

Sushil Kumar Sen Vs. Ram Chandra Sharma (Deceased by L. Rs.)

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Court : Allahabad

Decided On : Nov-18-1981

Reported in : AIR1982All129

Judge : Deoki Nandan, J.

Acts : Hindu Law; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 and 101;
[Transfer of Property Act, 1882](#) - Sections 92 and 95

Appeal No. : Second Appeal No. 3139 of 1968

Appellant : Sushil Kumar Sen

Respondent : Ram Chandra Sharma (Deceased by L. Rs.)

Advocate for Def. : Kuldeep, Assist. and ;Jagidish Swarup, Adv.

Advocate for Pet/Ap. : Rajeshwari Pd., ;V.D. Pd., ;Khare Dhananjai Pd. and
;Mohanji Varma, Adv.

Disposition : Appeal allowed

Judgement :

Deoki Nandan, J.

1. This is a plaintiff's second appeal in a suit for cancellation of a Danparta dated 22nd June, 1945 executed by the second defendant Hirendra Nath Sen in favour

of the first defendant Ram Chandra Sharma in respect of the plaintiffs' 1/3rd share of the two houses specified at the foot of the plaint and situated at Mohalla Alinagar of the City of Gorakhpur and for partition of the plaintiffs' 1/3rd share therein and separate possession over the same.

2. The plaintiffs Sushil Kumar Sen and Arun Kumar Sen and the third defendant Hirendra Nath Sen are the sons of Baidya Nath Sen. The third defendant Shambhoo Nath Sen and Baidya Nath Sen were brothers being the sons of Kanti Chandra Sen. The family was governed by the Dayabhaga School of Hindu Law. Kanti Chandra Sen was a reputed physician of Gorakhpur and was the owner in possession of the two houses in suit. He died in the year 1918. Shambhoo Nath Sen and Baidya Nath Sen had mortgaged the two houses in favour of Smt. Uttma Kuari wife of Baboo Bhagwat Prasad under a mortgage deed dated 13th May, 1931, for Rs. 5,950/-. The mortgage was usufructuary and the mortgagee was put into possession of the houses. Baidya Nath Sen died in the year 1936 and on his death the two plaintiffs and the second defendant became owners of a 1/3rd share each in his 1/2 share in the two houses in suit. None of them resided at Gorakhpur. The second defendant transferred on his own behalf and on behalf of the two plaintiffs, who were minors at that time, the half share possessed by the three of them in the two houses in suit by a Danpatra dated 22nd June, 1945 to the first defendant. This alienation has been impugned on the grounds that the second defendant had no power to execute it on behalf of the plaintiffs and that it was illegal and was obtained by fraud the details of which are given in the plaint. By another Danpatra dated 5th July, 1945 the third defendant Shambhoo Nath Sen also transferred his 1/2 share in the two houses in suit, to the first defendant. The validity of this Danpatra was not in question obviously because the plaintiffs had no right to question the same.

3. Having thus become the owner of the two houses, the first defendant filed Suit No. 20 of 1947 in the Court of Civil Judge, Gorakhpur, against Smt. Uttma Kuari for redemption of the said mortgage dated 13th May, 1931. The suit was decreed and the first defendant entered into possession of the two houses. According to the plaintiffs they came to know of the Danpatra in the course of the said Suit No. 20 of 1947 and still later of the fraud practised by the first defendant. According to

the plaintiffs they then asked the first defendant to put them into possession over their $\frac{2}{3}$ rd share of the $\frac{1}{2}$ share of their father in the two houses, that is to say over a $\frac{1}{3}$ rd share in the whole but the first defendant did not comply, hence the suit.

