

(1936) 12 CAL CK 0012
In the Calcutta High Court

Kumar Pramatha Nath Roy

APPELLANT

Vs

Raja Janaki Nath Roy

RESPONDENT

Date of Decision : 01-12-1936

Acts Referred:

Citation : AIR 1937 Cal 194

Judgement

1. This is an appeal from the decision of the learned Additional Subordinate Judge, Howrah, in a suit for enforcement of a mortgage. The mortgage in suit was executed on 11th November 1927 by Raja Promotha Nath Malia, (defendant 1) in favour of the plaintiffs Raja Janakinath Roy and Jadunath Roy; Kumar Pasupatinath Malia, son of the defendant 1, defendant 2 in the suit, was a party to the mortgage deed, and bound himself personally to satisfy the mortgage debt. The properties mortgaged were primarily those mentioned in Sch. D referred to therein, and the mortgage was for a consideration of Rs. 1,25,000 only, to be repaid with interest due thereon, on 11th November 1929. In connexion with the transaction evidenced by the aforesaid mortgage deed, it has to be mentioned that on 8th April 1924 defendant 1 executed in favour of the plaintiff a mortgage for Rs. 2,00,000 hypothecating properties described in Sch. A: there was another mortgage executed by defendant 1, in favour of the plaintiffs on 30th November 1925, for Rs. 2,00,000 hypothecating properties mentioned in Sch. B; a third mortgage bond was executed by defendant 1 in favour of the plaintiff's, on 29th November 1926, for a consideration of the amount of Rs. 1,00,000 advanced on that date, charging properties mentioned in Schs. A and B, and further charging properties mentioned in Sch. C, as further and additional security for the mortgages created on 8th April 1924 and 30th November 1925, mentioned above.

2. The mortgage of 11th November 1927, on which the claim in suit was based contained stipulations mentioned below. The mortgagor doth hereby declare that all those the several zemindaries, taluks lands, collieries, coal lands hereditament, messuages and premises fully described in Schs. A, B, C and D, hereunder written, shall be a security for and stand charged with the payment to

the mortgagees of the moneys due under the said indenture of mortgage dated respectively 8th April 1924, 30th November 1925 and 29th November 1926; and the sum of Rs. 1,25,000 the consideration for the mortgage of 11th November 1927, with interest thereon, shall not be redeemable until payment of all moneys due under the said mortgages of 8th April 1924, 30th November 1925, 29th November 1926, and the sum of Rs. 1,25,000 with interest thereon respectively. And it is hereby agreed and declared that all the powers, provisions, covenants and agreements contained in the said three several recited indentures of mortgage, relating to the title or for securing the payment of all moneys due thereunder or otherwise, shall extend to and be applicable for securing the further sum of Rs. 1,25,000 and all interest, costs, charges and expenses as in these presents contained in the same manner in all respects as if the same powers, provisions, covenants and agreements were herein repeated with such alterations as would be necessary in consequence of the further advance of Rs. 1,25,000.

3. On 27th December 1927 defendants 1 and 2 executed a mortgage in favour of Kumar Promotha Nath Roy, defendant 4 in the suit, charging the properties mentioned in Schs. A, B, C and D, covered by the four mortgages in favour of the plaintiffs to which reference has been made above, along with other properties, subject to the incumbrances in favour of the plaintiffs created by the aforesaid four mortgages with the object of satisfying the four mortgages mentioned above; the proposal was for the advance of Rs. 7,25,000 out of the consideration money so fixed, Rs. 5,75,000 was received by the mortgagors, and the three prior mortgages in favour of the plaintiffs executed on 8th April 1924, 30th November 1925, 29th November 1926 were satisfied. The mortgage of 27th November 1927, contemplated the further advance of Rs. 1,50,000, subject to certain conditions in the matter of sufficiency of security for the loan advanced. The mortgagee had the liberty reserved, to refuse to make the further advance; and in point of fact nothing above the amount of Rs. 5,75,000 was advanced. One of the very important clauses contained in the indenture of the mortgage of 27th December 1927, executed in favour of defendant 4 by defendants 1 and 2, was of the following description: It is hereby also agreed and declared by and between the parties to these presents that upon payment of the said several mortgages of 8th April 1924, 30th November 1925, 29th November 1926, and 11th November 1927, respectively, or any of them, the mortgagee, will, in addition to the security hereby created, be also entitled to be subrogated to the position of the said Raja Janaki Nath Roy and Jadu Nath Roy notwithstanding that a reconveyance or reconveyances shall have been granted by the said Raja Janaki Nath Roy and Jadu Nath Roy in respect of the mortgage or mortgages paid off, and such mortgage or mortgages shall be deemed to be kept alive for the benefit and protection of the mortgagee.

