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Court : Allahabad

Decided On : Jun-05-1930

Reported in : AIR1931All40

Appellant : Narain Pershad and ors.

Respondent : Narain Singh and ors.

Judgement :

Sen, J.

1. This is an appeal from the decree of the learned District Judge of Farrukhabad affirming the decree of the Additional Subordinate Judge of the same place in a suit for enforcement of a lien. Narain Singh, defendant 1, owned a zamindari share in Mauza Mandal Shankarpur, pargana Bhojpur, in the District of Farrukabad. On 1st August 1904 he executed a simple mortgage deed in respect of the bulk of the aforesaid share in favour of one Sadho Ram for Rs. 500 at a certain rate of interest.

2. On 19th January 1912 he executed a simple mortgage deed in favour of one Pearey Lal for Rs. 1,000 and left the entire sum with the mortgagee with the direction that the latter should pay the amount to Sadho Ram and redeem his mortgage. On the same day, he also executed a deed of usufructuary mortgage in favour of the plaintiffs and defendants 2 to 4 for Rs. 5,000 for a period of 20 years. The property mortgaged by these two documents was the entire interest of Narain

Singh in Mandal Shankarpur. Pearey Lal did not pay Sadho Ram and the latter sued for enforcement of his mortgage on 30th September 1916 and obtained a decree on 11th January 1917. Plaintiffs and defendants 2 to 4 were parties to this action. The decree was put into execution and the property was purchased at auction by Parsotam Singh, defendant 7, and three others for Rs. 2,900. The sale was set aside at the instance of the plaintiffs, who on 18th September 1920 deposited in Court Rs. 2,925-6-8 which represented the decretal amount together with the legal penalty at the rate of 5 per cent. Plaintiffs claim to recover from Narain Singh the aforesaid sum and Rs. 10,24-9-4 on account of interest by enforcement of the mortgage lien in favour of Sadho Ram. Defendants 5 and 6 have been impleaded as puisne incumbrancers of the mortgaged property.

3. Narain Singh alone contested the suit. He denied the usufructuary mortgage set up by the plaintiffs and pleaded that the entire consideration had not been paid to him. The main defence however was that Pearey Lal was merely a benamidar for the plaintiffs under the simple mortgage dated 19th January 1912, that the plaintiffs had agreed to discharge the mortgage debt of Sadho Ram and that, as they did not fulfil their obligation and did not pay Sadho Ram till the latter brought a suit on his mortgage, obtained a decree and got the property sold, the plaintiffs had no right to sue for the money so paid by them.

4. Plaintiffs had denied all knowledge of Sadho Ram's mortgage. This denial was foolish and false. Plaintiffs had also denied that Pearey Lal was their benamidar under the simple mortgage dated 19th January 1912.

5. The Court of first instance held that the usufructuary mortgage in favour of the plaintiff was duly executed by Narain Singh and that it was supported by consideration. A considerable portion of the judgment was devoted to the determination of the question as to whether the plaintiffs were the real mortgagees under the simple mortgage, dated 19th January 1912. The Court apparently considered this to be the crucial issue in the case and after elaborate reasoning arrived at the conclusion that the plaintiffs were the real mortgagees, Peary Lal being a mere benamidar for them. This finding was considered to be decisive as is manifest from the following extract:

In view of the foregoing findings on issues 6 and 7, the plaintiffs must be taken to have paid what they had taken upon themselves to pay to Sadho Ram in connexion with his (Sadho Ram's) mortgage. In this view of the matter, they cannot recover' the decretal money of Sadho Ram, nor have they (plaintiffs) got a right to sue.

