GANESHI LAL

v.

JOTI PERSHAD.

1952

Nov. 7.

[MUKHERJEA, CHANDRASEKHARA AIYAR and BHAGWATI JJ.]

Mortgage—Co-mortgagors—Redemption of entire mortgage by co-mortgagor paying less than amount really due—Right to contribution from others—Whether limited to their share on amount actually paid—Principles of equity.

On principles of equity, justice and good conscience, which apply to the Punjab (where the Transfer of Property Act, 1882, is not in force) if one of several joint mortgagors redeems the entire mortgage by paying a sum less than the full amount due under the mortgage, he is entitled to receive from his co-mortgagors only their proportionate shares on the amount actually paid by him. He is not entitled to claim their proportionate shares on the amount which was due to the mortgagee under the terms of the mortgage on the date of redemption.

Hodgson v. *Shaw* (40 E. R. 70), *Digambar Das* v. *Harendra Narayan Panday* [(1910) 14 C.W.N. 617] and *Suryanarayana* v. *Sriramulu* [(1913) 25 M.L.J. 16] referred to.

Judgment of the High Court of Punjab at Simla affirmed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 166 of 1951. Appeal from the Judgment and Decree dated September 15, 1948, of the High Court of Judicature for the State of Punjab at Simla (Mahajan and Teja Singh JJ.) in Regular Second Appeal No. 1844 of 1945 from the Judgment and Decree dated June 5, 1945, of the Court of the District Judge, Gurgaon, in Civil Appeal No. 171 of 1943, arising out of the Judgment and Decree dated August 27, 1943, of the Court of the Subordinate Judge, Gurgaon, in Civil Suit No. 11 of 1943.

Tarachand Brijmohanlal for the appellant.

Gurubachan Singh (*Radha Krishan Aggarwal*, with him) for the respondent.

1952. November 7. The Judgment of the Court was delivered by Chandrasekhara Aiyar J.

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CHANDRASEKHARA AIYAR J.—The plaintiffs, Joti Prasad and Sat Narain, sued for partition and possession of their two-fifths share in the suit properties alleging that the first defendant was alone in possession of the same, having redeemed a mortgage executed by the joint family of which the plaintiffs and defendants were members, in favour of one Raghumal in the year 1896 on paying Rs. 5,800. Defendants 2 to 5 were impleaded as co-sharers. Out of them, defendants 2 and 3 admitted the claims of the plaintiffs. Defendant 4 died pending suit, and her name was struck off. Defendant 5 supported the first defendant. On the date of the trial court's decree, the two plaintiffs were held entitled to one-sixth share each.

The first defendant resisted the plaintiffs' claim. He contended that the redemption by him in 1920 was not on behalf of the joint family as alleged by the plaintiffs but on his own account as there had been a disruption of the joint family status much earlier, and that before the plaintiffs could get any relief, they were bound to pay him not merely a proportionate share in the sum of Rs. 5,800 which he paid to the mortgagee for redemption but their share in the original mortgage debt of Rs. 11,200. He also denied that the original mortgage was executed on behalf of the joint family.

The Subordinate Judge, and on appeal, the High Court found that the original mortgage was a mortgage transaction of the joint family, and that the first defendant, Ganeshi Lal, redeemed the mortgage on his own account and for his own benefit at a time when there was no longer any joint family in existence. It was further held by the trial court that the plaintiffs and other co-sharers were bound to pay their proportionate share of the amount paid by the first defendant to redeem the mortgage, namely, Rs. 5,800. But from this a sum of Rs. 1,200 which he had already received by way of redemption of certain mortgage rights had to be deducted. The District Judge enhanced this sum of Rs. 4,600 to

Rs. 5,000, as the first defendant had paid taxes due on the property up to 1940, but he confirmed the main findings of the Subordinate Judge. A second appeal preferred by the first defendant was dismissed by the High Court at Simla (Mehr Chand Mahajan and Teja Singh JJ.). They repelled the contention of the first defendant that a suit for partition and possession was not maintainable without bringing a suit for redemption. They also negatived his right to get a proportionate share in the amount of Rs. 11,200 due on the mortgage. Two other learned Judges gave leave to appeal under section 109 (c) of the Civil Procedure Code, as a substantial question of law was involved.

Three points were argued before us by learned counsel for the appellant; firstly, there was an assignment of the mortgage in favour of the appellant with the result that the entire rights of the mortgagee vested in him; secondly, even viewing the question as one of legal subrogation, he was entitled, under the principles of justice, equity and good conscience which governed the State of Punjab, as the Transfer of Property Act has not been applied to the State, to recover from the co-mortgagors not merely their shares in the sum of Rs. 5,800 which he had paid for redemption but their shares in the full amount of Rs. 11,200 due under the mortgage; and thirdly, that the suit for partition without asking for redemption was not maintainable.

