
(1946) 01 MAD CK 0011
In the Madras High Court

Nachappa Goundan

APPELLANT

Vs

Samiappa Goundan and Another

RESPONDENT

Date of Decision : 04-01-1946

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89

Citation : AIR 1947 Mad 18 : (1946) 2 MLJ 35

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—This second appeal raises several interesting questions relating to the law of subrogation and consolidation. The first

defendant in the action is the appellant before us. The suit started as one for possession of the plaint mentioned property. The plaintiffs-respondents

purchased the property in execution of a decree passed on foot of a mortgage executed on the 15th April, 1921; they got symbolical delivery and

filed this suit for possession in 1941. The defence raised by the appellant is that before he is ejected, he should be paid Rs. 10,000 which was paid

by him towards certain earlier mortgages. The trial Court upheld his plea but the Subordinate Judge awarded only Rs. 2,000 and disallowed the

rest of his claim. Hence this second appeal.

2. There were five mortgages which have given rise to the several questions that arise for decision. One Komaraswami Goundan was the owner of

the properties and he effected all the mortgages. The first mortgage was a usufructuary mortgage and the other four were simple mortgages. On the

21st June, 1916, Ex. D-8, a usufructuary mortgage, was executed for Rs. 2,000 to one Samiappan Goundan of items 1 to 3 of the plaint schedule

and of another land not included in the suit. On the 13th June, 1917, a second mortgage evidenced by Ex. D-9 was executed for Rs. 2,000 in

favour of two persons, Ramaswami, the appellant's father and another Thammanna Goundan. On the 29th August, 1918, there was a third

mortgage Ex. D-6 for Rs. 1,000 in favour of Thammanna Goundan. On the 21st March, 1921, Ex. D-12, the fourth mortgage was executed for

Rs. 1,000 in favour of the second defendant in the suit. On the 15th April, 1921, the fifth mortgage was executed for Rs. 2,200 in favour of one

Chelliah Goundan and Chelliah assigned it to the plaintiffs-respondents.

3. A suit was filed on the fourth mortgage, Ex. D-12, in O.S. No. 972 of 1925 on the file of the District Munsiff's Court of Dharapuram. The fifth

mortgagee was also made a party and in execution of that decree the decree-holder brought the properties to sale and they were purchased on

29th March, 1927, by one Anga-muthu for Rs. 2,100. On 6th April, 1927, O.S. No. 414 of 1927 was filed on the fifth mortgage by the plaintiffs-

respondents. On the 21st April, 1927, item 1 was sold to the appellant for a sum of Rs. 10,000 under Ex. D-7. The sum of Rs. 10,000 was left

with the appellant, the vendee, for the purpose of paying Rs. 2,000 in respect of Ex. D-8 the first mortgage, Rs. 4,000 towards Ex. D-9 the

second mortgage, Rs. 1,900 towards Ex. D-6 the third mortgage, and Rs. 2,100 for payment under Order 21, Rule 89 of the CPC to set aside

the sale in execution of the fourth mortgagee's decree in O.S. No. 972 of 1925. The sale deed declares that there were no other encumbrances

than those mentioned in the document and there is a covenant that if there should be any other encumbrances, the vendor should discharge the

same from and out of his other properties. The purchase by the appellant was subsequent to the date of the plaint in the fifth mortgagee's suit and

that has given rise to the trouble. The fifth mortgagee's suit ended in a decree and the respondents become the purchasers in execution of that

decree. They tried to obtain possession but they could not get actual possession of the property. They however got symbolical possession and then

commenced the suit out of which this second appeal arises for possession of the property.

4. The appellant paid Rs. 2,100 into Court under Order 21, Rule 89 of the CPC and the sale which had taken place in the execution of the fourth

mortgagee's decree was set aside on the 6th June, 1927. Thammanna who had a half share in the second mortgage and who was the sole mortgagee under the third mortgage assigned his interest in both the mortgages in favour of the appellant's father Ramaswami (the co-mortgagee under the second mortgage) and in favour of another Muthuswami. Thus Ramaswami became entitled to three-fourths of the interest in the second mortgage and to a half interest in the third mortgage and Muthuswami became entitled to a one-fourth right in the second mortgage and to a half right in the third mortgage. The appellant paid Muthuswami Rs. 2,325 being the amount due to him. On the 19th May, 1929, the amount of Rs. 2,000 due under the first mortgage was paid by the appellant and he got into possession of the suit properties. He was thus in possession when the plaintiffs-respondents after purchasing the suit properties in execution of the decree passed on the fifth mortgage attempted to take possession of the properties. As regards the sum due to Ramaswami, the appellant's father, the case is that the appellant and his father are members of a joint family and that Ramaswami and the appellant acted for the joint family of both in the several transactions and that the sums due to the family must be taken to have been discharged by the appellant's purchase. The appellant therefore claims that he should be paid the entire sum of Rs. 10,000 before he is compelled to give up possession.

5. The plaint mentions that the sale in execution of the suit filed on the fifth mortgage was held subject to the usufructuary mortgage of Rs. 2,000 and that the plaintiffs-respondents purchased the property subject to the usufructuary mortgage. It then states that as the usufructuary mortgage was in force, the respondents could only get symbolical delivery. Paragraph 8 of the plaint states that the appellant obtained a sale deed of the first item after the suit on the fifth mortgage was filed, that the sale deed in favour of the appellant contained recitals that he should discharge some debts, that no provision was made for the discharge of the fifth mortgage, and that the appellant did not discharge any of the debts mentioned in the document. Paragraph 9 states that the second defendant is the senior paternal uncle of the appellant-first defendant and that the two conspired together and jointly or one of them alone paid the amount due under the usufructuary mortgage of the 21st June, 1916, that the first item included in

the suit was in the possession of the appellant and that items 2 and 3 were in the possession of the second defendant. Then comes the following

statement:

If the first defendant should have paid any money towards the usufructuary mortgage there is room for regarding him as a mere volunteer.

Paragraph 10 states that the respondents were entitled to get possession of the suit lands and that the defendants were not entitled to get the

usufructuary mortgage amount even by way of subrogation. It is then said that with a view to securing peace the respondents offered the amount of

Rs. 2,000 by way of grace and asked the defendants to receive it and deliver possession of the properties and that the defendants did not accept

the same and did not deliver possession. The plaint then says:

If the Court should decide that the plaintiffs should pay such amount as may be due according to law for the scheduled properties out of the above

usufructuary amount of Rs. 2,000 or the entire amount of Rs. 2,000 the plaintiffs are also ready to pay it.

On these allegations the Court passed an order holding that the suit was really one for redemption of the usufructuary mortgage and directed the

plaintiffs-respondents to amend the plaint as one for redemption of the usufructuary mortgage and to pay court-fee thereon. Paragraph 9-12 was

then added and it runs thus:

As the Court has directed as per its order dated 22nd October, 1942, to amend this suit as one for redemption and to pay court-fees accordingly,

the plaintiffs have under protest amended the plaint as above and paid court-fees.

The amended prayers are those that are found in a suit for redemption.

