

Umar Ali and anr. Vs. Asmat Ali and ors.

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Court : Kolkata

Decided On : Jan-14-1931

Reported in : AIR1931Cal251

Appellant : Umar Ali and anr.

Respondent : Asmat Ali and ors.

Judgement :

Rankin, C.J.

1. In this case, one Abdul Rahaman granted a mortgage of three plots of land to one Golam Ali in 1903. Defendants 2 to 7 in the present suit together with one Abdul Hashim, predecessor-in-interest of defendants 8 to 10, are the heirs of Abdul Rahaman. The plaintiff is a person who in 1918 purchased the shares of defendants 2 to 5 and of Abdul Hasim in one of the three plots of land comprised in the mortgage the other two plots having been sold by Abdul Rahaman to defendant 1 in 1906. Defendant 11 is an assignee of Golam Ali's mortgage who in 1921 brought a suit upon the mortgage against the plaintiff and the present defendants 2 to 7. Under the compromise decree which was made in that suit on 14th November 1922 the plaintiff paid off the mortgage debt by payment of a sum of Rs. 225 on 13th March 1923. Accordingly, on 9th May 1926, the plaintiff brought the present suit for contribution from the different defendants in proportion to their shares. The plaintiff claimed that as against the defendants whose property was liable under the original mortgage he had a charge on the property of each for the

amount due to him from that defendant for contribution. The Munsif has taken the view that the plaintiff's right is to enforce against the defendants the original mortgage of 1903, that he stands in the shoes of the original mortgagee and so obliged by the Limitation Act to bring his suit within 12 years from the due date mentioned in the original mortgage bond unless that time is extended in his favour by acknowledgment or part payment or otherwise. Upon this footing, it is not contested before us that the plaintiff's suit of 1926 would be out of time. The Munsif having dismissed the suit as statute barred, the Subordinate Judge on appeal by the plaintiff has reversed his decision holding in effect that upon the discharge of the original mortgage by the plaintiff in 1923, the plaintiff acquired by the express provisions of Section 95, T. P. Act, a charge upon the properties comprised in the mortgage and belonging to the defendants.

2. The point in issue was dealt with by a Division Bench of this Court in *Srimati Raj Kumari Debi v. Mukunda Lal Bandopadhyaya* A.I.R. 1921 Cal. 166, where it was held that a co-mortgagor seeking contribution must bring his suit within the period within which the mortgagee could have brought a suit to enforce his mortgage. A contrary view however has been taken by the Madras High Court in *Parvati Ammal v. Venkatarama Iyer* A.I.R. 1925 Mad. 80, by the Allahabad High Court in *Aziz Ahmad Khan v. Chotte Lal* : AIR1928 All241 , and by the Oudh Chief Court in *Rameswar v. Mt. Sheorani* A.I.R. 1927 Oudh 552. The Division Bench which dealt with the present case upon second appeal has differed from the decision in *Srimati Raj Kumari's* case and has referred the question to a Full Bench for final decision.

3. It may here be observed that Section 95, T.P. Act, has by Act 20 of 1929 been amended in such a way that 8s. 92 and '95, as they now stand, make it clear that the right of the co-mortgagor redeeming; is the 'same right as the mortgagee whose mortgage he redeems may have against the mortgagor.' In effect therefore the decision in *Srimati Raj Kumari's* case is now statute law. The present case how ever must be dealt with upon the Act as it stood prior to the amendment of 1929 and in recent years, more than one decision of the Judicial Committee of the Privy Council has insisted that matters which are dealt with by the Act shall be determined according to the true construction of the words used by the legislature. Thus in *Ganeshi Lal v. Thakur Charan Singh* , it was said of S. 82 that:

as the Act prescribes the conditions in which contribution is payable it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions.

4. There are special difficulties however in arriving at a strict or. exact construction of Section 95. Whether the wording was taken from Macpherson on Mortgages or from cases in the Sudder Dewani Adawlut, the section deserves the description given to it by Sir Hash Behari Ghose in his well-known text-book, *The Law of Mortgage-in India*, Edn. 5, p. 372 'this unskilfully drawn and clumsily worded section.' The phrase 'one of several mortgagors' must mean one of several persons interested in the equity of redemption. The phrase 'and obtains possession thereof which had been thought to restrict this section in practice to usufructuary mortgages has been dealt with by the Judicial Committee in *Ahmad Wali Khan v. Shamsuljehan Begum* [1906] 28 All. 482, in consonance with the view taken in *Bhagwan Das v. Har Dei* [1903] 26 All. 227, and the section must now be construed on the footing that in cases in which there is no question of obtaining possession the charge is intended to follow immediately upon the redemption. A third question arises out of the expression 'the expenses properly incurred in so redeeming.' Upon one view the section is addressed only to the question of costs and not to the question of contribution in respect of the original mortgage-doubt. But in view of the two decisions last mentioned and upon a consideration of the other sections of the Act, I agree in the opinion of the Division Bench that the mortgage debt is intended to be included by the phrase. So far therefore it would appear that Section 95 is intended by the legislature as a statement of the law applicable to such a case as the present and prima facie it is the duty of the Court to interpret and apply the section as a complete and independent statement of the law.