4. The suit was originally instituted in the Court of the City Munsif, Gorakhpur in the year 1950. The plaint was returned on the finding that on its true valuation the suit was beyond the pecuniary jurisdiction of the Court. The plaint was thereupon filed in the Court of the Civil Judge, Gorakhpur on 13th April, 1953. Only the first defendant defended the suit. According to his written statement, although the form of the two transfers made in his favour was that of gift, they were in fact sales made for consideration and the true terms of the transfers were recorded in an agreement dated 22nd June, 1945 in so far as the plaintiffs and the second defendant are concerned, under which the sum of Rs. 1,200/- was paid in cash to the second defendant. The transfer in question, it was claimed by the first defendant, was made for legal necessity and by the second defendant acting honestly and in good faith for the benefit of the plaintiffs as their guardian. The plaintiffs were parties to Suit No. 20 of 1947. That suit was compromised. The plaintiffs were parties to the compromise and their guardian ad litem entered into the compromise with the permission of the Court. The first defendant claimed that he spent Rs. 1557/6/- on costs besides the sum of Rs. 3,000/- paid in cash to Smt. Uttama Kuari. He thus redeemed the property for Rs. 4,557/6/- only because of his good relations with Smt. Uttama Kuari, although her claim was very large. After redeeming the property the first defendant found that the two houses had fallen into disrepair and unfit for habitation. He spent Rs. 3283/11/3 on repairs and Rs. 1226/15/- on installation of electric fittings therein. The first defendant then alleged that the custom of pre-emption was prevalent in Mohalla Ali-nagar. Besides, the plaintiffs grandfather Dr. Kanti Chandra Sen was a famous physician of the place, who had desired that the property be given to some deserving Brahman. In order, therefore, to avoid public censure and the law of pre-emption, the form of Danpatra was adopted for the transfers, but even so people did come to know of the real position and suits for pre-emption, being Suits Nos. 775 and 776 of 1946 were filed in the Court of the City Muntif, Gorakhpur, but were ultimately got dismissed on payment of Rs. 3,000/- by the first defendant to the plaintiffs in those

cases. The first defendant, besides spent the sum of Rs. 212/8/- on defending those suits. Another suit, being Suit No. 79 of 1950 was filed by Badri Narain Agarwal for redemption of the mortgage of the first house. That suit went on for some time on which the first defendant spent substantial amount of money but to get rid of it, he purchased the share claimed by Badri Narain Agarwal and Jagan Nath Prasad Agarwal by a sale deed dated 24th November, 1952 for Rs. 750/- in the name of his brother Badri Bishal Benami. This is followed by the allegation that the first defendant spent Rs. 584/12/- in Suits Nos. 912 of 1948 and 788 of 1949 for ejectment of tenants, and also spent the sum of Rs. 161/- in another Suit No. 187 of 1950 against a tenant. Lastly it was alleged that the first defendant was on very bad terms with his neighbour Sadalu Ram and the present suit was instituted on Sadal Ram's undertaking to bear the entire expenses of litigation and also to buy the house in case the suit was successful. It was also added that the first plaintiff was not even prepared to give his statement when the suit was going on in the Munsif's Court and when he did come to give his statement, he withdrew in the middle without completing his statement.

5. The allegation that Sadalu Ram was prosecuting the suit on behalf of the plaintiffs is supported by the registered power of attorney in his favour.

6. The parties went to trial on as many as 13 issues. I need not refer to them, for the controversy in the appeal before me has been restricted by the learned counsel for the parties to only two questions which I shall presently state. These questions arise from the modification made by the lower appellate Court in the decree passed by the trial Court. The trial Court declared the share of the two plaintiffs together in the two houses to be $\frac{1}{3}$ of the whole and decreed partition of the same subject to the condition that the first defendant will be allowed to continue as a tenant of the plaintiffs in the portion of the building allotted to their share on payment of such rent as may be settled between them. The lower appellate Court on the other hand declared the share of the two plaintiffs together to be $\frac{2}{9}$ of the whole in house No. 1 and $\frac{1}{3}$ of the whole in house No. 2 but dismissed their claim for separate possession over their share, until they got it redeemed by a separate suit against the first defendant in view of his being subrogated to the position of a mortgagee. At the same time the lower appellate

Court decreed that the first defendant would not be entitled to become a tenant of the plaintiffs in their portion of the houses after partition, and that the claim of the first defendant for proportionate share of amount' spent on repairs and electric fittings would not be decided in the present suit, but the first defendant would be at a liberty to claim 'the same in the suit for redemption to be filed by the plaintiffs. The other claims for compensation made by the first defendant were dismissed and the parties were directed to bear their own costs throughout.

7. The first question raised is whether the proper share of the two plaintiffs together in house No. 1 is $\frac{1}{3}$ of the whole or $\frac{2}{9}$ of the whole.