6. The main defence put forward by the appellant who is in possession of item I is that he is entitled to be in possession until the sums due under

the second, third and fourth mortgages are also paid. As regards the fourth mortgage, the content tion is that as per his sale deed Ex. D-7 a sum of

Rs. 2,246-5-6 was paid for setting aside the sale under Order 21, Rule 89 and that the fourth mortgage was thus discharged with the amount

advanced by him. As regards the second and third mortgages the appellant states that his father Ramaswami in taking the second mortgage

originally along with Thammanna and in taking an assignment of Thammanna's

rights under the second and third mortgages acted on behalf of the joint family, that the appellant in taking the sale deed Ex. D-7 and in paying Muthuswami acted for and on behalf of the joint family of himself and his father and that therefore the second and third mortgages must in law be treated as fully paid up. He says that under the circumstances he is entitled to be paid the sums due under the second, third and fourth mortgages by way of subrogation. He also says that he is entitled to be paid the sum of Rs. 2,000 in respect of the usufructuary mortgage. In the later stages of the suit and in the second appeal before us it was contended that the same result is reached by applying the doctrine of consolidation as the law stood before the Amending Act of 1929 came into force. The Amending Act came into force in April 1930 and it is therefore said that the law as it stood before 1930 governs the rights of the parties as regards both consolidation and subrogation.

7. The trial Court held that the plaintiffs-respondents are bound to pay Rs. 10,000 to the appellant before getting possession of the first item. On appeal the Subordinate Judge held that the plaintiffs-respondents are bound to pay only Rs. 2,000 the amount due under the usufructuary mortgage and that the appellant is not entitled to the balance of Rs. 8,000 mainly on the ground that the second, third and fourth mortgages were not usufructuary mortgages and that therefore the appellant was not entitled to retain possession of the property until payment of the amounts due under those mortgages. The appellant challenges the decision of the lower appellate Court and claims payment of the full sum of Rs. 10,000 before delivering possession of the item in his possession.

8. Mr. K. Bashyam, the learned advocate for the appellant, has presented the case from different aspects. The first argument is that the suit is one for redemption of the first item in his client's possession and that in a suit for redemption all the accounts between the mortgagor and the mortgagee must be taken, that their rights and liabilities must be determined after taking all the accounts between them, that his client obtained the right of insisting upon payment of the entire sum due under the four mortgages, by the doctrine of subrogation and also by the doctrine of consolidation and that the lower appellate Court was wrong in refusing the sum of Rs. 8,000 and in confining the relief to a sum of Rs. 2,000.

9. Of the four mortgages only the first mortgage was a possessory mortgage. The rest were simple mortgages. The appellant purchased the property subsequent to the filing of the suit on the fifth mortgage and was therefore affected by the doctrine of lis pendens. The sale to him therefore did not prevail against the decree in the fifth mortgagee's suit and against the auction sale held in pursuance of that decree. The result is that the plaintiffs-respondents who are the auction purchasers became entitled to recover possession of the suit properties and the appellant cannot resist their suit for possession. The appellant, however, claims that he paid the sums due under the four mortgages and that he is entitled to be paid all the sums before being obliged to deliver possession. The lower appellate Court has held that on the authority of the decision of the Judicial Committee in *Bijai Saran Sahi v. Rudra Bageshwari Prasad Bahadur Sahi* (1939) 58 M.L.J. 440 the appellant cannot retain possession until the payment of the amounts due under the second, third and fourth mortgages, they being only simple mortgages. The facts in *Bijai Saran Sahi v. Rudra Bageshwari Prasad Bahadur Sahi* (1939) 58 M.L.J. 440 are these. There were three mortgages in favour of the same person, executed in March and April, 1904, securing in all a sum of Rs. 27,999. On the 19th November, 1908, the mortgagor sold the properties in favour of the mortgagee's sons for a sum of Rs. 58,220 the sum then due on the three mortgages. Meanwhile a third party had obtained a money decree against the mortgagor and had attached the suit properties on the 14th September, 1908. Later on, the properties were brought to sale in pursuance of that attachment and the decree-holder purchased the properties in 1909. He then filed the suit which went up to the Judicial Committee for recovery of possession on the strength of the auction purchase. His case was that the sale deed of 19th November, 1908, was invalid against his rights under s. 64 of the Civil Procedure Code. The main defence was that the defendants were entitled to set up the three mortgages of 1904 as shields against the plaintiff's claim and that the plaintiff could not claim possession without paying the amounts due under those mortgages. The Judicial Committee held that as the mortgages were not usufructuary mortgages, the defendants were not entitled to retain possession until the amounts due under the three mortgages were paid. Their Lordships said this at page 446:

Now admittedly these mortgages were not usufructuary mortgages, and as the plaintiffs (respondents) have been held to be and are the owners of the equity of redemption it is impossible to see under what title the defendants (appellants) can claim to resist the decree for possession. As stated in the judgment of the High Court, "They", i.e., the defendants (appellants) "got possession by virtue of the sale of 19th November, 1908.... If the sale is invalid they must surrender possession of the same because their mortgages did not give them any right to possession. Whatever rights (if any) they have under their mortgages they can no doubt enforce in proper proceedings taken for the purpose, but there is no principle or authority which enables the defendants (appellants) as contended by them," to set up their mortgages as shields against the plaintiffs-respondents' claim for possession....

If, therefore, all the mortgages which were paid by the appellant were simple mortgages, this decision of the Judicial Committee would be directly in point and the appellant would have to seek his remedies in other appropriate proceedings.

10. One of the mortgages, however, is a usufructuary mortgage. The appellant got into possession after paying the amount due under the usufructuary mortgage and that was at a time when the Amending Act of 1929 had not come into force. Mr. Bashyam Aiyangar urges that if his right to subrogation in respect of all the mortgages is upheld, the decision of the Judicial Committee just cited would not stand in his way for the reason that the suit is one for redemption, and that in a redemption suit all the rights and liabilities of the mortgagor and the mortgagee must be settled and that enquiries should be ordered as regards all the claims between them. Reliance is placed on the decision of this Court in C.S.

Ananthanarayana Iyer Vs. Sivaramakrishna Iyer and Another, . That was a suit for partition and recovery of a fourth share of some properties.

Three brothers effected a simple mortgage over the properties and under a partition between the three brothers and another brother of theirs, the mortgaged properties were allotted to the four brothers in equal shares. The mortgage debt was also made payable by all the four brothers.

Subsequently, the mortgagee filed a suit on his mortgage impleading only his mortgagors, the three brothers. The suit ended in a decree and the

properties were brought to sale and purchased by him. The fourth brother's share was purchased by the plaintiff and he filed a suit for partition and

recovery of a quarter share. The defence was that the plaintiff should be directed to pay the one-fourth sum due under the mortgage before getting

possession. The learned Chief Justice and Krishnaswami Aiyangar, J., held that the plaintiff was bound to pay one-fourth of the sum due under the

mortgage before getting partition and possession of the quarter share. They were pressed with the decision of the Judicial Committee in *Bijai Saran*

Sahi v. Rudra Bageshwari Prasad Bahadur Sahi (1929) 58 M.L.J. 440 and the learned Judges pointed out that the decision of the Judicial

Committee did not stand in the way of the defendant claiming the relief which they granted. They said this:

We have here a case of an owner of an one-fourth share suing for a partition and recovery of that share against the owner of the remaining three-

fourths who was also a mortgagee of the suit property as well as of certain other properties. In such a suit it is the duty of the Court to adjust the

rights and liabilities inter se between the parties and to determine the shares on such adjustment. To ignore the liability of one of the parties to the

other or others and proceed merely to effect a division without regard to it, is to ignore the very character of the suit and the nature of the relief

which the Court is bound to grant.... That the mortgage in favour of the first respondent did not confer upon him a right to possession is immaterial

where, as here, the suit is one for partition calling for the adjustment of mutual rights and liabilities. The decision of the Privy Council in *Bijai Saran*

Sahi v. Rudra Bageshwari Prasad Bahadur Sahi (1929) 58 M.L.J. 440 which related to a simple suit for possession by an owner of the equity of

redemption against a mortgagee who had no right to possession has no bearing in the present connection.

