

(1949) 07 MAD CK 0069
In the Madras High Court

Dadi Appala Naidu and Others

APPELLANT

Vs

Kolluru Bhimalingam and Others

RESPONDENT

Date of Decision : 26-07-1949

Acts Referred:

Transfer of Property Act, 1882 — Section 92

Citation : (1949) 2 MLJ 520

Hon'ble Judges : Subba Rao, J

Bench : Division Bench

Judgement

Subba Rao, J.—This is a Letters Patent Appeal against the judgment of Patanjali Sastri, J., and it raises a question of subrogation

2. On 6th August, 1924, one Jagandhara, the husband of the seventh defendant, executed a mortgage deed Ex. D-i in favour of defendants 2 and

3 in respect of Item 4 of Schedule D annexed to the plaint for a sum of Rs. 1,000. On 6th September, 1924, he executed another mortgage deed

Ex. P-I in favour of defendants 4 and 5 in regard to items 1 to 3 for a sum of Rs. 750. He again mortgaged items 1, 3 and 4 to defendants 2 and 3

under Ex. D-2 dated 29th June, 1930, for a sum of Rs. 500. On 7th July, 1930, he borrowed another sum of Rs. 1,670 and executed a mortgage

deed Ex. P-2 mortgaging items 1 to 5. On 9th September, 1933, by Ex. D-10, defendants 2 and 3 transferred their interest under Ex. D-1 to the

sixth defendant. Under Ex. D-11, dated 7th October, 1933, Jagandhara's wife Mahalakshmi, being minor represented by her father, executed a

sale deed in favour of defendants 2 and 3 for a sum of Rs. 2,500 conveying to them item 4 of the plaint B Schedule. The consideration for that sale

deed was made up of three items:

(1) Rs. 1,710 due under the mortgage deed Ex. D-1 which was assigned in favour of the sixth defendant. The vendees undertook to pay this amount.

(2) The amount of principal and interest due under Ex. D-2 executed by the vendor's husband jagandhara in favour of the vendees, i.e., defendants 2 and 3.

(3) Rs. 126-14.-0, the amount received in cash.

On 31st March, 1934, defendants 2 and 3 filed a statement in E.P. No. 788 of 1933 wherein they admitted that Ex. D-2 was discharged and the

property was not subject to the mortgage. On 29th August, 1938, defendants 2 and 3 paid to the sixth defendant the sum due under Ex. D-1 and

Ex. D-1 (a) is the endorsement acknowledging the said payment. In execution of a simple money decree against the mortgagors, items 1, 2 and 5

were brought to sale and were purchased by defendant 3 on 2nd November, 1934, who, in his turn, sold those properties under Ex. D-7 dated

10th September, 1938, to the first defendant. The plaintiff is the assignee of the mortgage rights under Ex. P-1 and Ex. P-2. He instituted O.S. No.

27 of 1942 on the file of the Subordinate Judge of Vizagapatam to enforce the two mortgages assigned in his favour. Defendants 2 and 3 who

became the owners of item 4 claimed to be subrogated to the rights under the prior mortgage Ex. D-1 which they discharged. The first defendant

claimed in respect of item 1 the right to fall back upon the prior mortgage Ex. D-2 as against Ex. P-2 as his vendor, the third defendant, who was

the mortgagee of items 1, 3 and 4 under Ex. D-2 purchased that item along with items 2 and 5 in the Court sale of November 1934. The learned

Subordinate Judge rejected the claims of priority set up by defendants 1, 2 and 3; but the learned District Judge in appeal allowed the two claims.

The plaintiff preferred S.A. No. 759 of 1945 against the decree and judgment of the learned District Judge. Patanjali Sastri, J., agreed with the

learned Subordinate Judge and set aside the decree of the District Judge. With the leave of the learned Judge the defendants whose claims to

priority were rejected, prefer this Letters Patent Appeal.

3. Mr. Narasaraju, learned Counsel for the appellants accepted the conclusion of the learned Judge in regard to item 1 of B Schedule and confined

his arguments only to item 4 of the plaint B Schedule. He contended that

defendants 2 and 3 being the puisne mortgagees of item 4 before they purchased the said item under Ex. D-11 had a pre-existing interest in the mortgaged property, and therefore were entitled to be subrogated under the first paragraph of Section 92 of the Transfer of Property Act. The question raised in this appeal depends upon the construction to be put on Sections 91 and 92 of the Transfer of Property Act. The material provisions of the said sections read:

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage-debt or any part thereof; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

92. 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.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument, agreed that such person shall be so subrogated....