5. Prior to the recent amendment the Transfer of Property Act did not employ the word 'subrogation.' A co-mortgagor's right to contribution is given in express terms by S. 82. Section 74 deals with the right of a puisne mortgagee upon redemption of the prior mortgage and says that he

shall acquire in respect of the property all the rights and powers of the mortgagee as such to whom he has made such tender.

6. This is in effect the right of subrogation. But nowhere in the Act is similar language used with reference to the case of a co-mortgagor redeeming, as S. 82 applies to mortgagors inter se and gives one mortgagor a right to have, the other property contribute to the discharge of the mortgage debt. It may very well be contended [c.f. *Har Prosad v. Raghunandau* [908] 31 All. 166 that so far the mortgage debt is concerned the Act apart from Section 95 gives a right which can only be a charge within the meaning of Section 100. For the right to bring a money suit for contribution recourse can be had to Section 69, Contract Act. But as regards the right of a co-mortgagor redeeming against the property of other mortgagors comprised in the same mortgage, Section 95 was needed to make clear both that the expenses of redemption are not to be left out and that the nature of the right is a charge. Hence it seems to me to be necessary to treat Section 95 as intended to declare the right against the mortgaged property which a co mortgagor acquires by redemption..

7. There is thus a marked contrast between language of Section 95 which deals with a co-mortgagor and the language of Section 74 which 'deals with a puisne mortgagee. What Section 95 confers is a charge and Section 100 explains that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. It would seem therefore that the right given by Section 95 is a case in which immovable property of one person is by operation of law made security for the payment of money to another. A consideration of the definition of mortgage given in Section 58 leads me to doubt whether a mortgage (which must needs be a transfer) can ever result by the operation of law as distinct from the act of the parties and the phrase used in Section 100 'and the transaction does not amount to a mortgage ' seems to have reference only to a security created by act of the parties. I should hesitate before assuming that the charge given by Section 95 cannot amount to 'an interest in specific immovable property' or to draw the consequence which has often been drawn that all charges are liable to be

defeated by a purchaser for value without notice. There is however much to be said for these propositions though I do not now pronounce upon them. (Would they apply to a charge under Section 73). In any case some difficulty has been found to arise as regards priority of the charge declared by Section 95 over mortgages granted by other mortgagors subsequently to the mortgage which has been redeemed. If the right of a co-mortgagor redeeming is not a right to stand upon the original mortgage but is a charge given by Section 95 in lieu of the right of subrogation which English equity would have given to him and which he could in any event have obtained by taking a proper transfer at the time of payment or getting proper provisions inserted in the decree in case of a suit, the position of a co-mortgagor would not seem to be satisfactory. Questions of limitation have also arisen as in the case before us and acute difference of opinion has been exhibited by the decisions. On this point the leading consideration is that in the case of *Syed Mahommad Ibrahim v. Ambika Prosad* [1912] 39 Cal. 527, the Privy Council held in a case of a puisne mortgagee who had redeemed the first mortgage that his right to stand upon the prior security was not a new right which accrued to him upon his redemption of that security but one to which Article 132, Lim. Act of 1877 had to be applied counting the period of 12 years from the due date of the original security: c.f. *Sibanand v. Jagmohan* A.I.R. 1922 Pat. 499.

8. On the footing that Section 95 has a general application to mortgages of all kinds and that the word 'expenses' covers the mortgage-debt, one view is that adopted in *Periama Servaigaran v. Marudainayagam Pillai* [1899] 22 Mad. 332 where Shephard, J., says:

The language, of Section 74 makes it clear that the second mortgagee is by tender of the mortgage money to acquire no other right than that possessed by the first mortgagee . . '. The same principle as I conceive applies in favour of the mortgagor who has paid off the mortgage debt which his co-mortgagors were equally interested in paying... That section (Section 95) as I understand like the decree which should be framed in the case of redemption by one of two co-mortgagors or a mortgagor interested in part only of the property... does nothing more than preserve to the mortgagor the right which the mortgagee-possessed as against the interest of the other parties in the mortgaged property. There is no question in any

of these cases' of creating a new charge on the property.

