

**(1935) 10 AHC CK 0004**  
**In the Allahabad High Court**

|                                                     |            |
|-----------------------------------------------------|------------|
| Khudawand Karim Khalesan-fi-sabil Allah and Another | APPELLANT  |
| Vs                                                  |            |
| (Babu) Narendra Nath and Another                    | RESPONDENT |

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**Date of Decision :** 03-10-1935

**Acts Referred:**

Contract Act, 1872 — Section 128  
Evidence Act, 1872 — Section 92  
Transfer of Property Act, 1882 — Section 82

**Citation :** AIR 1936 All 258

**Hon'ble Judges :** Niamatullah, J;Allsop, J

**Bench :** Full Bench

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## Judgement

Allsop, J.—This is a second appeal against an appellate decree passed by the learned District Judge of Bareilly. The appellant as described upon the record is the Almighty through Mt. Kaniz Fatma and Mt. Fakhr-un-nisa, but it is admitted that we may treat the appeal as having been instituted by the two ladies in their capacity as mutawallis of a wakf. It is the result of a suit for contribution arising out of a deed of mortgage executed in the year 1917 by Mt. Imtiaz Begam, Zia-ud-din and Pazal Ahmad in favour of Nand Ram. Zia-uddin was the son and Fazal Ahmad the brother of Mt. Imtiaz Begam. The property mortgaged consisted of a shop and a house belonging to this lady and a shop and a house belonging to Fazal Ahmad. Nand Ram instituted a suit on the basis of the mortgage. Fazal Ahmad set up the plea that he had signed the deed merely to accommodate the other mortgagors and that he was to be treated merely as a surety for them. The learned Subordinate Judge who decided the suit was of the opinion that it was not necessary for him to record any finding upon this plea because all the mortgagors were equally liable to the mortgagee whether Fazal Ahmad's allegation was true or not. He gave the mortgagee a decree against the mortgagors, but he did decide—that the property should be sold in two lots, that is that the property of Mt. Imtiaz Begam should be sold first and that the property of Fazal Ahmad should be sold only if the property belonging to Mt. Imtiaz Begam did not fetch a price which was sufficient to satisfy the decree.

After the decree was passed Mt. Imtiaz Begam paid Nand Ram one sum of Rs. 300 on 28th September 1922 and another sum of Rs. 1,600 on 21st August 1924. After that her house was auctioned and sold for a sum of Rs.1,005. This sum was sufficient to discharge the balance of the liability on the decree. Some time after that Mt. Imtiaz Begam died. Her heirs were Zia-ud-din and his sister. This sister also died and was succeeded by her two daughters who sold their interest in the property of Mt. Imtiaz Begam to Zia-ud-din. Zia-uddin then transferred half of the property to Babu Narendra Nath. Zia-uddin and Narendra Nath instituted the suit which has given rise to this appeal in order to recover from Fazal Ahmad's property his share of the money paid by Mt. Imtiaz Begam to the mortgagee and of the money delivered to the mortgagee after the sale of the house. In the meanwhile Fazal Ahmad had created a wakf of his property and the appellants were impleaded as defendants. They raised the same plea that Fazal Ahmad had raised in the previous suit they said in the written statement that

Fazal Ahmad did not borrow any money from Nand Ram, but in reality Imtiaz Begam and her son named Zia-uddin had borrowed the money; and inasmuch as Zia-uddin stood in need of money for the purpose of trade;

they also said that

the position of Haji Fazal Ahmad was merely as a surety, and he did not get any sum out of the mortgage-money,

that "Haji Fazal Ahmad had no necessity to borrow money" and that

he merely having regard to the relationship with Imtiaz Begam and Zia-uddin got his name entered in the mortgage-deed in the capacity of a surety for the satisfaction of Nand Ram.

2. The learned Subordinate Judge in the Court of first instance decided that these allegations were true and he dismissed the suit. In appeal the learned District Judge did not express any opinion upon the truth of the statements made by the mutawallis. He decided the appeal on the assumption that the statements were true. He applied the provisions of Section 82, T.P. Act, which says:

Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage.

