

(1958) 08 P&H CK 0006
In the Punjab And Haryana At Chandigarh
Case No : First Appeal No. 222 of 1951

Janardhan Bhagwan Dass

APPELLANT

Vs

Sham Lal Nand Lal and Others

RESPONDENT

Date of Decision : 27-08-1958

Acts Referred:

Transfer of Property Act, 1882 — Section 60, 92

Citation : AIR 1959 P&H 170

Hon'ble Judges : K.L. Gosain, J; Harbans Singh, J

Bench : Division Bench

Advocate : F.C. Mital and G.P. Jain, for the Appellant; D.N. Aggarwal and R.N. Aggarwal, for the Respondent

Final Decision : Dismissed

Judgement

1. The relationship between the parties to the present case is clear from the pedigree-table given below.

Gobind Ram _____ |
_____ | | | | Lal Chand Bhagwan Das
Naman Beli | | | | Janardhan (Defendant No. 1) | Amritsaria (Default No. 2) |
| _____ | _____ | _____ | | | | Nand Lal Mukand Lal
Basanta Jagan Nath=Mt. Achhri, | (Died sonless) (Defendant No. 3) (Defendant
No. 4) | _____ | | Sham
Lal (Plaintiff No. 1) Salig Ram (Plaintiff No. 2).

2. The parties owned considerable landed property, some of which was ancestral and the other non-ancestral. In 1902 Lal Chand, Bhagwan Das and Beli mortgaged 50 kanals and 11 marlas of land which Kalu Mal and others with possession for a sum of Rs. 2,000/-. In 1904 Lal Chand, Bhagwan Das, Beli and the sons of Naman made a simple mortgage of another 88 kanals and 15 marlas of land for a sum of Rs. 2,000/- in favour of the same mortgagees.

In 1906 the second mortgage was also converted into a usufructuary mortgage

with the result that the mortgagees came into possession of the entire land covered by both the mortgages and measuring 139 kanals and 6 marlas. From 1914 to 1932, fifteen additional charges were created on the aforesaid land by documents, Exhibits D. 3 to D. 17, and the total amount covered by the aforesaid fifteen additional charges came up to Rs. 11,183/-.

The mortgagors made an application to the Collector for redemption of the mortgages under the Redemption of Mortgages (Punjab) Act, and for reasons with which we are not now concerned, the said application was dismissed. In the year 1947 a suit for redemption was filed by all the four branches of Gobind Ram and on the 16th July 1948, a preliminary decree was passed for redemption on payment of Rs. 25,339/11/3 on or before the 14th of January, 1949.

Janardhan, defendant No. 1, alone paid the entire amount by depositing Rs. 10,000/- on the 14th of January, 1949, and the balance on the 24th of January, 1949. On the 11th of March, 1949, a final decree for redemption was passed in favour of the mortgagors. In execution of the decree Janardhan, defendant No. 1, got the possession of the entire land. Sham Lal and Salig Ram, plaintiffs in the present case, then brought an application for redemption of their share of the mortgaged property but the same was dismissed by the Collector for reasons with which we are not again concerned in the present case.

The present suit was brought by Sham Lal and Salig Ram on the 18th of January, 1951, for redemption of their one-fourth share in land described in para (a) of the heading of the plaint and one-third share of land described in para, (b) of the heading of the plaint. The plaintiffs alleged that they were entitled to the redemption of their aforesaid shares on payment of Rs. 5,879/2/8, i.e., the mortgage money of their share.

Janardhan contested the suit on the grounds that on payment of the entire mortgage money found due under the preliminary decree he had been subrogated to the rights of the mortgagees, that qua his own share he had become owner of the same, that qua the rest three-fourths share he was the mortgagee and was as such entitled to all the rights of the original mortgagees in respect of redemption etc., and that the plaintiffs could not redeem only their share and were bound to redeem the whole.

He also pleaded that he had incurred Rs. 800/- as costs of the previous litigation and the plaintiffs could not redeem till they paid the same or at least their proportionate share of the same. He further pleaded that he was entitled to the interest as due on the original mortgages. He took various other pleas also which are evident from the following nine issues framed by the trial Court-

(1) Whether the plaintiffs are not entitled to the benefit of the redemption decree and what is its effect?

