

**(1993) 01 KAR CK 0001**

**In the Karnataka High Court**

**Case No :** Miscellaneous First Appeal No. 1692 of 1990

Kadamba Sugar Industries Pvt. Ltd. and others

APPELLANT

Vs

Devru Ganapathi Hedge Bhairi and others

RESPONDENT

**Date of Decision :** 08-01-1993

**Acts Referred:**

Contract Act, 1872 — Section 140

Transfer of Property Act, 1882 — Section 100, 52, 74, 91

**Citation :** AIR 1993 Kar 288 : (1993) ILR (Kar) 679 : (1993) 1 KarLJ 285

**Hon'ble Judges :** N.D.V. Bhat, J

**Bench :** Single Bench

## Judgement

1. This appeal is preferred against the order dated 23-3-1990 passed on I.A. No. II by the Civil Judge, Sirsi in FDP No. 2/1987. By the said order the learned Civil Judge allowed the application at I.A. II permitting defendants 2, 4 and 6 to 8 to be transposed as plaintiffs in the place of original plaintiff viz., the Corporation Bank.

2. The facts which are relevant for the disposal of this appeal, briefly stated, are as under:

The Corporation Bank having its Administrative Office at Mangalore and a Branch Office also at Sirsi had advanced a loan of Rs. 3,00,000/- to the instant appellant-1 Kadamba Sugar Industries Private Ltd., in Basti galli at Sirsi. The instant respondents and appellant-2 had stood as sureties and had guaranteed repayment of the said loan. All the assets of the Kadamba Sugar Industries Private Ltd., including the machineries and immovables belonging to Kadamba Industries were hypothecated and charged for the said debt and an equitable mortgage was also created by depositing the title deeds in respect of the land and buildings. It appears that the principal debtor and the sureties did not repay the loan in time with the result, the Corporation Bank filed a suit against Kadamba Sugar Industries (instant appellant 1) and all the sureties including the instant appellant 2, in O.S. No. 8/1981 in the Court of Civil Judge, Sirsi for the

recovery of the amount towards the loan including the interest accrued thereon from time to time. The said suit at O.S. No. 8, 1981 culminated in passing of a preliminary decree dated 28-6-1986. The decretal terms are as under:

"Plaintiff do recover Rs. 4,57,350.85/- ps. with costs of Rs. 71,660.50 ps. and future interest at the rate of 16.50% p.a. from the date of suit till the date of payment from defendants-I to 7. And Rs. 1,97,898.50 ps with future interest at the rate of 17% p.a. from the date of suit till the date of realisation from defendants 1 to 8. Defendants are granted six months time to deposit the amount as aforesaid. In the case, the defendants fail to deposit the amount the plaintiff Bank is entitled to apply for final decree for the sale of hypothecated machineries shown in the Schedule A and immovable properties shown in Schedules C and D for realisation of the entire suit claim.

Given under my hand and the seal of the Court this 28th day of June, 1980."

The properties which were hypothecated and mortgaged are shown in Schedules A, C and D appended thereto.

3. It appears that the defendants did not pay the amount decreed by the Court during the stipulated time. The Corporation Bank therefore, filed the decree final proceedings at FDP No. 2/87. When this was so defendants 2, 4 and 6 to 8 (according to the case made out by them during the pendency of the said proceedings) negotiated with the Corporation Bank and persuaded the Corporation Bank to accept Rs. 7.5 lakhs towards full satisfaction of the decree and in furtherance of such negotiation made the payment of the said amount to the Corporation Bank on 14-12-1988. It appears that on 31-7-1989 the learned Counsel for the plaintiff-Bank filed a memo in the Court stating that the matter was settled for Rs. 7.5 lakhs and that accordingly, the said amount was paid by defendants 2, 4 and 6 to 8 and that, therefore, the decree was fully satisfied. At the same time an application at I.A. II was filed for defendants 2, 4 and 6 to 8 praying for the reliefs referred to above. The pith and substance of the application filed by the aforesaid persons at LA. No. II before the Civil Judge is that they having paid the amount under the preliminary decree during the pendency of the proceedings for final decree, they are entitled to be subrogated or transposed as plaintiffs in the place of the Corporation Bank. The said application was purported to have been filed under Order 22, Rule 10, CPC. The said application was resisted by the instant appellants. In sum, it was contended by them that the remedy of the applicants in I. A. II before the lower Court, if at all, was to file a suit and that they do not have the right of subrogation in the decree final proceedings. They also raised certain other contentions which are referred to in their objection, a copy of which is produced before this Court. The learned Civil Judge on a consideration of the submissions made on either side and for the reasons recorded in his impugned order allowed the application at I.A. II before him by permitting defendants, 2 4 and 6 to 8 to be transposed as plaintiffs in the place of the original plaintiff-Corporation Bank to recover the amount due to them. It is this order which is challenged before this Court in this

appeal.

4. I have heard the arguments of the learned Counsel appearing on either side.

5. In the light of the submissions made at the Bar on either side, the following points arise for consideration:

(1) Whether defendants 2, 4 and 6 to 8 (instant respondents 1 to 5) have the right of subrogation?

(2) If so whether they can enforce their right in the final decree proceedings itself or whether they have to enforce that right by filing a separate suit?

(3) What order?

6. Point No. 1: It is not in dispute that defendant 1 Kadamba Sugar Industries Private Ltd. (instant appellant I) had taken the loan from the Corporation Bank. It is also not in dispute that the assets referred to in the schedule to the preliminary decree were hypothecated and that the movable properties including the buildings were mortgaged to the Bank by the Kadamba Sugar Industries by depositing of title deeds by way of security towards the loan. There also does not appear to be dispute regarding the fact that defendants 2 to 8 that is to say, instant respondent I to 6 and appellant 2 were sureties and had guaranteed the repayment of the aforesaid loan to the Bank. I may mention here that arguments are addressed by the learned Counsel appearing on either side with reference to this aspect. It is further seen that the Corporation Bank had filed a suit before the Civil Judge at Sirsi in O.S. No. 8/1981 for the recovery of the amount against the Kadamba Sugar Industries and these sureties. There is no dispute that a preliminary decree dated 28-6-1986 was passed by the Court of Civil Judge. The substance of the decretal term is already culled out earlier. It is also not in dispute that the Corporation Bank filed a final decree proceeding at FDP No. 2/1987 before the Civil Judge's Court, since the defendants did not make the payment as per the decretal terms. It is further seen from the order of the lower Court that on 31-7-1989, the learned Counsel for the plaintiff Bank filed a memo stating that the matter was settled for Rs. 7.5 lakhs and accordingly, defendants 2, 4 and 6 to 8 had paid to the Bank the said sum in full discharge of the decree in question. Having regard to the said observations there should not be any difficulty in reaching a conclusion that defendants 2, 4 and 6 to 8 did make the payment as alleged by them.