3. The learned Judge says:

The section itself is very clearly worded and in the absence of a contract to the contrary a property subject to a mortgage is liable to contribute rateably to the debt secured by the mortgage. No such contract was even alleged in the written statement. Nor has, any attempt, been made to prove the existence of such a contract. It has been argued that as Fazal Ahmad was merely a surety, Section

82, T.P. Act, has no application to his property.

4. It seems to me that the learned Judge relied upon the fact that there is no clear allegation in the written statement that there was a specific agreement between the mortgagors themselves or between the mortgagors and the mortgagee. I think however that the intention of the defendants was clearly to allege that there had been an agreement between the three mortgagors that the money borrowed should go to Mt. Imtiaz Begam and Zia-uddin and that Fazal Ahmad should sign the deed merely in order to afford greater security to the mortgagee. That being so, the first thing which is to be decided is whether the finding of fact recorded by the learned Subordinate Judge was right or not. The appellants produced two witnesses who stated that there was an arrangement between the three mortgagors that Mt. Imtiaz Begam and Zia-uddin should receive the whole of the mortgage-money and that their property should in the first instance be liable for the debt. One of these witnesses is the person who identified the executants of the deed before the Sub-Registrar. Their evidence is corroborated by the fact that Zia-uddin in the year 1918, in the course of the suit, on the basis of the mortgage admitted that such an arrangement had been made. He entered the witness-box in this later suit to deny the existence of the arrangement, but in view of his previous admission, his statement is not worthy of belief. He produced one witness, but this man's evidence is of no value at all. It has been suggested in the course of arguments that Zia-uddin's admission is not evidence against the other plaintiff, Narendra Nath, but as Narendra Nath has acquired his interest in the property from Zia-uddin, there is no force in this suggestion. I have no hesitation in agreeing with the learned Subordinate Judge that the mortgagors did enter into the agreement which the defendants-appellants have set up. There is no necessity for remanding this case to the learned District Judge for a finding upon the question of fact, as there are sufficient materials before us to enable us to decide the matter for ourselves.

5. It has been argued on behalf of the respondents that the provisions of Section 92, Evidence Act, prevent the defendants-appellants from proving the agreement, as there is no mention of such an agreement in the deed of mortgage itself and the agreement would vary the terms of the contract of mortgage. The respondents rely upon the case of Muthukumaraswami Mudaliar v. Govinda Padayachi 1932 Mad 218, where the learned Judge in his judgment says:

If the mortgagors have undertaken certain obligations, for instance, when the severally owned item of the hypotheca shall be rateably liable, one mortgagor can no more set up an oral agreement against his fellow mortgagor, for the purpose of varying the terms of the document than he could as against his mortgagee.

6. The learned Judge mentions two decisions of this Court in *Mulchand v. Madho Ram* (1888) 10 All 421 and *Shamshul Jahan Begum v. Ahmad Wali Khan* (1903) 25 All 337. It was held in the earlier case that the words in Section 92, Evidence Act "between the parties to any such instrument" referred to the persons who

on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. This decision was followed in the later case. The learned Judge of the Madras High Court seems to have doubted whether these decisions were correct but he himself mentions that the agreement set up in the case before him was one between the mortgagee and the mortgagor, so that it was not really necessary for him to come to any decision upon this point. In any event I am bound to follow the decisions of this Court and even apart from authority, I think that in the present case the question of varying the contract does not really arise. The agreement upon which the appellants based their case was one between the mortgagors that Mt. Imtiaz Begam and Zia-uddin would take the whole of the money lent by the mortgagee and would be liable in the first instance to repay it while Fazal Ahmad would stand merely in the position of a surety. In other words, this was an agreement that there would be no right in Mst. Imtiaz Begam and Zia-Uddin to demand contribution from Fazal Ahmad if they paid off the money due to the mortgagee. This agreement could vary the contract expressed in the deed of mortgage only if there was some covenant in that deed that the mortgagors would be liable to contribution as between themselves. It is not alleged that there was any such covenant. It is not suggested that the right to contribution arose out of any contract between the mortgagors; it arose out of the statutory provisions contained in Section 82, T.P. Act. I cannot see how it can be argued that the agreement between the mortgagors is set up to vary the terms of the contract of mortgage when there was no covenant in the contract of mortgage upon the matter to which the other agreement relates. I have no doubt that it was open to the defendants-appellants to prove the existence of the agreement between the mortgagors if they could do so. The effect of the provisions of Section 82, T.P. Act, was dependent upon the non-existence of a contract to the contrary and it was, therefore, a question in issue whether such a contract existed or not.

