

(1957) 06 KL CK 0019

In the High Court Of Kerala

Case No : Second Appeal No's. 463 and 464 of 1955 (E)

Ayyappan Raman and Others

APPELLANT

Vs

Kunju Vakki Ithappiri and Others

RESPONDENT

Date of Decision : 05-06-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89
Limitation Act, 1908 — Article 132
Transfer of Property Act, 1882 — Section 100, 82, 92

Citation : AIR 1958 Ker 386

Hon'ble Judges : K.T. Koshi, C.J.;Varadaraja Iyengar, J

Bench : Division Bench

Advocate : M.K. Narayana Menon and C.S. Narayanan, for the Appellant; V. Sankara Menon, for 1st Respondent (in S.A. 463 of 55), G.V. Ramanan and K.V. Kuriakkose for Respondents 4 and 7 to 9 (in S.A. 463 of 55), V. Sankara Menon and K.K.K. Kurup for Respondent (in S.A. No. 464 of 55), for the Respondent

Judgement

K.T. Koshi, C.J.—These two Second Appeals arise from a suit for contribution instituted before the Ernakulam Munsiff's Court. The plaintiff who has preferred both the appeals is a second mortgagee (usufructuary) of three out of thirteen items of properties comprised in an earlier simple mortgage. The first mortgage, that is, the simple mortgage referred to, was brought into existence on 17-6-1903 (30-1-1918) by the members of an undivided Ezhava family and it was for a consideration of Rs. 900.

Some time after that the family got itself divided and the eldest brother Kunjan got plaintiff schedule items 1 to 3, the second, Kochu Pillai, items 4 to 7, the third Kandu items 8 to 10 and the fourth, Padmanabhan items 11 to 13. The mortgage debt remaining unpaid and the mortgagee having died, his successor-in-interest brought a suit in O.S. 426 of 1105 on the file of the Ernakulam Munsiff's Court for recovery of the debt.

To that suit, among others, the four brothers and their mother, the present

plaintiff (the appellant), defendant 1 and the predecessor-in-interest of defendant 4, were made defendants. In these appeals we are not concerned how defendant 1 happened to be made a party. Kochu Pillai sold one of the items he got in partition, namely, item 4, to the predecessor-in-interest of defendant 4 and gifted items 5 to 7 to his wife and children.

The latter in their turn usufructually mortgaged those three items to a stranger and the plaintiff is a purchaser of that mortgage right. He (the plaintiff) was defendant 8 to O. S. 426 of 1105 and the predecessor-in-interest of defendant 4 was defendant 9. Besides defendant 4, defendant 7 (the mother of defendant 4) and defendants 8 and 9 have also now interests over item 4. Padmanabhan, the youngest brother who got items 11 to 13, had soon after the partition, created a further mortgage with respect to those items and the mortgagee brought O. S. 466 of 1102 to enforce payment of the money.

In execution of the decree passed in that suit those properties were sold and defendant 2, a son of defendant 1 later acquired the rights of the execution purchaser. The puisne mortgagee of items 11 to 13 or any one to whom the puisne mortgage right or the decree obtained on that mortgage, had passed was not made a party to the first mortgagee's suit. The execution sale in the puisne mortgagee's suit was however after the institution of the first mortgagee's suit.

Defendant 2 sold the right he obtained from the auction-purchaser in O. S. 466 of 1102 to his sister, defendant 3. Defendant 3 is therefore the present owner of items 11 to 13. We have noticed that the plaintiff is in possession of items 5 to 7 in the right of the usufructuary mortgagee over those items and that defendants 4 and 7 to 9 are the present owners of, or persons otherwise interested in, item 4.

2. During the course of the execution of the decree passed in the first mortgagee's suit (O. S. 426 of 1105) the decree-holder received some amounts from the owners of items 1 to 3 and 8 to 10 and released those items from all further obligations under the decree. Afterwards the decree was transferred to a stranger. While the assignee-decree-holder took out execution, the present plaintiff among others raised objections that the entire balance of the decree debt should not be allowed to be recovered from the remaining items.

It was urged that the amounts realised from the owners of the items released were far below the amounts rateably chargeable on them. The execution court overruled the objection and the appeal preferred against the order was equally unsuccessful. The appellate court however directed that item 4 should be sold last and that only in certain eventualities. The present appellant took the matter in second appeal to the High Court in S. A. 117 of 1122 and by the decision rendered there, to which one of us was a party, items 4 to 7 and 11 to 13 were directed to be sold only for the amounts rateably chargeable on them. That is to say, that portion of the decree debt rateably chargeable on the items released was deemed to have been satisfied and the decree was held to be capable of

execution only for the balance. This decision, as pointed out by the lower appellate court was passed with the consent of the assignee-decree-holder and the High Court directed the execution court to fix the quantum of the amounts rateably chargeable on the different items or groups of items, as circumstances might require.

When the case went back to the execution court the present appellant took the necessary steps to have the proportionate amounts for the different items or groups of items fixed. After due enquiry the execution court found that an amount of Rs. 1,737-2-10 out of the entire debt was chargeable on items 4 to 7 and 11 to 13. The court also fixed in what proportion item 4, items 5 to 7 and items 11 to 13 should contribute towards the said amount. Even after all these proceedings the persons liable to pay off the different amounts did not do anything to pay them and the assignee-decree-holder had therefore to take out further execution.

According to the plaintiff in collusion with defendant 3 and defendants 4 and 7 to 9, the assignee-decree-holder was seeking to sell items 5 to 7 first. To avert the sale of those items the plaintiff paid the entire balance decree debt and the decree was got recorded as satisfied. This was on 13-11-1951 and the amount paid was Rs. 1,763/-.

3. Soon afterwards on 27-11-1951 the present suit was instituted for contribution claiming the amounts rateably chargeable on item 4 and items 11 to 13. Out of the amount of Rs. 1,763/- which he had to pay to satisfy the mortgage decree, the plaintiff gave credit for the amount chargeable on items 5 to 7 and claimed only the balance. Defendants 1 to 4 and 7 to 9 filed separate written statements raising various contentions.

Defendants 5 and 6 were made parties as they were kudikidappukars in some items and they did not enter appearance in the suit. Defendants 1 and 2 disowned all present interests in any of the concerned items, but their written statements fully supported the contentions raised by defendant 3. The sequel will disclose what contentions defendant 3 and defendants 4 and 7 to 9 raised to the suit and we consider it unnecessary to set out them at this stage.

The learned Munsiff in a well-considered judgment negatived all the contentions raised by the contesting defendants and gave a decree to the plaintiff in the sum of Rs. 384/- with interest at 6 per cent, per annum from the date of the suit and for proportionate costs with interest at 6 per cent, (from the date of the decree) against item 4 and a decree in the sum of Rs. 811/- with like interest and proportionate costs and interest thereon against items 11, to 13. Besides, the contesting defendants were made personally liable for proportionate costs.

The basis of the decree was that out of the amount of Rs. 1,763/- paid by the plaintiff to discharge the decree debts in O. S. 426 of 1105, a sum of Rs. 384/- was chargeable on item 4, that a sum of Rs. 507/- was chargeable on items 5 to 7 and a sum of Rs. 811/- was chargeable on items 11 to 13. Against this decree

defendants 4 and 7 to 9 preferred an appeal before the Anjikamal District Court in A. S. 128 of 1954 and defendant 3 soon followed suit with A. S. 132 of 1954.