Text-book writers treated the law conveniently under two categories : (1) Legal subrogation or subrogation by operation of law; and (2)

Conventional subrogation. Sir D. F. Mulla in his commentary on the Transfer of Property Act broadly states the two principles in the following manner:

(1) Legal subrogation, or subrogation by operation of law arises when a person who has in the property an interest of his own to protect,

discharges a prior encumbrance.

(2) Subrogation is conventional when there is an agreement express or implied that the person making the payment shall exercise the rights and powers of the original creditor

There was no comprehensive statement of law of subrogation in the Transfer of Property Act till Section 92 was inserted by the amending Act XX

of 1929. The first paragraph of Section 92 deals with legal subrogation and the third paragraph provides for the conventional subrogation. There

was a lucid and exhaustive exposition on the interpretation of the provisions of this section by two judgments of this Court : one that of the Full

Bench reported in *Lakshmiammal v. Sankaranarayana Menon* (1935) 70 M.L.J. 1 : ILR 59 Mad. 359 and the other by a Division Bench reported

in *Vedantam Subbarayudu (dead) and Others Vs. Chattapalli Lakshminarasamma and Others*, It would be redundant if we attempted to re-state

the law at any length. It would be enough if we extract the principles embodied in those judgments and the judgments of other Courts following

these judgments. The distinction between paragraphs 1 and 3 of Section 92 of the Transfer of Property Act has been succinctly brought out by

Varadachariar, J., in *Lakshmiammal v. Sankaranarayana Menon* (1935) 70 M.L.J. 1 : ILR 59 Mad. 359 in the following passage:

There is a well-established distinction between cases in which a person who has a pre-existing interest in property pays off a prior charge on that

property for the protection of his own interest and cases in which a person acquires an interest in property only by reason of his advancing money

to pay off an existing mortgage debt. It seems to me that Clause 1, Section 92 must be held to relate to the first type of cases above referred to

and Clause 3 to the second type.

Venkataramana Rao, J., states the law to the same effect but in different terms. He says:

The first clause enunciates no new principle (vide Section 74 of the Transfer of Property Act, since repealed). It applies to all persons who have an

interest in the equity of redemption and are under no personal obligation to discharge prior incumbrances. Clause 3 has been enacted to confer a

benefit on persons who advance money to discharge an incumbrance only "if the mortgagee has by a registered instrument agreed that such

persons shall be subrogated ". The clause is intended to apply to all persons who acquire an interest in the mortgaged property by advancing

moneys to discharge prior incumbrances and there is no warrant for restricting the scope of that clause to persons other than purchasers or mortgagees.

In view of the observations of Venkatasubba Rao and Abdur Rahman, JJ., in *Vedantam Subbarayudu (dead) and Others Vs. Chattapalli*

Lakshminarasamma and Others, throwing considerable doubt on the correctness of the aforesaid observations, Venkataramana Rao, J., had to

consider the position in greater detail in his judgment reported in *Vedantam Subbarayudu (dead) and Others Vs. Chattapalli Lakshminarasamma*

and *Others*, After exhaustively considering the case-law on the subject, he adhered to the view expressed by him in the Full Bench judgment,

Lakshmiammal v. Sankaranarayana Menon (1935) 70 M.L.J. 1 : ILR 59 Mad. 359 544 the learned Judge summarises the law under various

aspects which may usefully be referred to.

7. In *Hira Singh v. Jai Singh* ILR (1937) All. 880 Sulaiman, G.J., accepts the law as enunciated in the Madras decisions and states it in his own

words at page 893 as follows :.

Now it is well known that subrogation can arise in two ways : (1) by agreement and (2) by operation of law. Paragraph 1 deals with subrogation

arising by operation of law and paragraph 3 deals with subrogation by agreement. It is necessary that there should be an agreement for

subrogation, that the agreement should be in writing and that it should be a registered instrument. It would be impossible to hold that these two

paragraphs overlap each other, for paragraph 3 requires certain stringent conditions which are not found in paragraph 1. They must therefore be

mutually exclusive. The basic difference underlying these two paragraphs consists in this that paragraph 1 refers to a person redeeming property

and the third paragraph to a person who advances money with which a mortgage is redeemed.

Later on he states

Where a person himself redeems a mortgage, that is to say, pays the mortgage money out of his own pocket and not merely discharges a

contractual liability to make the payment, he is entitled to the rights of

subrogation under paragraph 1 if he is one of the persons enumerated in

Section 91. But where the person does not himself redeem the mortgage, that is to say, does not himself pay the money out of his own pocket in

excess of his contractual liability but advances money to a mortgagor and the money is utilised for payment of a prior mortgage, whether the money

is actually paid through the hands of the mortgagor or is paid through the hands of the mortgagee, the latter acquires the right of subrogation only if

the mortgagor has by a registered instrument agreed that he shall be so subrogated ... He is really not himself redeeming the mortgage but

redeeming it as the agent of the mortgagor...