9. A second view is to take the language of the section as declaring the extent and nature of the right against the property of other mortgagors which a co-mortgagor obtains upon redemption of the original security in view of the difference in language between Section 74 and Section 95 and to refuse to apply to the latter principles of subrogation which are admitted only by the former. On this view the right given to a co-mortgagor is not the same as that given to a puisne mortgagee but is a charge with the incidents of a charge as defined by the Act and is nothing more and nothing different.

10. In *Aziz Ahmed Khan v. Chotte Lal* the High Court at Allahabad may have meant to suggest an intermediate view but if so I am not certain that I have fully understood it. Of course if the view be taken that in addition to the charge given by Section 95 a co-mortgagor redeeming has the right to stand upon and enforce the original security, the circumstance that the latter right has become statute barred would be no objection to the enforcement of the statutory charge. In this sense it may be true and important to say that the principle of subrogation may be applied for the benefit but cannot be applied to the disadvantage of the party. This seems to be the meaning of the judgment because it affirms as

undoubtedly a correct proposition of law the proposition that where one of the mortgagors redeems a prior mortgage he is subrogated to the rights of the prior mortgagee and on that account has a priority in enforcing a right of contribution over a transferee of a mortgagor although the actual payment that gave the plaintiff a right to enforce contribution was made subsequent to the mortgage made by the co-mortgagor.

11. Here the difficulty is that the statute which by Section 74 gave this right of subrogation to a puisne mortgagee gives to a co-mortgagor something deliberately different. He may be worthy of all possible protection; one may think that a charge is insufficient. But will it do as a matter of construction to say:

Let the worthy man have both. And when the other mortgagor wants to redeem him he must redeem not the statutory charge but the original mortgage within the

statutory period from the due date thereof.

12. So to hold is not to treat Section 95 as the legislature's decision upon such a case. And if the statute has not given to the co-mortgagor, who redeems, the right to enforce the original mortgagee's security it is difficult to see how the principle of subrogation can be invoked to attach special incidents to the statutory charge. The priority to which the charge is entitled must be discovered from the statute and any special priority must be bottomed upon the express or presumable intention of the legislature rather than upon a principle which the legislature has not adopted as applicable to the case.

13. In choosing between these views it is I think important to remember that the principle of subrogation works out somewhat differently according as it is applied to a puisne mortgagee or to a co-mortgagor. As Grimwood Mears, C.J., has pointed out, a puisne mortgagee can stand upon the original mortgage and enforce all the rights of an assignee against his mortgagor. Moreover as regards his costs of redeeming the original mortgage these at the worst could be added to his own mortgage as money necessarily expended to defend his own security. A co-mortgagor redeeming however can only stand upon the original mortgage or the purpose of enforcing payment of that amount of the mortgage debt which he has discharged in excess of his own share. Even as regards such excess, his right is not a right to recover in solidum from all the other mortgagors but he must split up his claim into a claim against each, consonant with Section 82 which defines his right. On English principles therefore if he can be said to have the position of an assignee of the mortgage at all, this is only *suo modo*. The assignment is only for the purpose of giving him a security against each of his co-mortgagors in respect of that portion of the debt which each is liable to reimburse. If the decision in *Digambar Das v. Harendra Narayan Panik* [1910] 5 I.C. 165 is right, what his co-mortgagors owe to him upon the transaction is not necessarily to be calculated upon the footing of the original mortgage, e. g., he is not necessarily entitled to interest at the same rate as in the original mortgage. These considerations make it very intelligible that the legislature should deal in different language with the cases of a puisne mortgagee and of a co-mortgagor. One cannot profess to be surprised at the suggestion that it should have been deemed simpler and better to

say that in India a co-mortgagor should have a charge than to say (a) that he should acquire the rights of the original mortgagee but that (b) he should be limited in enforcing those rights to treat himself as a mortgagee as against each co-mortgagor for the amount rightly due to him in respect of the share of each. It must again be remembered that, though it may not be very common in India, any mortgage may contain special stipulations. The legislature may have thought it better to give to a co-mortgagor redeeming a plain statutory charge than to complicate the matter by requiring the original mortgage to be worked out in circumstances in which the bringing of the suit on the original mortgage might very well give rise to difficulties. But beyond all such considerations there is this, that whatever else is meant by a charge it carries with it the right to bring the property to sale by process of law. Section 100 of the Act originally contained the words:

and all the provisions herein before contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall so far as may be apply to the person having such charge.

14. These words were in effect transferred in 1908 to the Code of Civil Procedure and Rule 15, O. 34, now stands thus:

All the provisions contained in this order as to the sale or redemption of mortgaged property shall so far as may apply to property subject to a charge within the meaning of Section 100, T. P. Act, 1882.