The learned Second Additional District Judge, before whom the appeals came up for hearing disposed of them by a common judgment allowing the appeals and dismissing the plaintiff's suit with costs to defendants 3, 4 and 7 to 9. These second appeals by the plaintiff are directed against the said decision, S. A. 463 of 1955 being against the decree passed in A. S. 128 of 1954 and S. A. 464 of 1955 against the decree passed in A. S. 132 of 1954.

The second appeals first came up for hearing before one of us (Varadaraja Iyengar, J.) sitting alone and in view of the importance of the questions raised, by the order quoted below, dated 8-10-1956, the second appeals were referred to a Division Bench for decision:

"These appeals raise a question of limitation for a suit for contribution by the owner of some of several properties mortgaged for a common debt against the owners of other properties. The decisions on the subject are not uniform and some of them complicate the question by introduction of the principle of subrogation. As the question raised is important and constantly recurs, it is desirable that it is disposed of by a Division Bench. I therefore refer these cases to a Division Bench."

Later the second appeals came up before us for hearing and we heard arguments. This judgment will dispose of both the appeals.

4. In this Court the arguments were mainly confined to questions of law and the decision of the case will turn on those questions. The lower appellate court has not properly formulated the points arising for decision and though the learned Judge entered judgment for the defendants it is difficult to make out what views he entertained on those points. Mr. M. K. Narayana Menon, learned counsel for the appellant formulated the various questions of law arising in the case with precision and he sought to sustain the appeals by citing several decided cases and text-books.

Mr. G. V. Ramanan appearing for respondents 4 and 7 to 9 (defendants 4 and 7 to 9) and Mr. V. Sankara Menon appearing on behalf of respondent 3 (defendant 3) ably sought to counter the arguments on behalf of the appellant. We feel indebted to counsel on either side for the elaborate arguments adduced at the bar.

5. Before referring to the points debated at the bar it may, however, be pointed out that though both defendant 3 and defendant 4 had contended before the trial court that their predecessors-in-interest had made substantial payments towards the mortgage put in suit in O. S. 426 of 1105, both before the institution of the suit and afterwards, they did not succeed in substantiating that contention by adducing any reliable evidence and that the trial court negatived the contention.

In the view the lower appellate court took of the case it was unnecessary for that

court to consider this aspect, but counsel for the respondents virtually conceded before us that there was hardly any evidence worth the name to prove the contention and that we can proceed to dispose of the appeals accepting the trial court's finding thereon.

6. Another aspect which may likewise be referred to at this stage is that though the fixation of the price for the various items in the execution proceedings in O. S. No. 426 of 1105 was impugned as not correct, in the present suit no attempt was made before the trial court to show that the valuation was incorrect. The records do not expressly show that the valuation of the properties was made as on the date of the mortgage, that is 1093.

However, on this matter also there was tacit assent from counsel for the respondents that the trial court's finding may very well be accepted. We are therefore free to dispose of the second appeals on the points of law debated at the bar.

7. The first point to be considered is whether as a puisne mortgagee of some of the items included in the first mortgage, the plaintiff has a right to claim contribution from the other items the rateable share of the common debt discharged by him. This question of the puisne mortgagee's right for contribution in circumstances similar to the present has come up for decision before the Courts in several cases and the balance of judicial opinion is decidedly in favour of the view that in circumstances similar to the one before us the puisne mortgagee is entitled to claim contribution.

The first case that we would cite in this connection is the decision by Madhavan Nair J. (afterwards a member of the Judicial Committee of the Privy Council) in B. Raghavachari and Others Vs. Pelletti Venkatanarayana Reddi and Another, It was held there that it cannot be said that u/s 82, Transfer of Property Act (1882), it is only an owner of properties that can claim the benefit of contribution and that even a mortgagee as distinguished from a full owner can claim that right.

There the plaintiff was a puisne mortgagee of one of the two items comprised in an earlier mortgage and when the earlier mortgagee brought the mortgaged items to sale in execution of the decree obtained by him, the plaintiff as puisne mortgagee paid of the debt to avert the sale and afterwards brought the suit that gave rise to the decision. The first point raised before the learned Judge was the right of the puisne mortgagee-plaintiff to claim contribution.

In disposing of the question the learned Judge has referred to the earlier decisions bearing on the point and to quote here the relevant portion of the discussion will make a reference by us to the earlier cases cited there unnecessary. After quoting Section 82, the learned Judge proceeded to state :

"It is argued that under this section it is only an owner of properties that can claim the benefit of contribution and that the plaintiff being only a mortgagee as

distinguished from a full owner cannot claim that right. The words of the section do not support this contention, and no decision supporting it has been cited. On the other hand the cases cited by the respondents' learned counsel show that such a right can be claimed by the mortgagee. *Gulam Hazrat v. Gobardan Das* ILR All 387 (B) is a direct decision on the point, though there is no discussion of the question in the judgment as apparently the point was never disputed. The suit in that case was brought by a subsequent mortgagee claiming the right of contribution and he was allowed the benefit of that right. In *Faqir Chand v. Aziz Ahmed* AIR 1982 PC 74 (C), the Privy Council have recognized the right of an assignee from the mortgagee to claim contribution, It is said by the appellant's learned counsel that in the light of the facts as mentioned in the judgment of the High Court in that case reported in *Aziz Ahmad Khan and Others Vs. Chhote Lal and Others* the suit was brought by a person claiming the rights of the owner and not that of a mortgagee; but the judgment of the Privy Council does not support this statement. In *Seshti Iyer v. Krishna Iyengar* ILR Mad 96 (F), the suit was by mortgagees for contribution. The learned Judges say having regard to the facts of the case that if the sale of the properties had not taken place and they had paid the money themselves they would be entitled to claim contribution. They observed as follows :--

"In the present case the plaintiffs, who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property, subsequently sold under Rana-gayya Goundan's decree had the opportunity, and they might, by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property. They would then have stood in a position analogous to that of one of several mortgagors who has redeemed the whole property and claims to take advantage of Section 95 of the Act. But the plaintiffs did nothing and therefore no right of contribution arose and the other property stood free from any lien".

The position that sale would affect the question has been held to be wrong in *Ramabhadrachar v. Sreenivasa Iyengar* ILR 24 Mad 85 (F),..... In English law a subsequent mortgagee's right to contribution seems to be undisputed; see Coote on Mortgages at p. 811, Vol. 1 Edn. 9, 1.927 and also *Flint v. Howard*. (1893) 2 Ch. 54 (G). On the whole I am inclined to think that the plaintiff in this case though only a mortgagee and not a purchaser of the properties, is entitled to claim contribution. The cases cited by the respondent support that view though it must be said that the question as such has not been discussed in any of these cases."

The facts of the case which went up to the Privy Council in *Faqir Chand v. Aziz Ahmad* as stated in *Aziz Ahmad Khan and Others Vs. Chhote Lal and Others* show that the statement of the appellant's counsel before Madhavan Nair, J., that the suit there was brought by a person claiming the rights of the owner was right. Facts set out on pp. 242 and 243 of *Aziz Ahmad Khan and Others Vs. Chhote Lal and Others* make it clear that Chhote Lal who paid off the prior debt

had subsequent to his becoming a puisne mortgagee also acquired the right to the equity of redemption. The discharge of the prior debt was made after the acquisition of the latter right and he then transferred his rights to plaintiff No. 1; and to the predecessor-in-title of the remaining plaintiffs. To say therefore that the decision in *Faqir Chand v. Aziz Ahmad* lent support to the view *Madhavan Nair, J.* took in the above case is not correct.