The same view was also expressed by the Patna High Court in *Rai Bahadur Bansidar Dhandania v. Kairoo Mandar* ILR 17 Pat. 666, the learned

Judges observed:

The first paragraph of Section 92, would undoubtedly have entitled the appellant as purchaser of the equity of redemption to subrogation if he had

redeemed the prior mortgages on his own account and independently of any agreement with the mortgagor who is specifically excluded in this

paragraph; but the appellant paid off the prior mortgagees with moneys that were left with him for the purpose by the vendors-mortgagors. The

third paragraph of the section, which it is claimed by the respondent would apply to the appellant, provides that a person who had advanced to a

mortgagor money with which a mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been

redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.... That they were not paid into the

hands of the mortgagors is immaterial, for, it was by agreement with them (if not at their instance) and in pursuance of what the learned Judge of

this Court has called an express covenant that the appellant actually paid them to the old mortgagees....

The same view was expressed by the Calcutta High Court in *Mukaram Marivari v. Muhammad Hossain* ILR (1935) Cal. 677 *Nasim Ali, J.*,

observes:

It is equally well established on authorities that if the debt is the debt of the person who paid it, or is a debt which he has covenanted to pay, his

payment of it raises no right of subrogation, but is simply a performance of his

own obligation or covenant".

Indeed Mr. Narasaraju for the appellant not only did not question the aforesaid, principles but relied upon them in support of his argument. He

contended that when defendants 2 and 3 purchased the property under Ex. D-11 on 7th October, 1933, they had a pre-existing interest in the

property being the puisne mortgagees under Ex. D-2, dated 29th June, 1930, and therefore they would be entitled to the right of subrogation under

the first paragraph of Section 92. Learned Counsel said that the existence of an interest in the property on the date of the sale deed was sufficient

and it did not matter whether a prior mortgage was discharged not to protect his interest but only pursuant to an agreement entered into with the

vendor. If this argument was accepted it would be destructive of the principles on which he purported to rely upon. The distinction between legal

subrogation and conventional subrogation is that in the case of the former the person having the pre-existing interest discharges the prior mortgage

to protect his interest and by meeting an obligation in excess of his liability; whereas in the latter case he would be discharging only an obligation he

had undertaken under a specific agreement. Defendants 2 and 3 did not discharge Ex. D-1 to protect their interest but because of their obligation

under the sale deed Ex. D-n. The argument of Mr. Narasaraju ignores this distinction and therefore we cannot accept it.

8. Further the facts of this case disclose that on the date when defendants 2 and 3 discharged Ex. D-1 they had no longer any interest in the

mortgaged properties. In Ex. P-9 as we have already stated defendants 2 and 3 admitted that the mortgage in their favour was discharged even

prior to 31st March, 1934. Ex. D-1 (a) shows that Ex. D-1 was discharged on the 29th August, 1938. It therefore follows that on the date when

the prior mortgage was discharged, they ceased to be puisne mortgagees in view of their unambiguous admission. In this view also the contention

of Mr. Narasaraju has no merits.

9. Learned Counsel for the appellants further pressed on us that the crucial date for the application of the doctrine of subrogation is the date of the

sale deed whereunder defendants 2 and 3 took upon themselves the obligation to discharge Ex. D-1 and on that date as the puisne mortgage in

their favour was subsisting they must be deemed to be persons having a pre-

existing interest within the meaning of the Full Bench decision reported in *Lakshmiammal v. Sankaranarayana Menon* (1935) 70 M.L.J. 1 : ILR 59 Mad. 359 This argument again is based upon a misapprehension of the principles of legal subrogation. The foundation of the right is the equitable principle of re-imbursement. If a person is interested in the payment of money which another is bound by law to pay, and therefore pays it, he is entitled to be reimbursed by the other. The personal obligation arising under the circumstances is embodied in Section 69, of the Indian Contract Act and the equitable right of subrogation u/s 92 of the Transfer of Property Act. Sir D. F. Mulla puts the same principle in the following manner: Subrogation by operation of law rests therefore on the same equity of reimbursement as is enacted in Section 69 of the Indian Contract Act. In either case the right to subrogation or re-imbursement will arise only on the discharge of the prior mortgage and not earlier. We therefore agree with the learned Judge that on the facts of this case, the third paragraph of Section 92 applies and the condition laid down therein not having been complied with, the defendants 2 and 3 would not be entitled to be subrogated to the rights of the mortgagee under Exhibit D-1.

10. In the result the appeal is dismissed with costs of the first respondent.