On the strength of this decision it is contended that in the case before us the suit is not merely one for possession but is in substance and in form

one for redemption of the usufructuary mortgage and that in a suit for redemption all the accounts should be settled between the parties. Mr.

Bashyam Aiyangar urges that even as originally framed, the suit was one for redemption. It is pointed out that in their plaint the plaintiff's-

respondents categorically admitted that their purchase was subject to the usufructuary mortgage (paragraph 5) and that they offered to-pay the

sum of Rs. 2,000 to the defendants (paragraph 10). Reference is also made to the statement that if the Court should hold that the plaintiffs were

bound in accordance with law to pay the amount of the usufructuary mortgage, they were willing and ready to pay the same. The view of the trial

Court that the suit was in substance one for redemption is claimed to be a correct order and it is pointed out that the plaintiffs actually amended the

plaint into one for redemption. The fact that there is a statement that the amendment was made under protest is said to be of no avail. We are of

opinion that the suit even to start with was one for redemption and that after the amendment the plaintiffs-respondents are not entitled to go back

upon the position and contend that the suit is not one for redemption. The mere fact that they chose to mention that they amended the plaint under

protest is not really material and cannot affect the position that at any rate the suit as it went to trial was really one for redemption of the

usufructuary mortgage.

11. Treating the suit as one for redemption of the usufructuary mortgage the question is whether the appellant is entitled to be paid not merely the

amount of the usufructuary mortgage but also the amounts due under the other three mortgages. Mr. K.V. Krishnaswami Aiyar, the learned

advocate for the respondents, put forward several arguments in support of the position that the appellant is not entitled to payment of these sums.

The first is that the appellant paid the amount in pursuance of the covenant contained in the sale deed Ex, D-7 and that a covenant excludes

subrogation. His next argument is that for the application of the doctrine of conventional subrogation under the law as it stood before the

amendment of 1930 there must be an agreement between the alienee and the mortgagor or the mortgagees that he should be subrogated to the

rights of the mortgagees who were to be paid off with the amounts advanced by him. He next urges that the sale under which the appellant got the

right to the property was *Us pendens*, that as far as he is concerned, the sale must be treated to have been non-existent as it was ineffectual in law

to affect his rights and that therefore the appellant, when he paid the money, was a mere volunteer and therefore not entitled to the rights of

subrogation. The next is that the second and third mortgages have not been fully paid and that partial subrogation is not allowed in law. Mr.

Krishnaswami Aiyar challenges the truth of the appellant's case that he and his father are members of an undivided family. The last argument on

this part of the case is that even if the appellant is entitled to subrogation in respect of the second, third and fourth mortgages, the appellant can

enforce those mortgages subject to the law of limitation in independent proceedings and that he cannot use them as shields in the present suit.

12. As already stated, the appellant also relied upon the doctrine of consolidation and his case is that if before the amendment of the Transfer of

Property Act came into force in April 1930 there were several mortgages on the same property and they all became united in one and the same

person, that person can insist upon redemption of all the mortgages and deny the mortgagor the right of redeeming one of the mortgages leaving the

others unpaid. It is urged that this was the law even before the Transfer of Property Act of 1882, that the Legislature while passing the Act of

1882, abolished consolidation only where the mortgages were on different properties and by implication enacted that the rule of consolidation

should be applicable when the different mortgages were on the same property. For this the decision of the Judicial Committee in *Ramarayanimgar*

v. Maharajah of Venkatagiri (1936) 52 M.L.J. 338 : L.R. 54 IndAp 68 : ILR 50 Mad. 180 is relied upon. The Judicial Committee there held that

Section 61 of the Transfer of Property Act enacts by implication that a mortgagor cannot redeem without paying money due on a separate

mortgage or on a separate charge on the same property. To this Mr. Krishnaswami Aiyar has attempted various answers. It is said that the right of

consolidation is claimed after the amended Transfer of Property Act came into force in 1930, that in applying the rule of consolidation one must

have regard to the law as it stands when the right of consolidation is claimed, i.e., the law prevailing at the time of the suit; and that as Section 61 as

amended has abolished consolidation even when the several mortgages are on the same property, the appellant cannot claim the right of

consolidation. The next argument is that consolidation is not a vested right but only a privilege given to the person in whom several mortgages

happen to be united for the time being of asking that all the mortgages should be redeemed at once and the same time and that a privilege not being

a vested interest is not governed by the rule that vested rights cannot be affected by subsequent legislation. It is also urged that the Amending Act

of 1929, in so far as it amended Section 61 of the Transfer of Property Act was declaratory in character and Section 24 of Act XX of 1929 really

states what the law always was, and not that the prior Section 61 was amended. Yet another argument is that consolidation can be claimed only in

respect of the mortgages which are alive on the date of the plaint and that it cannot be claimed in respect of mortgages which had become barred

before the date of suit.

13. We shall now take up the question of subrogation and first deal with the argument that covenant excludes subrogation." That a covenant

excludes subro-gation, though a compendious method of expressing one aspect of the law of subrogation, is really a misleading statement unless

we bear in mind the true implications of that statement. If there are two mortgages, A and B, and a subsequent alienee undertakes to pay off both

the mortgages and pays A and does not ply B, he cannot take advantage of his own default and claim subrogation as against the holder of the

mortgage B. In such a case his covenant to pay both the mortgages A and B prevents him from claiming the right of subrogation when he pays off

A and defaults in payment of the mortgage B; in other words covenant excludes subrogation. This has been laid down in *Govindasawmi Thevan*

Vs. T.M. Doraisawmi Pillai and Others, Lakshmi Amma v. Sankaranarayana Menon (1935) 70 M.L.J. 1 : ILR 59 Mad. 359 and by the Judicial

Committee in *Ayyareddi v. Gopalakrishnayya* (1923) 46 M.L.J. 164 : L.R. 51 IndAp 140 : ILR Mad. 190 . The rule rests upon quite an

intelligible principle that a person cannot claim subrogation as against the very mortgagee whose debt he has also undertaken to discharge from and

out of the purchase money in his hands. In such a case, the purchaser retains the whole of the property which he purchased and would not pay the

entire purchase money in discharge of all the mortgages which he had undertaken to pay up. He discharges only one or two and claims that he is

entitled to rights of subrogation as against the holder of the other mortgage which he was bound to discharge and which he did not pay. In all these

cases we may say that covenant excludes subrogation; but a covenant to have that effect must be a covenant to discharge the debt of the very

mortgagee against whom subrogation is claimed. Mr. Krishnaswami Aiyar relies upon two decisions of the Judicial Committee in *Ayyareddi v.*

Gopalakrishnayya (1923) 46 M.L.J. 164 : L.R. 51 IndAp 140 : ILR Mad. 190 and Jagmohan Das v. Jugal Kishore 36 C.W.N. 4 in support of

the wide proposition that if an alienee undertakes to pay certain mortgages from and out of the amount payable under the alienation taken by him,

he cannot claim subrogation in respect of those mortgages. In other words, the term ""covenant"" is the covenant to pay the earlier mortgages and is

not the covenant to pay the later mortgage. In Ayyareddi v. Gopalakrishmyya (1923) 46 M.L.J. 164 : L.R. 51 IndAp 140 : ILR Mad. 190 a

property was subject to three simple mortgages of which the second was on the crops as well. After the three mortgages, the right, title and interest

of the mort-gagor was brought to sale in execution of a money decree and was sold subject to the mortgages. One Pingala became the purchaser.