7. The question as to whether defendants 2, 4 and 6 to 8 (instant respondent 1 to 5) have the right of subrogation will have to be answered in the context of the aforesaid facts about which there cannot be any dispute. The law of subrogation in India is contained in Section 92 of the Transfer of Property Act. This was inserted by Section 47 of Act No. 20./1929. Sections 74 and 75 of the T.P. Act relating to the law of subrogation in an imperfect form were repealed by Section 39 of the 1929 Act. Section 92 of the T.P Act reads as under:

"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 mortgaged has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

A perusal of Section 92 of the T.P. Act would go to show that it deals with the rights of subrogation of two classes of persons. Para 1, relates to the rights of persons referred to in Section 91 of the T.P. Act, whereas para 3 refers to persons who have advanced to a mortgagor money with which the mortgage has been redeemed. At this juncture, it is necessary to refer to the provisions of Section 91 of the T.P. Act. Section 91 of the Act reads as under:

"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 thought 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."

8. At this juncture, it is also necessary to mention here that the instant respondents I to 5 have sought subrogation on the count that they were sureties to the mortgage loan of defendant 1 (instant appellant 1) and during the pendency of the suit filed by the creditor (mortgagor) to be more precise, during the pendency of the final decree proceedings they paid the mortgage money. It is, therefore, clear that in the instant case, the subrogation pleaded by the instant respondents 1 to 5 is legal subrogation within the meaning of Section 92, Para 1 of the Transfer of Property Act r/w Section 91(b) of the said Act. At this juncture, it is therefore not necessary to go into the details regarding the distinction between legal subrogation and conventional subrogation.

9. At this stage itself it is necessary to point out that the concept of subrogation can also be culled out from the provisions of S. 140 of the Indian Contract Act, 1872. Section 140 of the Indian Contract Act reads as under:

"Rights of surety on payment or performance -- Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for,

is invested with all the rights which the creditor had against the principal debtor."

A careful perusal of the aforesaid provision and the intendment reflected in enacting the said provision would go to show that on payment of the amount due to the creditor by the surety, the surety would be subrogated to the right of the creditor. In fact, the Supreme Court in the decision in *Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another*, had an occasion to deal with this aspect and in the course of its judgment, the Supreme Court, among other things, has held as under at page 298 of AIR SC:

"It is the duty of the surety to pay the credit amount. On such payment, he will be subrogated to the rights of the creditor u/s 140 of the Indian Contract Act, and he may then recover the amount from the principal."

10. It is also necessary to bear in mind that the provision of Section 69 of the Indian Contract Act also will have a bearing with reference to the principal relating to subrogation though, there is a vital distinction between the right of subrogation embodied in Section 92 of the T.P. Act and the right of contribution embodied in Section 69 of the Indian Contract Act. It is pointed out in the decision in *Amar Singh and Others Vs. State of Madhya Pradesh*, pressed into service by Sri Tarakaram, learned Counsel for the respondents that Section 69 of the Indian Contract Act confers a personal right, whereas the right of subrogation involves equitable charge on the property. It is not necessary to dilate on that respect at this stage. I have made a brief reference to Section 69 of the Indian Contract Act since the same, according to me, will have some bearing while dealing with the right of subrogation. At this juncture only, it is necessary to refer the provisions of Order 22, Rule 10 of CPC since the said provision relates to the rights of the persons mentioned therein to continue the suit. O. 22, R. 10 of CPC reads as under:

"Procedure in case of assignment before final order in suit-

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

A careful perusal of the aforesaid provision would go to show that before the suit filed by one can be continued by the other, there should be, during the pendency of the suit, either an assignment or creation or devolution of any interest in the suit property. It will suffice if it is borne in mind at this juncture that before the said provision can be called in aid one of the three events referred to in the said provision should take place "during the pendency of the suit". Whether the said provision is attracted to the facts of the instant case will be considered later.

11. The brief discussion relating to the law of subrogation and the incidental

aspects relating to the same should not leave any doubt, as regards as to when subrogation takes place. The facts on the basis of which the right of subrogation is founded by the instant respondents 1 to 5 are already referred to earlier. Even at the risk of repetition it would be convenient to mention here that the instant respondents 1 to 5 were the sureties to the loan taken by defendant 1 Kadamba Sugar Industries Pvt. Ltd. Further it can also be held that a mortgage was created towards security for the loan, by way of deposit of title deeds. Further, it can also be held as having been established that defendants 2, 4 and 6 to 8 who were the sureties made the payment during the pendency of the final decree proceedings.

12. It is in the context of the aforesaid facts the question as to whether the instant respondents 1 to 5 have the right of subrogation asserted by them.

13. Shri K.I. Bhatta, learned Counsel, for the appellants submitted that in the instant case the mortgagee, that is to say, the Corporation Bank had filed a suit which culminated in a preliminary decree and if the decretal amount is paid in full discharge, the decree gets exhausted and that therefore there remains nothing to enforce with the result, the question of subrogation does not arise at all. In this connection, the learned Counsel has relied on the decision of the Privy Council in Gopi Narain Khanna v. Babu Bansidhar 32 Indian Appeals 123. The learned Counsel further contended relying on the decision in Babu Lal Ray and Others Vs. Bindhyachal Rai and Others, that when the preliminary decree was passed by the Court in O.S. No. 8/1981 the mortgage merged in the decree and when the decree was satisfied the question of enforcing the charge did not arise at all and that therefore, para 1 of Section 92 of the T.P. Act cannot be called in aid at all. In other words, what Sri K.I. Bhatta, learned Counsel for the appellants submitted is that the payment of money after the decree is passed will make difference to the question relating to subrogation and the matter would have been otherwise had mortgage money been paid earlier to the filing of the decree. Support is also sought from the observations made by the Supreme Court in Prithi Nath Singh and Others Vs. Suraj Ahir and Others, .