6. It is difficult to follow the reasoning of the learned Additional Subordinate Judge. The decretal amount was considerably in excess of what the plaintiffs had agreed to pay Sadho Ram. In paying the decretal amount, the plaintiff could not be 'taken to have paid what they had taken upon themselves to pay to Sadho Ram,' The assumption of the Subordinate Judge is against settled facts and the conclusion is amazing. Assuming that the decretal amount: had been paid in fulfilment of the contract with the defendant, why were not the plaintiffs entitled to sue for this money? No reasons have been given in support of this view, nor any authorities cited. But the above conclusion having been reached, the Subordinate Judge was justified, consistently with his view, in dismissing the suit. The plaintiffs appealed. They impugned the correctness of this decision and urged that they were by the rule of subrogation clothed with all the rights of Sadho Ram. This contention was negatived by the Court below, which dismissed the appeal and affirmed the decree of the trial Court.

7. The appellate Court appears to have shared the opinion of the first Court that the question whether Pearey Lal was a benamidar for the plaintiff was the vital issue in the case. It held on the evidence and was justified in so doing that:

Pearey Lal was the benamidar not only of the plaintiffs but also of their co-mortgagees.

8. It next addressed itself to the question whether the plaintiffs had acquired the rights of Sadho Ram on the principle of subrogation. The answer was a clear negative. We shall deal with the reasons in support of this view.

9. The principle of subrogation, according to the Court below:

would be applicable only where a puisne mortgagee pays off a prior mortgage in addition to some payment made by him to his mortgagor. The universal rule of subrogation is subject to this exception

10. The restriction imposed by the Court below upon the applicability of the rule does not appear to us to be legitimate. It is a matter of common occurrence that the mortgagee is directed by the mortgagor to redeem a prior mortgage out of funds left in his hands and when the mortgage is redeemed, he is subrogated to the position of the prior mortgagee as the result of an agreement with either the debtor or the creditor. This indeed is one of the common instances of conventional subrogation. But as was pointed out in a notable decision, subrogation:

is independent of any mere contractual relations between the parties to be affected by it, and is broad enough to cover every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and conscience ought to be discharged by the latter.

11. There are certain well-recognized limitations upon the rule of subrogation and these limitations are founded upon reason and principle. For instance/there is the rule that there cannot be a partial subrogation by a partial discharge of a mortgage debt. To allow subrogation in; Such cases would lead to obviously anomalous results which need not be enlarged upon. It is therefore settled law' that subrogation does not take place until the payment of the entire debt. Similarly, it is a settled principle that the mortgagor discharging a prior debt is not entitled to be subrogated to the rights and remedies of his creditor. Only such persons are entitled to the benefit of the rule who discharge a debt for which they are not primarily liable. The right is denied to the mortgagor because, in discharging a prior incumbrance created by himself, he merely performs his own obligation to his creditor: *Sat Narain v. Sheo Baran Singh* [1911] 11 I.C. 649. It is also clear that under normal conditions, where the mortgagor employs an agent to clear a prior mortgage, the agent is not entitled to subrogation for the manifest reason that the agent cannot be clothed with a higher right than his principal.

12. It is in each case a question of fact whether a payment has been made by a person as a mere agent of the mortgagor or on his own account for the protection

of his interest in the mortgaged property. Again the right is never accorded to a volunteer. The principle underlying legal subrogation is that a person claiming it had to pay the debt under grave necessity to save himself a loss. There is authority for the view that persons are not entitled to subrogation of any rights, where such alleged rights arise from their own tortious conduct. Where a rule of equity is sought to be invoked, the person who invokes it must come into Court with clean hands.

13. The restriction imposed and the exception grafted upon the general rule does not come within the fold' of any of the cases enumerated above. We have not the slightest hesitation in laying down the rule that subrogation operates for the benefit of a person who being himself a creditor discharges the claim of another who has a priority over him by reason of antecedence of liens and securities. The creditor here is not a stranger or a volunteer and he must be presumed to have discharged the incumbrance for safeguarding his own interest. It is a settled rule of law that where a party only secondarily liable on an obligation created by his debtor is compelled to discharge it, he steps into the shoes of the creditor, so that all the rights and remedies which were available to the latter are available to him : *Gurdeo Singh v. Chandrika Singh* [1909] 36 Cal. 193.