The second mortgagee then filed a suit upon his mortgage and certain payments were made by Pingala and by the alienees of his right. Meanwhile

the third mortgagee filed a suit on his mortgage, obtained a decree and brought the properties to sale in execution of his decree. The sale was held

free of all mortgages. After payment to the first mort-gagce, there was a sum of Rs. 1,327 remaining to the credit of the suit. The respondents

before the Judicial Committee who were the purchasers from pingala, claimed the amount by way of subrogation. The third mortgagee decree-

holder resisted the claim and said that he was entitled to the amount as the second mortgage had really been discharged. His contention was that

when the owner of a property subject to several mortgages pays off a prior mortgage, he is not entitled to stand in the shoes of the prior mortgagee

but is to be taken as clearing the property from prior encumbrances for the benefit of the later mortgagee."" The Judicial Committee first held in

favour of the respondents on another point as well which does not need mention here. Then they dealt with the question whether Pingala's

representatives were entitled to be subrogated to the rights of the second mortgagee. Their Lordships said this on page 194:

It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgages, may, if he

pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the

incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted

to pay the later mortgage debt, but in this case there was no such personal covenant.

14. Mr. Krishnaswami Aiyar relies upon the last sentence and urges that if there was a personal covenant to pay, the rule of subrogation would be

avoided. We are unable to agree with this contention. Taking the passage relied upon it says that the rule would not apply if the owner of the,

property had covenanted to pay the later mortgage debt. It is clear that the covenant which the Judicial Committee was referring to was a covenant

to pay "the later mortgage debt"; that is, the debt of the person against whom subrogation was claimed. Their Lordships expressly refer to the

covenant as one to pay the later mortgage debt. How Mr. Krishnaswami Aiyar wants to read is that if there is a covenant to pay the earlier

mortgages, the rule of subrogation will not avail as even against a later undisclosed mortgage.

15. This decision of the Judicial Committee does not lay down any such proposition. Further there was no covenant at all on the part of Pingala the

subsequent purchaser as he was a purchaser in Court auction who merely purchased the property subject to all the mortgages. Thus there was no

covenant to pay the third mortgage. The Judicial Committee made the remarks relied upon when pressed with the argument that the purchase in.

Court auction was subject to all mortgages, that therefore the purchaser had covenanted to pay all the three mortgages and that therefore the

purchaser when paying off the second mortgage was not entitled to subrogation as against the third mortgage. Their Lordships pointed out that that

rule would apply if the person who claimed the rights of subrogation had personally covenanted to pay the later mortgage against whom he

claimed subrogation. That this is the correct understanding of their Lordships' decision has been pointed out by Venkatasubba Rao, J., in

Srinivasalu Naidu v. Damodaraswami Naidu AIR 1938 Mad. 779 and by Varadachariar, J., in Lakshmiammal v. Sankaranarayana Menon (1935)

70 M.I.J. 1 : ILR 59 Mad. 359 Venkatasubbarao, J., said this:

If a person buys for Rs. 10,000 properties subject to mortgages in favour of A and B, agreeing to pay out of the consideration Rs. 6,000 to A

and Rs. 4,000 to B, it stands to reason, that if he pays off A alone, he cannot have priority against B, for the very essence of the transaction is, that

he makes himself liable to pay off both A and B, and by failing to pay off B, he cannot be permitted to make an illegal profit of Rs. 4,000. That is

the ratio of Govindasawmi Thevan Vs. T.M. Doraisawmi Pillai and Others, and Lakshumi Achi and Another Vs. Narayanaswami Naicker and

Others, already relied to.

16. Their Lordships of the Privy Council in Ayyareddi v. Gopalaktishnayya (1923) 46 M.L.J. 164 : L.R. 51 IndAp 140 : ILR 47 Mad. 190 after

declaring that it is settled law thru the purchaser may by paying off an earlier charge treat himself as buying it and stand in the same position as his

vendor, go on to add the following limitation, which gives effect to the principle, abovementioned:

This rule would not apply if the owner of the property (by which expression is meant the purchaser) had covenanted to pay the later mortgage

debt....

19. In Lakshmi Ammal v. Sankaranarayana Menon (1935) 70 M.L.J. 1 : ILR 59 Mad. 359 Varadachariar, J., referred to the decision in

Ayyareddi v. Gopalakrishnayya (1923) 46 M.L.J. 164 : L.R. 51 IndAp 140 : ILR 47 Mad. 190 and says this:

The observation already extracted from the judgment of the Privy Council in Ayyareddi v. Gopalakrishnayya (1923) 46 M.L.J. 164 : L.R. 51

IndAp 140 : ILR 47 Mad. 190 shows that that is not the true basis of the rule, but an inference derived from or a disability founded on the fact that

the person claiming subrogation has covenanted to discharge the debt due to the very person against whom he seeks to claim priority.

(The italics are ours.)

20. Another decision of the Privy Council which was relied upon by Mr. Krishnaswami Aiyar is Jagmohan Das v. Jugal Kishore 36 C.W.N. 4 . It

is urged that this decision is a direct authority for the position that in every case in which money is paid by the later alienee in performance of a

covenant to pay the whole or a portion of the purchase money to an earlier mortgagee, the alienee cannot claim any right of subrogation. The

judgment of the Judicial Committee in this case was merely an endorsement that the judgment of the Oudh Court was right. The Judicial Committee

says this:

All the points urged before this Board in support of the present appeal have been

effectively dealt with in the judgment of the Oudh Court and their Lordships agree fully with that judgment.

21. Now turning to the judgment of the Oudh Court we find the following facts. One Baktarwar Begum inherited some properties from her father

who had effected a mortgage in 1896 of two villages in favour of the Maharaja of Balrampur. Baktarwar Begum sold to one Inderprasad a half

share in the two mortgaged villages and a half share in some other villages. Part of the consideration for the transfer was that the vendee should pay

half the amount due to the Maharaja of Balrampur. Inderprasad, the vendee, did not pay the amount to the Maharaja of Balrampur, but continued

in possession of the half of all the villages which he purchased. Then the Maharaja of Balrampur instituted a suit on the basis of his mortgage of

1896, obtained a decree and brought the properties to sale. After the sale was held Inderprasad's representative paid the necessary amount under

Order 21, Rule 89, CPC and had the sale set aside. He then filed the suit out of which the appeal arose for recovering all that he paid. The suit by

Inderprasad's representative was against the owner of the other half and he claimed that he was entitled to get not merely the half of the debt which

was payable on the other half of the property which was owned by the defendant but the whole of the amount which he paid. The plaintiff was still

in possession of the half which he had purchased. The claim was really one of contribution by the owner of a half of the mortgaged properties as

against the owner of the other half, the plaintiff claiming not merely the half which the other co-owner was under law bound to pay but the whole

amount including what he himself had undertaken to pay as consideration for his own purchase. Put briefly, Baktarwar Begum sold to Inderprasad

one half of the property and the vendee undertook to pay half the mortgage debt as consideration for the sale. Inderprasad did not pay and the

mortgagees filed a suit and obtained a decree. A sum of Rs. 45,000 was paid by Inderprasad's representative and he filed the suit against the

owner of the other half, who we may take to be Baktarwar Begum herself, for recovery of the entire amount. On these facts, Inderprasad or his

representative obviously cannot claim from the defendant who owned the other half the amount which he himself had contracted to pay as the sale

consideration, Inderprasad or his representative was not deprived of what he had

purchased by his sale deed. He was still in possession and enjoyment of the half which he had purchased and there were no intermediate encumbrances or any other outstanding claim in another person which would deprive him of the full benefit of what he had bargained for. Nor could the sale to him fail either for lack of registration or anything of the kind.