8. It is undisputed that if Kanti Chandra Sen owned the entire right, title and interest in the houses the share of the two plaintiffs together would be $\frac{2}{3}$ and on cancellation of the Danpatra executed on their behalf by their brother Hirendra Nath Sen, the 2nd defendant-respondent, on 22nd June, 1945 they would be owners of that $\frac{1}{3}$ rd share in house No. 1 also. The difference of $\frac{1}{9}$ arises this way. One Hanuman Prasad had four sons (1) Mukund Lal, (2) Sukhdeo, (3) Harakhchand; and (4) Shyamsunder. The house belonged to them. Sukhdeo had a son Tara Chand and two daughters Chandra Bibi and Chameli Bibi. Mukund Lal and Harakhchand having died issue-less, Tara Chand and Shyamsunder together mortgaged the entire house with possession on 2nd September, 1890 with one Bindeshwari Prasad who was the Benamidar of Mahabir Prasad and Abhi-nandan Prasad. Eventually Mahabir Prasad alone is said to have become the mortgagee in possession. This mortgage deed is not on the record. Nevertheless, this fact is not disputed. On 11th November, 1891 Tara Chand alone made a second mortgage of his $\frac{1}{3}$ rd share in the house in favour of one Dubari Lal, vide Ext. A-54. Dubari Lal sold the mortgagee rights to Mahabir Prasad vide Ext. A-55 dated 23rd December, 1894. The widow of Mahabir Prasad, as his heir, transferred all the mortgagee rights in the house to Mahadeo Prasad vide Ext. A 48 dated 28th October, 1898. After Tara Chand's death which occurred in the meanwhile, Shyam Sunder sold the entire house (that is the entire rights of the mortgagors in the house) to Mahadeo Prasad, vide Ext. A-53 dated 12th December, 1899. It is said that Mahadeo Prasad thus became the owner of the entire right, title and interest in the house. The sons of Mahadeo Prasad sold the house of Kanti Chandra Sen

vide Ext-A-44 dated 23rd April, 1912. Tara Chand had a widow Smt. Mallo Bibi who survived him and lived up to the year 1940.

9. After the two Danpatras in his favour and redemption and recovery of possession over the two houses by the first defendant Ram Chandra Sharma from Smt. Uttam Kuari's mortgage, by Suit No. 20 of 1947, Badri Narain Agarwal and Jagarnath Prasad Agarwal claiming to be the sons of the two sisters Chandra Bibi and Chameli Bibi of Tara Chand, filed Suit No. 79 of 1950 for redemption of the 1/3rd share in House No. 1 mortgaged by Tara Chand vide Ext. A-54. They claimed that Tara Chand was separate and divided in estate from his uncle Shyam Sunder when he made the mortgage of 1891 and his 1/3rd share in the house being his separate property, it was inherited by his widow Smt. Mallo Bibi, and on her death in the year 1940 it was inherited by Badri Narain Agarwal and Jagarnath Prasad Agarwal, as her nearest heirs. Ram Chandra Sharma denied the allegation of Badri Narain Agarwal and Jagarnath Prasad Agarwal, in that suit, that Tara Chand was separate in estate from Shyam Sunder and that he had a separate 1/3 share in the house which was inherited by Badri Narain Agarwal and Jagarnath Prasad Agarwal. It was contended by Ram Chandra Sharma in that suit that Tara Chand and Shyam Sunder were joint and on Tara Chand's death his interest lapsed by survivorship to Shyam Sunder and passed to Kanti Chandra Sen by the several transfers recited hereinabove. However, instead of contesting that litigation to the end, Ram Chandra Sharma got the suit withdrawn by the plaintiffs Badri Narain Agarwal and Jagarnath Prasad Agarwal with permission to file a fresh suit vide order dated 24th September, 1952 Ext. A-42 by purchasing off the 1/3 rights, (title and interest which they claimed in the house for Rs. 750/- in the name of one Badri Bishal Misra, who was at one stage impleaded as defendant No. 5 in the present suit but was later on struck off from the array of parties. The defendant Ram Chandra Sharma admitted this fact in his written statement but claimed that Tara Chand was a separate owner of a 1/3rd share in house No. 1 which had accordingly devolved on him by the said purchase from Badri Narain Agarwal and Jagarnath Prasad Agarwal.

10. The trial Court held that there was no evidence to show that Tara Chand was separate from Shyam Sunder and that on the death of Tara Chand, his share in

the houses did not pass to Shyam Sunder by survivorship but was inherited by Badri Narain Agarwal and Jagarnath Prasad Agarwal. The lower appellate Court has on the other hand held that the very fact that Tara Chand had by a mortgage deed dated 11th November, 1891 sought to transfer his 1/3 interest in the house showed that he had become separate. According to the lower appellate Court, the coparcenary came to an end when a coparcener defined his share in the coparcenary property and the ruling of this Court in *Kali Shankar v. Nawab Singh*; (1909) ILR 31 All 507 : (1909-6 All LJ 762) to the effect that the mortgage by a member of joint Hindu family of his undivided interest was not valid did not apply, as according to the lower appellate Court, no question of invalidity of the mortgage was involved in the present case the question rather was about the effect of the mortgage upon the status of the family. The lower appellate Court thus found that the mortgage deed itself was evidence of partition and it further relied on Ext. A-40 which is the plaint in Suit No. 79 of 1950 filed by Badri Narain Agarwal and Jagarnath Prasad Agarwal in which they claimed that Tara Chand was separate owner of a 1/3 share in the house.