15. Now a mortgage in India may be a usufructuary mortgage or a mortgage by conditional sale, and in neither case is there any right to bring a suit for sale of the mortgaged property. But Section 95 gives to the co-mortgagor a charge in all cases whether it was the right of the original mortgagee to have a judicial sale or not. This is almost certainly the reason or part of the reason for the difference between Section 74 and Section 95. I agree with what was said of Section 95 by Stanley, C.J., and Burkitt, J., in *Bhagwan Das v. Har Dei* (7) at p. 231:

The object of the legislature apparently was to give to a co-mortgagor independently of the nature of his mortgage a charge on a share of a co-mortgagor for the proportion of the share of the mortgage debt paid by him to

redeem the property.

16. Upon the whole therefore as a matter of construction, the statute seems to reject the idea that the charge given by Section 95 is intended to be nothing new or nothing different from the right given to a puisne mortgagee by Section 74 and the opinion of Shephard, J., to that effect seems untenable. Moreover in Ahmad Wali Khan's case the Judicial Committee treated the section as conferring the right to a charge in a case arising out of a mortgage bond. Again Vasudev v. Babaji [1902] 26 Bom. 500 was an express decision that a co-mortgagor redeeming the mortgage is not a mortgagee, that his transaction does not amount to a mortgage and that he has merely a charge upon the property. In that case Jenkins, C. J., deliberately refused to concur in the view taken in Allahabad [Ashfaq Ahmad v. Wazir Ali [1891] 14 All. 1], and still maintained by that High Court [Aziz Ahmad Khan's case] and by others that the time within which the co-mortgagor can be redeemed is limited by Article 148, Lim. Act. In this conflict of authority we will be least presumptuous if we prefer the decisions to keep most closely to the words of the statute. In favour of the other view there is the argument that unless the principle of subrogation be admitted the co-mortgagor who redeems will lose his right to priority. It may be that this is what the legislature overlooked in 1882 and put right in 1929. But I am by no means satisfied either that the right to subrogation can be invoked at all or that without it the priority must be given up.

17. On this point it is well to remember that while in English law a mortgage implies a covenant to repay this is by no means generally true in India. If the Act be looked at carefully it will be seen that the security of the co-mortgagor for reimbursement of the excess paid beyond his share is not something which is given to reinforce a personal liability resting upon the other mortgagors to contribute, nor is it something which has to be engineered by putting him in the shoes of the mortgagee. On the face of Section 82 subrogation appears to be an 'extrinsic principle.' Section 82 makes the share depend upon the value of each property, and the primary liability is imposed by the section itself and is imposed directly upon the properties. The right to a personal judgment follows only by reason that under Section 69, Contract Act, and in view of the illustration thereto, it is held that the law imposes a personal liability to indemnify not only where the

debt discharged was a personal liability of the defendant but also in cases in which he is indirectly liable, e.g., the liability being imposed upon land held by him : of *Mothoranath v. Kristo Kumar* [1878] 4 Cal. 369. If then each mortgagor, as an incident of the mortgage transaction, obtains a right that the property brought into the mortgage by each of the others shall contribute rateably to the mortgage debt, does it necessarily follow upon general principles or as a matter of the intention of the statute, that because from the nature of that right he cannot enforce it as a charge till he has paid off the whole mortgage and (in some cases) recovered possession from the mortgagee, the priority of his charge is not determined by the date of the mortgage deed ?

18. For purposes of priority cannot Section 95 be read with Section 82? And is this not easier than to read subrogation into it Hitherto for reasons good or bad the Courts in India have affirmed that a mortgagor is entitled to this priority; and as this question is of great importance; it is perhaps not right that this Full Bench should undertake to pronounce upon it finally in a case in which the question does not arise. But when we are invited to do some violence to the language of Section 95 on the ground that this is necessary if a reasonable result as regards priority is to be obtained, I think it right to say that the necessity is not at present clear to me. The amendment of 1929 may well be thought to make more clear the priority of the co-mortgagor and to clear away all risk of postponement to a purchaser for value without notice, but as a co-mortgagor can when redeeming take a formal assignment (or its equivalent in the case of a decree) the chief merit of the amendment is that it provides to the co-mortgagor by the general law the same security that proper conveyancing would always have provided and not a form of charge which is different in some of its incidents.

19. I am of opinion that in answer to this, reference, we should say that the case of *Sreemati Rajkumari* was wrongly decided in so far as it was held in that case that a suit by a redeeming co-mortgagor for contribution, instituted beyond the period within which the ' original mortgagee could institute his suit on the mortgage, had it not been redeemed, was barred, and that the second appeal should be dismissed with costs before the Division, Bench and before us.

C.C. Chose, J.

20. I agree.

Mukerji, J.

21. I am of the same opinion.

Mallik, J.

22. I agree.

Guha, J.

23. I agree.

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