Baktarwar Begum or her representatives did nothing to deprive Indraprasad or his representative of what he had purchased under the sale deed.

Therefore the case was purely one in which the purchaser of a half retained that half and still claimed even the amount which he had contracted to pay for his purchase. Strictly the question whether a person is entitled to be subrogated to the rights of a mortgagee who has been paid off arises where the person had bargained for certain rights in the property and it ultimately turns out that he is deprived of the whole or a portion of such rights because of the existence of a mesne encumbrance as in *Gokuldas* (1884) L.R. 11 I.A. 126 (Privy Council) . or of an attachment as in *Dinabandu Shaw Chowdhry v. Jogmaya Dasi* (1901) 12 M.L.J. 73 : L.R. 29 IndAp 9 : 36 C.W.N. 4 or of the refusal of the mortgagor to fulfil the contract as in *Oonnamalai Animal v. Narasimharao Naidu* (1937) 47 L.W. 40. (1920) 39 M.L.J. 4,15 or of the existence of a co-owner on whom the sale or mortgage is held not binding as in *Chama Swami and Another Vs. Padala Ananda and Another*, or of a prior contractee whose claim is held to prevail as in *Syamalarayudu v. Subbarayudu* ILR 21 Mad. 143. In all such cases it will be observed that the subsequent mortgagee or vendee is deprived of the whole or a portion of what he had bargained for. The decision in *Jagmohan Das v. Jugal Kishore* 36 C.W.N. 4 is really a case where a person who paid the money retained what all he had bargained for, would not pay what he had undertaken to pay as the consideration for the purchase made by him and yet wanted to claim against the owner of the other half the entire amount paid for discharge of the common mortgage. It is really a case of contribution, and a person paying off a common mortgage cannot claim what is payable on his own property. The judgment of the Oudh Court in dealing with this question is very brief and they say this:

The vendee obtained a half share. He agreed to pay for the half share The second point which he takes is that he should be given credit for the

full amount to satisfy the decree. There again is no force in that. He was obliged under the terms of the deed of sale to satisfy one half of the liability.

22. Then they go to another point. The judgment of the Privy Council is therefore no authority for the proposition that the mere fact that the money

which was paid to the earlier mortgagee was part of the purchase money which the later vendee covenanted to pay deprives the vendee without

anything more of the right of claiming subrogation. It is clear that the plaintiff in the case of Jagmohan Das v. Jugal Kishore⁶⁶, was claiming the

right not against any person who claimed any interest in the half which he purchased but against the owner of the other half who had no interest in

the half which he had purchased. Against the other owner or owners of the other shares he cannot get the whole amount including that which he

had bargained to pay for his own share. When a person takes an alienation by way of a sale or a mortgage for the purpose of discharging earlier

mortgages, a prudent alienee would not pay the amount into the hands of the mortgagor who may not pay the earlier mortgages but who may

misapply the money for his own purposes. In the vast majority of cases the vendee or mortgagee would retain the money in his hands in order to

pay off the earlier mortgages and the deed would recite that the money was left with the later vendee or the later mortgagee in order to pay the

earlier mortgages. This would be in the form of a covenant by the later alienee to pay off earlier mortgages-. If in such cases there is an

intermediate encumbrance or the like, the later alienee ought not to be deprived of the right of subrogation merely because the later alienee retained

the price in his own hands, to pay off the earlier mortgages.

23. The decision of this Court in Chidambaram Nadan v. Muni Nagendrqyyan (1920) 39 M.L.J. 4 is very instructive. The only difference between

that case and this is that in this case the later alienee who claims subrogation is a purchaser and there it was a mortgagee. Dealing with the question

whether a direction that the later encumbrancer should discharge the earlier mortgage would deprive him of the right of subrogation, the learned

Judges said this on page 449:

It is obvious that in the vast majority of cases such an arrangement would be made for the protection of the subsequent mortgagee. The mortgagor

probably wants the money for himself rather than to discharge his existing debts and the origin of such a stipulation is most likely to be a distrust felt

by the subsequent mortgagee as to the use to which the moneys would be put if he handed them direct to the mortgagor, who, instead of

discharging the prior encumbrance, might squander the money for his own purposes. We think that a mortgagee who inserts in the mortgage bond

the stipulation that he and not the mortgagor shall pay off the prior encumbrance can, in the absence of any indication to the contrary, be rightly

presumed to have wished to make that payment by his own hand with a view to keep the prior encumbrance alive for his own benefit.

24. The later mortgagee was held entitled to subrogation. These observations apply equally to a case of a later purchaser who takes the precaution

of retaining the whole or a portion of the price in his own hands for the purpose of paying off the earlier mortgage.

25. We respectfully adopt the observations of Venkatasubba Rao and Abdur Rahman, JJ., in *Srinivasalu Naidu v. Damodaraswami Naidu* AIR

1938 Mad. 779. The point was put before them in a slightly different form that where the earlier mortgage was discharged from the purchase

money, there would be no right of subrogation, as the money paid was that of the mortgagor. The learned Judges pointed out, after referring to the

decisions of the Judicial Committee in *Dinabandho Shaw v. Jagmaya Dasi* (1901) 12 M.L.J. 73: L.R. 29 IndAp 9 : ILR (1940) 1 Cal. 291 and

Mohamed Ibrahim Hussain Khan v. Ambika Per shad Singh (1912) 22 M.L.J. 468 : L.R. 39 IndAp 68 : ILR 1945 Kar. 73 that the mere fact that

the amounts paid towards the earlier mortgages came out of the consideration of the later mortgage does not deprive the later mortgagee of the

right of subrogation.

26. Another point to be noticed in connection with the expression "'covenant excludes subrogation'" is that the covenant must be with the original

mortgagor who was personally bound to pay the mortgage or his heir-at-law. If the original mortgagor or his heir-at-law pays a mortgage, he

cannot use it as a shield against a subsequent mortgagee from him. In such case, being personally bound to pay both the mortgages, he cannot

claim subrogation. But if an assignee from him or a Court auction purchaser of his interest or a subsequent mortgagee pays a mortgage he can on

the decision in Gokuldas's case and by virtue of Sections 91 and 92 first paragraph claim the right of subrogation. If such a person sells his right to another and directs his vendee to pay the earlier mortgage and the vendee pays it in pursuance of such a covenant, he cannot obviously be denied the right of subrogation. A vendee always gets all the rights of his vendor. If the vendor would get a right of subrogation, a vendee from him must also get the right when he makes the payment even though the payment is made in performance of a covenant claimed in his sale deed. The equitable rule of subrogation gives a vendee a higher right than what the vendor has if certain conditions are fulfilled. Though the original mortgagor who is personally bound to pay is not entitled to subrogation when he pays an earlier mortgage, a vendee or a mortgagee from him may be entitled to this right if the case satisfies the requirements of law as already discussed. Thus the word "mortgager" used in the expression "A person who has advanced money to a mortgagor" occurring in paragraph 3 of Section 92 of the Transfer of Property Act as amended must be understood to mean the original mortgagor who was personally bound to pay and his legal heir. This position has been discussed by one of us in *Linganna Naicker v. Ponnuswami S.A.* No. 707 of 1944. Thus the expression "covenant excludes subrogation" has to be understood subject to these and possibly other limitations as well.