11. The reasons given by the lower appellate Court for holding that Tara Chand was separate owner of a 1/3 share in the house are in my opinion not correct. An undivided coparcener cannot merely by declaration and definition of his share in a deed of transfer executed by him, validly make a transfer of a share to which he would have been entitled if he had effected a partition before making the transfer. The unequivocal intention to separate has to be communicated to the other coparceners in order to effect a partition by severance of status. A severance of status is not brought about by transferring a certain specific share in joint family property. For example see *Mulam v. Kanchhendi Lall*, : AIR 1958 MP304 . Also see *A. Raghavamma v. A. Chenchamma* : [1964]2SCR933 *Potti Lakshmi Perumallu v. Potti Krishnavenamma* : [1965]1SCR26 and *Puttorangamma v. M. S. Ranganna* : [1968]3SCR119 . The lower appellate Court has not referred to any other evidence of partition, and the trial Court having said that there was no evidence of partition, it must be held that there was in fact no partition between Tara Chand and his uncle Shyam Sunder in respect of the house and on the death of Tara Chand, his undivided interest therein lapsed to Shyam Sunder. That position is consistent with the subsequent facts as well and appears to me to be a

better view of the facts than the finding arrived at by the lower appellate Court and the finding of the lower appellate Court on this point being a finding based on no evidence it is illegal and could be set aside on second appeal. Ext-A-40 only contains the self serving admission of Badri Narain Agarwal and Jagarnath Prasad Agarwal and Ram Chandra Sharma being a purchaser from them he could not rely on the admission of his predecessor-in-interest as proof of the allegation that Tara Chand was separate owner of a 1/3rd share in the house, and that too in the teeth of his own admission contained in the written statement which he filed in that suit contending that Tara Chand was not separate in estate from his uncle Shyam Sunder and that his undivided interest in the house lapsed on his death to his uncle Shyam Sunder.

12. There is one further difficulty in the way of the contesting defendant Ram Chandra Sharma. Under the mortgage of 1891 made by Tara Chand in favour of Dubari Lal the mortgagee rights came to vest through the several transfers in Ram Chandra Sharma himself and when he purchased the right, title and interest claimed by Badri Narain Agarwal and Jagarnath Prasad Agarwal as the mortgages of 1/3 share in the house by the sale deed dated 24th September 1952 the mortgage ceased to exist by merger and since the unity of a mortgage cannot be broken, it was not open to Ram Chandra Sharma to say that he remained a mortgagor of 1/3 share in the house in the right of Badri Narain Agarwal and Jagarnath Prasad Agarwal. On the other hand if he did remain a mortgagor of the 1/3 share in the house, the mortgage being of the year 1891, a fresh suit for its redemption could not be filed after the withdrawal of their Suit No. 79 of 1950 by Badri Narain Agarwal and Jagarnath Prasad Agarwal. The present suit had already been filed in the year 1950 in the Munsif's Court and Ram Chandra Sharma was aware of its pendency when he purchased the 1/3 share of the property from Badri Narain Agarwal and Jagarnath Prasad Agarwal. It appears to me that the purchase made by Ram Chandra Sharma on 24th, Sept., 1952 from Badri Narain Agarwal and Jagarnath Prasad Agarwal was more by way of purchasing peace than property. The claim made by them was highly speculative. Shyam Sunder had transferred the whole property on 12th December, 1899 vide Ext. A-53 and the possession of Mahadeo Prasad and his successors-in-interest after that date was clearly adverse to Tara Chand's widow and his heirs. I do not

