

Umed Singh Vs. Babu Ram

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SooperKanoon Citation : sooperkanoon.com/473237

Court : Allahabad

Decided On : Apr-16-1934

Reported in : AIR1934All1035; 150Ind.Cas.937

Appellant : Umed Singh

Respondent : Babu Ram

Judgement :

1. This is a defendant's appeal arising out of a suit for sale brought on the basis of a second mortgage-deed dated 15th January 1917, executed in favour of the plaintiff by the original mortgagor. Previous to this there had been a prior mortgage of 13th June 1911, executed by the same mortgagor to the predecessor-in-title of the defendant-appellant under which the same two villages were successively mortgaged. In 1918 the mortgagor sold one of the mortgaged villages to the present defendant-appellant for Rs. 6,500 out of which Rs. 6,105 were left for payment to the first mortgagee and only Rs. 395 for parctis discharge of the second mortgage. The defendant made these payments on two dates in December 1918 and June 1919. Owing to the delay in the payment, additional interest had accrued under the first mortgage with the result that instead of Rs. 6,105 which were due under it on the date of the sale, a sum of Rs. 6,219 became due which was duly paid by the vendee. Having paid an extra amount to the first mortgagee, the vendee did not pay the whole of Rs. 395 to the second mortgagee, but deducted a sum of Rs. 114 from it and paid only the balance. The vendee obtained possession of the property under a sale-deed and having satisfied the

prior mortgage-debt did not take any steps to bring a suit for sale as a representative of the prior mortgagee into whose shoes he had stepped.

2. When a suit was brought by the present plaintiff, the second mortgagee, the vendee pleaded that he was entitled to priority by virtue of the discharge of the first mortgage and he claimed the whole sum of Rs. 6,21.9 which he had paid to the prior mortgagee and also claimed interest on the same at the contractual rate. He also pleaded that he was entitled to deduct Ha. 114 out of the amount left in his hands for payment of the second mortgage. The ultimate decree which has been passed by the lower appellate Court is to give of the defendant the sum of Rs. 6,219 minus Rs. 114 with interest on this balance at the contractual rate entered in the first mortgage-deed. The plaintiff has submitted to this decree, but the defendant has appealed. On his behalf it is urged that he was entitled to be subrogated to the rights of the prior mortgagee in full and must get the amount of the interest which had accrued between the date of the sale-deed and the date of the payment to the prior mortgagee together with interest.

3. The first question which arises for consideration is whether a purchaser from the mortgagor is entitled to be subrogated to the rights of the prior mortgagee whom he redeems. Under the old Transfer of Property Act, Section 74, in terms, applied to a subsequent mortgagee only and not to a subsequent purchaser. But in several cases their Lordships of the Privy Council extended the principle underlying that section to a purchaser of the equity of redemption where the intention appeared to be to keep alive the security. Drastic amendments have been made in the new Transfer of Property Act, and the Amending Act 20 of 1929, has introduced very material changes in several sections. Both Sections 91 and 92 have been amended. Under Section 92, any of the persons referred to in Section 91 other than the mortgagor, and any co-mortgagor on redeeming property subject to a mortgage has, so far as regards sale, etc, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. Section 91 allows a right of redemption to various classes of persons besides the mortgagor and among these classes of persons are persons who have any interest in, or charge upon, the property mortgaged or in, or upon, the right to redeem the same, but Section 59(A) provides that in the chapter in which

Sections 91 and 92 occur, mortgagors and mortgagees shall be deemed to include references to persons deriving title from them, respectively. Taking Section 59(A) literally it would follow that transferees, whether purchasers or subsequent mortgagees who derive title from mortgagors would be included in the word 'mortgagor' unless it is otherwise expressly provided. But the context of Section 91 indicates that all transferees including purchasers, subsequent mortgagees, lessees, etc., would come within the class of persons who have any interest in, or charge upon, the property mortgaged or in, or upon, the right to redeem the same and would, therefore, not be included in the word 'mortgagor' which occurs earlier in the section. On this interpretation we would have to give a narrow meaning to the word 'mortgagor' in this section so as to include the person who made the mortgage and his legal heirs and not include transferees from him. Giving this meaning to the word 'mortgagor, ' it would follow that under Section 92 all transferees from the mortgagor, whether they be purchasers or subsequent mortgagees or lessees, would have the right of subrogation when they redeem a prior mortgage, as against a puisne mortgagee.

4. Sir D.F. Mulla in his Transfer of Property Act, p. 481 has given two reasons why, although the word 'mortgagor' includes a purchaser of the equity of redemption in Section 59(A) the purchaser of an equity of redemption is not excluded from the right of subrogation. These are : (1) that he is under no covenant or personal liability to the mortgagee whose mortgage he discharges, and (2) the principle that the mortgagor cannot derogate from his grant has no application to him. We accordingly hold that a purchaser of the equity of redemption from the original mortgagor is entitled to the benefit of subrogation under Section 92, T. P. Act, if he redeems a prior mortgage. In the recent case of Tota Ram v. Ram Lal 1932 All. 489, a Full Bench of this Court has laid down that Sections 92 and 101, T.P. Act, as amended by Act 20 of 1929, have retrospective effect, and that even if they did not have any retrospective effect, the rule laid down by the Legislature would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the Amending Act. It is not necessary for us to express any independent opinion on the retrospective character of the Amending Act as the opinion of the Full Bench is binding upon us. The Full Bench discussed the previous cases in which the question of the agency of the transferee was