7. I have based my argument upon the assumption that the agreement set up was one between the mortgagors alone, and that the mortgagee was not a party to it. The respondents have urged that the written statement, if it set up an agreement on the subject of contribution at all, set up one to which the mortgagee was a party. It seems to me that the defendants-appellants in their written statement never suggested that the mortgagee had agreed that he would proceed against Fazal Ahmad's property only if the other property was not sufficient to discharge the mortgagors' liability. I now come to another question of law. The respondents have argued that the agreement between the mortgagors, even if it is proved, is not "a contract to the contrary" within the meaning of that term as used in Section 82, T.P. Act. They have relied upon *Ramabhadrachar v. Srinivas Ayyangar* (1901) 24 Mad 85. In the head-note to that case it is stated that the Court held that the words "in the absence of a contract to the contrary" in Section 82, T.P. Act, applied to contracts between a

mortgagor and a mortgagee and that any agreement which was binding only as between the mortgagors was not "a contract to the contrary" within the meaning of the section. The words actually used by the learned Judges were:

Having regard to the principle upon which the equitable doctrine of contribution is based, as illustrated in the English authorities to which our attention has been called, it seems clear that an agreement binding only as between the mortgagors is not a contract to the contrary within the meaning of the section and that these words were intended to apply to contracts between mortgagor and mortgagee, contracts for example, under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of the properties liable in the first instance being insufficient.

8. I do not say that the head-note is incorrect but as it is expressed, it may perhaps lead to misconception, as the latter half of it may be overlooked. The learned Judges never said that a contract between the mortgagors would not be binding upon them; what they intended to say apparently was that a contract between the mortgagors alone would not run with the land so as to bind any assigns or transferees. That was a case where the property belonging to a joint Hindu family was mortgaged and there was a subsequent partition by which the mortgaged property was divided into four shares. At the time of the partition the members of the family who obtained those four shares agreed between themselves that the shares would equally bear the charge created by the mortgage. One of the shares was afterwards transferred to another person and that share was sold in execution of a decree on the basis of the mortgage. The proceeds from the sale were sufficient to discharge the whole of the liability. The transferee instituted a suit for contribution and the question arose whether he was bound to pay one-fourth of the mortgage-debt in respect of the value of the property which had come into his hands. The learned Judges held that he was not bound by the contract between his transferor and the other members of the family. They said in fact:

The contract as between the parties, the owners of the equity of redemption, is of course binding, but it is not a contract which binds their assigns.

9. The learned Judges never said that the contract as between the members of the family would not have been binding if one of them had sued the other for contribution after discharging the mortgage debt. I think, therefore, that this decision is, not authority for the wide proposition that in any case even when there has been no transfer, the agreement between the mortgagors alone would not be a contract to the contrary " within the meaning of Section 82, Transfer of Property Act,, so that the property even of the parties to the agreement would not be bound by it in the event of a suit for contribution in which no transferees or assigns were concerned. The respondents have drawn our attention to three cases of this Court in which the decision in *Ramabhadrachar v. Srinivas Ayyangar* (1901) 24 Mad 85 has been affirmed by this Court. These are *Charan Singh v. Ganeshi Lal* 1926 24 ALJ 401 *Muhammed Inamullah Khan v. Aisha Bibi* (1926) 24

10. In the first case the learned Judge, who delivered the judgment of the Court said:

It has been judicially held that the expression "a contract to the contrary" in Section 82 means a contract between the mortgagor and mortgagee: see the decision in Ramabhadrachar v. Srinivas Ayyangar (1901) 24 Mad 85 and if that is a correct statement of the law it follows that in the present case Section 82 is left to its full operations....