8. The above decision of *Madhavan Nair, J.* was followed by a Full Bench of the Madras High Court in *Narayanan Chetti v. Nallammal*, AIR 1942 Mad 685 (H). There, by a sale of a portion of the property the mortgage over the whole property was satisfied and the subsequent mortgagee of the portion sold was held to be entitled to sue the holder of the unsold portion for contribution. The order of reference by *King, J.*, contains the following instructive observations on the question :--

"On an examination of the language of Section 82, there seems no reason at all for rejecting a claim for contribution merely because it is made by a puisne mortgagee. Rights and liabilities are thrown by the section not upon individuals but upon items of property. It is undeniable that the plaintiffs are interested in the western item, (portions sold) just as much as, if not more than, defendant 2 (person who purchased the equity of redemption subject to the two mortgages). On general principles therefore their right to suit seems clear, and that a puisne mortgagee can so sue as well as an owner, has been recognised by *Madhavan Nair, J.* in 41 Mad LW 416 : *B. Raghavachari and Others Vs. Pelletti Venkatanarayana Reddi and Another*,

"..... Now if defendant 2 can sue I see no reason why plaintiffs also should not sue, as they also are interested in the same item of property. And this right of suit seems to me to arise equally whether there has been a payment by plaintiffs in cash, or property in which plaintiffs are interested has been sold in execution : See *Ibn Hasan v. Brijbukhan Saran* ILR All 407 (FB), at pp. 416 and 435 (I), where ILR Mad 96 (E) is dissented from. I accordingly with great respect do not feel inclined to follow TLR 24 Mad 96 (E), in disposing of this appeal, and agree with the opinion of *Madhavan Nair, J.* in 41 Mad LW 416 : *B. Raghavachari and Others Vs. Pelletti Venkatanarayana Reddi and Another*, that a subsequent mortgagee has a right to contribution whether he pays cash or not even though that opinion was given in a case in which cash was in fact paid."

Sir Lionel Leach, C. J. who delivered the judgment of the Full Bench (*Lakshmana Rao and Krishnanswami Ayyanpar, JJ.* concurring) stated that both before and after the Transfer of Property (Amendment) Act XX of 1929, the liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability. In that case the Full Bench was called upon to examine the correctness of the decision in ILR 24 Mad 96 (E), that the right to contribution would arise only when an owner or a puisne mortgagee pays off the prior debt and not when the mortgaged property happens to be sold for it.

After referring to the cases which dissented from that view, the learned Chief Justice concluded his judgment with the paragraph quoted below. The views of the Full Bench on the particular question which concerns us here, namely, the right of a puisne mortgagee to sue for contribution occurs there :--

"The governing factor here is what Section 82 T. P. Act says, and the learned Judges who decided ILR Mad 96 (E), had not sufficient regard to its wording. That decision if allowed to stand would mean that persons in the position of the plaintiffs would lose everything unless they were sufficiently well off to discharge the prior mortgage. It would not only be most unjust, but it would mean inserting into the section a provision which is not there and a provision which runs counter to its tenor.

In order to avoid this conclusion Mr. Rajah Iyer, who represents the respondents, has suggested that a second mortgagee is in the position of a mortgagor and a mortgagor cannot claim contribution. A second mortgagee does not stand in the shoes of a mortgagor. Where there is a second mortgage the second mortgagee holds a mortgagee's interest in the property and the fact that some other person has previously received a mortgagee's interest does not detract from the nature of his interest.

When a person agrees to lend money on the security of a 2nd mortgage of a portion of the property he knows that the first mortgagee has the benefit of the whole of the property, and that the first mortgagee if he calls in the mortgage loan, will have the right to cause the whole of the hypotheca to be sold. If the first mortgagee does not cause the whole of the hypotheca to be sold, the second mortgagee has the right, as the section stands, to call upon the holder of the unsold portion to contribute his share of the principal debt.

All that persons in the position of the present plaintiffs ask is that the holder of the unsold portion of the hypotheca shall bring into Court the proportion of the amount of the first mortgagee's debt which is allottable to the portion held by him. In our opinion the plaintiffs as the second mortgagees of the western portion have an interest in the portion sold and come within the principle stated by Stanley C. J. in Mohammed Yahia v. Rashiduddin LR All 65 (J). For the reasons given we consider that ILR Mad 96 (E) was wrongly decided....."

What Stanley, C.J., said in ILR All 65 (J), case cited in the above quotation has been re-stated by Leach, C. J., in the penultimate paragraph of his judgment in the above case as that the right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone.

The Madras Full Bench decision cited above is clear authority for the position counsel for the plaintiff-appellant contended before us regarding his client's right, and negatives the contention of the contesting respondents,

9. Reference may now be made to another Madras decision, one by Wads worth and Patanjali Sasrri, JJ., where the learned Judges took it for granted that a puisne mortgagee had right to sue For contribution -- see P. Kathisa Bi Vs. V.R. Venkateswara Iyer and Others, . There a claim to marshalling was raised in the suit and was negated.

Still the defendants wanted to reagitate the question in proceedings to execute the decree and while repelling that claim the learned Judges observed that as a large number of properties was involved and almost all were subject to encumbrances or alienations, many of which were complicated by the existence of rights to compensation for improvements in the alienees, instead of trying to work out the equities of all the encumbrancers and alienees by arranging the order of sale without prejudice to the decree-holder on the first mortgage, the better course would be to direct the puisne encumbrancers to work out their rights by way of suits for contribution.

The learned Judges had not the least doubt that the puisne encumbrancers had the right to sue for contribution. Yet another Madras case where the right was recognised in K. Chunilal Sowcar Vs. M.N. Srinivasa Aiyengar and Others,

10. Obviously the Bombay High Court is of the same view as the Madras High Court on this question -- See Baswannawa v. Dodgowda AIR 1942 Bom 95 (M). That case related to a suit which ultimately the High Court treated as one for contribution and speaking of Section 82, Transfer of Property Act, Macklin, J. who delivered the judgment of the Division Bench consisting of Broom-field, J. and himself said :

"It is contended on behalf of defendant 4 that Section 82 does not apply unless the mortgage is still subsisting. That is not so. It can apply while the mortgage is still subsisting, but it applies even more when the mortgage has been paid off out of some only of the properties mortgaged, and the owner or "the person interested" (the underlining (here in " ") is ours) in the properties from which the mortgage has been paid off then has a right to claim contribution from the owner of other properties which were liable under the mortgage but which were not called upon to pay it off."

If as owner of some of the items subject to the common debt, the person who created the mortgage now held by the plaintiff appellant could have claimed contribution from the owners of the other properties, had he paid off the debt, we fail to see why the plaintiff, the puisne mortgagee, should not be allowed to enjoy the same right. As pointed out by King, J. in AIR 1942 Mad 685 (FB) (H), very often the puisne mortgagee will be more interested in saving the property than the owner of the equity of redemption.

We have seen that in circumstances similar to the present the Allahabad, the Bombay and the Madras High Courts recognise the right of the puisne mortgagee to maintain a suit for contribution.