14. In sum, the contention of the learned Counsel with reference to this aspect is the right of subrogation embodied in Section 92 of the T.P. Act is not available to respondents 1 to 5.

15. At this juncture, it is necessary to bear in mind the clear distinction between the substantive right of subrogation and the modus operandi to be adopted to enforce the said right. Whether the said decision will be of any assistance to the appellants to contend that the remedy of respondents 1 to 5, if at all, is by way of a separate suit can more appropriately be considered under Point No. 2 raised for decision. At this stage it would be convenient to confine the discussion to the question as to whether the said decisions would be of any assistance to contend that in the facts and circumstances of this case, respondents 1 to 5 did not acquire the right of subrogation.

16. In Gopi Narain Khana's case 32 Ind Appeals 13 the point involved in essence was as to whether a payment made by puisne incumbrancer of the decretal amount relating to the decree passed in a suit between the first mortgagee and the mortgagor, would result in the transfer of rights and powers of the first mortgagee to the puisne mortgagee u/s 74 of the T.P. Act (as it stood before 1929 Act) and would revive a decree which has been discharged and whether a suit filed by such puisne incumbrancer for enforcing his right was barred under S. 244 of C.P.C. (as it stood next before 1908 Code). The subordinate Judge had passed a decree in favour of the puisne incumbrancer in a suit filed by him. The High Court reversed the same on the ground that the suit was barred under S. 244 of CPC and the remedy of the puisne mortgagee was an application for foreclosure in the execution department. The Privy Council sitting in judgment over the same observed as under:

"Their Lordships cannot agree with the learned Judges of the High Court that the respective rights of Gaya Prasad and the respondent consequent on the redemption by the former of the first mortgage on Patara, could have been worked out in execution of the decree of December 22, 1894, made in suit No. 123 of 1893, and they are of opinion that the order of Nov. 6, 1897, made by the Subordinate Judge on Gaya Prasad's application to execute that decree was correct. Foreclosure is by the decree directed only in the event of the sum named not being paid into court on or before the prescribed date. And their Lordships think that on payment of Gaya Prasad of the sum into court before the expiry of the enlarged time, and acceptance of that sum by the plaintiffs, the decree was spent and became discharged and satisfied. There was, therefore, nothing left to be done in the execution department. It is true that Gaya Prasad, having made that payment (as he had the right to do), acquired under S. 74 of the Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged. Even if that were not so, their Lordships fail to see how the respective rights of Gaya Prasad, as owner of the first mortgage and half owner of the second mortgage, and the respondent as owner of the other moiety of the second mortgage could have been worked out without additions to the decree which the Court in executing the decree had no power to make. They are, therefore, of opinion that a new decree was required for the purpose, and S. 244 of the CPC was not a bar to the present suit.

The learned counsel for the respondent, no doubt, was conscious of this difficulty, and he contended alternatively that Gaya Prasad might have obtained the relief to which he was entitled in the suit of the second mortgagee (No. 122 of 1893). But Bansidhar and Gaya Prasad were co-plaintiffs in that suit, and it is equally difficult to see who the rights of the plaintiffs inter se in respect of the first mortgage Patara (which was not in question in that suit) could have been worked out in the decree in suit No. 122 of 1893."

A careful perusal of the observation made by the Privy Council would go to show

that the same will not be of any assistance to the appellants to contend that the instant appellants do not get the right of subrogation. In fact, the underlined portion of the observations of the Privy Council culled out hereinabove, would negative such a contention. Whether the rest of the portion of the observations relating to the remedy of sub-rogation is of any assistance to the appellants can be conveniently considered while dealing with point No. 2.

17. In *Babu Lal Ray and Others Vs. Bindhyachal Rai and Others*, the Patna High Court has specifically held that a puisne mortgagee paying of a decree on a prior mortgage can claim the right of subrogation, though it is held therein that such a right will have to be enforced by way of a suit. It will suffice if it is observed that the said observation also would not be of any assistance to the appellants to contend that there is no right of subrogation at all to respondents 1 to 5.

18. In *Prithi Nath Singh and Others Vs. Suraj Ahir and Others*, the Supreme Court was considering the effect of payment of mortgage money by a mortgagor to a usufructuary mortgage, with reference to the provisions of Section 58(d), and 62 of the T.P. Act. The Supreme Court, among other things, has held as under at para 4:

"Whether the mortgage money is paid by the mortgagor to the mortgagee, there does not remain any debt due from the mortgagor to the mortgagee, and therefore the mortgage can no longer continue after the mortgage money has been paid. The transfer of interest represented by the mortgage was for a certain purpose, and that was to secure payment of money advanced by way of loan. A security cannot exist after the loan had been paid up. If any interest in the property continues to vest in the mortgagee subsequent to the payment of the mortgage money to him, it would be an interest different from that of a mortgagee's interest. The mortgage "as a transfer of an interest in Immovable property for the purpose of securing payment of money advanced by way of loan must come to an end on the payment of the mortgage money."

In para 5 it is further observed as follows:

"When the mortgage money has been paid up, no question of appropriating the rents and profits accruing from the property towards interest or mortgage money can arise. It is clear therefore that on the payment of the mortgage money by the mortgagor to the mortgagee the mortgage comes to an end and the right of the mortgagee to remain in possession also comes to an end."

A perusal of the aforesaid observation would go to show that the same does not have bearing on the facts of this case. The Supreme Court was considering the question relating to the effect on mortgage on payment of mortgage money by the mortgagor. The question relating to subrogation obviously did not arise at all, as indeed it could not have arisen. It was a case where the mortgage money was paid by the mortgagor, It is significant to notice here that in terms of S. 92 of the T.P. Act the mortgagor is excepted from the operation of the provision of S. 92 of the T.P. Act. Under these circumstances, it is clear that the decisions in *Prithi*

Nath Singh's case also is not of any assistance to the appellants to contend that respondents 1 to 5 did not acquire the right of subrogation. Whether the said decision will have any bearing in connection with point No. 2 will be considered at the appropriate stage.