(2) Whether at the time of redemption it was agreed that every co-mortgagor would be entitled to redeem on payment of his share?

(3) If issue No. 2 is not proved, whether the plaintiffs are legally entitled to redeem their share on payment of the amount due from them?

(4) On payment of what mortgage amount are the plaintiffs entitled to redeem their share?

(5) Whether the costs of the previous suit were borne by defendant No. 1 alone and he is entitled to the payment of the same to the extent to the plaintiffs' share? If so how much?

(6) Whether defendant No. 1 is entitled to claim interest on the further charges? If so, how much interest is payable to the plaintiffs?

(7) Whether the plaintiffs are estopped from suing?

(8) Whether defendant No. 1 at the time of redemption admitted that the plaintiffs are entitled to redeem their share on payment of Rs. 5,879/2/8 and cannot now object that they cannot do so?

(9) Relief.

3. After recording the evidence of the parties the trial Court found that the plaintiffs were entitled to the benefit of the redemption decree, that there was no agreement at the time of redemption, that every co-mortgagor would be entitled to redeem on payment of his share, that the plaintiffs were legally entitled to redeem their share on payment of the proportionate amount due on their share of the property, that the amount payable by the plaintiffs by calculation came to Rs. 5,879/2/8, that the costs of the previous suit were incurred by all the parties jointly, that defendant No. 1 was entitled to claim interest on the further charges but only to the extent of Rs. 189/13/6, that the plaintiffs were not estopped from suing, and that defendant No. 1 at the time of redemption did not admit that the plaintiffs were entitled to redeem their share on payment of Rs. 5,879/2/8.

As a result of the aforesaid findings the trial Court granted a decree to the plaintiffs for redemption of their share of the mortgaged property on payment of Rs. 5,879/2/8 proportionate share of the amount paid by defendant No. 1 plus Rs. 189/13/6 interest allowed on the same. The parties were left to bear their own costs. Defendant No. 1 feeling aggrieved against the said decree has come up to this Court in appeal, while the plaintiffs have filed cross-objections.

4. Mr. F. C. Mital, learned counsel for the appellant has urged only the following three points:

(1) that the plaintiffs were not entitled to redeem their share only and that they were bound to bring a suit for the redemption of the entire mortgaged property,

(2) that the finding of the trial Court with regard to the costs of the previous litigation was erroneous and that it should have been held that the entire costs were incurred by defendant No. 1, and

(3) that defendant No. 1 was entitled to interest as provided in the original

mortgages.

5. With regard to the first point the contention raised by Mr. Mital is that on payment of the mortgage money under the preliminary decree dated the 16th of July, 1948, defendant No. 1 had been subrogated to the rights of the previous mortgagees and although with respect to his own share, i.e. one-fourth, the mortgagee rights had come to be merged with the equity of redemption of the mortgages and had thereby become extinct, a fresh mortgage qua the three-fourths share of the property had come into existence by operation of law and the plaintiffs could redeem the said mortgage only as a whole and not qua their share. The learned counsel relies for this proposition on the provisions of Section 92 of the Transfer of Property Act. The relevant part of the aforesaid section reads as under-

"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. Mr. D. N. Aggarwal, learned counsel for the plaintiff-respondents, urges that the Transfer of Property Act as such is not applicable to the Punjab and that the principles of justice, equity and good conscience which do apply in the Punjab do not stand in the way of the plaintiffs from redeeming their share of the mortgaged property. He further contends that the integrity of the mortgages must be deemed to have broken inasmuch as the original mortgages have been redeemed and qua the snare of defendant No. 1 no mortgage is now in existence. He draws our attention to the last clause of Section 60 of the Transfer of Property Act and urges that his clients are entitled to redeem their snare of the mortgaged property under the said provision of law. The last clause of Section 60 reads as under-

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage except only where a mortgagee, or, if there are more mortgagees than one all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

After giving our careful consideration to the respective contentions of the learned counsel for the parties, we have come to the conclusion that the contention raised by the learned counsel for the appellant cannot prevail and must be repelled. There can be no doubt that the integrity of the original mortgages is no longer in existence and the mortgages which were originally for 139 kanals and 6 marlas of land now operate only on three-fourths of the aforesaid property, the mortgagee rights of the rest, having merged with the equity of redemption and the mortgage on the same having thereby become extinct.