11. Mr. V. Sankara Menon strenuously contended that the only right the plaintiff obtained by the discharge of the prior mortgage decree was that of the prior mortgagee himself and not anything higher or different. Put in other words the argument was that the plaintiff was entitled to the right of subrogation and not to the right of contribution.

Support was sought for this position in the decision of the Calcutta High Court in Umar Ali and Another Vs. Asmat Ali and Others, , where Sir George Rankin, C. J. made certain observations tending to show that in his opinion after the Transfer of Property (Amendment) Act, XX of 1929, a co-mortgagor obtained on redemption only the right of subrogation and not a right for contribution.

That case related to a transaction prior to the Amendment Act and the plaintiff there, a co-mortgagor, was held to be entitled to claim contribution. According to the learned Chief Justice (with whom four other Judges agreed) the law before the amendment permitted it. The observations in that decision, apparently favourable to the contention of the respondents in this case, have been characterized as obiter in subsequent decisions and those observations are really obiter. Some of the decisions which we will presently be referring to, also criticise those observations as unsound.

12. When a person interested only in a portion of the mortgaged property redeems the mortgage he gets two distinct rights; one for contribution and the other for subrogation -- see Ghose on Mortgage (Fifth Edition) p. 397 and Mulla's Transfer of Property (Fourth Edition) p. 510. The former right he gets u/s 82 of the Transfer of Property Act and Section 100 confers a charge by operation of law in his favour on the properties which have not contributed towards the liquidation of the debt.

The other right (subrogation) is one conferred by Section 92. The two rights are independent and not mutually exclusive. It may well be that as subrogee the enforcement of the claim is barred by time, but the doctrine of subrogation is called to aid in suitable cases for the benefit of a party making the payment and it cannot be applied to the disadvantage of that party. The dual character of the rights which a co-mortgagor, or any other person interested only in a portion of the mortgage security, obtains on redemption is clearly explained by P. R. Das, J. in Sibanand Misra and Others Vs. Babu Jagmohan Lal and Others, of the report the learned Judge states :--

"In my opinion the right to reimbursement stands on one footing, the right to enforce a security by virtue of subrogation stands on another footing. The right to reimbursement arises on a contract, express or implied to reimburse; and the party who claims the right enforces it in his own right, and not in the right of another. Consequently the right does not arise until he has discharged the debt of another.

But the right to enforce a security by virtue of subrogation, is a right which equity concedes to a person who, not being primarily liable to discharge an

obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor".

Subsequent decisions of the Patna High Court further elucidate the point. The cases we seek to rely upon are Sheosaran Singh and Others Vs. Amla Co-operative Credit Society Ltd. and Others, ; Gopinath and Another Vs. Raghubansh Kumar Singh and Others, and Rameswar Pd. Missir Vs. Ramnath Khemka and Others, These cases no doubt refer to the rights of co-mortgagors, but once it is found that a puisne mortgagee interested only in a portion of the mortgage security, is also entitled to claim contribution, with respect to that, what applies to the co-mortgagor must equally apply to such a puisne mortgagee.

13. In Sheosaran Singh and Others Vs. Amla Co-operative Credit Society Ltd. and Others, Shearer, J., (Varma, J., concurring) after setting out the facts of the case stated that the period of limitation in a suit by one co-owner for contribution against the other co-owners is 12 years from the date on which he made the payment to the mortgagee. Counsel for the appellants (defendants) in that case conceded before the learned Judges that prior to the amendments to the Transfer of Property Act made in 1929, a co-mortgagor suing for contribution had a 12 years" period from the date of the payment of the prior mortgage to sue, but the argument raised was that after the said amendment the position was different and that a co-mortgagor was only entitled to the rights of a subrogee. So far as the puisne encumbrancer is concerned the position remains unaffected by the amendments, but the view taken by the learned Judges in that case was that a co-mortgagor's right for contribution was not affected by the amendments. It is useful to quote the following discussion from the judgment in that case :--

"Sections 82 and 100 of the Aet as they now stand, are not precisely the same as they were in the Act prior to 1929, but such alterations as have been made in them do not affect this particular matter. If Sections 82 and 100, as they stood prior to 1929 and, as they stand now, give to a redeeming co-mortgagor in the position of the plaintiff a right to a charge, what is the result of the removal from the Act of the old Section 95 and the insertion of the new Sections 92 and 95.

Is it not that, under the Act as it now stands, a co-mortgagor redeeming a simple mortgage, and suing the other co-mortgagors for contribution, may either stand on the mortgage he has redeemed if he can, or if he cannot, may rely on a charge. If he cannot stand on his mortgage as a suit on it is barred by limitation, he may lose his priority as against some subsequent mortgages but he does not lose his right to have the property sold. The learned advocate for the appellants endeavoured to-meet this point in two ways.

In the first place, he invited our attention to certain observations of Rankin, C. J., in ILR 58 Cal 1167 : Umar Ali and Another Vs. Asmat Ali and Others, , and suggested that these support his view that the existence of a right of subrogation side by side with a right to a charge was impossible. What the learned Chief

Justice there said was this :--

"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 not redeem the statutory charge but the original mortgage within the statutory period from the due date thereof ".

It is I think, quite clear that the learned Judge was construing Section 95 of the Act as it stood prior to 1929, and not laying down any broad general proposition that a right of subrogation with its ancillary right to priority over subsequent encumbrances, and a right to a charge without any such right of priority, could not co-exist. As I have already said, a right of subrogation is, as a rule, an additional right given by equity to a creditor to enable him the more effectively to realise his debt. Secondly, the learned advocate relied on the words "and the transaction does not amount to a mortgage" which occur in Section 100.

The plaintiff, he said, when he paid the amount due under the decree into Court and had the sale set aside, acquired the rights of the mortgagee. It is true that he became an assignee in equity of the mortgage bond, but if a suit on the mortgage bond was barred by limitation, the security was worthless and had become a mere scrap of paper. Apart from this, the words on which reliance is placed have to be read with the words "by act of the parties" and not with the words "by operation of law", as pointed out by Rankin C. J. in ILR 58 Cal 1167: Umar Ali and Another Vs. Asmat Ali and Others, .

The plaintiff, as I have said, asked in his plaint for a decree for money to be realised by the sale of that portion of the mortgaged property in the possession of the defendants, and to such a decree he is, in my opinion, entitled. He did not sue primarily as a subrogee, and the point of limitation, that has been argued at such length, and, if I may say so with much ability, does not, properly speaking, arise".

The decisions in Gopinath and Another Vs. Raghubansh Kumar Singh and Others, and Rameswar Pd. Missir Vs. Ramnath Khemka and Others, are both by Manohar Lall and Ramaswami, JJ. The leading judgments in both have been delivered by Ramaswami, J. and paragraph 4 of the judgment in the earlier case contains the discussion on the point we are considering here and that paragraph reads:

"On behalf of the appellants the main argument was presented that u/s 82, Transfer of Property Act, a co-mortgagor who paid the full amount of the mortgage debt cannot sue for contribution but u/s 92 of the Act, he may be subrogated to the rights of the mortgagee whose mortgage he redeems. In my opinion this argument is untenable. Section 82 is in these terms:

"Where property subject to a mortgage belongs to two or more persons having

distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date." Section 95 states:

"Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation u/s 92 against his co-mortgagors, be entitled to add to the mortgage money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property."