14. It is next argued that the plaintiffs having undertaken to discharge the mortgage of Sadho Ram were not entitled to subrogation for the amount claimed for the following reasons:

(a) The money paid to satisfy Sadho Barn's decree must be taken to be money belonging to the mortgagor; (b) the plaintiffs in depositing the decretal amount must be taken to have acted as agents of Narain Singh (mortgagor); (c) plaintiffs acted mala fide in not paying Rs. 1,000 to Sadho Ram. They were legally bound to pay the money, and the interest on Sadho Barn's mortgage mounted up as the natural result of breach of engagement and laches on the part of the plaintiffs. The lower appellate Court for its view of law relies upon a ruling of Burkitt, J., in *Baijnath v. Murlidhar* [1907] 4 A.L.J. 349.

15. The facts of that case were as follows : Ghasi Ram had mortgaged his property first to Lakshmi Chand for Rs. 500 on 27th May 1898, and next to

Murlidhar on 14th September 1899, for Rs. 425. On 14th April 1900 he sold his equity of redemption to Baijnath for Rs. 1,000 and left with the vendee the two sums of Rs. 500 and Rs. 425 to be paid to Lakshmi Chand and Murlidhar respectively. Baijnath paid off Lakshmi Chand, but did not pay Murlidhar. The latter sued on his mortgage. Baijnath contended that he was entitled to priority for having paid the mortgage of Lakshmi Chand. Burkitt, J., held that Baijnath

never got into the position of a person to whom Section 74, T. P. Act, applies . . . He never became a mortgagee of the property;. . . But he' paid that only as agent of his vendor, the mortgagor, to discharge the debt due to Lakshmi Chand by his mortgagor. The money did not-come out of the appellant's pocket, but it came from the mortgagor's.

16. This decision was upheld in Letters Patent Appeal No. 29 of 1907, decided on 4th January 1908. In reading his conclusion of law, Burkitt, J. follows an earlier decision of this Court in *re Tufail Fatima v. Bitola* [1908] 27 All. 400, in which the prior claim was said to have been discharged' by the plaintiff ' as the mortgagor's agent.' A similar view was taken by Griffin, J., in *Dalip Rai v. Binaik Rai* [1909] 6 A.L.J. 549. In *Muhammad Sadiq v. Ghaos Mohammad* [1911] 33 All. 101, which was followed in *Ma-khan v. Nathi* A.I.R. 1923 All. 509 the right to subrogation was negatived on the ground that the intention of the parties in effecting the sale was to wipe off the prior mortgages. A decision of the Calcutta High Court proceeds on much the same lines : *Harshyam Chaudhari v. Shyam Lal* [1916] 43 Cal. 69 at p. 72. It may be remembered that it was obviously of the greatest advantage to the purchaser to retain the right of the prior 'mortgagee as a shield, if not as a weapon of attack, and in the absence of any evidence to the contrary a party should have been presumed to intend what was manifestly for his advantage.

17. The facts of Baijnath's case [1907] 4 A.L.J. 349 are not parallel to the case now before us. Baijnath having purchased the property of Ghasi Ram, the purchase money belonged to his vendor. The whole of the purchase money having been left in his hands to pay both the prior mortgagees, the initial intention was the complete extinction of both the mortgages. It would have been monstrous and most inequitable to allow the purchaser to claim priority with reference to the

mortgage he had paid as against the other mortgagee whom he had not paid in clear breach of his contract with his vendor. The decision was justified in view of the equities involved in the case.

18. We do not think that it was intended in Baijnath's case to lay down the broad proposition that a puisne mortgagee who had undertaken to pay off specific mortgages of prior dates was not entitled to the rights of the mortgagees, whom he paid off. If the case went to that length we respectfully differ from that view, as we are clearly of opinion that such a view is fundamentally opposed to the principle of subrogation which we have discussed at some length, and is not reconcilable with the pronouncements of the Privy Council in a number of cases, notably in *Gokul Das v. Puranmal* [1884] 10 Cal. 1035 and *Dinabandhu v. Jogmaya* [1902] 29 Cal. 154. In the latter case, the mortgagor took a loan from a certain creditor, paid off two earlier mortgages with the money so advanced and executed a mortgage in favour of the creditor, who had advanced the money. The Privy Council held and held unhesitatingly, that the subsequent mortgagee whose money was utilized in paying off the prior mortgages was entitled to priority with reference to those mortgages. In a more recent case, *Ibrahim Husain Khan v. Ambika Prasad* [1912] 39 Cal. 527, when a third mortgagee, in pursuance of an agreement with the mortgagor, paid off the first mortgage, it was held that the third mortgagee had acquired priority over the second mortgagee in respect of the first mortgage, discharged by him.