Points Nos. 1 and 3 have no force whatever. The registered deed of redemption does not contain any words of assignment. To say that Ganeshi Lal shall be the owner of the entire amount due from the mortgaged property is something different from stating that the security has been assigned in his favour. On the other hand, the endorsement of receipt of payment on the back of the mortgage deed itself and the statement of the mortgagee that he has released the mortgaged property from his mortgage go to show that there was no assignment.

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The non-maintainability of the suit does not seem to have been in issue either before the trial court or before the District Judge, and it appears to have been raised for the first time before the High Court. It was pointed out by the learned Judges, and quite rightly, that so long as no question of limitation was involved, there was no objection to a claim for redemption and one for possession and partition being joined together in the same suit.

Only the second point remains for consideration, and this raises an interesting question of law. It is not denied that Ganeshi Lal who redeemed the prior mortgage is subrogated to the mortgagee's rights, but the controversy is about the extent of his rights as subrogee. By virtue of the redemption, does he get all the rights of the mortgagee and hold the mortgage as a shield against the co-mortgagors for the full amount due on the mortgage on the date of redemption whatever he may have himself paid to get it discharged, or does he stand in the mortgagee's shoes only to the extent of getting reimbursed from the co-mortgagors for their shares in the amount actually paid by him? The lower courts have held that the latter is the correct position in law, but the appellant has challenged it as unsound.

The first two clauses of the present section 92 of the Transfer of Property Act run in these terms:

"Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems."

It is a new section and was inserted by the amending Act XX of 1929. The original sections 74 and

75 conferred the right to redeem in express terms only on second or other subsequent mortgagees, though the co-mortgagor's right to subrogation on redemption was recognised even before the Act. As the Transfer of Property Act has not been extended to the State of East Punjab, it is unnecessary to decide whether section 92 is retrospective in its operation, on which point there has been a conflict of opinion between the several High Courts. Section 95 of the Act which removed the confusion caused by the old section which, conferring on the co-mortgagor what was called a charge, and thus seeming to negative the application of the doctrine of subrogation, is also inapplicable to the present case. We therefore steer clear of sections 74 and 75 of the old Act and sections 92 and 95 of the present Act, and we are free to decide the question on principles of justice, equity and good conscience.

If we remember that the doctrine of subrogation which means substitution of one person in place of another and giving him the rights of the latter is essentially an equitable doctrine in its origin and application, and if we examine the reason behind it, the answer to the question which we have to decide in this appeal is not difficult. Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognised that where there are several joint debtors, the person making the payment is a principal debtor as regards the part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtors. Such being the legal position as among the co-mortgagors, if one of them redeems a mortgage over the property which belongs jointly to himself and the rest, equity confers on him a right to reimburse himself for the amount spent in excess by him in the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share. This proposition is postulated in several authorities. In the early case of *Hodgson* v. *Shaw* (1) Lord Brougham said:

(1) 3 Myl. & K. 183; 40 E. R. 70.

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"The rule is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his *reimbursement*."

I have italicised the word "reimbursement". Sheldon in his well-known treatise on Subrogation has got the following passage in section 13 of the Second Edition:

"There is another class of cases in which he who has paid money due upon a mortgage of land to which he had some title which might be affected or defeated by the mortgage, and who was thus entitled to redeem, has the right to consider the mortgage as subsisting in himself, and to hold the land as if it subsisted, until others interested in the redemption, or who held also the right to redeem, have paid a contribution."

Be it noted that what is spoken of here is a contribution.

Dealing with the subject of subrogation of a surety by payment of a promissory note and citing the observations of the Alabama Court, Harris says in his work on Subrogation (1889 Edition) at page 125:

"The rule is, that a surety paying a debt, shall stand in the place of the creditor; and is entitled to the benefit of all the securities which the creditor had for the payment of the debt, from the principal debtors; in a word, he is subrogated to all the rights of the creditor; the surety, however, cannot avail himself of the instrument on which he is surety, by its payment. By payment it is discharged and ceases to exist, and the payment will not, even in equity, be considered an assignment; the surety merely becomes the creditor of the principal to the amount paid for him."

To compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditor or mortgagee would be to perpetrate an inequity or

injustice, as it would mean that the debtor who is in a position to pay and pays up can obtain an advantage for himself over the other joint debtors. Such a result will not be countenanced by equity; the favouritism shown by law to a surety, high as it is, does not extend so far. The surety can ask to be indemnified for his loss: he can invoke the doctrine of subrogation as an aid to his right of contribution. Sheldon says in section 105 of his book:

"The subrogation of a surety will not be carried further than is necessary for his indemnity; if he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him. He cannot speculate at the expense of his principal; his only right is to be repaid."

In section 178, Harris is still stronger:

"Since subrogation is founded on principles of equity, the surety who would avail himself of the doctrine and invoke equity must do equity; and while he is entitled to a reimbursement in all that he pays out properly for his principal, debt, interest and cost, he is not entitled, in any way to recover more than he has paid. For instance, if he pays the debt of his principal, in depreciated currency, the rule would seem to be that he could demand from the principal only the value of that currency at the time he made the payment. Nor would he upon principles of equity be permitted to purchase the debt at a discount and then be subrogated to collect the whole face value of the debt, and especially if he held securities, or if the creditor held securities which would fall into his hands, out of which to pay the debt; because the securities are trust funds for the purpose, and set aside for the payment of that debt and an assignee of trustee cannot speculate in the purchase of claims against the fund in his hands. It would not be equality; it would not be equity."

While it can be readily conceded that the joint debtor who pays up and discharges the mortgage

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stands in the shoes of the mortgagee, and secures to himself the benefit of the security by such payment, the extent to which he can enforce his right as against the other joint debtors is a different matter altogether. In his monumental work on Equity Jurisprudence, Pomeroy points out that he will be subrogated to the rights of the mortgagee only to the extent necessary for his own equitable protection. (See page 632 of Volume IV of the Fifth Edition by Symons). Clearer still is the passage found at page 640 of the same book:

"The *mortgagor* himself who has conveyed the premises to a grantee in such manner that the latter has assumed payment of the mortgage debt becomes an equitable assignee on payment, and is subrogated to the mortgagee, *so far as is necessary to enforce his equity of reimbursement or exoneration from such grantee.*"

It is as regards the excess of the payment over his own share that the right can be said to exist. Pomeroy says this at pages 660 and 661:

"In general, whenever redemption by one of the above-mentioned persons operates as an equitable assignment of the mortgage to himself, he can keep the lien of it alive as security against others who are also interested in the premises, and who are bound to contribute their proportionate shares of the sum advanced by him, or are bound, it may be, to wholly exonerate him from and reimburse him for the entire payment.....The doctrine of contribution among all those who are interested in having the mortgage redeemed, in order to refund the redemptor the excess of his payment over and above his own proportionate share, and the doctrine of equitable assignment in order to secure such contribution, are the efficient means by which equity completely and most beautifully works out perfect justice and equality of burden, under these circumstances....."

Whatever the difference might be between the English law and the Indian law as regards the right

to enforce decrees and securities for the due payment of a debt in the case of a surety who discharges a simple money debt and a surety who pays up a mortgage, it is still noteworthy that Section V of the Mercantile Law Amendment Act of 1856 (England) provided for indemnification by the principal debtor for the advances made and loss sustained by the surety.

There is a distinction in this respect between a third party who claims subrogation and a co-mortgagor who claims the right, and this is brought out by Sir Rashbehary Ghose in his Law of Mortgage in India, Volume I, 5th Edition. He says at page 354, pointing out that co-mortgagors stand in a fiduciary relation:

"I should add that an assignee of a mortgage is entitled, as a rule, to recover whatever may be due on the security. But if he stands in a fiduciary relation, he can only claim the price which he has actually paid together with incidental expenses."

The right of the co-mortgagor who redeems the mortgage is spoken of as the right of reimbursement at page 372 in the following passage:

"Strictly speaking, therefore, when one of several mortgagors redeems a mortgage, he is entitled to be treated as an assignee of the security which he may enforce in the usual way for the purpose of re-imbursing himself."

The redeeming co-mortgagor being only a surety for the other co-mortgagors, his right is, strictly speaking, a right of reimbursement or contribution, and in law, when we have regard to the principles of equity and justice, there should be no difference between a case where he discharges an unsecured debt and a case where he discharges a secured debt. It is unnecessary for us to decide in this appeal whether section 92 of the Transfer of Property Act was intended to strike a departure from this position when it states that the co-mortgagor shall have the same

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rights as the mortgagee whose mortgage he redeems, and whether it was intended to abrogate the rule of equity as between co-debtors, and provide for the enforcement of the liability on the basis of the amount due under the mortgage; and this is because, as has been already stated, we are governed not by the statute but by general principles of equity and justice. If it is equitable that the redeeming co-mortgagor should be substituted in the mortgagee's place, it is equally equitable that the other co-mortgagors should not be called upon to pay more than he paid in discharge of the encumbrance.