27. While on the question of subrogation, we consider it necessary to refer to the judgment of the Privy Council delivered by Lord Romer in

Jankinath Ray v. Pramatha-nath Malik (1940) 1 M.L.J. 446: L.R. 67 IndAp 82 : ILR 29 Cal. 154 which has been re-affirmed by the Judicial

Committee in a later pronouncement of theirs, in *Man Mohan Das v. Janki Prasad* (1945) 1 M.L.J. 97 : L.R. 72 IndAp 39 : ILR 39 Cal. 527. The

facts of the former case are these : There were five mortgages in succession (1) First mortgage by the first respondent of his property A in favour

of the appellant on 8th April, 1924, for a sum of Rs. Two lakhs, the said sum being repayable on 8th April, 1925. (2) Second mortgage by the first

respondent of property A as well as property B in favour of the same person on 30th November, 1925, for a sum of one lakh of rupees repayable

on 30th. November, 1926. Property B was also to be additional security for the first mortgage. (3) Third mortgage by the first respondent in

favour of the same person c f properties, A and B and C on 29th November, 1926, for a sum of Rs. One lakh repayable on 28th November,

1927, with similar stipulations with regard to properties B and C forming respectively additional security for the earlier mortgages. (4) Fourth

mortgage of properties A, B, G and D by the same person in favour of the mortgagee of the three previous mortgages and another on 11th

November, 1927, for a sum of Rs. One and a half lakhs repayable on nth November, 1929. Stipulation similar to those in the previous mortgages

were repeated. (5) Fifth mortgage of A, B, C and D and other properties in favour of a different person, the fourth respondent, on 27th

December, 1927, for Rs. Seven lakhs and a quarter. The mortgage money was left with the fourth respondent to pay off all the four prior

mortgages. By that time the time for payment of the first three mortgages had elapsed; but the fourth mortgage was repayable only much later in

1929. So it was stipulated in the fifth mortgage that upon payment by the fifth mortgagee of the amount due under the first three mortgages, he

should be subrogated to the right under those three mortgages. The mortgagee paid the first three mortgages in full but did not pay the fourth

mortgage of nth November, 1927. The fourth mortgagee sued upon his mortgage in 1931 for sale of all the four items on the averment that the first

three mortgages had been discharged and extinguished. Upon these facts, the High Court held that the fourth respondent (the fifth and last

mortgagee) stood subrogated to the rights under the first three mortgages which he paid off. The Privy Council affirmed the decree of the High

Court on the question of subrogation. Their Lordships cited with approval the law on that point as expressed by Mookerjee, J., in the case of

Gurdeo Singh v. Chandrikah Singh I.L.R.(1907) Cal. 193 where the learned Judge said:

It may be said in general, that to entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety of the debt or

must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security,

or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected.

28. Applying this test, their Lordships found that as the law stood prior to the amendment of Section 92 of the Transfer of Property Act by the

Amending Act XX of 1929 the fourth respondent in terms contracted with the mortgagor that on payment of the first three mortgages out of the money advanced by him, he was to be subrogated to the rights of the appellants under these mortgages. The decision rested on the express agreement with the mortgagor that the person who advanced money to pay off the first three mortgages was to be subrogated to the rights under those three mortgages. This is within the rule laid down by Mookherjee, J., and approved by the Judicial Committee. The case would also satisfy the third paragraph of Section 92 as amended by the Act of 1929.

29. In *Man Mohan Das v. Janki Prasad* (1945) 1 M.L.J. 97 : L.R. 72 IndAp 39 : ILR (1945) Kar. 73 the dictum of Mookherjee, J., approved in

Jankinath Ray v. Pramathanath Mullick (1940) 1 M.L.J. 446 : L.R. 67 IndAp 82 : ILR (1940) 1 Cal. 291 was again reproduced and adopted and

it was stressed that if a person was not the surety of the debt or was not otherwise interested in the property, he must prove, in order to succeed

on the equitable doctrine of subrogation, that there was an agreement between him and the debtor or creditor that he should receive and hold an

assignment of the debt as security. They also pointed out that the right of subrogation which could be claimed or granted on very slight evidence or

what may be described as a semblance of an agreement prior to the amendment of the Act could not be so claimed or granted after the

amendment as u/s 92 of the Transfer of Property Act as it now stands, the right of subrogation can be claimed by the lender only if the mortgagor

has by registered instrument agreed that he shall be so subrogated. They said this:

After the amendment of the Act the rights of subrogation can be claimed by the lender only if mortgagor has by a registered instrument agreed that

he shall be so subrogated. The right can no longer be claimed or granted as before, on very slight evidence or what may be described as the

semblance of an agreement. In the present case, in their Lordships' view, there is no such evidence or semblance of an agreement between the

appellant and the idol or the creditor.

30. Mr. Krishnaswami Aiyar urges that the present case is really one of conventional subrogation and not of legal subrogation, and that in the case

of conventional subrogation the fact to be proved is an agreement express or

implied with either the mortgagor or the mortgagee that the alienee who advances money under his sale or mortgage"" should be subrogated to the rights of the mortgages which are paid off with the money advanced by him; and that in a case of legal subrogation which arises when a person who has a pre-existing interest in the property when he pays off an earlier mortgage, the question would be one of intention whether the party intended to keep alive the original mortgage or to discharge the mortgage. But it will be seen that in *Dinabandho Shaw Chowdhury v. Jagmaya Dasi* (1901) 12 M.L.J. 73 : L.R. 29 IndAp 9 : ILR 29 Cal. 154 and in *Mohamed Ibrahim Husain Khan v. Ambika Pershad Singh* (1912) 22 M.L.J. 468 : L.R. 39 IndAp 68 the moneys were advanced by the later mortgagee who had no prior existing interest and the cases involved conventional subrogation. In both the cases the Judicial Committee considered the case from the standpoint of the intention of the parties to the later mortgage whether it was that the earlier mortgages should be kept alive for the benefit of the later mortgagee who advanced the money with which the earlier mortgages were paid off. When there, is such an intention, we can well say that it amounts to a contract express or implied that the later alienee should be subrogated to the rights of the earlier mortgages which are discharged with the money advanced by him. In this case also the covenant that the properties are sold free of all encumbrances and that if there were any other mortgages, the vendor would pay them from his other properties may well be taken to be evidence of the contract between the vendor mortgager and the vendee that the vendee should be subrogated to the rights of the mortgagees who were to be paid from the money advanced by the vendee.

31. Then Mr. Krishnaswami Aiyar urged that no facts have been proved in this case to find a case of implied agreement. We are of opinion, that the stipulation in Ex. D-7 that the sale was to be free from all mortgages is a sufficient indication that there was an implied agreement that the mortgages were to be kept alive for the benefit of the later alienee. In *Subbarayudu v. Lakshminarasamma* (1901) 12 M.L.J. 73 : L.R. 29 IndAp 9 : ILR 29 Cal. 154 *Venkata-ranaana Rao and Newsam, JJ.*, said this at page 544: Where a person advances money to discharge a mortgage and takes a mortgage or sale, the presumption is that the mortgage is extinguished. But

if it is shown that there is an intermediate encumbrance or other circumstances which raise equity in his favour, the presumption shifts or is rebutted

and an agreement with the borrower that the mortgage was to be kept alive is presumed or implied. The agreement is often implied from such

circumstances as an arrangement with the mortgagor that after the discharge of the mortgage the mortgage deed should be surrendered to him. and

a new document would be executed in his favour or a sale free from encumbrance.

(The italics are ours.)