In my opinion the remedies granted by these sections are independent and not mutually exclusive; and a co-mortgagor who pays the mortgage money has right of contribution and acquires a charge under Sections 82 and 100 in addition to his right of subrogation under Sections 92 and 95 of the Act In *Rajkumari Debi v. Mukunda Lal* 23 CWN 283: AIR 1921 Cal 166 (S), a co-mortgagor who had paid off the entire mortgage money had sued the other mortgagor for contribution and the suit had not been brought until the expiration of more than 12 years after the due date fixed in the mortgage bond for the payment of the mortgage money. The Division Bench held that the position of a co-mortgagor redeeming a mortgage was that of an assignee of the original security and he could not get a fresh charge and the period of limitation for enforcing the charge was the same as that within which the original mortgagee could have brought his suit on his mortgage had he not been redeemed. The case was overruled by a Full Bench in *Umar Ali and Another Vs. Asmat Ali and Others*, but *Ranlcin C. J.* remarked that the decision in 25 C WN 283: AIR 1921 Cal 166 (S) was the statute law after the amendment. Before making that remark he stated:

"It may here be observed that Section 95, Transfer of Property Act has by Act XX of 1929 been amended in such a way that Sections 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".

If this dictum means that the co-mortgagor has no other right but that being subrogated to the rights of the original mortgagee, I must respectfully express my dissent. For it is manifest that a person who is bound to pay only a part of the mortgage debt acquires on redemption two distinct rights. He may simply sue for reimbursement u/s 82 of the Act. He may also sue to enforce the right of the mortgagee to follow the mortgaged properties.

"Subrogation is rather an additional remedy than an additional right, and may exist concurrently with, and as a further-security to, the right to a simple action for reimbursement. The fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems to have been overlooked

to the confusions of both doctrine." Pomeroy's -- Equity Jurisprudence --Note to Section 920.

In the latter case, Rameswar Pd. Missir Vs. Ramnath Khemka and Others, para. 6 of the judgment of Ramaswami, J., contains the discussion as to the dual character of the rights obtained on redemption by a person interested only in a portion of the mortgage security. We will quote that also here.

"In this context it is important to remember that a co-mortgagor who paid the full amount of the mortgage debt may u/s 82 not only sue for contribution but u/s 92 of the Act he may be subrogated to the rights of the mortgagee whose mortgage he redeemed. It is plain that the remedies granted by these sections are independent and not mutually exclusive; and a co-mortgagor who pays the mortgage money has right of contribution and acquires a charge under Sections 82 and 100 in addition to his right of subrogation under Sections 92 and 95 of the Act. In 25 Cal WN 283: (AIR 1921 Cal 166) (S), a co-mortgagor who had paid off the entire mortgage money had sued the other mortgagor for contribution and the suit had not been brought until the expiration of more than 12 years after the due date fixed in the mortgage bond for the payment of the mortgage money. The Division Bench held that the position of a co-mortgagor redeeming a mortgage was that of an assignee of the original security and he could not get a fresh charge and the period of limitation for enforcing the charge was the same as that within which the original mortgagee could have brought his suit on his mortgage had he not been redeemed. The case was overruled by a Full Bench in Umar Ali and Another Vs. Asmat Ali and Others, but Rankin, C. T. remarked that the decision in 25 CWN 283: AIR 1921 Cal 166 (S) was the statute law after the amendment. Before making that remark he stated:

"It may here be observed that Section 95, T.P. Act, has by Act XX (20) of 1929 been amended in, such a way that Sections 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".

If this dictum means that the co-mortgagor has no other right but that being subrogated to the rights of the original mortgagee, I must respectfully express my dissent. For it is manifest that a person who is bound to pay only a part of the mortgage debt acquires on redemption two distinct rights. He may simply sue for reimbursement u/s 82 of the Act. He may also sue to enforce the rights of the mortgagee to follow the mortgaged properties. In : Sibanand Misra and Others Vs. Babu Jagmohan Lal and Others, Das J. emphasised the distinction."

14. The learned Judge then quoted the passage quoted earlier by us from the decision of Das, J. in the said case and concludes the discussion by referring to the passage quoted by him in Gopinath and Another Vs. Raghubansh Kumar Singh and Others, from Pomeroy's Equity Jurisprudence.

In a supporting judgment Manohar Lall, J. stated that if it was not for the case in Sadhuprasad Bidyadhar Mahapatra and Another Vs. Harikrishna Panda and

Others, he could not imagine that it can be seriously argued that the period of limitation for a contribution suit could arise earlier than the date when payment is made by the plaintiff entitling him to a decree for contribution and went on to say as follows:

"17. In my opinion, the whole confusion, arises in thinking that a claim for contribution is merely another name for the claim for subrogation.

The two are entirely independent remedies and should not be confused. The matter has been put with his usual clarity by Das, J., in ILR 1 Pat 780: *Sibanand Misra and Others Vs. Babu Jagmohan Lal and Others*, See the quotation given by my learned brother from that case in his judgment. It is true that Das, J., gave a personal decree for the amount, but I do not take this to mean a decision that the amount contributed cannot be charged on the property to the extent that it was rateably liable to pay the mortgage debt which has been paid off. I would draw attention to the observations of Lord Tomlin in *Ganeshi Lall v. Charan Singh*, 57 Ind App 189: AIR 1930 183 (Privy Council)

"It seems to their Lordships that Section 82 is the section that governs the ease, and 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".

and distinguished the case of *Muhammed Abbas v. Muhammed Hamid* 9 All LT 499: 14 Ind Cas 179 (T2) on the ground that in that case there passed to the party from whom the contribution was sought the benefit of the contract by which the money was to be applied, but in the case before their Lordships the defendants were no party to take contract of 1914, nor has the benefit of the contract passed to them in law or in equity.

18. x x x x

19. The only other serious argument that could be advanced is that under the amended Transfer of Property Act, Section 92 only confers a right of subrogation on any of the persons referred to in Section 91 other than mortgagor and on any co-mortgagor who redeems the property subject to the mortgage.

But in my opinion, this argument is not sound as Section 82 has not been abrogated by Section 92, and it is open to the person who redeems the property to claim either subrogation or to enforce a charge on the property to the extent that the payment has redeemed the property from the charge rateable due upon it. To such a situation the period of limitation cannot "begin to run till after the payment has been made giving rise to the right of contribution. For these reasons, I agree that no question of limitation arises in this case. I would dismiss this appeal with costs subject to the modifications proposed by my learned brother"".

To revert to the decision in *Umar Ali and Another Vs. Asmat Ali and Others*, if the observations referred to in the foregoing decisions of the Patna High Court

amount to saying that after the amendments made to the Transfer of Property Act in 1929, a co-mortgagor (or another situated like him for our present purpose) has only the right of a subrogee and is not entitled to the benefits of Sections 82 and 100. Transfer of Property Act, we respectfully disagree with that view.

Reasons for the contrary view are found in the quotations we have made above and we consider it unnecessary to repeat them here. IE the twofold rights that spring in favour of a person interested only in a portion of the mortgaged property when he redeems the prior mortgage are kept in view, most of the arguments advanced by the respondent's counsel will be found to be devoid of merit.

15. When a co-mortgagor or a puisne mortgagee, interested in only some of the items comprised in a mortgage, redeems it, he obtains a charge over the remaining items. The authorities so far referred to make the position clear; but we shall refer to a few more of them. In Chose on Mortgage (Fifth Edition) at pp. 395 to 396 we find the following discussion on the question.