4. The plaintiffs on 21st January 1931 instituted the suit in which this appeal has arisen, making defendant 4 a party, and claiming realisation of the money due on the mortgage of 11th November 1927, with interest and costs, valuing the claim

at Rs. 1,63,561-14-6. In the plaint filed in Court, the three earlier mortgages were recited, and reference was specifically made to the covenant contained in the fourth mortgage, that the properties described in Schs. A, B, C and D would not be redeemable until payment to the plaintiffs of all moneys due under the four mortgages executed on 8th April 1924, 30th November 1925, 29th November 1926, and 11th November 1927, and that all the powers, provisions, and agreements contained in three previous mortgage deeds relating to the title or for securing the repayment of all moneys due thereunder or would otherwise extend to and be applicable for securing the money advanced under the last of the four mortgages, dated 11th November 1927. The prayers made in the plaint were for a mortgage decree against the defendants in the suit, and for the sale of the mortgaged properties in Schs. A, B, C and D. The mortgage in favour of defendant 4 was recited in the plaint; and it was asserted that defendant 4 agreed to repay the sum of Rupees 1,25,000 covered by the mortgage in suit with interest, and that defendant 4 was a puisne mortgagee who was entitled to redeem the said mortgage dated 11th November 1927; defendant 4 had agreed to hold and retain the sum of Rs. 1,50,000 for applying the same for and on account of the mortgagor in payment of the mortgage aforesaid. It is to be noticed that defendants 2 and 3 were made parties to the suit, as by a conveyance dated 14th April 1928, the properties covered by the mortgage executed on 11th November 1927, were transferred to them by defendant 1. The claim in suit was resisted by the defendants.

5. In this appeal we are concerned with the case of defendant 4 only as against the plaintiffs in the suit. The position indicated in the written statement filed by that defendant was that he had become a prior mortgagee and was not a puisne mortgagee as asserted by the plaintiffs, regard being had to the covenants contained in the indenture of mortgage executed in his favour on 27th December 1927, by defendants 1 and 2; that by virtue of payment made by him on account of the three mortgages dated 8th April 1924, 30th November 1925, and 29th November 1926, which were fully satisfied by those payments, he was subrogated to the position of the plaintiffs as a prior mortgagee, and that he held a prior charge for the repayment of the amount paid in full satisfaction of the said three mortgages, under the terms and covenants of his mortgage upon the properties in Schs. A, B, C and D. According to defendant 4, the said properties could only be sold subject to the three mortgages satisfied by payment from out of money advanced by him when the mortgage, dated 27th December 1927, was executed in his favour by defendants 1 and 2. In his written statement averments were made by defendant 4, giving reasons for not advancing Rs. 1,50,000 as stipulated in the mortgage deed owing to the defect in title discovered in the matter of securities for the loan advanced, and for non-satisfaction of the mortgage in suit dated 11th November 1927, which defendant 4 was ready and willing to do, in pursuance of the terms and conditions of the mortgage in his favour. On the pleadings of the parties, the material issue raised for determination in the case was issue No. 3.