19. In the instant case, it is seen that all the requirements reflected in S. 92 of the T.P. Act are in existence. Further even in the light of the observations made in Gopi Narain Khanna's case by the Privy Council the fact that mortgage amount was paid after the preliminary decree was passed, will not make any difference to the right of respondents 1 to 5 for subrogation. In this view of the matter, it is not necessary at this stage to refer to the other decisions cited by Shri K.I. Bhatta or Sri Tarakaram since according to me they would appropriately arise for consideration in the context of point No. 2.

20. For the reasons stated hereinabove, I answer point No. 1 by holding that defendants 2, 4 and 6 to 8 (instant respondents 1 to 5) have the right of subrogation.

21. Point No. 2: Under this point the question for consideration is as to whether respondents 1 to 5 can enforce their right in the final decree proceedings initiated by the Corporation Bank or whether the said right will have to be enforced by filing a separate suit. In other words, the controversy revolves round the question as regards to how the said right can be enforced.

22. Sri K.I. Bhatta, learned Counsel for the appellants contended that when the amount under decree is paid by respondents 1 to 5, the decree stands satisfied and there is nothing which can be enforced in the final decree proceedings. It is pointed out by the learned Counsel that in the instant case, the decree is in Form 5A of Appendix D to the CPC and not in Form 9 of Appendix D. The attention of this Court is invited to para 5 of the "preliminary decree in Form 9" which reads as under:

"And it is hereby further ordered and decreed-

(a) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree, (in the same manner as the plaintiff might have done under clause 4 above) ....."

The learned Counsel pointed out that such a stipulation is conspicuous by its absence in the preliminary decree obtained by the Corporation Bank. Making his submission on the above lines, the learned Counsel contended that the remedy of respondents 1 to 5 if at all is by way of a separate suit. In support of his submission, the learned counsel apart from the decisions already referred to, viz., Gopi Narain Khanna's case 32 Ind Appeal 123, Babu Lal Ray and Others Vs. Bindhyachal Rai and Others, Prithi Nath Singh and Others Vs. Suraj Ahir and Others, , has also relied on the decisions in Kotappa v. Raghavayya, AIR 1927

Mad 631 Aravamudhu Ayyangar v. Abiramavalli Ayyah, AIR 1934 Madras 353; (Saiyed) Alam Ali Vs. Beni Charan and Others, Sundarreddiar v. Subba Koundan 24 MLJ 28 . The learned Counsel has also placed reliance on the observation made in Mulla's Transfer of Property Act (7th Edition) at page 588, to contend that it is well settled that a subrogee has to file a separate suit within the period of limitation prescribed under the Indian Limitation Act. The learned Counsel has also cited a decision in Monmohini Das Gupta Vs. Basanta Kumar Das Gupta and Others, to contend that persons whose title is contradictory to that of the original plaintiff cannot be added in his place or as parties under O. 1, R. 10, CPC.

23. On the other hand, Sri Tarakaram, learned Counsel for respondents 1 to 5 contended that the suit filed by the Corporation Bank was a suit for the recovery of the mortgage money by sale and that, therefore, in terms of Order 34, R. 4 a final decree will have to follow a preliminary decree as held by this Court in the decision in Ukay Pharma Vs. State Bank of India, . The learned Counsel contended that the suit filed by the Corporation Bank which was pending in final decree proceedings does not come to an end unless the final decree is passed. In this connection, he has also relied on the Commentary in Mulla's CPC (14th Edition) at page 1791, wherein it is observed that when the devolution is after the preliminary decree and before the final decree, the provisions of O. 22, R. 10, CPC would apply. Support is also sought from the observations made by the Supreme Court in Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass (Deceased) through his Chela Shiam Dass, The learned Counsel, Sri Tarakaram, relying on the decision in AIR 1940 38 (Privy Council) contended that the payment made by the respondent does not result in redemption of property. Reliance is also placed on the decision in Sushil Kumar Sen Vs. Ram Chandra Sharma (deceased by L. Rs.), . Continuing his submission, the learned Counsel contended that in the case of subrogation u/s 92 of the T.P. Act, the mortgage that is redeemed is not extinguished but is regarded as assigned to the subrogee. In this connection, he has placed reliance on certain observations made in the decision in AIR 1942 111 (Nagpur) It is further contended by the learned counsel with reference to the decision in AIR 1933 163 (Nagpur) that respondents 1 to 5 are entitled to be subrogated as plaintiffs. It is pointed out by the learned counsel that in the said cast, Gopi Narain Khanna's case is referred to and is explained. Reliance is also placed on the decision in AIR 1928 145 (Nagpur) in support of the same submission. The learned counsel further contended that O. 21, R. 2, C.P.C. only applies in "execution" and in the case of mortgage decree for sale execution begins only after the final decree is passed. In this connection, he has relied on the decision in AIR 1945 152 (Privy Council) It is, therefore, contended by the learned counsel for respondents 1 to 5 that the decisions cited at the Bar by the other side touching upon the bar of inter se dispute between the person who has redeemed the mortgage and the mortgagor, in the execution department has no application to the facts of the instant case at all since according to Sri Tarakaram stage of execution did not commence in the instant case at all. The learned counsel has also placed reliance on the decision

in *The Coorla Spinning and Weaving Mills Company Limited Vs. Vallabhdas Kallianji*, in connection with the effect of payment after decree. According to the learned counsel, the effect is as that of assignment without an instrument. Reliance is also placed on certain passage particularly at pages 484 and 486 of "Law of Mortgage" by Rashbehary Ghose.

24. The learned counsel also placed reliance on the decision in *C. Lakshmiah Setty v. Guruswamy Aradhya* AIR 1964 Mys 157, in support of his contention that respondent 1 to 5 deserve to be transposed as plaintiffs. He has also placed reliance on certain other decisions which can be conveniently referred to herein below in the course of further discussion. Basing his submissions on these lines, Sri Tarakaram, learned counsel for respondents 1 to 5 contended that the order passed by the lower Court cannot be found fault with.