considered when money had been left out of the consideration money in his hands for payment of the prior debt, but they came to the conclusion that that question has now entirely disappeared from the arena of controversy owing to the amendment of the Transfer of Property Act. Taking Section 92 as it stands, it is certainly clear that there are no restrictions placed on the applicability of that section to cases where the money is paid out of the sum left in the hands of the transferee or cases where he has undertaken liability to discharge the previous debt. There can therefore be no doubt that the defendant-appellant on paying off the prior mortgage of 1911 was entitled to the benefit of subrogation as against the subsequent mortgagee of 1917. One question which arose for consideration in this case was whether, in view of the circumstance that he had undertaken to pay off the prior mortgage under his sale deed and obtained possession of the mortgaged property as he delayed payment in consequence of which delay further interest accrued the vendee was entitled to, claim credit for the extra interest which had accrued on the prior mortgage. The learned advocate for the plaintiff has urged before us that the defendant should not be allowed to take advantage of his own delay in discharging his obligation and that he should not have allowed to pocket the profits during this interval and thereby throw a larger burden on the subsequent mortgagee. But this argument, in our opinion, is fallacious.

5. The subsequent mortgagee was not privy to the contract between the mortgagor and the vendee and cannot be allowed to take advantage of the terms of that contract. If owing to the delay in payment, the mortgagor had suffered any loss, it would be his right to recover compensation from his vendee. But the delay in the payment of a prior mortgage, either by the mortgagor himself or by the mortgagor's representative, would not in any way cause harm to the subsequent mortgagee who should himself have paid off the prior mortgage and claimed subrogation. According to Section 92 a person on redeeming property, subject to the mortgage, acquires the same rights as the mortgagee whose mortgage he redeems. The right of subrogation is therefore obviously acquired when the property is redeemed. It is not acquired on the date of the acquisition of the right to redeem. It follows that the vendee's right to subrogation arose not on the date when he took the sale deed with the right to redeem the prior mortgage and the obligation to pay off the amount, but on the last date when he made the payment

and finally discharged the prior mortgage, for it was only on that date that he can be deemed to have redeemed the property. In these circumstances the benefit of the receipt of profits derived by the vendee must go to his and the subsequent mortgagee cannot claim credit for it. The subsequent mortgagee is bound to pay to the vendee the entire amount which he paid to the prior mortgagee on the date when he redeemed the prior mortgage for, if no such payment had been made, the prior mortgagee would have recovered that amount as against the subsequent mortgagee as well. The Court below has therefore erred in not allowing credit to the vendee for the sum of Rs. 114 out of Sections 6,219 which he paid to the prior mortgagee.

6. On the other hand, it seems to us that the vendee in this case is not entitled to any interest on Us. 6,219 from the date of the last payment. No doubt when he redeemed the property by paying off the prior mortgage he acquired the rights of the prior mortgagee as regards sale, etc. The prior mortgage was a simple mortgage. Accordingly, the vendee, on redeeming the prior mortgage acquired the right to bring a suit for sale on the basis of that mortgage, but within the period of limitation prescribed for that mortgage. Had he availed himself of that remedy it might perhaps have been open to him to recover the whole amount at the contractual rate of interest. But he did not bring a suit and did not enforce the remedy which the mortgagee possessed. Instead he remained in possession of the property which he had purchased from the mortgagor. He is only entitled to claim the equitable relief of using the previous payments as a shield against the subsequent mortgagee who is suing him. Such a plea can be allowed to him only on equitable grounds. But a man who seeks equity must himself do equity. In order therefore to see whether we should allow him subsequent interest on the amount which he paid towards the discharge of the prior mortgage we have to consider all the circumstances of this case.

7. The defendant-vendee had purchased the property from the mortgagor and had undertaken to discharge the whole of the prior mortgage debt. In fact, money was left in his hands for the payment of the mortgage debt in full. He obtained possession of the property and appropriated the profits, but delayed making the payment. In consequence the amount of the mortgage money increased. After

having made the payment he has been appropriating the profits, although it was clearly understood between the mortgagor and the vendee that there would be no right to recover interest by the vendee. As the vendee has been receiving profits of the property in lieu of the interest on the amount which he paid off we think that it would be inequitable and unjust to give him interest on top of the profits at the contractual rate mentioned in the mortgage-deed. It is only fair that interest should cease from the date when he redeemed the first mortgage and remained in possession of the mortgaged property. On these equitable considerations we think we ought to disallow the vendee's claim for interest on the amount which he paid. In this suit he is entitled to the extra sum of Rs. 114. On the same, grounds he would not have been entitled to any subsequent interest on the balance of Rs. 6,219. But the lower appellate Court gave to the vendee credit for subsequent interest on the sum of Rs. 6,219 minus Rs. 114 up to date. The vendee has not chosen to appeal nor has he filed any cross-objection. The learned advocate for the second mortgagee urges before us that he is entitled to support the decree of the Court below and resist the claim for the extra sum of Rs. 114 on the ground that interest on the balance has been allowed wrongly.

8. It seems to us that the principal and interest thereon were different items in the claim. A decree has been granted to the vendee who paid the prior mortgage for the amount of the subsequent interest. That decree stands and is not challenged by way of any cross-objection. It would therefore not be supporting the decree if we disallowed the sum of Rs. 114 to which the vendee is entitled on the ground that he has been wrongly awarded some interest. We cannot allow the second mortgagee to challenge the correctness of the decree passed by the Court below on this ground. The result therefore is that the appeal is allowed in part and the decrees of the learned Judge of this Court and of the lower appellate Court are modified to this extent that the sum of Rs. 114 without any interest, is added to the amount allowed to the defendant, Umed Singh by the lower appellate Court which also, if paid by the subsequent mortgagee, would be tacked on to his mortgage debt. As the appeal has succeeded in part only we direct that the parties do bear their own costs in this Court and in the Court below.