"The question whether the plaintiff in an action for contribution can claim a charge on the property which was subject to a common burden in cases not provided for by Section 95 of the Transfer of Property Act, (as it stood before the amendment of 1929) has also led to some divergence of opinion. I confess, however, that I am unable to appreciate the grounds on which such a right is denied to the plaintiff. Indeed, except where the defendant is personally liable to pay the mortgage debt, a charge on his interest in the mortgaged property is all that the plaintiff can claim. For a person, who is not under a covenant to pay, if called upon to contribute is at liberty to exercise his option whether he will save 1m interest by paying his proportion of the debt or allow it to be sold."

In ILR All 407 (I), Banerji, J., held that a person entitled to contribution acquires a charge when the debt paid off is a mortgage debt. The discussion occurs on pp. 443 to 445 and the relevant portion may with advantage be quoted here:

"Upon the next question, namely, whether a person entitled to contribution also acquires a charge in the case of a mortgage, the provisions of Sections 82 and 100 of the Transfer of Property Act, cannot, as it seems to me, leave any room for doubt. Section 82 provides that "where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary liable to contribute rateably to the debt secured by the mortgage." It will be noticed that the liability to contribute to the common burden attaches to the properties subject to that burden and not personally to the owners of those properties. This is further manifest from the fact that "where the equity of redemption is transferred by way of sale, no personal liability is incurred by the purchaser except when he enters into a covenant to pay". (Ghose on Mortgages, 3rd Edition, p. 44). The liability for the mortgage debt rests in such a case on the property purchased by him. It follows

that when the owner of one of the several properties liable for a debt pays it, or when it is realised by sale of one of such properties, it is the remaining properties (from which reimbursement is to be obtained. Consequently by the operation of Section 82 those remaining properties are made security for the payment of the amount of the reimbursement and a charge is created on them as defined in Section 100. I cannot agree with the learned pleader for the respondents that a charge cannot be obtained otherwise than u/s 95. That section provides that "where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession". As the section is worded, it provides for only one class of cases in which a charge is acquired, namely, the case of a co-mortgagor who has obtained possession after redeeming the mortgage. In my judgment the section is not exhaustive. Surely a mortgagor who redeems a mortgage other than a usufructuary mortgage and does not obtain possession upon redemption is also entitled to a charge, but this charge is in my opinion acquired not u/s 95 but under the provisions of Sections 82 and 100. From the fact that the Transfer of Property Act provides specifically for one class of cases in which a charge is obtained, it does not follow that the legislature intended that a charge cannot be acquired in any other case. Section 95 appears to me to be what Maxwell, in his Interpretation of Statutes calls "a superfluous provision", enacted by the legislature "under the influence of excessive caution". It has been held in numerous cases that a person claiming contribution in the case of a mortgage debt is entitled to a charge on the property for contribution. The course of rulings on the subject in this and other courts has hitherto been, as far as I have been able to ascertain uniform. I may refer to Bhagirath v. Naubat Singh ILR All 115 (U), Pancham Singh v. Ali Aliinad LR 4 All 58 (V), Ibn Hussain v. Ram Dai R 12 All 110 (W), Baldeo Sahi v. Baij Nath ILR All 371 (X), Hari Raj Singh Ahmaduddin Khan ILR All 545 (Y), Shanto Chandar v. Nain Sukh ILR All 355 (Z), Uanappa v. Yamnappa ILR Bom 379 (Z1) and the other cases collected on p. 640 of Agarwala's Mortgage Suits. (See also Ghose on Mortgages, 3rd Edition, pp. 444 and 446, and Storey's Equity Jurisprudence, Grigsby's Edition p. 313)."

The learned Judge then referred to certain decisions cited before him by the respondents and after stating that those decisions did not support their contention observed:

"Those rulings had no reference to the provisions of the Transfer of Property Act. In my judgment Sections 82 and 100 of that Act confer upon a co-mortgagor or co-owner entitled to contribution a charge upon the property liable to contribute, and this is irrespective of the principle of salvage which the courts in Ireland apply also to cases other than cases of maritime salvage and which was recognised by their Lordships of the Privy Council in Dakhina Mohan Roy v. Saroda Mohan Roy ILR Cal 142 (Z2). I would, for the above reasons, repel the third contention put forward on behalf of the respondents". In the above case the

judgment of Banerji, J. was a dissenting judgment. The dissent however related only to the question whether to obtain the right to contribution and to acquire the charge the whole debt should have been discharged. The majority view was that contribution can be claimed and the charge would arise only when the prior debt is discharged in full and not partially. Here the entire debt has been paid off and the majority view does not therefore militate against our holding that the plaintiff in this case is entitled to the charge he claims,

16. The question arose before the Oudh Chief Court in AIR 1930 260 (Oudh) a case which we shall have to refer later in another connection and there also it was held that the person claiming contribution in respect of a mortgage debt discharged by him was entitled to a charge over the mortgaged properties in the hands of the co-debtors or their assignees or representatives. This is also the view held in AIR 1942 449 (Oudh) which also we will have to cite again.

17. These are no doubt cases relating to co-mortgagors. If a puisne mortgagee like the plaintiff is found to be entitled to claim contribution in respect of a mortgage-debt discharged by him, what rights the co-mortgagor obtains by the discharge, the puisne mortgagee also will and must get. In the light of the above authorities we have therefore no hesitation to hold that when a puisne mortgagee who is interested only in a portion of the mortgaged properties discharges a prior mortgage, he will get a charge over the properties comprised in the mortgage which have not been made to bear the burden of the common debt.

18. The plaintiff being entitled to the contribution he seeks, out of the properties in the hands of defendants 3 and 4 and 7 to 9 and charged on those properties, no question of limitation really arises in the case. All the arguments as to limitation of the suit was on the basis that the only right the plaintiff obtained was of subrogation and that as subrogee he had to sue within the period within which a suit on the discharged mortgage should have been brought, or in any event, within 12 years of the date fixed for payment in the mortgage decree. In that view the suit was hopelessly barred, but what the plaintiff seeks is contribution from such of the mortgaged properties as have been relieved of the common burden without any payment by their owners. In other words, the suit is in terms of Section 82 and Section 100 of the Transfer of Property Act and in such a case the cause of action arises and the period of limitation begins to run only from the date of the discharge of the common debt. In this context the decision in Aziz Ahmad Khan and Others Vs. Chhote Lal and Others may usefully be referred to. As noticed earlier that case went up in appeal to the Privy Council and in Faqir Chand v. Aziz Ahmad the decision of the High Court was reversed, but the reversal had nothing to do with the present question. Indeed the question of limitation was left open and on that question the decision has been followed in subsequent cases by Allahabad and other High Courts. What Mukerji, J. (Sir Grimwood Mears, C. J. concurring) said on the question of limitation may usefully be quoted here: "There can be no doubt that where a right of

contribution exists, that right comes into play only when a payment is made. It would be absurd to say that although the right to exact contribution arose in Chhote Lal on 19-7-1916 (the date of the discharge of the mortgage), the limitation against him had begun to run on 23-9-1899 (the date of the mortgage) and that it had already been time barred on 23-9-1911, i.e., even before the right accrued.