32. In *Mohdmed Ibrahim Husain Khan v. Ambika Pershad Singh* (1912) 22 M.L.J. 468 : L.R. 39 IndAp 68 referred to by Venkata-ramana Rao

and Newsam, JJ., in support of the above rule the alienation to Alfian, the subsequent alienee stipulated that the alienation was to be free from all

encumbrances. That was held to give rise to an intention to keep alive the earlier mortgages. The Judicial Committee said at page 553:

It is true that so far as the zarpeshgi deed of 20th of November, 1874, operated as a lease of the mortgaged properties, it came to an end on the

payment of the zarpeshgi debt of Rs. 12,000 to the representatives of Girwar Singh on the 15th July, 1888, but their Lordships have found as a

fact that the Rs. 12,000 were lent by Mussammat Alfian and were borrowed by Kishan Kumar Singh for the express purpose of paying off the

zarpeshgi debt of Rs. 12,000, which was secured by the deed of the 20th of November, 1874; that the Rs. 12,000 lent by Mussammat Alfian

were in accordance with the agreement between Musammat Alfian and Kishan Kumar Singh applied in paying off the zarpeshgi debt, that on

payment of that debt the zarpeshgi deed of the 20th November, 1874, was handed over to Musammat Alfian, and that Musammat Aifan when she

lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the zarpeshgi deed of the 20th of

November, 1874.

33. In dealing with that case which was one of a person who got an interest in the property by advancing money for the first time, the Judicial

Committee applied the rule laid down by the Board in (1884) L.R. 11 I.A. 126 (Privy Council) which was a case where the person had a pre-

existing interest. In the present case it is clear that the property was sold free of

all mortgages. The facts in this case are analogous to those in

Mohamed Ibrahim Husain Khan v. Ambika Pershad Singh (1912) 22 M.L.J. 468 : L.R. 39 IndAp 68 : ILR 39 Cal. 527 e are of opinion that the

sale having been expressly stated to be free from all mortgages, the rule laid down by Venkataramana Rao and Newsam, JJ., in Vedantam

Subbarayudu (dead) and Others Vs. Chattapalli Lakshminarasamma and Others, is satisfied in this case.

34. The next point raised is that the purchase by the appellant was pendent lite and that the purchase must be treated as non-existent so far as the

plaintiff is concerned. We are unable to accept this argument which is based on Section 52 of the Transfer of Property Act. Section 52 does not

render a sale made pendente lite void. It is valid for all purposes, but it has to give way as against rights created under the decree passed in the suit.

For instance if in the suit on the fifth mortgage money had been paid by the mortgagor or if the decree amount was satisfied by the sale of

properties other than item No. 1 then the sale of item 1 would have been perfectly valid against all the world. But as the fifth mortgagee purchased

this item in execution of his decree, the right which the appellant got under his sale is not available to him. Therefore to that extent he loses the right

which he bargained for under his sale deed; but this is far from saying that the sale should be treated as non-existent and that the appellant must be

relegated to the position of a mere "volunteer when he paid off the earlier mortgages. In fact in Syamalarayudu v. Subbarayudu I.L.R.(1897) Mad.

143 there was first a contract to sell the properties in favour of A. Then the property was sold to B. A filed a suit for specific performance of the

contract in his favour and pending the suit B paid off an earlier mortgage in order to substantiate his case that he was a bona fide purchaser. It

will be observed that the subsequent purchaser who takes the property with notice of a prior contract does not get any right as against the prior

contractee. The prior contractee when he obtains a decree for specific performance obtains a right which prevails over the subsequent alienee. The

position is analogous to the case before us where by reason of a suit having been filed and the alienation having taken place subsequent to the date

of the plaint, the alienation has to give way to the respondent's purchase in execution of the decree passed in the suit. In Syamalarayudu v.

Subbarayudu I.L.R.(1897) Mad. 143 the learned Judges held that the subsequent purchaser who paid off the earlier encumbrance, though the

payment was after the suit for specific performance, started, was entitled to subrogation in respect of the earlier mortgage which he paid. The fact

that the sale in favour of the person who paid off the earlier encumbrances was subsequently found to be ineffectual as against a prior contractee

by virtue of Section 27(b) of the Specific Relief Act was held not to exclude the right of subrogation. For the same reason we hold that the fact that

the appellant's purchase became unavailable by virtue of Section 52 of the Transfer of Property Act as against the person who filed his suit prior to

the sale to the appellant is not a ground for excluding the right of subrogation.

35. The next question that arises is whether the second and third mortgages have been fully discharged. As already stated, the second mortgage

was taken in the name of the appellant's father Ramaswami and another Thammanna and the third mortgage was taken in the sole name of

Thammanna. Thammanna transferred his right under the second and third mortgages to both Ramaswami and another Muthuswami. Muthuswami

alone was paid the sum due to him, that being half the amount due under the third mortgage and one-fourth of the amount due under the second

mortgage. It is urged by Mr. K. V. Krishnaswami Aiyar that the first defendant's father has not been paid and that therefore the appellant is not

entitled to the rights of subrogation. The appellant seeks to get over this trouble by alleging that his father acted for and on behalf of the joint family

of himself and the appellant in taking the second mortgage and in taking a transfer of the rights of Thammanna, aforesaid and that the appellant

acted for the joint family when taking the sale deed in question. The trial Court has gone into the question very elaborately and has accepted the

appellant's case on this point. That Court finds that the first defendant and his father were members of an undivided family, that the second

mortgage was originally taken for the benefit of the joint family, that in taking the transfer of Thammanna's rights the father acted on behalf of the

joint family, and, what is more, that the sale in the name of the appellant was likewise taken for the benefit of the joint family. The appellate Judge

has not dealt with the matter at length, but we think there is enough to show that he ^concurs in the opinion of the trial Court. In paragraph 18 the

appellate Judge says this:

As regards the fourth mortgage the amount was deposited into Court and the sale was set aside. Therefore there can be no doubt that the

mortgage was also discharged. The evidence discloses that the other two mortgages were also discharged by the first defendant. The suit O.S. No.

79 of 1939 was withdrawn by Ramaswami Goundan and dismissed. It is observed that the suit was filed on the last day of limitation. We are not

now concerned with the reason as to why the suit was withdrawn or dismissed.

36. We might here mention that O.S. No. 79 of 1939 was filed by the appellant's father to recover the money due in respect of the three-fourths

share in the second mortgage and the half share in the third mortgage. To that suit, the present plaintiffs (respondents) were made defendants. They

filed a written statement, Ex. D-3. In that written statement they pleaded that the sale taken by the appellant operated as a discharge of the claims

put forward in that suit. After the matter went to trial and at the last moment the suit was withdrawn and, as the evidence shows, it was withdrawn

for the reason that there was overwhelming evidence to show that the sale in favour of the appellant was really in discharge of the claims put

forward by the father in that suit. In paragraph 9 of Ex. D-3, the present plaintiff stated thus with reference to the mortgages sued upon:

As the suit mortgages have been quoted in the sale deed dated 21st April, 1927, as the aforesaid sale was one actually obtained by the plaintiff in

the name of his undivided son, the sixth defendant, and as he has obtained possession of the lands in accordance with the sale deed and has been

enjoying the profits of the lands for these 12 years, the suit mortgages have been discharged in fact.

37. We have therefore very good evidence in the shape of an admission made by the respondents in Ex. D-3 in support of the conclusion that the

claims of the appellant's father under Exs. D-9 and D-6 were in fact discharged by the sale under Ex. D-7. There is therefore no substance in the

argument that the second and third mortgages have not been fully discharged and we reject it.

38. The next argument is put forward with reference to the fourth mortgage. It is said that as there was a suit filed by the fourth mortgagee, a

decree obtained and the property brought to sale and sold, the mortgage is no

longer alive and is not available for the application of the doctrine of subrogation. We think that the mere fact that the fourth mortgage was sued upon and that preliminary and final decrees were passed on the said mortgage or that the properties were sold in execution of that decree is not a ground for negating the right of subrogation. What is required is that the mortgage should have been discharged. It was discharged by payment of the amount advanced under the suit sale.