Have the prior mortgages dated 8th April 1924, 30th November 1925, and 29th November 1926, as mentioned in the plaint been paid off by the money which defendant 4 advanced as consideration of his mortgage dated 27th December 1927, executed by defendants 1 and 2? and has defendant 4 been subrogated to the position of the prior mortgagee in respect of the properties in suit as alleged in para. 11 of his written statement, or is he a puisne mortgagee as alleged in the plaint?

6. This issue was subsequently recast by the trial Judge; and, as amended, issue 3 was in following terms:

Is the principle of consolidation applicable to the present case? If yes, could the payment of debts under the mortgages dated 8th April 1924, 30th November 1925 and 29th November 1926, if any, place defendant 4 in the position of a sub-rogée? If not, is he a puisne mortgagee as alleged in the plaint?

7. On the materials placed before the Court the Subordinate Judge who decided the case in the Court below, came to the conclusion that the first three mortgages held by the plaintiffs were not redeemed by defendant 4, but by defendant 1, the real debtor; defendant 1 paid the debt due to the plaintiffs under the first three mortgages, and the effect of the payment was to discharge the mortgages. When the debt had been extinguished, it could not be said, by any parity of reason, that those mortgages had been kept alive for the benefit and protection of the interest of defendant 4, and to the prejudice and embarrassment of the plaintiffs. The decision given by the trial Judge was that defendant 4 had not been subrogated to the position of the plaintiffs in respect of the first three mortgages held by them; defendant 4 was a puisne mortgagee vis à vis the plaintiffs, in respect of the mortgage in suit, and was bound to redeem it. The reason for the decision appears to have been this: that defendant 4 covenanted with defendants 1 and 2 that he would pay the whole debt due under the four mortgages held by them; but the debt due under the mortgage in suit had not been paid. There was consolidation of the four mortgages in favour of the plaintiffs, and there could not be any subrogation unless the whole debt due to the plaintiffs on account of the four mortgages so consolidated was paid off. The trial Court, in line with the conclusions arrived at, as indicated above, passed a decree in favour of the plaintiffs, allowing the defendants time to pay the decretal amount, failing which the plaintiffs were to recover the decretal amount by the sale of the mortgaged properties which must be taken to be those mentioned in Schs. A, B, C and D. Defendant 4 appealed to this Court.

8. The materials on record establish the position that there was the contract for consolidation, and the right in the plaintiffs to consolidate the four mortgages in their favour, dated 8th April 1924, 30th November 1925, 29th November 1926 and 11th November 1927. The three mortgages mentioned above were satisfied out of payments made by defendant 4; the plaintiffs accepted money in full satisfaction of the mortgage bond dated 8th April 1924, 30th November 1925, and 29th November 1926; and there can be no question that the amount of Rs.

4,60,000 paid by cheque drawn by defendant 4, as also the amount of Rs. 2,469-14-3 paid in cash, were paid for the three aforesaid mortgages, and received by the plaintiffs. The entire amount due on account of the three mortgages was paid, and was accepted by the plaintiffs on 28th December 1928, in full satisfaction of the three mortgages before the mortgage money payable on the fourth mortgage, dated 11th November 1927, fell due on 11th November 1929, according to the terms of that mortgage. The fourth mortgage was not satisfied by defendant 4 according to the stipulations contained in the indenture of mortgage executed in his favour on 27th December 1927. The reason for not satisfying the fourth mortgage is not of consequence, as the position must be recognized that defendant 4 could not claim any right higher than that conferred on him by the covenants contained in the mortgage in his favour, by leading evidence, not of much value, indicating that it was due to the conduct of the mortgagor defendants that the fourth mortgage was not satisfied by him. There was however the distinct covenant contained in the indenture of mortgage executed by defendants 1 and 2 in favour of defendant 4, of which the plaintiffs had notice, that defendant 4 had the right to pay off all or any of the mortgages in favour of the plaintiffs, and that the mortgage or mortgages so paid off shall be deemed to be kept alive for the benefit and protection of the mortgagee (defendant 4).