The principle of subrogation may have been applied and adopted by the "Transfer of Property Act in certain cases, but the law that actually governs is that which is enacted within the four corners of the Transfer of Property Act. The maxim of law is well known, viz., "Where there is law, there is no equity. Where legal rules are clear, equitable rules cannot be applied. Supposing, therefore, that equity would require that Chhote Lal's right to contribution should be co-extensive with Hargu Lal's right, we have to be governed by the provisions of Sections 82 and 95, T. P. Act, read with Section 100 of the same Act. The right of contribution in India, where the Transfer of Property Act is enforced, arises under the provisions of Section 82 of the Act. Under the view expressed by their Lordships of the Privy Council in the case of Ahmad Wali Khan v. Mst. Shamsh-ul-Jahan Begum ILR All 482 (PC) (Z5) quoted above, Section 95 is equally applicable. On the satisfaction, therefore, of a mortgage by a co-mortgagor, a charge arises in favour of the person making the payment and that charge can be enforced u/s 100 T. P. Act. Thus we have the clearest sanction for holding that the right to enforce arose on payment and, under Article 132, Lim. Act, the person making the payment has 12 years within which to enforce the charge."

Sulaiman, Ag. C. J. and Sen, J., cited the above case with approval and expressed themselves as follows in the Collector of Farrukhabad and Others Vs. Kishore Mohan

"Reading Sections 82, 95 and 100, T. P. Act, in the light of the observation made by their Lordships of the Privy Council, there can be no doubt that a mortgagor redeeming the whole mortgage was entitled to enforce the charge against his co-mortgagors. The right to enforce it obviously accrued on the date of payment. The article applicable to such a claim would obviously be Article 132, Lim. Act. It was therefore impossible to hold that if 12 years had expired by the time the mortgage decree was passed on the mortgage and one of the mortgagors paid up the whole amount he had no remedy left. We are therefore of opinion that the suit was really one for contribution and was not barred by time." Some of the cases cited earlier have also dealt with the question of limitation and they are AIR 1930 260 (Oudh) , AIR 1942 449 (Oudh) , Sheosaran Singh and Others Vs. Amla Co-operative Credit Society Ltd. and Others, , Gopinath and Another Vs. Raghubansh Kumar Singh and Others, and Rameswar Pd. Missir Vs. Ramnath Khemka and Others, . Birendra Keshri Prasad and Narain Sahee Vs. Bahuria Saraswati Kuer and Others, ; Korrapati Sreeramulu Vs. Nadella Ramakrishnayya and Others, ; Raman Menon v. Sreenivasa Achariar 22 C LR 450 (Z9), Subbia Nadan v. Kutty Nadan 25 TLJ 1061 (Z10) and Kenchappa v. Rokhade Nagappa,

(S) AIR 1957 Mys 1 (Z11) are also cases where this question of limitation arose for decision and the question was decided in the same way as in the other cases cited. In Rustomji's Law of Limitation (Fifth Edition, Vol. II) the question is discussed in the light of the amendments made to the Transfer of Property Act in 1929 (see pp. 1165 to 1168) and the discussion is concluded thus:

"The earliest date when the redeeming co-mortgagor could maintain a suit for contribution would be the date of payment, and the statute cannot run against him till then."

Limitation began to run with respect to the plaint claim on 13-11-1951 when the decree-debt in O. S. 426 of 1105 was paid into the court and the suit brought on 27-11-1951 is, of course, well within time. The contention of the respondents that the suit was barred by time is therefore groundless and the lower court went wrong in accepting that contention.

19. The next question for consideration is whether the plaintiff's claim cannot be sustained as his payment towards the prior mortgage was a Voluntary" payment. The view that found favour in ILR Mad 96 (E), which decision as noticed earlier was overruled in AIR 1912 Mad 685 (FB) (II) was that the puisne encumbrancer will not be entitled to contribution if he allows the property comprised in his mortgage to be sold away in execution of the prior mortgage decree and that in order to entitle him to claim contribution he should have paid off the mortgage-debt. The contention before us is just the opposite of that and it would here be instructive to refer to the observations in Ghose on Mortgage (Fifth Edition, 1922) p. 395. It is stated there thus:

"In connection with this (contribution) question, I should state that a distinction has been made between a case where the mortgage is redeemed in the usual way, and one in which the debt is realised by a forced sale of the property of one of several owners of the equity of redemption. But the distinction seems to be a very refined one, as the right to claim contribution rests upon the broad principle that where two or more persons are equally bound and equally relieved, it is only just that they should all contribute in proportion towards a common benefit. The arguments in support of this view, as well as the authorities have been fully set forth by Mr. Justice Bhashyam Ayyangar of Madras, in *Rajah of Vizianagaram v. Rajah of Setrucherala Somasekharaz*, ILR Mad 688 (Z12) and by Mr. Justice Banerji of Allahabad, in ILR All 407 (I); and I should not be justified in detaining you with any remarks of my own". The case in ILR Mad 686 (Z12) related to a claim for contribution made by a person who had discharged the land revenue on properties belonging to him and others while that in ILR All 407 (I) was of a claim for contribution by a co-mortgagor who had paid off a mortgage debt. What Banerji, J., has said in the latter case on this question occurs on p. 435 and that may usefully be quoted here:

"As regards" the first contention mentioned above, namely, that contribution cannot be claimed in respect of a payment levied by legal process, the learned

vakil for the respondents relied on certain observations contained in the judgment of the Madras High Court in ILR Mad 96 (E), which undoubtedly support the contention. There is also an unreported judgment of this Court in S. A. 382 of 1883, in which a similar opinion was expressed. With great deference I am unable to agree with the view of the learned Judges who decided those cases. I can see no distinction in principle between a case in which payment has been made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant for contribution. In both cases his claim is based upon the ground that his property has contributed more than what it was liable for, and that the defendant has benefited thereby."

Alongside of this another passage from Ghose on Mortgage may also be quoted:

..... a mortgage-debt is one and indivisible, and if several distinct parcels of land are hypothecated to the creditor, which belong to two or more mortgagors, or subsequently pass to different owners the creditor may, as a rule, proceed against any one of such parcels; and the only way to prevent a sale or foreclosure would be to pay the whole of the mortgage-debt. It is but reasonable that in such a case, the person who is compelled to discharge the common burden should be permitted to seek indemnification from the others, and no fairer rule can be suggested than that each of them should contribute according to the value of the property owned by him or the extent of his interest in it." (p. 394).

A few other decisions where this question was raised and decided may now be referred to. In *Dhakeshwar Prasad Singh v. Harihar Prasad Narain Singh* AIR 1915 Cal 759 (2) (Z13) it was held that the right to claim contribution is the same whether the mortgage is redeemed in the usual way or whether the debt is realised by a forced sale of the property of one of the several owners of the equity of redemption. The same view was taken in AIR 1930 260 (Oudh) a case already referred to in another context. *Srivastava, J.* (*Wazir Hasan, J.* concurring) dealt with the question in these terms:

"Lastly, it was argued that the payment made by Ismail Husan was a voluntary payment by means of a private sale and that such payment could not create any charge upon the property. I cannot accede to this argument. In ILK All 407 (I) already referred to, *Banerji, J.*, held that as regards the application of the doctrine of contribution, there is no distinction between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant out of Court. Similarly in ILR Mad 686 (Z12) *Bhashyam Ayyangar, J.*, in his order of reference to a Full Bench observed that:

"It is perfectly immaterial whether a party seeking contribution made the payment voluntarily or involuntarily, i.e., whether he made the payment and thus averted any coercive process against his property, or, without making such payment suffered his property to be seized under process of law for the purpose

of the amount being realized from its income or by its sale.