25. Sri K. I. Bhata, learned counsel for the appellants by way of reply submitted that the subrogation does not have all the attributes of assignment. In this connection, the learned counsel has placed reliance on the decision in *Lakshmi Pilla Subhadra Amma and Another Vs. Easwara Pillai Velayudhan Pillai and Another*, Dilating on this aspect, the learned counsel argued that the subrogate does not get all the rights of an assignee. It is also pointed out by Sri K. I. Bhatta, learned counsel for the appellants that the decision in AIR 1933 163 (Nagpur) has no application to the facts of the case in that in the said case in the preliminary decree itself there is a stipulation to the effect that if defendant 2 pays the decretal amount he can continue the proceedings. It was pointed out by the learned counsel that the preliminary decree was in Form No. 9 in the said case. The learned counsel, in substance, contended that having regard to the fact that the mortgage merged in the decree and once when the amount is paid the decree itself stands discharged and that, therefore, the question of doing anything further in that behalf does not arise at all.

26. I have given my anxious consideration to the submissions made by the learned counsel on either side. It is seen that the application filed by the instant respondents 1 to 5 before the lower Court purports to be one under O. 22, R. 10, C.P.C. The said application is filed as an LA. in FDP No. 2/87. The crux of the question in this context, therefore, is as to whether respondents 1 to 5 fall within the compass of O. 22, R. 10, C.P.C. As pointed out earlier, the submission made by Sri K. I. Bhatta, learned counsel for the appellants is that the preliminary decree passed in O.S. No. 8/81 is spent up on the payment of the amount by respondents 1 to 5 and that, therefore, there is nothing to be continued in this suit at O.S. No. 8/81. At this juncture, it is necessary to bear in mind the ingredients of O. 22, R. 10, C.P.C. Before the said provision can be called in aid, it is necessary that the suit must be pending. If the suit is not pending it is obvious that the question of continuing the suit does not arise.

Further during such pendency there should be either an assignment creation or devolution of an interest in the suit, to be more precise, in the subject matter of the suit. It is therefore necessary to probe as to whether respondents 1 to 5

satisfy all the requirements of O. 22, R. 10, C.P.C. In the instant case, the decree that was passed by the lower Court in O.S. No. 8/81 is a preliminary decree. The suit in question was one for the recovery of the amount by the sale of the mortgage property. By the said decree, the defendants were granted six months time to deposit the amount mentioned in the decree. It further stipulates that in case, the defendants fail to deposit the amount the plaintiff-Bank is entitled to apply for a final decree for the sale of hypothecated machineries shown in Schedule "A" and Immovable properties shown in Schedules "C" and "D" for realisation of the entire suit claim. The question to be considered is as to whether the payment of the amount by respondents 1 to 5 will enable them to continue the suit in FDP or whether the suit whether away on such payment.

27. In Gopi Narain Khanna's case, 32 Ind App 123, the point involved was as to whether the payment made by the puisne incumbrancer the decretal amount decreed in the suit between the mortgagor and the mortgagee would result in the transfer of rights and powers of the first mortgagee under S. 74 of the Transfer of Property Act (as it stood before 1929 Act) and would revive the decree which has been discharged and whether the suit filed by such puisne incumbrancer for enforcing his right u/s 74 of the T. P. Act was barred under S. 244 of the CPC (as it stood next before 1908). In fact, the subordinate Judge had decreed the suit in the said case. However, the High Court reversed the same. The Privy Council took the view that when the decree is paid up, the dispute inter se between the incumbrancer who redeems the mortgage and the mortgagor cannot be decided in the execution department. Their Lordships observed that the payment of the money in Court before the expiry of the enlarged time and acceptance of that sum by the plaintiffs, the decree was spent and became discharged and satisfied and there was nothing left to be done in the execution department. I have culled out earlier, the observation of the Privy Council in para 16 (at P. 17) of this judgment. It is therefore not necessary to cull out the same here again.

28. A careful perusal of the observations made by the Privy Council in the context of the facts of the said case, are clearly distinguishable. In the first place, it is significant to notice here that the said decision was rendered in the year 1905 before the CPC (Act 5 of 1908) came into force. It is necessary to notice that the modus operandi to be adopted in a suit to enforce a mortgage as embodied under O. 34, C.P.C. (Act 5 of 1908) was not in vogue at that time. Further the facts of the said case would go to show that on June 22, 1898 a minute was filed in the suit in which it was stated that a decree absolute for foreclosure had been made in the suit of the second mortgagee. In that context, what remained to be done was the execution. In that context, the Privy Council made the observations which it did and which are culled out hereinabove in the context of the said facts. It is also necessary to point out here that the Privy Council had no occasion to consider the provisions of O. 22, R. 10, C.P.C. (Act 5 of 1908). Further, the dispute in that case was between the puisne incumbrancer and mortgagor. In the instant case what has arisen for consideration is the

dispute between the sureties to the mortgage debt on the one hand and the mortgagor on the other. It is necessary to bear in mind that though a puisne mortgagee redeeming prior mortgage, a co-mortgagor redeeming the mortgage, the mortgagor's surety redeeming the mortgagee and the purchaser of equity redemption are all the persons who are entitled to the right of legal subrogation covered by para 1 of S. 92 of the T.P. Act and though their rights are similar in certain respects, it may not be correct to hold that their rights are the same. It is significant to notice here that the surety under S. 140 of the Contract Act upon payment or performance is invested with all rights of the creditor as against the principal debtor. I will deal with this aspect in greater detail little later. I have referred to the aforesaid aspects at this stage only to point out that as to how the sum total of the facts referred to hereinabove are clearly distinguishable from the facts in Gopi Narain Khanna's case.

29. In Babu Lal Ray and Others Vs. Bindhyachal Rai and Others, the question for consideration was as to whether a puisne mortgagee paying of a decree on a prior mortgage had the right of subrogation and within what time he is required to bring the suit to enforce his right. It is held therein that when the mortgage had merged in the decree a suit by the subrogee for contribution should be treated as a suit to enforce the right under the decree which he has paid up. It is significant to notice here that it was a case where the decree was put in execution. It is obvious that it was not a case where the question for consideration was as regards the rights and remedy of a subrogee who has paid the amount under a preliminary decree, much less, a case where the amount was paid by a surety -- subrogee.