think that in view of these facts and circumstances the contesting defendant RamChandra Sharma could be said to have acquired any 1/3 share of Tara Chand in house No. 1 by the purchase made by him on 24th September, 1952 for Rs. 750/- from Badri Narain Agarwal and Jagar-nath Prasad Agarwal. As stated above, he could at best be deemed to have purchased peace as the presumptive owner in possession of the entire property, on the basis of the two Danpatras in his favour and the redemption of the mortgage of Smt. Uttam Kuari in Suit No. 20 of 1947. That seems to be the sense in which this fact is mentioned in paragraph 19 of his written statement as a claim for contribution in case the present suit for cancellation were to succeed by cancellation of the Danpatra dated 22nd June, 1945 to the extent of the plaintiffs' share in the property. There is the further fact that although the purchase was in fact made by Ram Chandra Sharma, it was not made by him in his own name and even the right to sue for redemption was shown to have been kept alive by the device of withdrawing the suit with permission to file a fresh one. The intention seems to have been not to merge the position of mortgages acquired by Ram Chandra Sharma under the Danpatras with the position of mortgagor claimed under the sale deed from the alleged heirs of Tara Chand of his alleged 1/3 share in the house. If that be so the position would be that the mortgage made by Tara Chand of his 1/3 share in the house vide Ext. A-54 dated 11th November, 1891, was not extinguished by the transactions entered into on 14th September, 1952 and Ram Chandra Sharma could not be said to have become the owner of a 1/3 share in the house by transfer from the alleged heirs of Tara Chand free from the liability to the mortgagee incurred under that mortgage. This position appears to have been adopted by the lower appellate Court also in the last paragraph of the discussion under point No. 4 in its judgment, but the inference therefrom that the share of the plaintiffs in house No. 1 would be 2/9 only and not 1/3 is incorrect. So far as the mortgagee rights were concerned, the plaintiffs undoubtedly had a 1/3rd share in them if the Danpatra dated 22nd June, 1945 was invalid in respect of their share and so far as the mortgagors rights, if any, which alone could be said to have been purchased by Ram Chandra Sharma under the sale deed dated 24th September, 1952 are concerned they had become unenforceable, on account of the bar of limitation, despite the withdrawal of Suit No. 79 of 1950 with permission to file a fresh suit It

follows that the position of the mortgagees even in respect of the 1/3 share under Tara Chand's mortgage of 1891 had ripened into ownership with possession. The mortgage being a usufructuary mortgage there was no question of bringing any suit for foreclosure by the mortgagees. It was sufficient that the suit for redemption and/or possession was barred by time. I am accordingly of the opinion that the lower appellate Court was not right in declaring the share of the plaintiffs to be 2/9 only in house No. 1 and I restore the finding of the trial Court on this point and declare that the plaintiffs' share in house No. 1 also is 1/3 on the grant of the declaration that the Danpatra dated 22nd June, 1945 was invalid to the extent of the plaintiffs' share in the property.

13. The second question which arises for consideration in the second appeal is whether the plaintiffs must be relegated to a suit for redemption of Smt. Uttam Kuari's mortgage, against the first defendant Ram Chandra Sharma, for a division of their 1/3 share in the two houses and separate possession over the same.

14. This matter has been dealt with by the lower appellate Court under point No. 5 whereunder it has dealt with several items in respect of which contribution was claimed by the contesting defendant Ram Chandra Sharma. Seven such items are detailed in the judgment of the lower appellate Court. In view of my observation while discussing the first question I would add an 8th item, namely, the sum of Rs. 750/- paid by Ram Chandra Sharma for buying off the claim for redemption of Tara Chand's mortgage of 1891 in Suit No. 79 of 1950. The expenses of contesting that suit have not been detailed by Ram Chandra Sharma in his written statement and may, therefore, be ignored.

15. The fifth one of the seven items detailed by the lower appellate Court is the item relating to the alleged expenditure incurred by the contesting defendant Ram Chandra Sharma on redeeming Smt. Uttam Kuari's mortgage by Suit No. 20 of 1947. Rs. 3000/- was claimed for payment made to Smt. Uttam Kuari and Rs. 1557/6/- in prosecuting the suit. The sixth item of expenditure was of repairs and electric fittings amounting to Rs. 3283/11/3 and Rs. 1226/15/- respectively. The lower appellate Court at first took note of the view expressed by the trial Court on this point as being that the position of the contesting defendant was 'no doubt that

of one who was subrogated to the place of the mortgageethat as this point was not claimed by him, it should not be decided in this case and it should be left open to a separate suit for redemption to be filed by him, and further that 'a person who is subrogated is not entitled to possession but only to a decree for sale and, therefore, although he had left this question open he did not grant him the right of possession pending redemption of his interest by the co-mortgagor namely, the plaintiff. The lower appellate Court said 'I do not agree with him on this point. The learned trial Court had relied upon a commentary of Sri Hari Singh Gaur in his II Volume of the Law of Transfer para 2396 in support of his above observation..... But his observation was made by Sri Hari Singh Gaur at a time when the Transfer of Property Act had not been amended. After the amendment of the T. P. Act by Act 20 of 1929, the whole scheme of Section 92 which gives the right of subrogation has been changed. Prior to that only a co-mortgagor or a subsequent mortgagee was entitled to subrogation, but now all persons referred to in Section 91 who include persons interested in equity of redemption like the defendant were entitled to be subrogated. Further it has mentioned clearly in Section 92 of the Transfer of Property Act, that such a person would have the same rights as the mortgagee so far as regards redemption, foreclosure or sale of such property. Previously this right was limited to foreclosure or sale. So a person who is subrogated will have a right of possession till it is redeemed by the person concerned.'