It would appear therefore that he was not saying definitely that the decision was correct.

11. In the second case, Mears, C.J., certainly did say:

It has been held in Ramabhadrachar v. Srinivas Ayyangar (1901) 24 Mad 85 that a contract to the contrary, referred to in Section 82, T.P. Act, means a contract between the mortgagor and the mortgagee. This decision had been approved of recently by a bench of this High Court in Charan Singh v. Ganeshi Lal 1926 24 ALJ 401.<

12. In both these cases however it was not necessary to consider the question at all because they were cases in which the mortgagee was attempting to rely upon a contract between the mortgagors alone, that is a contract to which he was no party and it was sufficient for the purposes of those cases to hold that a person cannot rely upon a contract to which he is no party. The case of Charan Singh v. Ganeshi Lal 1926 24 ALJ 401 was taken in appeal to the Privy Council, Ganeshi Lal v. Charan Singh 1930 ALJ 753. Their Lordships in delivering the judgment did not make any reference to the case of Ramabhadrachar v. Srinivas Ayyangar (1901) 24 Mad 85, nor did they rely upon the principle set forth in that case. "The appellants," they said:

bought subject to the mortgage and paid a price for the property on that footing, and their contention really amounts to this: that having paid for the property on the basis of its being subject to the mortgage they; ought now to be allowed to have the benefit of it free from the mortgage and that without making any payment towards the attainment of that satisfactory result.

13. The learned Subordinate Judge had relied on Muhammad Abbas v. Muhammad Hamid (1912) 9 ALJ 499 and referring to this case, their Lordships said:

The decision in the case to which the Subordinate Judge referred may be justified on the footing that in that case there passed to the party from whom the contribution was sought, the benefit of the contract by which the money was to be applied, so that he could say: "I have a contract which frees me from the liability to contribution which the section would otherwise impose upon me.

14. The case of Muhammad Abbas v. Muhammad Hamid (1912) 9 ALJ 499, was

one in which transferees of part of the mortgaged property relied upon an agreement between their transferors and the transferees of another part of the mortgaged property to resist the claim for contribution and were successful in so doing. I think therefore on a review of these authorities that it is not possible to lay down the wide principle which the respondents assert that in no case can a contract not between the mortgagor and the mortgagee affect the provisions of Section 82, T.P. Act.

15. The third case of this Court to which I have referred was one in which it was held that there was no contract at all on the subject of contribution between the mortgagors themselves or between the mortgagors and the mortgagee. The case of *Ramabhadrachar v. Srinivas Ayyangar* (1901) 24 Mad 85 was mentioned. The learned Judge said that the defendant would not have been able to resist the claim unless he set up a clear contract and added that "any such contract would have had to be a contract to which the mortgagee would have assented." In the circumstances of that case however it was not necessary to apply any such principle. It is necessary only to consider the result of the learned District Judge's decision to see that that decision must be incorrect. Mt. Imtiaz Begam and Zia-ud-din were the persons who received the money advanced by the mortgagee. Mst. Imtiaz Begam through whom Zia-ud-din is claiming paid off the whole of the debt. She was in no worse position afterwards than she had been in before. She had received the money and she had returned it. Fazal Ahmad received no benefit at all from the mortgage, and yet the result now would be that he is to pay to the representative of Mt. Imtiaz Begam, practically as a gift, a proportion of the money which she had paid to the mortgagee.