30. In the decision in AIR 1926 84 (Nagpur) it is pointed out that the rights acquired by the puisne mortgagee can be enforced by a separate suit and Art. 132 of the Limitation Act (1908 Act) would apply. In fact, Sri K. I. Bhatta, learned counsel for the appellants with reference to this decision, which is a Bench decision, contended that the decision in AIR 1928 145 (Nagpur) and AIR 1933 163 (Nagpur) which are not Bench decisions run, in substance, contrary to the Bench decision in Suryabhan's case. It will have to be seen as to whether the learned counsel is right in making the said submission. In AIR 1928 145 (Nagpur) among other things, it is observed as under :

"It has been urged on their behalf that the lower Court had no power under O. 1, R. 10, C.P.C., to make the transposition it did in the circumstances of the case. I have been referred to the well-known decision of their Lordships of the Privy Council in Gopi Narain Khanna v. Babu Bansidhar (1905) 27 All 325 : 32 IA 123 : ALJ 336 : 8 Sar 799 , and it has been suggested that, on the strength of this case, the District Judge's procedure in allowing the transposition of the non-applicant was wrong and illegal. It has been suggested in the first instance that, in the circumstances, the final decree which followed as a result of the District Judge's order is at variance with the preliminary decree; that the preliminary decree only directed payment by the defendants to the plaintiffs and that there

was no direction inter se for foreclosure as between the defendants. In addition to the Privy Council case quoted above the applicants have relied on a decision of Banerji and Gokul Prasad, JJ., reported in Asharfi Lal Vs. Musammatt Nannhi and Others, as well as on a decision of the Madras High Court reported in Kotappa v. Raghavayya, AIR 1927 Mad 631 These decision however, seem to me hardly to the point in the present instance. At the time the transposition complained of was allowed by the District Judge, it is clear that the mortgage suit was still pending. There was no completed decree in the case, and the preliminary decree might be described as an inchoate one of Digamber v. Ganpat 1916 12 NLR 50 : 33 IC 496. The Privy Council decision quoted above was, needless to say, passed before the present CPC was enacted. and the considerations, on which their Lordships relied in coming to the decision they did in that case seem to me no longer to hold good. With all defence it would appear to me that the Judges of the Madras High Court, who decided the case just quoted, ignored the fact of the all important change of procedure which had been introduced as regards the decree final in mortgage suits by the new Civil Procedure Code. The Privy Council case quoted is, in my opinion, inapposite for the simple reason that their Lordships only held therein that the subsequent mortgagees could not be substituted as decree-holders for the purpose of carrying out the execution of the decree.

In the present case, the question is whether the non-applicant can be substituted as a plaintiff for the purpose of obtaining the final decree in the case. For my own part, I entertain no doubt but that, both under O. 1, R. 10, or under O. 22, R. 10, Civil P.C., the substitution of the present non-applicant as a plaintiff was permissible and indeed was the logical consequence of the provision contained in S. 74, T.P. Act. I am aware of the Bench decision of this Court in AIR 1926 84 (Nagpur) but that case is not really to the point. It cannot be denied that the present non-applicant had a right to bring a separate suit, but it seems to me that he also had the alternative of adopting the procedure he did, so long as that was done before the decree final had been passed. Reading, in short, S. 74, T.P. Act, with the rules of the Civil Procedure Code, quoted above, I am of opinion that the District Judge was correct in allowing the transposition of parties he did. There is no question in the present instance of the non-applicant tacking on his own mortgage to the decree in suit. All he acquires thereunder by his payment of the decretal amount is the right which the original plaintiffs held against the defendants.

For these reasons I am of opinion that the order of the District Judge is a correct one, and the present application is dismissed. The applicants must bear the non-applicant's costs."

A perusal of the said decision would go to show that in the said case, the decision of the Privy Council in Gopi Narain Khanna's case has been explained. The observations are there as they are and they are self-explanatory and it is not necessary to dilate further. It will suffice if it is stated at this stage that the

decision in Surbhan's case is referred to and explained in Balaji's case. Similarly, in Yamunabai's case also both the decisions viz., Gopi Narain Khanna's case and Suryabhan's case are referred to. In the said case, the decision in Balaji's case is followed. At this juncture, it is necessary to see as to whether the decree in Yamunabai's case was in Form No. 9. However, on a perusal of the facts in the said case stated in the preamble portion of the judgment, I find that the preliminary decree was not in Form 9, Appendix D to the Schedule of CPC though both Yamunabai and Maroti were given the right to redeem. Among other things, it is observed as under:

"Form 9, Appendix D to Schedule I, C.P.C. was not used possibly because Maroti the subsequent mortgagee had not asked for the determination of the sum due in respect of his mortgage." In the context of the aforesaid observations it appears to me that the submission made by the learned counsel for the appellants with reference to Form of decree used in the said case is not tenable. In the said case, it is further observed in para 2 therein as under:

"The appellant's counsel relies on the decision of the Privy Council in Gopi Narain v. Bansidhar (1905) 27 All 325 : 32 IA 123 : 8 Sar 799 (PC) , Their Lordships there held that, on payment of the sum due into Court and acceptance of that sum by the plaintiffs, the decree was spent and became discharged and satisfied. They added: "There was therefore nothing left to be done in the execution department." But, as remarked by Findlay, JC in AIR 1928 145 (Nagpur) this decision was passed at a time when a mortgage suit was decided by what is now the preliminary decree, and the subsequent procedure was taken in the execution department. Under the present law the Court has to pass a final decree, and it seems clear that the Judge is not functus officio when the payment is made and accepted. As is stated in Digambar v. Ganpat (1916) 12 NLR 50 : 33 IC 496 , a mortgage suit is pending, at any rate, until a final decree is passed. The Judges, who decided AIR 1926 84 (Nagpur) had not to consider this question; if Maroti had not chosen to ask that he should be substituted as plaintiff, it may well be that he could subsequently bring a separate suit. Now the law appears quite clear. Under S. 92, T.P. Act, a subsequent mortgagee, after redeeming the prior mortgage, is subrogated to the rights of that mortgagee, the interest of the prior mortgagee has devolved upon him, and the suit may by leave of the Court be continued by him against the mortgagor. The position is the same as that which arises when a plaintiff transfers his rights pendente lite. The fact that he was originally a defendant cannot affect the power of the Court; he is omitted from the list of defendants, as no further relief against him is claimed. The substitution was proper, and the appeal must be dismissed. Costs on the appellant. Counsel's fee Rs. 40/-."