16. The lower appellate Court further observed that both the parties were agreed that the question of subrogation had neither been properly pleaded nor had the plaintiffs claimed any redemption of their share, even though without payment of any amount and that while according to the plaintiffs the point would be let open to be decided in a fresh suit, on the other hand, although the contesting defendant had not in so many words claimed subrogation, he had alleged all the necessary facts and claimed reimbursement from the plaintiffs for proportionate amount spent in that suit, Thus impliedly he had claimed subrogation. However, no issue on that point was framed. Further, according to the lower appellate Court subrogation takes place by operation of law and as soon as the contesting defendant redeemed the mortgage, he was subrogated to the rights of the mortgagee so far as the interest of the plaintiffs was concerned, and as such they

could claim specific possession of their shares only claiming redemption though they might allege that nothing was due on that account. This was not specifically alleged, though it was alleged that nothing remained to be paid for that mortgage. No issue was framed on that point. The trial Court left the point open for the next suit. The lower appellate Court agreed with it on this point, but in the view that it had taken on the rights of the contesting defendant on being subrogated by redeeming Smt. Uttam Kuari's mortgage, it held that the contesting defendant was entitled to withhold possession over the plaintiffs' share until they redeemed the mortgage by a proper suit for redemption and/or possession.

17. The question is why should the parties be relegated to a separate suit for redemption of the mortgage which has already been redeemed by the contesting defendant Ram Chandra Sharma not merely in respect of his $\frac{2}{3}$ share in the property but also in respect of the $\frac{1}{3}$ share enjoyed by the plaintiffs. At the time when the mortgage was redeemed the plaintiffs had no share in the property for their share has already been given away by their brother Hirendra Nath Sen to the contesting defendant Ram Chandra Sharma by the Danpatra dated 22nd June, 1945 the validity of which was impugned in the present suit. The contesting defendant Ram Chandra Sharma purported to redeem the mortgage of Smt. Uttam Kuari as the successor-in-interest of the mortgagor and owner of the whole property and not any part or share of it. Indeed, the mortgage was extinguished by the decree in Suit No. 20 of 1947 and Ram Chandra Sharma, who was the plaintiff in that suit entered into possession of the property as the sole decree-holder in that suit. The present plaintiffs were parties to that suit and were represented through their brother Hirendra Nath Sen who had given away the property to Ram Chandra Sharma by the Danpatra dated 22nd June 1945. That did not, however prevent the two Courts below on the finding recorded by them from declaring that the Danpatra was invalid to the extent of the plaintiffs' share, which has been found to be $\frac{1}{3}$ in both the houses. The question is does it have the effect of reviving the mortgage which was already extinguished by the decree in Suit No, 20 of 1947, on the rule of subrogation enacted by Section 92 read with Section 95 of T. P. Act and if it does, could the right not be enforced in the present suit for partition and must the parties be relegated to a fresh suit for redemption and/or possession by the present plaintiffs against the contesting defendant. I would rather think that on

the facts and in the circumstances of this case the mortgage having been extinguished by redemption in Suit. No. 20 of 1947 at a time when the plaintiffs' share in the property was not established and the contesting defendant was to all intents and purposes the sole owner or mortgagor of the property, there could be no question of redeeming the mortgage once over again by the plaintiffs, and that the plaintiffs could claim contribution on the principle of Section 51 of the T. P. Act. But Mr. Jagdish Swarup appearing for the contesting defendant Ram Chandra Sharma contended that, that was the effect of the adjudication, in the present suit, of the invalidity of the Danpatra dated 22nd June, 1945 to the extent of the plaintiffs' share, and the position of the present plaintiffs and the contesting defendant must be deemed to have become that of co-mortgagors and in that view of the matter Section 92 read with Section 95 of the T. P. Act were squarely attracted. It may be here clarified that a reading of Sections 92 and 95 of the T. P. Act shows that the redemption has to be only of the plaintiffs' share and the contesting defendant would be entitled to add to the mortgage money recoverable from them such proportion of the expenses properly incurred by him in redeeming the mortgaged property by Suit No. 20 of 1947 as are attributed to the 'plaintiffs' share in the property.

