

Har Prasad Vs. Raghunandan Prasad and ors.

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Court : Allahabad

Decided On : Dec-23-1908

Reported in : 1Ind.Cas.825

Judge : John Stanley, C.J. and ;Banerji, J.

Appellant : Har Prasad

Respondent : Raghunandan Prasad and ors.

Judgement :

1. This appeal arises out of a suit for sale on a mortgage executed on the 25th of May, 1892, by two persons, Umrao and Piare Lal. One of the properties mortgaged is a 5 biswa share in the village Meadi Khurd. A two biswa share in that village had been mortgaged to one Ghumi Mal by Piare Lal on the 6th of January 1890. To this mortgage Shib Lal, the father of Har Prasad defendant, was also a party. Har Prasad, who was added as a defendant, contended that he had discharged the debt due on the aforesaid mortgage and had thereby acquired a prior charge on the two biswa share of Piare Lal mortgaged to Ghumi Mal and that the plaintiffs were bound to pay the amount which he, Har Prasad had paid to Ghumi Mal, before they could bring to sale a two biswa share of the village Meadi Khurd. This contention was overruled by the Court below on two grounds: first that if Har Prasad discharged the prior mortgage he did not thereby acquire a charge on the property of Piare Lal, and second that even if he acquired a charge he could not enforce it against the plaintiffs who were puisne mortgagees. The

correctness of these findings is impugned in this appeal which was brought by Har Prasad.

2. The lower Court's view that a mortgagor, who discharges a simple mortgage, does not thereby acquire a charge on the property of his co-mortgagor comprised in the mortgage for a rateable share of the debt, is clearly erroneous. By virtue of the provisions of Sections 82 and 100 of the Transfer of Property Act a charge is acquired by a co-mortgagor redeeming a mortgage. This was held in *Bhagwan Das v. Har Dei* 26 A. 227. If, therefore, Har Prasad, who upon the death of his father Shib Lal, became the mortgagor of Piare Lal in respect of the mortgage of the 6th of January 1890, discharged that mortgage, he acquired a right to obtain contribution from Piare Lal and a charge for the amount of the contribution on Piare Lal's two biswa share.

3. The next question is whether this charge can take priority over the plaintiff's mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage, he acquired we think priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee or the purchaser of the equity of redemption who pays off a prior mortgage acquires, on equitable grounds, priority over a puisne mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the right of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee, whose debt he discharges, a co-mortgagor is equally subrogated. It was held by this Court in *Pancham Singh v. Ali Ahmad* 4 A. 58, that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of mortgagee. The same rule is applied by the Courts in America. It is thus stated in *Jones on Mortgages*, Vol. I, para. 877: 'When a mortgage is paid by one

entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent incumbrances.... In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it,' In the present case Har Prasad, who was one of the mortgagors, was entitled to redeem Ghumi Mal, but he was under no obligation as between himself and Piare Lal to pay the latter's share of the debt. He could not redeem the mortgage piece-meal and was, therefore, bound to pay the whole amount of the mortgage. If he paid that amount he was by such payment subrogated to the rights of the mortgagee and was entitled to priority over the subsequent mortgagees, who appear from their mortgage deed to be the sons of the prior mortgagee whose prior mortgage is mentioned in that deed. We have not been referred to any authority in support of the view of the learned Subordinate Judge. For the reasons stated above we hold that if Har Prasad discharged the mortgage of the 6th of January, 1890, he acquired priority over the plaintiffs, s regards two biswas of Meadi Khurd, to the extent of the proportionate liability of that property for the mortgage debt. The Court below has not found whether he has paid off that debt and if he has done so, what is the proportionate amount of liability of the aforesaid share for that debt. We accordingly refer the following issue to that Court under the provisions of Section 566 of the Code of Civil Procedure:

4. Did Har Prasad pay the amount due upon the mortgage of the 6th of January, 1890, and if so, for what portion of that amount was the two biswa share of the village Meadi Khurd comprised in that mortgage proportionately liable?

5. The Court below will take such additional evidence relevant to the above issue as may be necessary. On receipt of its findings ten days will be allowed for filing objections.