There can also be no doubt that the provisions of Section 92 of the Transfer of Property Act do not apply to the Punjab, and the case is therefore to be governed by the principles of justice, equity and good conscience. Janardhan, defendant No. 1 -- appellant, in the present case -- cannot be taken to have been subrogated to all the rights of the original mortgagees because he can in no case be regarded to hold a mortgage at least on his own share of the mortgaged property.

By redeeming the previous mortgages the defendant--appellant (Janardhan) became entitled to reimbursement of the amount paid by him in respect of the shares of his other co-mortgagors and succeeded to the rights of the previous mortgagees only to this extent. It will be in accord with the principles of justice equity and good conscience that each of the other mortgagors may redeem his share of the property by payment of the proportionate amount actually paid by Janardhan. A similar view on this matter was taken by Beckett J. in *Phula Singh v. Harnaman* AIR 1941 Lah 421. The following observations were made by the learned Judge at page 422 of the report -

"It is true that Section 92, T.P. Act, lays down that a co-mortgagor on redeeming the property shall have the same rights as the original mortgagee as regards the redemption, foreclosure or sale of the property; but these words can hardly be read in their most literal sense. One of the present mortgages may be taken by way of example. Tehl Singh could have insisted on redemption of Bhana's land on payment of the full amount of Rs. 600/-after it had passed into the hands of the persons who became co-mortgagors; but it is obvious that Harnama does not possess exactly the same right. His own share is now free from the mortgage, so that there is no question of redeeming the land as a whole and there is certainly no question of paying a sum of Rs. 600/-. Once the integrity of the mortgage has been broken up by the person assuming the position of a mortgagee in respect of the rest of the property it seems to me that the mortgage can no longer be regarded as indivisible.

In this respect the position of a co-mortgagor is quite different from that of the sole mortgagor when it comes to subrogation. With a sole mortgagor the question of subrogation only arises if the property passes out of his hands, and it is possible for him to assume the position of the original mortgagee in all respects, since he is regarded as holding a mortgage over the property as a whole against the third person. When a co-mortgagor redeems the property as a whole, it is hardly possible to regard him as holding a mortgage against himself in, respect of his own share so that he only succeeds partially to the rights of the original mortgagee, and this makes the position quite different."

Almost the same view was also taken by a Division Bench of the Oudh Chief Court in AIR 1934 348 (Oudh) and by a Division Bench of the Lahore High Court in *Ali Akbar v. Sultan-ul-Mulk* AIR 1923 Lah. 129 . In *Ganeshi Lal Vs. Joti Pershad*, their Lordships of the Supreme Court observed at page 2 of the report as under:--

"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."

6. There is no doubt that the facts of the Supreme Court case were somewhat different from those of the present case, but the controversy there also related to the extent of the rights of a "co-mortgagor who had redeemed the previous mortgage and claimed to have been subrogated to all the rights of the original mortgagee.

7. We, therefore, find that it will be in accordance with the principles of justice, equity and good conscience to allow the plaintiffs to redeem their share of the property on payment of the proportionate amount of the mortgage money.

8. With regard to the costs of the previous litigation, we entirely agree with the finding of the trial Court that the same were incurred by all the co-sharers jointly. The evidence of P.Ws. 1, 2 and 3, which has been believed by the trial Court, fully supports the said finding and there is nothing shown to us why we should not rely on the said evidence.

9. Regarding the amount of interest, the point is settled by the decision of their Lordships of the Supreme Court referred to above. The subrogee cannot according to the rules of justice, equity and good conscience as applicable in the Punjab claim anything more than what he has himself paid. Infact this point was conceded by the learned counsel for the appellant.

10. In the result, we dismiss this appeal but, in the peculiar circumstances of the case, leave the parties to bear their own costs in this Court.

11. As regards the cross objections filed by the plaintiffs no arguments at all were addressed to us and we do not find any force in the said objections and dismiss the same leaving the parties to bear their own costs.