the defendant's rights cannot be affected by the purchase made by plaintiff since it was made while the suit brought by the defendant was pending, but neither will that purchase deprive the plaintiff of any right he may otherwise have against the defendant based on his prior mortgage and the condition in his bond against subsequent mortgages by his obligor. The purchase of the equity of redemption does not necessarily extinguish the original security when as in this case it was manifestly the intention of the plaintiff to keep it alive,—Story's Equity Jurisprudence, 11th ed. vol. ii., s. 1035 c.—and there is nothing to prevent plaintiff from contesting the validity of the mortgage made to defendant so far as it affects him, on the ground that it is an infringement of the stipulation in the contract between him and his obligor. The appeal fails and is dismissed with costs.

SPANKIE, J.—I concur with my honorable colleague in his view of the case.

*Appeal dismissed.*

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