16. From the terms in which Section 82, T.P. Act, is expressed, there is no justification for concluding that "a contract to the contrary" mentioned therein is a contract between the mortgagor and the mortgagee. The term is very general and may refer to any contract. In the majority of cases it would appear that the mortgagee has no interest at all in the question of contribution between the various parts of the property. In so far as he is concerned, he is entitled to proceed against the whole of the property or any part of it to realise the amount due to him. He may be interested if afterwards he acquires the equity of redemption in part of property but in his capacity as a mortgagee alone he is not interested and, therefore, there seems to be no reason why he should be a necessary party to any contract which involves the right of contribution between various portions of the property mortgaged. It is unnecessary in this case to consider in what circumstances or in what manner the parties can enter into a contract which will run with the land. The important consideration is that no right or liability to contribution ever arose at all, and that in so far as the mortgagors themselves were concerned, Mst. Imtiaz Begam could never have claimed contribution from Fazal Ahmad. When she died, the mortgage-debt had been paid, and there was no mortgage subsisting. She had no charge on any part of the mortgage property, and it is impossible that any of her heirs should have such a charge. It has been argued that Zia-ud-din may be precluded from

claiming contribution in respect of that part of the property which he inherited directly, but that he is not precluded from claiming in respect of that property which he purchased from his sister's heirs. There is no force in this argument because there was no charge in favour of Mt. Imtiaz Begam which Ziauddin's sister could have inherited. I am satisfied that the decision of the learned District Judge cannot be upheld. I would allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs throughout.

Niamatullah, J.

17. I am in entire agreement with the views expressed by my learned brother. I wish to add a few remarks in support of his conclusions. It is clearly established that Fazal Ahmad was only a surety in the mortgage transaction. As against the mortgagee," however, he and the property hypothecated by him were as liable as Imtiaz Begam and Ziauddin, the principal debtors. Two sets of properties were hypothecated as security for the debt advanced by the mortgagee, Nand Ram. One of them exclusively belonged to Fazal Ahmad, while the other belonged to Imtiaz Begam. Ziauddin had, at the date of the mortgage, no interest in the mortgaged property. It is not disputed that the mortgagee was at liberty to proceed against the entire mortgaged property, regardless of the fact that Fazal Ahmad had himself borrowed nothing and was made liable only to accommodate his relations, Imtiaz Begam and Ziauddin. Nand Ram actually obtained a decree, on foot of his mortgage, against his three debtors. The decree directed the sale of both the properties. In view however of Fazal Ahmad's allegation made in the mortgagees, suit that he was only a surety, the Court directed that the property claimed by him be sold only in case the sale of the other property did not satisfy the mortgage money. Fazal Ahmad's property was not sold, as payments made by Imtiaz Begam from the sale of her property satisfied the entire mortgage money then due. All this happened when Imtiaz Begam was alive.

18. If Mt. Imtiaz Begum had no right of contribution against Fazal Ahmad by sale of the latter's property, it is obvious that her heirs (a son, Ziauddin, and a daughter) would not inherit any such right. I am clearly of opinion that, in the circumstances of the case, Mt. Imtiaz Begam had no right of contribution against Fazal Ahmad, her surety, u/s 82, T.P. Act, or otherwise. That section merely prescribes the extent to which each of several properties subject to a common charge is liable for the encumbrance. As a general rule, such extent is to be determined with reference to their respective values at the date of the mortgage. It is however open to the parties to the mortgage transaction to vary this general rule. In the absence of a contract to the contrary between the mortgagee on one side and the mortgagors owning the several [properties mortgaged on the other, the former is entitled to an encumbrance of the whole of what is due to him on every portion of the mortgaged property. The case however is different where the mortgagee agrees to split up his charge and hold particular properties liable for particular portions of such charge, regardless of the values of the properties.

In such a case, the mortgagee is bound by the agreement. Similarly, the owners of two mortgaged properties may contract themselves out of the rule contained in Section 82, one agreeing to pay more than the amount proportionate to the value of his property and the other agreeing to pay less than the proportionate value of his property. On payment by one of the mortgagors of the entire encumbrance, he would be entitled to contribution, not in terms of Section 82, but in terms of the agreement between (him and the co-mortgagor. It is clear to me that to an agreement operating between the co-mortgagors alone the mortgagee is not a necessary party, nor is it open to one of the mortgagors to escape liability under the agreement between him and his co-mortgagor on the ground that the mortgagee was no party to it.