9. In the plaint in the suit giving rise to this appeal, the mortgages of 8th April 1924, 30th November 1925 and 29th November 1926, were specifically mentioned. The mortgagors had, in the words of their Lordships of the Judicial Committee of the Privy Council in *Dinobundu Shaw Chowdhry v. Jogmoya Dasi* (1902) 29 Cal 154, paid off their own debt arising out of these mortgages, and done so for the benefit of the mortgagee (defendant 4), and in performance of the agreement with him. The fourth mortgage dated 11th November 1927, in favour of the plaintiffs with the covenant for consolidation, was mentioned in the plaint; but no mention was made of the very material fact that the three earlier mortgages had been paid off Defendant 4 was impleaded in the suit as a mere puisne mortgagee, in view of the mortgage in his favour executed by defendants 1 and 2 on 27th November 1927. The rights of parties to the litigation have to be determined on the position above referred to; and the decision must depend primarily upon the facts elicited by the documents themselves. The case is one of the construction of the covenants contained in the documents to which reference has been made above, and the intention of parties has to be gathered from these documents. As was observed in *Reeve v. Lisle* 1902 A C 461 the question was what inference was to be drawn from the nature of the instruments and to ascertain the object and purpose with which they were entered into: see also *Dinobundu Shaw Chowdhry v. Jogmoya Dasi* (1902) 29 Cal 154, *Malireddi Ayyareddi v. Gopala Krishnayya* AIR 1924 P C 36, AIR 1927 32 (Privy Council) and AIR 1930 176 (Privy Council) . There was the right to consolidate and as between the plaintiff and defendants 1 and 2 the intention was clearly expressed, and the construction of the covenants contained in the mortgage executed on

11th November 1927 leads clearly to that inference, so far as the object and purpose of the parties to the instrument were concerned.

10. The doctrine of consolidation of mortgage and the rule in equity on which it is founded are well known, and the right to consolidate different and separate mortgage securities was enforceable only where default had been made in payment, in view of the term of contract in respect of all the securities in respect of which consolidation was claimed: see *Jennings v. Jordan* (1882) 6 A C 698, *Cummins v. Fletcher* (1880) 14 Ch D 699, In the case before us, before the right of consolidation had become enforceable on 29th November 1929, in terms of the covenant contained in the fourth mortgage executed by defendants 1 and 2 in favour of the plaintiffs, the three earlier mortgages of 8th April 1924, 30th November 1925, and 29th November 1926, had been paid off; and they were kept alive for the benefit of defendant 4 in terms of the contract between defendants 1 and 2 on the one hand and defendant 4 on the other, of which the plaintiffs were aware, at the time when the plaintiffs on 28th December 1927 received money in full satisfaction of the three mortgage bonds aforesaid. The intention could be gathered from instruments; and the conduct of the parties concerned had to be taken into account. The intention was clearly expressed in the covenants contained in the instrument of mortgage in favour of defendant 4; and that intention could also be gathered from their conduct at the time when full satisfaction was obtained by the plaintiffs so far as three of the mortgages executed in their favour by defendants 1 and 2. There was the intention to keep alive the these earlier mortgages for the benefit of defendant 4, who had to advance the full amount due on those mortgages. The intention was also there, that so far as the plaintiffs were concerned they were not to be considered prior mortgagees in respect of the mortgages which had been satisfied by defendant 4. Defendants 1 and 2 had on 28th December 1927, before the right of consolidation could be enforced on 11th November 1929, according to the covenants contained in the mortgage of 11th November 1927, elected not to avail of the exercise of the right of consolidation; the plaintiffs had made the choice; the election was completed by accepting money in full satisfaction of the three out of the four mortgages in respect of which the right to consolidate was enforceable; and the plaintiffs could go no further: see *Griffith v. Pound* (1890) 45 Ch D 553 and *Scarf v. Jardine* (1882) 7 A C 345.