19. In view of the law indicated above, the plaintiffs could not be deprived of their right of subrogation in the absence of proof of circumstances in supersession of the said right. The judgment of the Court below proceeds upon a misappreciation of the tenor and legal effect of the simple mortgage dated 19th January 1912. The contract between the parties was one of loan. The mortgagees broke the contract and did not pay Rs. 1,000 to Sadho Ram as had been agreed upon. Where the mortgagees failed to perform their undertaking to discharge a debt due from the mortgagor, the remedy of the mortgagor lay in a suit for compensation against the defaulting mortgagees and not by specific performance of the agreement. Specific performance cannot be compelled, where compensation is the adequate remedy. The provision of Section 21-A, Specific Relief Act, is clear, and authorities are not

wanting: vide *The South African Territories Co., Ltd. v. Wellington* [1898] A.C. 309; *Hukam Singh v. Khunni Lal* [1911] 12 I.C. 952 and *Phul Chand v. Chand Mal* [1908] 30 All. 252.

20. A contract to lend is not the same thing as a contract of agency. The mortgagees did not hold in their hands any money belonging to the mortgagor. No such money of the mortgagor was ever applied towards the discharge of the debt due to Sadho Ram. According to the finding of the Court below the plaintiffs had no intention to abide by their contract and the simple mortgage in the name of Pearey Lal was merely a clever move on the part of Narain Prasad and Ram Dayal to draw in their toils the poor debt-ridden mortgagor with a view to divesting him ultimately of his property.

21. The mortgagee had some excuse in not carrying out the contract, inasmuch as the money left with him was insufficient to satisfy the entire claim of Sadho Ram. Sadho Ram has not been examined in this case and the Court below rightly observes that:

it is impossible to speculate whether he should have accepted Rs. 1,000 if it was immediately offered to him.

22. By a partial tender of Sadho Ram's debt, the plaintiffs would not have been entitled to all the rights 'and remedies available to Sadho Ram under his mortgage; on the other hand they would have still continued liable to Sadho Ram for his unpaid amount.

23. There is nothing on the record to show that the plaintiffs paid the sum of Rupees 2,925-6-8 in pursuance of the contract contained in the simple mortgage. The findings of the Court below on this point are inconsistent and illogical. There is the distinct finding that the plaintiffs were guilty of breach of contract. It is manifestly clear that the sum deposited in Court was considerably in excess of the sum agreed to be paid to Sadho Ram. There was no warrant for the assumption that the payment was made in fulfilment of the contract with the mortgagor.

24. The plaintiffs were impleaded in Sadho Barn's suit as puisne mortgagees. The decree was passed against them and they were liable to pay the decretal amount, if the mortgagor failed to pay. They paid Rs. 2,925-6-8 not from qualms of conscience for the non-fulfilment of their obligation to the mortgagor, but they did so because they intended to protect their interest as usufructuary mortgagees. Narain Singh may possibly have a remedy against the plaintiffs for their breach of contract, but manifestly he cannot resist the present suit. The claim disclosed by the plaintiffs was one for which Narain Singh was primarily liable. The money was paid by the plaintiffs 'under grave necessity' to protect their interest in the property as usufructuary mortgagees. The plaintiffs were therefore subrogated to the right of Sadho Ram. We allow the appeal, set aside the decrees of the Courts below and decree the plaintiffs' claim with costs throughout. Costs in this Court will include fees on the higher scale.