I have referred to the aforesaid decision in greater detail having regard to the fact that both those decisions, viz., Gopi Narain Khanna's case 32 IA 123 and AIR 1926 84 (Nagpur) which are relied on by the learned counsel for the appellants are referred to and explained.

31. In the decision in *Kotappa v. Raghavayya*, AIR 1927 Mad 631 it is pointed out that where a prior mortgagee obtains a decree on his mortgage and the puisne mortgagee pays the decretal amount thus not allowing the mortgaged property to be sold, the puisne mortgagee gets a charge only by virtue of S. 74 of the T.P. Act (as it stood before 1929 Act) and bound to enforce his right within the period of limitation allowed to the prior mortgagee i.e., 12 years from the date of his mortgage. In the said case, *Gopi Narain Khanna's* case is followed. It appears to me that the said decision also has no application to the facts of this case. In fact, this decision is referred to in AIR 1928 145 (Nagpur) and I am inclined to hold that the same is not applicable to the facts of this case. It is not clear as to whether the decree in the said case was not final.

32. In the decision in *Aravamudhu Ayyangar Vs. Zamindarini Srimath Abiramavalli Ayah by Power Agent M. Chinnaswami Naicker and Others*, their Lordships of the Madras High Court were considering the impact of S. 52 and 100 of the T.P. Act (1882). Among other things, it is pointed out that when the decree was paid off the question of execution does not arise, A careful perusal of the facts of the said case, would indeed go to show that a question like the one which has arisen in the instant case had not arisen for consideration in the said case. The question as to what would happen if the amount is paid after the preliminary decree and before the final decree particularly by those who are entitled to the right of subrogation was not a point which fell for consideration or which was considered. In *Sundar Reddiar v. Subbiah Koundan*, 24 Mad LJ 28, the Madras High Court has held, among other things, as under:

"When the plaintiff instituted O.S. No. 412 of 08 he had not discharged Subba Reddi's mortgage. He had then a valid and enforceable mortgage only to the extent of the consideration paid by him for his mortgage bond. When he subsequently paid off Subba Reddi's mortgage he became entitled under S. 74 of the Transfer of Property Act to the rights of Subba Reddi under his mortgage. His cause of action to enforce that right was distinct from his right on his mortgage bond. We agree with the learned District Judge in holding that the present suit is not barred by S. 11 or O. 2, Rr. 1 and 2 of the Civil Procedure Code. We also agree in holding that the plaintiff's proper remedy was not to proceed in execution on the mortgage decree in favour of Subba Reddi but to institute a fresh suit on the right acquired by him by paying off Subba Reddy. (See *Gopi Narain Khanna v. Bansidhar* (1905) II. R 27 A 325."

33. A perusal of the same also goes to show that the same is not to the point which has arisen in this case.

34. In *(Saiyed) Alam Ali Vs. Beni Charan and Others*, it is pointed out that the payment of a mortgage decree confers upon the person who pays it off a statutory right which is not identical with the rights of an assignee of the mortgagee itself, but is an acquisition of a fresh charge enforceable within the period of limitation. I may point out here that the observation made by the Full Bench of Allahabad High Court with reference to the meaning of assignment does

not appear to apply to the payment made by a surety before the final decree is passed. Why it is so will be dealt with later. It will suffice if it is pointed out that a question similar to the one that has arisen for consideration in this case did not arise for consideration in the said case.

35. I have referred to the aforesaid decisions cited at the Bar by the learned counsel Sri K. I. Bhatta with a view to show as to how and under what circumstances and facts, the said decisions were rendered. It is needless to say that a ratio of a case will have to be understood in the light of the facts leading to the ratio. Often like facts appear to be similar, but there are always shades of difference in certain crucial aspects. I will presently show as to how the present case has facts peculiar to itself.

36. In the affidavit filed by Devaru Ganapati Hegde to the application at I.A. II, it is clearly stated that defendants 2 to 8 (appellant 2 and respondent 1 to 6) stood sureties and guaranteed repayment of the loan contracted by Kadamba Sugar Industries Pvt. Ltd. Further averments therein go to show that the assets of defendant 1 (appellant 1) were hypothecated and equitable mortgage was created by depositing of title deeds in respect of lands and buildings. The copy of the decree discloses the properties which were hypothecated and mortgaged. It is significant to notice that in the objection filed to I.A. No. I on behalf of defendants 1 and 3, which is signed by defendant 3, it is stated that they are not aware of the fact that defendants 2 to 8 stood sureties and guaranteed repayment of loan contracted. I have, therefore, no hesitation to hold that there is no specific denial by defendants 1 to 3 in this behalf. Further, at the time of hearing of this appeal, no arguments were advanced in this behalf. Hence, there should not be any difficulty in holding that defendants 2 to 8 are the sureties to the mortgage debt. It is further seen that the preliminary decree was passed on 29-6-1986. The contents of the decree relevant for consideration are already culled out earlier hereinabove. It is not in dispute that an application for final decree was filed by the Corporation. It is also not disputed before me that defendants 2, 4, 6, 7 and 8 (respondents 1 to 5) paid the amount of Rs. 7.5 lakhs to the plaintiff-Corporation Bank on 14-12-1988, which the Bank accepted towards full discharge. It is also seen from the order of the lower Court that on 31-7-1989 the learned counsel for plaintiff Bank passed a memo stating that matter was settled for Rs. 7.5 lakhs and accordingly defendants 2, 4, 6, 7 and 8 paid the said amount and that therefore, the decree was fully satisfied. Thereafter, that is to say, on 7-2-1989, defendants 2, 4, 6, 7 and 8 filed the application under O. 22. R. 10, C.P.C. seeking leave to prosecute the present final decree proceeding by transposing them in the place of original decree-holder that is to say, the Corporation Bank. It is not in dispute that the final decree proceeding is pending. In fact, in the appeal memo under ground (b) it is stated as under :

"That means after the payments of the decretal amount and acceptance by the plaintiff Bank, decree was fully discharged and satisfied, only formal final decree

has to be drawn, declaring under plaintiff is debarred to redeeming the hypothecated property, or ordering the plaintiff to deliver the hypothecated agreements referred to, in the preliminary decree etc."