18. Mr. Jagdish Swarup further contended that the amount payable, or not payable, by the plaintiffs for redeeming their 1/3 share and getting possession over it, cannot be determined in this suit for partition and must be determined by way of a separate suit for redemption and possession. A suit has to be decided on the pleadings of the parties, and Mr. Jagdish Swarup even suggested that the logical result of the finding of the lower appellate Court was notto relegate the plaintiffs to a suit for redemption but to dismiss the suit for partition as not maintainable. That, however, does not seem to be possible, or the proper thing to do, on the pleadings of the contesting defendant who claimed contribution of the amount spent by him in due course of management and preservation of the property given to him by the two Danpatras, before the adjudication and the invalidity of the impugned Danpatra dated 22nd June 1945 in the present suit. The contesting defendant never claimed himself to be in the position of a mortgagee qua the plaintiffs on the foot of Uttam Kuari's mortgage, which he had already redeemed and whereupon he had already entered into possession before the present suit was filed. The

contesting defendant throughout claimed to be the owner of the whole property that the Danpatras were validly and lawfully executed and that the plaintiffs have no share in the property. It was by way of abundant precaution that he had given a full account of the steps and the expenditure incurred by him in preserving and protecting the property in the meanwhile and he had claimed in the alternative, in Paragraph 28 of his written statement that in any case the plaintiffs were not entitled to partition without contribution of the seven items of expenditure amounting to Rs. 15,596/3/3 that had been incurred by him.

19. I think that the correct procedure to be followed in this case was to have first ascertained whether the Danpatra dated 22nd June, 1945 was invalid to the extent of the plaintiffs' share, and in the process to determine whether the plaintiffs had any share, and if so what, in the property about to be partitioned by the suit, and to declare the same by preliminary decree. We have reached that stage. Further the preliminary decree should provide the manner in which the plaintiffs' share is to be divided and in the course of doing so to adjust the equities between the parties if any.

20. Mr. Rajeshwari Prasad appearing for the plaintiff-appellants did not contend that Section 92 or Section 95 were not attracted to the facts of the present case. His case shortly was that in the case of a mortgage with possession, or a usufructuary mortgage, the suit for redemption is essentially a suit for possession on payment of the mortgage money found due, if any, on taking accounts of the profits, and setting off the mortgage money and interest against the same. A suit for partition is also in the ultimate analysis a suit for possession over the plaintiffs' share after dividing the property to be partitioned by metes and bounds and adjusting the equities, if any, between the parties. Where a co-mortgagor or a part owner only redeems the whole mortgage, and is thereupon subrogated to the rights of the mortgagee under Section 92 of the T. P. Act, his co-mortgagor or the mortgagors who had not joined in the redemption, could redeem him only to the extent of his/their share in the property. That necessarily involves a partition of the mortgaged property and in the case of mortgage with possession, or usufructuary mortgage, the process should be identical with the proceedings taken in a suit for partition after the preliminary decree. A suit for redemption to which the Courts

below have relegated the plaintiffs would in substance be a suit for partition and separate possession over their share after taking an account and determining the amount payable or not payable by the plaintiffs to the defendant as the plaintiffs' share in the amount paid and expenses incurred on the redemption of the property by the defendant. There was nothing in law to bar that being done in the proceedings to be taken hereafter in the present suit for partition. Mr. Rajeshwari Prasad relied on a decision of the Pepsu High Court in Mehman Singh v. Prem Kaur, (AIR 1955 Pepsu 145} in this context. Mr. Jagdish Swarup learned counsel for the defendant-respondent countered by saying that the T. P. Act was not applicable in Pepsu, and so far as the equitable principles are concerned, they were out of the way where the T. P. Act made a specific provision for the situation in hand, and relied on the following three cases namely. (1) Kedar Lal Seal v. Hari Lal Seal : [1952]1SCR179 (2) Hira Singh v. Jai Singh : AIR1937 All588 Taibai v. Wasudeorao Gangadhar Deshpande (AIR 1937 Nag 372) (FB).