11. The three mortgages executed in favour of the plaintiffs on 8th April 1924, 30th November 1925 and 29th November 1926, having been fully satisfied before the date of payment fixed by the fourth mortgage executed on 11th November 1927, there was therefore no right in the plaintiffs to consolidate which was exercisable on the date of the institution of the suit in which the appeal has arisen. The principle underlying the judgments of James, L.J. and Cotton, L.J. in *In re Raggett; Ex parte Williams* (1880) 16 Oh D 117, that one mortgaged property having ceased to exist, there could be no consolidation of two debts, apply with very great force in the case before us, regard being had to the different instruments of mortgage and to the conduct of parties, evidenced

by materials on record, relating to the satisfaction of three out of four mortgages in regard to which there was a right to consolidate. The intention of parties which the plaintiffs in the suit, respondents in this appeal, appear to have resiled from, at the date of the institution of the suit, ignoring the position that out of the four mortgages they wanted to consolidate in terms of an instrument in their favour, three had been satisfied, and were to be treated as non-existent so far as they were concerned, was there; and that intention was in consonance with principles of justice, equity and good conscience applicable to the case before us; and it did not in any way militate against any of the provisions contained in the Transfer of Property Act. None of the provisions contained in the Transfer of Property Act has any direct application in the case before us in which, as has been indicated already, the question was whether the parties intended that the debt due on the mortgage of 11th November 1927, was charged upon the properties covered by the three earlier mortgages of 8th April 1924, 30th November 1925 and 29th November 1926. The answer must, in our judgment, be in the negative. The plaintiffs had undoubtedly the right to sue on the mortgage of 11th November 1927; but they could not be allowed, in view of the conclusions arrived at above, to enforce the mortgage in respect of properties covered by the three earlier mortgages mentioned above, and treat defendant 4 as a puisne mortgagee as they have done in the suit. The remedy open to the plaintiffs in the suit was to proceed against the properties in Sch. D in the instrument of mortgage dated 11th November 1927, and not against the other properties in Schs. A, B and C mentioned in that instrument, on the footing that the three mortgages in respect of the same were satisfied, and that they were kept alive only for the benefit of defendant 4, appellant in this Court.

12. The material question in the case before us is the question of the exercise of the right of consolidation of mortgage securities; the question of subrogation does not strictly speaking arise for consideration in the case before us, except as a subsidiary question. It is worthy of notice in this connexion that the proposition laid down by the learned Judge in the trial Court, that the payment of money in the case before us for the satisfaction of the three mortgages of 8th April 1924, 30th November 1925, and 29th November 1926, "did not place defendant 4 in the position of a subrogee," has not been supported during the course of the argument of the appeal before us, in view of the judgment of the Judicial Committee of the Privy Council in *Dinobundu Shaw Chowdhry v. Jogmoya Dasi* (1902) 29 Cal 154, to which reference has been made above. It may also be mentioned that we do not at all feel pressed by the decision of the High Court at Rangoon in *Bank of Chettinad v. Ma Ba Lo* AIR 1936 Rang 152 that the equitable doctrine of subrogation could not be applied in India, regard being had to decisions by the Judicial Committee of the Privy Council, binding on us, in which the doctrine of subrogation or the equitable rule of giving effect to the intention of parties to keep security alive for the benefit of a party, has been recognized: see *Malireddi Ayyareddi v. Gopala Krishnayya* AIR 1924 P C 36 and the cases referred to in the judgment of their Lordships. The result of our decision on the

material question arising for consideration in this case is, that the appeal is allowed, the decree of the Court below against which this appeal is directed is varied. The suit in which the appeal has arisen is decreed with costs against defendants 1, 2 and 3; three months' time is allowed to defendants 1, 2 and 3 in the suit to pay the decretal amount, failing which the plaintiffs will recover the decretal amount by the sale of the mortgaged properties mentioned in Sch. D to the plaint, and as mentioned in Sch. D in the instrument of mortgage dated 11th November 1927. The suit is dismissed as against defendant 4, impleaded as a puisne mortgagee. Defendant 4, appellant, is entitled to get his costs in the suit and in this appeal from the plaintiffs-respondents.