It appears that the word "agreement" is wrongly typed out for "assets".

37. From what is stated hereinabove, it is clear that a final decree in one form or the other was required to be drawn even according to the showing of appellants. Further O. 34, R. 5, C.P.C. also makes it clear. It reads as under :

"Final decree in suit for sale-

(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of R. 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order-

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,--

(b) ordering him to transfer the mortgaged property as directed in the said decree, and, also, if necessary.-

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent, thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of R. 4."

From what is stated hereinabove, it is clear that the suit at O.S. No. 8/1981 did not reach its terminal point. It is well settled that a mortgage suit is deemed to be pending till a final decree is passed. As pointed out earlier, the amount under the preliminary decree was paid by the sureties, after the preliminary decree was passed, and during the pendency of the suit. If that be so, whether they are not entitled to continue the suit from the date of the payment of the amount.

38. It is necessary to remember here that the surety stands in a unique position.

He is such a great favourite in law that he is entitled to the benefits of the securities although he is not aware of their existence. Under S. 140 of the Indian Contract Act, when a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

39. It is necessary to notice here that the Legislature in its wisdom has employed the term "invest" in S. 140 of the Contract Act. The High Court of The Coorla Spinning and Weaving Mills Company Limited Vs. Vallabhdas Kallianji, has, among other things, held as under :

"I have not been referred to any authority on S. 140, but the word "invested" seems to be a strong one and coming as it does in a statute, I do not see why in a case like the present it should not operate as a transfer to the surety of the creditors" rights without the necessity of any written assignment."

It is therefore, clear that when the debt of the mortgagee is paid by the surety all the rights of the creditor immediately vest in the surety. As pointed out in AIR 1928 145 (Nagpur) the preliminary decree in a mortgage suit is an "uncompleted decree" and inchoate one. In that context, if the surety pays the amount payable by the preliminary decree, in substance he pays the mortgage debt, which is in the process of partaking the complexion of a completed decree. It is needless to say that a preliminary decree in a mortgage suit cannot be executed unless it is made final as provided for in O. 34, R. 5, C.P.C. It is exactly for this reason that a preliminary decree is an inchoate one. If therefore the surety at this stage pays the amount what is paid in substance is a debt which has not ripened into full decree. Further as pointed out by the Bombay High Court, there is a transfer in law in such a situation without the necessity of a deed of assignment.

40. It is exactly for this reason that the facts in the case in (Saiyed) Alam Ali Vs. Beni Charan and Others, can be distinguished. Even at the risk of repetition it is necessary to point out here that Alam Ali's case was not one where a situation like the one involving the right of a surety had come up for consideration. I have pointed out hereinabove as to how the word "invest" in S. 140 of the Contract Act would make all the difference to the issue in question. It is therefore clear that when the sureties in this case (respondents 1 to 5) paid the amount "during the pendency of the suit", there is by operation of law an assignment in their favour. I have already pointed out earlier that the mortgage debt had not completely ripened into a complete decree. Under these circumstances, I am of the view that there is an assignment by operation of law. The provisions of O. 22, R. 10, C.P.C. are already referred to. Under the said provision assignment is one of the modes by which the assignee or transferee gets the right to continue the suit. There is no reason as to why a restricted meaning should be given to the word "assignment" employed in O. 22, R. 10, C.P.C. if on a proper reasoning it can be held that there is assignment by operation of law. I would observe that the observations made in AIR 1928 145 (Nagpur) the observations made in AIR

1933 163 (Nagpur) will apply on all force to a case of a surety standing in the situation like the one in hand though it is not necessary for this Court to decide as to whether the said logic would hold good in respect of other clauses of subrogates covered under S. 92 para 1 of T.P. Act. Further it is not as if the defendants in a suit cannot be transposed as plaintiffs at all. It is to dispel any doubt in this behalf Sub-Rule 6 is added to O. 1, R. 10, C.P.C. by High Court amendment viz., ROC.2526/.1959. The said provision would go to show that the defendants can be transposed as plaintiffs. Sri K.I. Bhatta, the learned counsel for the appellants is right in contending that persons with contradictory titles cannot be transposed to the same position. However, when the sureties made the payment or to be more precise, paid the debt which was in the process of a completed decree, obviously, thereafter there could not be any conflict of interest between the creditor and the sureties. Further it is significant to notice here that the legislature in its wisdom has provided in O. 22, R. 10, C.P.C. that continuation of the suit will have to be had with the leave of the Court. In other word"s, in a given case it is for the Court to give the permission or not. There may be cases where it is not possible to decide the disputes inter se on account of complexities arising out of or inherent in the transaction itself. In such cases it is certainly possible for the Court to direct the parties to separate suit. However, in a case like the one where all the parties who would have been proper parties and necessary parties if a suit were to be filed by the sureties are there before the Court and if it is possible to reasonably take a view that the sureties can be construed as assignees (without of course assignment deed as held by the Bombay High Court) there is no reason as to why the permission should be refused. It is necessary to bear in mind that the anxiety of the Court of course subject to the provisions of law should be to see that a litigation is cut short and the litigation is not lengthened and the ends of justice should be the main consideration.

41. In my view, taking into consideration all the circumstances, the conclusion reached by the lower Court with reference to the application at I.A. II filed by the instant respondents 1 to 5 cannot be considered to be wrong in the facts and circumstances of this case. I hasten to add here that though I have chosen to adopt certain reasons reflected in Balaji"s case and Yamunabai"s case, the same, in my view, will more appropriately apply to a case like the one in hand. I would like to make it clear here that it is not necessary for me to express any view a regards as to what would be the rights relating to the subrogates covered under S. 92, Para 1 of the T.P. Act, other than a surety.

42. In that view of the matter, it is not necessary to dilate on the decision in Laxmi Pillai"s case AIR 1977 Ker 149 cited at the Bar by the learned counsel for the appellants and briefly referred to earlier. In the view that I have taken it is also not necessary to refer to in greater details to the other decision cited at the Bar by Sri Tarekaram.

43. For the reasons stated there above the appeal is dismissed. In the facts and

circumstances of the case, I make no order as to costs.

44. Appeal dismissed.