19. In the case before us, Fazal Ahmad was only a surety. The entire sum advanced by the mortgagee, Nand Ram, had been taken by Imtiaz Begam to help her son, Ziauddin, in his business. The transaction, properly analyzed, has a clear implication to the effect that the principal debtors would be liable to pay the debts to the creditor, who is, however, at liberty to proceed both against the principal debtor and the surety. The relationship of the surety and the principal debtor implied the ultimate liability of the principal debtor, though as against the creditor their liabilities are co-extensive. This is perfectly clear from Sections 126 and 128, Contract Act. "Where, in consequence of the liability of the principal debtor and the surety being co-extensive, the surety has had to pay to the creditor, he is at once clothed with the right to recover it from the principal debtor (Section 140, Contract Act), and the surety is not only entitled to recover the debt personally from the principal debtor, but is entitled to the benefit of the security which the creditor had against the principal debtor (Section 141, Contract Act). Bearing these rules in mind in determining the rights and liabilities of Imtiaz Begam and Fazal Ahmad on the former having paid the entire mortgage money, the equities can work out only in one way. On the claim of the creditor being satisfied by Imtiaz Begam or by sale of her property, her own debt was completely paid up. There was no room for the application of the doctrine of contribution, which presupposes the existence of a debt payable by two persons.

20. The phrase "In the absence of a contract to the contrary", occurring in Section 82, T.P. Act, includes an implied agreement between the surety and the principal debtor, and has the same effect as an agreement embodied in a separate deed providing that in case the entire debt is satisfied by sale of the principal debtor's property, the latter will have no claim against the property, hypothecated by the surety as such. Suppose Imtiaz Begam could have instituted a suit against Fazal Ahmad and enforced contribution by sale of his property, Fazal Ahmad would forthwith be entitled to recover the same amount, he having discharged the liability of the principal debtor, Imtiaz Begam. It is obvious that no Court would countenance a claim of Imtiaz Begam in face of her own corresponding liability to her surety Fazal Ahmad. The two liabilities cannot co-exist and automatically adjust themselves. In this view, Imtiaz Begam did not, in the first place, acquire any right of contribution against her surety, Fazal Ahmad,

and in the second place, if she id theoretically acquire such right, it was forthwith extinguished by the operation of the equity in favour of Fazal Ahmad.

21. Some complication will be introduced "where two persons, owning separate properties, jointly mortgage them to a mortgagee, but contract themselves out of the rule of contribution enacted in Section 82, T.P. Act, and the interest of one of them in the mortgaged property passes to a transferee. In such a case, the agreement between the mortgagors being personal will not run with the land, and the transferee, at any rate a bona fide transferee for value without notice, who is not bound by the personal undertaking of his transferor, cannot be deprived of the right of contribution which attaches to the land transferred to him. The personal agreement of the transferor cannot be successfully enforced against his transferee, who is entitled to all the benefits arising out of his ownership of the land which was subject to a common charge which the transferee has had to discharge. His transferor's agreement foregoing contribution cannot be enforced against the transferee in derogation of his right as the owner of the land u/s 82, T.P. Act. This position will exist only when the transferee has had to pay the entire encumbrance and the personal agreement of his transferor is sought to be enforced against him. The present case is free from a complication of this kind. The original mortgagor, Imtiaz Begam, against whom her personal undertaking, implied in the relation of surety and principal debtor between herself and Fazal Ahmad, could be enforced, had herself paid the debt. No third person intervened when the right of contribution is said to have accrued in consequence of payments by her of the entire mortgage money. *Ramabhadrachar v. Srinivas Ayyangar* (1901) 24 Mad 85 was a case in which the question was whether a personal covenant, in modification of the right of contribution u/s 82, was binding on a subsequent transferee, who had to pay the entire mortgage money. That case is easily distinguishable from the present case on the above ground and is no authority for the proposition contended for by the learned advocate for the respondent.

22. My learned brother has dealt with the other cases cited in arguments. I have nothing to add to his remarks. I concur in allowing the appeal, setting aside the decree of the lower appellate Court and restoring that of the Court of first instance.

23. The appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance is restored with costs throughout