We can see no reason why a person should lose his right because he makes the payment from his pocket to save his property from sale or raises money by means of a private sale." In another case already cited, a Full Bench of the Chief Court of Oudh reaffirmed this view, AIR 1942 449 (Oudh) .

20. The point arose for decision before a Division Bench of the Patna High Court in one of the cases cited earlier, *Gopinath and Another Vs. Raghubansh Kumar Singh and Others*, . In repelling the argument that contribution claimed by a person who paid off the entire prior mortgage decree cannot be sustained, Ramaswami, J. observed that there was no difference in principle between a case where the payment of which contribution is claimed was made to avert a legal process and a case where payment has been enforced by a sale of the property of the claimant for contribution. The learned Judge remarked that the reason is that the right to claim contribution is based upon the broad principle that where two or more persons are equally bound and equally relieved, it is only just that they should all contribute in proportion to the common benefit. The authorities relied upon are the judgment of Bhashyam Iyengar J. in ILR Mad 686 (Z12), the judgment of Banerji, J. in ILR 26 All 407 (I), the Madras Full Bench decision in AIR 1942 Mad 685 (FB) (H) and the Oudh Full Bench decision in AIR 1942 449 (Oudh) This view was reiterated in *Rameswar Pd. Missir Vs. Ramnath Khemka and Others*, another case referred to earlier.

21. Before leaving this aspect of the case reference may usefully be made to one Privy Council decision and to one decision of the Supreme Court. In AIR 1930 183 (Privy Council) a part owner of the equity of redemption who paid off the mortgage-debt after the mortgaged properties were sold in execution of the mortgaged decree, but before confirmation of the same was held to be entitled to contribution. In *Kidar Lall Seal and Another Vs. Hari Lall Seal*, one of the co-mortgagors discharged the common debt by selling his own property to the creditor privately and in upholding his claim for contribution Bose, J. (Fazl Ali, J., concurring) observed that on the facts set out by the plaintiff it was evident that he was entitled to contribution.

22. On principle and authority it would therefore appear to us that the contention that as the payment made by the plaintiff was a "voluntary" payment, he has no right for contribution has no substance at all.

23. Another argument on behalf of the respondents was that in the mortgagee's suit, or in proceedings in execution of the decree passed in that suit (O. S. 426 of 1105) the persons against whom the present claim is made or their predecessors-in-interest were not parties and the properties in their bands are not therefore liable for contribution. For defendant 3 it was pointed out that the puisne mortgagee, pursuant to the decree obtained by whom items 11 to 13 were sold in execution (O. S. No. 466 of 1102) and purchased by her predecessor-in-interest, was not party to the first mortgagee's suit and for defendants 4 and 7

to 9 it was pointed out that neither defendant 4 nor defendants 7 to 9 were parties to S. A. 117 of 1122. There is some controversy whether the latter assertion is true, but the plaintiff conceded that the puisne mortgagee of items 11 to 13 or the person who obtained an assignment from him of the decree in O. S. 466 of 1102 was not a party to O. S. 426 of 1105. Such an omission, however, is no defence to a claim for contribution --- See Ghose on Mortgage p. 394 (Note) where it is stated that the right to claim contribution may be successfully asserted even as against a person who ought to have been, but was not joined, as a party defendant by the mortgagee in his action to enforce the security. The authorities relied upon are the decisions in Jagat Narain v. Qutub Hussain ILR All 807 (215), Chagandas v. Gansing ILR 20 Bom 615 (Z16) and V. Perumal Pillai Vs. R.M.M.R.M. Raman Chettiar, Mulla's Transfer of Property Act (4th Edition, 1956) discusses this question at p. 511 under the heading "Co-mortgagor omitted from the mortgagee's suit". The view expressed there is in conformity with what we find in Ghose on Mortgage and the cases cited there. Krishna Iyer v. Muthukumaraswamiya Pillai ILR Mad 217 (Z18) is a decision where the Allahabad and the Bombay cases mentioned above were followed. This argument is also therefore not of any assistance to the respondents. The mortgagee has a right to enforce the mortgage against any part of the security, and the discharge of one mortgagor by limitation or otherwise does not affect his liability for contribution to the co-mortgagor or other persons interested in the property that bore the burden of the prior debt.

24. Counsel for defendants 4 and 7 to 9 took another ground in support of the lower appellate court's decision in their favour. The mortgage decree in O. S. 426 of 1105, as also the orders of the execution court and the appellate order thereon (A. S. 185 of 1121 on the file of the Anjikaimal District Court) contained a direction that item 4 should be sold last and that only in certain eventualities. As no sale of the other properties took place it was argued that item 4 cannot be made liable to contribute towards the plaintiff's present claim. In S. A. 117 of 1122 the decision in A. S. 185 of 1121 was varied and counsel's answer to it was that defendant 4 and defendants 7 to 9 were not parties to the second appeal. The trial court in this case, however, found that defendant 4 was a party and that he was therefore bound by the decision, Nothing is mentioned in the trial court's judgment about defendants 7 to 9. On verification of the records it does not appear that defendant 4 and defendants 7 to 9 were made respondents to S. A. 117 of 1122. To our minds, however, the direction in the mortgage decree or the subsequent orders in execution that item 4 should be sold last and that only if the sale of the other properties did not satisfy the mortgage decree, is no bar to the present claim for contribution. In the suit or in the execution proceedings there was no attempt to determine the liabilities of the defendants inter se, nor was such a decision necessary to give relief to the plaintiff in the suit. In the first decision cited by us in this judgment, B. Raghavachari and Others Vs. Pelletti Venkatanarayana Reddi and Another, , Madhavan Nair, J., had to consider this question and the view we have expressed above conforms to the view the

learned Judge took in that case. That decision was followed in this regard by Govinda Menon, J., in R.S. Subbiah Chettiar Vs. Seeranga Chettiar, The decision of the Travancore High Court in Varghese v. Ouseph 12 T LT 593 (Z20) takes the same view as these two Madras decisions regarding the effect of a direction similar to the one relied upon by defendants 4 and 7 to 9. The direction to sell item 4 last, even if it survived the decision in S. A, 117 of 1122, cannot help the concerned defendants to resist the plaintiff's claim.

25. There is no point in the contention that no contribution can be allowed with respect to the costs of the prior mortgage decree. The decree made the mortgagor and the mortgage security liable for costs as well. There is no analogy between costs decreed to a mortgagee in his suit for mortgage money and the compensation payable to a disappointed court auction purchaser under Order 21 Rule 89, Civil Procedure Code, or the fee chargeable for poundage from a judgment-debtor whose property is sold by the court.

26. No other point was urged in these second appeals. The plaintiff-appellant is entitled to succeed in both and we accordingly set aside the lower appellate court's decrees in A. S. 128 of 1954 and A. S. 134 of 1954 and restore the decree of the Munsiff with proportionate costs throughout. Defendant 3 will also be personally liable for the plaintiff-appellant's costs in S. A. 464 of 1955 and A. S. 132 of 1954 and likewise defendants 4 and 7 to 9 in S. A. 463 of 1955 and A. S. 128 of 1954.