

provision only expresses what is implied in every partnership agreement, namely, that the partners must contribute to payment of the losses of the concern. I have never heard of an action being held maintainable between partners upon an implied agreement that the partners are to contribute to the losses where dissolution of partnership is not claimed.

Under these circumstances I am of opinion that the plaintiff is not entitled to an account, and therefore that this part of his claim must be dismissed and the appeal allowed.

There is one other observation I have to make regarding the claim as to the outstanding loans to cultivators. It appears to me that upon this point Mr. Conlan is in this difficulty. If he argues that these loans should be regarded as capital, then that is what his client agreed to provide, because Kassa Mal had no money with which to furnish capital as appears by the agreement. If he argues that they should be taken into the profit and loss account, it is obvious that there is no November in which there could be taken an account of profit and loss including them.

For these reasons I am of opinion that the action must be dismissed, and this appeal allowed with costs.

BRODHURST, J.—I concur.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MUHAMMAD SAMI-UD-DIN (DEFENDANT) *v.* MAN SINGH (PLAINTIFF).*

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December 4.

Mortgage—First and second mortgages—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Effect of decree—Act IV of 1882 (Transfer of Property Act), s. 85—Notice.

Certain immovable property was mortgaged in 1865 to *H*, in 1871 to *G*, and in 1873 again to *M*. In 1883 the property was purchased by *M*, the representative of *G*, in execution of a decree obtained in 1877 by *G* in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873 was not a party. In 1885 *M* sued the representatives of *H* for redemption of the mortgage of 1865. One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to

* First Appeal No. 197 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 9th June, 1885.

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this suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court.

Held, with reference to the terms of s. 85 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence and should therefore have made him a party; and that, under the circumstances, he should be placed in the same position as he would have held if the decree of 1877 had never been passed.

Held also that, although it would have been more regular had the defendant in the Court below asked in express terms to be allowed to redeem the plaintiff's mortgage and brought into Court what he alleged to be due thereunder, or expressed his willingness to pay such amount as might be found to be due on taking accounts, yet, the defendant having pleaded that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money, the Court should not be too technical in such a matter, where the defendant had the undoubted right now asserted by him, and where the result of not recognizing such right would be to extinguish his security.

The Court therefore passed an order declaring the defendant entitled to retain possession of the property in suit, if within ninety days he paid into Court the amount of the plaintiff's mortgage-debt, with interest, otherwise the lower Court's decree for redemption on payment of the amount due on the mortgage of 1865 would stand.

THIS was a suit for redemption of two usufructuary mortgages, and was brought under the following circumstances:—The property to which the suit related was situated in a village called Pulwa, and was usufructuarly mortgaged by two deeds, dated respectively in October and December, 1865, and executed by Syed Ibn Imam and Syed Al Muhammad in favour of Muhammad Hidayat Khan and Muhammad Sadr-ud-din Khan. On the 12th June, 1871, the same mortgagors executed a mortgage of the same property to Gaj Singh for Rs. 15,000; and in March and June, 1873, two further mortgages of the same property in favour of Muhammad Hidayat Khan and Muhammad Sadr-ud-din Khan, the holders of the mortgages of October and December, 1865. These deeds were duly registered.

On the 17th March, 1877, Lachhman Singh, son of Gaj Singh, having brought a suit upon the mortgage of 12th June, 1871, against the mortgagors for the sale of the mortgaged property, obtained

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a decree for the sale of the same. To this suit and decree the mortgagees under the deeds of March and June, 1873, were not made parties. On the 22nd June, 1883, the property was put up for sale, and was purchased by Man Singh, the grandson of Gaj Singh. In January, 1885, Man Singh brought the present suit against the representatives of Muhammad Hidayat Khan and Muhammad Sadr-ud-din Khan to redeem the two prior usufructuary mortgages of October and December, 1865. The mortgagees-defendants set up as a defence to the suit that the plaintiff was liable to redeem the two subsequent mortgage-bonds of March and June, 1873, respectively. One of the defendants, Muhammad Sami-ud-din, further contended as follows :—

“After the execution of the documents of the 27th June and the 25th March, 1873, the plaintiff brought a suit on his document of the 12th June, 1871, and did not give an opportunity to the defendant for protecting his rights and interests, and thus the plaintiff has forfeited his prior right. If there be any such rule, it would be contrary to the rules of justice that the first mortgagee, having a small demand against a property of large value, which was sufficient, not only for meeting the debt due under the first mortgage, but also the debts due under the subsequent mortgage, should, in satisfaction of his small demand, destroy the right of subsequent mortgagees in their absence and without their consent, or giving them an opportunity of protecting their rights by payment of the prior mortgage money.”

The Court of first instance (Subordinate Judge of Mainpuri) did not frame any issue with reference to this contention, nor notice it in its judgment. It held that the plaintiff was not liable to redeem the mortgages of 1873, as he had purchased the property in satisfaction of a prior incumbrance, and gave him a decree for redemption on payment of the amount due on the bonds of 1865.

The defendant Muhammad Sami-ud-din appealed from this decree to the High Court, his fourth ground of appeal being as follows :—

“That the present appellant is ready to pay off all the charges on the property, provided that he be allowed to keep it in his possession as it is now.”

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Mr. *W. M. Colvin* and Mr. *Habibullah*, for the appellant

The Hon. *T. Conlan* and Mr. *Abdul Majid*, for the respondent.

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.

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 the Courts in India in a long course of rulings, but has now found expression in s. 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.

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 mauza 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.

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

Decree modified.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

BALDEO AND OTHERS (DEFENDANTS) v. GULA KUAR (PLAINTIFF).

Suit in formâ pauperis—Application for permission to sue as a pauper—Rejection of application on the ground that it had been withdrawn—Civil Procedure Code, s. 2—“Decree”—Appeal.

Held that an order rejecting an application for permission to sue as a pauper, and striking the case off the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, was a “decree” within the meaning of s. 2 of the Civil Procedure Code, and appealable as such.

THE appellant in this case, Musammat Gula Kuar, made an application to the Subordinate Judge of Cawnpore for permission

* First Appeal No. 191 of 1886, from an order of W. Blennerhasset, Esq., District Judge of Cawnpore, dated the 7th August, 1886.

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December 6.