In this connection, reference may be made with advantage to the decision of Sir Asutosh Mookerjee and Teunon JJ. in *Digambar Das* v. *Harendra Narayan Panday* (1) where the question arose as regards the the rate of interest and the period for which the redeeming co-mortgagor would be entitled. There is an elaborate examination of the nature of the right of subrogation obtained by one of several joint co-mortgagors who redeems the mortgaged property, and in the course of the discussion the following observations occur:

"In so far as the amount of money which he is entitled to recover from his co-mortgagors is concerned, he can claim contribution only with reference to the amount actually and properly paid to effect redemption to which sum he can add his legitimate expenses .....The substitution, therefore, of the new creditor in place of the original one, does not place the former precisely in the position of the latter for all purposes.....If therefore one of several mortgagors satisfies the entire mortgage debt, though upon redemption he is subrogated to the right and remedies of the creditor, the principle has to be so administered as to attain the ends of substantial justice regardless of form; in other words, the fictitious cession in favour of the person who effects the redemption, operates only to the extent to which it is necessary to apply it for his indemnity and protection."

(1) (1910) 14 C.W.N. 617.

There is a definite expression of opinion by the Madras High Court on the point in the decision reported in *Suryanarayana* v. *Sriramulu*(1). In that case, a purchaser of a half share of the equity of redemption claimed to recover half of the amount of the mortgage on the security of the other share in the hands of the defendant, and it was held that as his purchase of the decree on the mortgage was prior to his purchase of the equity of redemption, he was entitled to the full amount claimed by him. The learned Judges distinguish the case from one where one of two mortgagors discharges an encumbrance binding on both, and say that in such a case the mortgagor doing so could not recover from his co-mortgagors more than a proportionate share of the amount actually paid by him.

After this rather lengthy discussion of the subject, we consider it unnecessary to notice and comment on the several decisions cited for the appellant. It may be said generally that they only lay down that in cases where the Transfer of Property Act, as it stood originally or as amended in 1929, is not applicable, we are governed by the principles of equity, justice and good conscience, and that sections 92 and 95 embody such principles. None of the cases deals with the extent or degree of subrogation, and there is nothing in them which runs counter to the view that the doctrine must be applied along with other rules of equity, so that the person who discharges the mortgage is amply protected, and at the same time there is no injustice done to the other joint debtors. He who seeks equity must do equity, and we shall be violating this rule if we give effect to the appellant's contention. The High Court, in our opinion, reached the correct conclusion.

The parties are not agreed on the shares to which the plaintiffs are entitled, and this is because after the date of the final decree some of the branches have become extinct by the deaths of their representatives. Whether under customary law in the Punjab, uncles

(1) (1913) 25 M.L.J. 16.

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exclude nephews or they take jointly, and whether succession is *per stirpes* or *per capita*, was the subject of disagreement at the Bar before us. This question must therefore be left over for determination by the trial court, and the case will have to go back to that court for effecting partition and delivery of possession according to the shares to which the plaintiffs may be found entitled.

Subject to what is contained in the foregoing paragraph, the appeal will stand dismissed with costs.

Appeal dismissed.

Agent for the appellant: *Nehal Chand Jain.*

Agent for the respondent: *B. P. Maheshwari.*

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Nov. 10.

THE STATE OF PUNJAB

v.

AJAIB SINGH AND ANOTHER

[PATANJALI SASTRI C.J., MUKHERJEA, DAS, VIVIAN BOSE, and GHULAM HASAN JJ.].

Abducted Persons (Recovery and Restoration) Act (LXV of 1949) ss. 4, 6, 7—Constitution of India, Arts. 14, 15, 19 (1) (d), (e), (g), 21, 22—Law authorising police officers to take abducted persons into custody and deliver such persons to officer in charge of camp—Constitutional validity—"Arrest and detention", meaning of—Scope of Art. 22—Construction of statutes.

The Abducted Persons (Recovery and Restoration) Act (Act LXV of 1949) does not infringe art. 14, art. 15, art. 19 (1) (d), (e) and (g), art. 21 or art. 22 of the Constitution and is not unconstitutional on the ground that it contravenes any of these provisions.

The physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, and delivery of that person to the custody of the officer in charge of the nearest camp under s. 4 of the Abducted Persons (Recovery and Restoration) Act (LXV of 1949) is not arrest and detention within the meaning of art. 22 (1) and (2) of the Constitution. The said Act does not therefore infringe the fundamental right guaranteed by art. 22 of the Constitution.