21. There could be no dispute that the matter has to be decided in accordance with law as enacted under Sections 92 and 95 of the T. P. Act and not on any equitable principles dehors the said provisions. But Section 92 or Section 95 of the T. P. Act, does not provide that the Rights of a co-mortgagor of possession over his share of the mortgaged property could be enforced against his co-mortgagor who had redeemed the same and had been subrogated to the rights of the mortgagee, only by a suit for redemption and not by private treaty or by adjudication of the respective rights of the parties in suit for partition of the mortgaged property between the co-mortgagors. A suit for 'redemption' in a case like the present one, by the present plaintiffs against the contesting defendant, would in a sense be a suit for partition and separate possession over their share in the properties mortgaged to Smt. Uttam Kuari, on determination and payment of the amount found due and payable by them to the contesting defendant as their share of the mortgage money and the expenses properly incurred on the redemption of the mortgage by him in Suit No. 20 of 1947. The fact that the T. P. Act was not applicable to Pepsu did not prevent the Pepsu High Court from applying the provisions of Section 92 to the case before it, and inasmuch as the decision is based on an application of the provisions of Section 92, it cannot be said that it cannot be relied upon or applied for deciding a case like the present one where

the T. P. Act is directly applicable. Indeed, the Pepsu High Court did not lay down anything different from what was laid down by the five Judge Full Bench of our Court in *Hira Singh v. Jai Singh* : AIR1937 All588 . The Full Bench observed that the foundation of the right of subrogation is the well-known equitable principle of reimbursement now embodied in Section 69, Contract, Act that a person who is interested in the payment of money which another is bound by law to pay, and who therefore, pays it, is entitled to be reimbursed by the other. But the Contract Act confers a personal right only whereas a right of subrogation involves an equitable charge on the property. When subrogation exists the previous encumbrance that is paid off is not all extinguished but is kept alive and its benefit transferred to the person who has paid it off.

22. I think the contesting defendant is fully entitled to prove the amounts spent by him to claim contribution to the extent of the plaintiff's share in the property as declared by the preliminary decree in the proceedings for ascertainment and division of that share by the final decree and this is what the preliminary decree should further declare and direct.

23. Of the seven items of expenditure recited by the lower appellate Court in its finding on point No. 5 the claims for contribution of items Nos. 1 to 4 and 7 were rejected out of hand, on one ground or the other, and only items Nos. 5 and 6 were reserved for consideration in a suit for redemption to be filed by the plaintiffs against the contesting defendant. I have referred, hereinabove, to an 8th item, namely, the amount of Rs. 750/- for which the contesting defendant purchased the rights claimed by the heirs of Tara Chand in Suit No. 79 of 1950.

24. Although it appears to me that the contesting defendant could not have offered better proof or produced more evidence than what he has already produced in support of the claim for contribution made by him in respect of these three items, sitting in second appeal from a preliminary decree, it is neither possible nor appropriate for this Court to record findings on the extent of the plaintiff's liability for contribution in respect of these amounts in proportion to the share which they have been declared entitled to and which has yet to be worked out by a division by metes and bounds. The matter should be left to be determined by the trial Court in

the proceedings for preparation of the final decree for partition in the suit.

25. The appeal succeeds and is allowed. The preliminary decree under appeal is set aside and in its place the following preliminary decree for partition is passed.

The share of the two plaintiffs together in both the properties in suit is declared to be $\frac{1}{3}$ of the whole. The plaintiffs are entitled to a division and separate possession over their $\frac{1}{3}$ share in the properties subject to contribution of a $\frac{1}{3}$ share in the amount which is proved by the first defendant Ram Chandra Sharma (since deceased) to have been properly paid for the redemption of the mortgage of Smt. Uttam Kuari in Suit No. 20 of 1947, and the expenditure properly incurred by him in prosecuting that suit, as also the expenses properly incurred by him in the repairs and maintenance or essential improvements of the mortgaged property and their preservation since the date of the impugned Danpatra dated 22nd June, 1945 up to the date of this decree, provided that the claim for contribution of the expenditure said to have been incurred on items Nos. 1 to 4 and 7 detailed under point No. 5 of the judgment of the lower appellate Court and which has already been rejected, shall not be allowed to be reagitated. The trial Court shall issue a commission to the Civil Court amin or to an Advocate Commissioner to be appointed for the purpose for drawing up a scheme for partition, and shall after taking an account of the amounts in respect of the contribution claimed before it, determine the amount payable by the plaintiffs to the first defendant, after hearing the parties and allowing them to lead such further evidence as they may wish to lead on the point, and shall then pass a final decree of partition and separate possession over the property allotted to the plaintiffs in accordance with their share, subject to payment of the amount so determined to be payable by them to the first defendant.

However, in the rather peculiar circumstances of the case, I would direct the parties to bear their own respective costs incurred so far but it shall further be open to the trial Court to direct that in case the amounts payable by the plaintiffs under the final decree are not paid within a time to be fixed by it for doing so, the suit shall stand dismissed with costs throughout. The costs to be incurred hereafter shall be in the discretion of the trial Court.