39. We next go to the question of consolidation on which an alternative claim is put forward by the appellant. The doctrine of consolidation has been recognised by the Judicial Committee in *Ramarayanimgar v. Maharajah of Venkatagiri* (1926) 52 M.L.J. 338 : L.R. 54 IndAp 68 : ILR 50 Mad. 180 Referring to Sections 61 and 62 of the Transfer of Property Act, their Lordships laid down at page 190:

It is contended before this Board on behalf of the defendant (appellant) that the two deeds Exs. A and I should be read together, as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realising the interest due on the mortgage; further, that Section 62 of the Transfer of Property Act has no application to the case as it applies only to a case of an usufructuary mortgage pure and simple, which Ex. A is not, as it contains covenants for payment both of principal and interest. The section which the appellant's counsel urges as being applicable to the facts of this case is Section 61 of the Transfer of Property Act which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same-property.

Their Lordships are of opinion that these contentions on behalf of the appellant must prevail. A number of authorities on the sections of the Transfer of Property Act were cited which their Lordships have considered, but upon which they think it unnecessary to comment. In their Lordships' view Section 62 of the Transfer of Property Act applies only to usufructuary mortgages pure and simple and is not in any way inconsistent with the provisions of Section 61.

40. This decision is an authority for the proposition that the Transfer of Property Act of 1882 enacted by implication that a mortgagor seeking to

redeem one mortgage shall not be entitled to do so without paying the sums due under a separate mortgage or charge if the latter relates to the

same property. It is a statutory right that is given by the Act, though not expressly, that in cases where there are two encumbrances on the same

property, the mortgagor is not entitled to redeem the one without redeeming the other. This decision is also an authority for the proposition that

whether the other encumbrance is a mortgage or a charge, in either case, the mortgagor has to pay sums due thereunder before he can redeem the

mortgage which he seeks to redeem--see also Fisher on Mortgages (7th edition, page 578)½

Securities may be of different natures, e.g., an assignment of equitable personalty with a mortgage upon freeholds and leaseholds.

41. The next point is whether the change made by the Amending Act of 1929, which came into force on the 1st April, 1930, has altered the

position. Mr. Krishna-swami Aiyar has presented different aspects to this question. One is that Section 24 of Act XX of 1929 which amended

Section 61 of the Transfer of Property Act of 1882 took away the right of consolidation even in a case where the mortgages are on the same

property. The old section and the new section may now be set out:

Section 61 before amendment Section 61 as amended

A mortgagor seeking to redeem any one mortgage A mortgagor who has executed two or more mortgages

shall, in the absence of a contract to the in favour of the same mortgagee shall, in the

contrary, be entitled to do so without paying absence of a contract to the contrary, when the

any money due under any separate mortgage made principal money of any two or more of the mortgages

by him or by any person through whom he claims has become due, be entitled to redeem any one such

on property other than that comprised, in the mortgage separately, or any two or more of such

mortgage which he seeks to redeem. mortgages together.

42. The words ""on property other than that comprised in the mortgage which he seeks to redeem"" have been omitted in the new section. Now

whether the mortgages are on the same property or on different properties, there is no right of consolidation and the mortgagor may redeem any

one mortgage or one or more mortgages, without redeeming the others. This result was reached by Section 24 of Act XX of 1929 which runs thus:

For Section 61 of the said Act and the illustration thereto the following section shall be substituted, namely, 61 : A mortgagor who has executed

two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or

more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

43. Section 63 of that Act (XX of 1929) enacts that certain sections in the Amending Act are not to operate retrospectively. Section 24 of the

Amending Act is not included in this group of sections which are expressly stated to be not retrospective. The argument of Mr. Krishnaswami

Aiyar is that, as Section 24 is not included in that group of sections which are stated to be not retrospective, the other sections of the Amending

Act are retrospective and that Section 24 is therefore retrospective. There is much force in this argument; but this Court has held that the mere fact

that a particular section of the Amending Act is not included in the group of sections which are declared to be not retrospective by Section 63 of

the Amending Act is not a ground for saying that that section is retrospective. The question arose with reference to Sections 92 and 53-A of the

Transfer of Property Act. Both the sections have been amended by Act XX of 1929 and both of them are omitted from the group of sections

which are declared to be not retrospective. Pressed with an argument like the one that is pressed upon us by Mr. Krishnaswami Aiyar this Court

held that the mere fact that a particular section of the Amending Act is not included in Section 63 of that Act as not being retrospective in character

does not lead to the conclusion that that section is retrospective in character--see P. Kanakamma and Another Vs. B. Krishnamma and Others, .

The ordinary rule of interpretation is that vested rights under an existing statute are not to be taken away by an amending statute unless the latter is

clearly retrospective in character. The question is whether the right which is claimed under the old Act is a vested right in property. If what is

claimed is not a right or a vested right but only a privilege, then an alteration of the law will take away the privilege. Where a person had a license

for two years coupled with an option to renew the license for another year, the Judicial Committee held that it was only a privilege and not a right

and that no one has a vested right in a mere privilege. In such a case the amending legislation will prevail and the privilege can no longer be

exercised. This was decided by the Judicial Committee in *Reynolds v. Attorney-General of Nova Scotia* (1896) A.C. 240. After stating the facts,

Lord Morris, delivering the judgment of the Committee, stated thus at page 243:

When the appellants applied for the renewal for one year on August 21, 1889, the power of the Commissioner to grant such renewal was gone, as

the section of the statute conferring it had been repealed. It has, however, been contended on the part of the appellants that the Act of 1889 ought

not to be construed so as to have the effect of taking away their right u/s 95 of Chapter VII. No doubt, the maxim ""Omnis nova constitutio futuris

formam imponere debet non praeteritis ""has been applied to the extent that a new law ought to be construed so as to interfere as little as possible

with vested rights, and in *Main v. Stark* (1890) 15 A.C. 388, the Earl of Selborne says "words not requiring a retrospective operation, so as to

affect an existing status prejudicially, ought not to be so construed," yet the result is that in all cases it is necessary to ascertain what the Legislature

meant. In the present case the only existing license the appellants had when the amending statute passed was one for two years expiring in August,

1889. They had a privilege to get an extension for one year u/s 95, but had no accrued right, and the object of the legislation of 1889 was to get

rid of licenses and substitute leases.

44. In *Abbot v. Minister for Lands* (1895) A.C. 425 it was laid down that a mere right to take advantage of the provisions of a statute is not a

right accrued. The relevant portion of the head note runs thus:

The mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute, repealed is not a "right accrued " within the

meaning of the usual saving clause.

45. The decision depended on the wording of the particular statute. In this case we are of opinion that the right of consolidation was not a mere

right to take advantage of an existing statute when it was repealed but that it was an accrued right. The moment that one mortgagee gets in the right

of other mortgagees or chargeholders the right of consolidation arises as decided

by the Judicial Committee in *Rama-rayanimgar v. Maharaja of*

Venkatagiri (1926) 52 M.L.J. 338 : L.R. 54 IndAp 68 : ILR 50 Mad. 180 already cited and it is a valuable vested right in property.

46. Yet another point raised by Mr. Krishnaswami Aiyar, is that the right claimed was one given by the common law of the land and not a right

given by a statute and that the right given by the common law is not governed by the rule that vested rights are not to be taken away except when

the amending legislation is clearly expressed to be retrospective. But we need not go into this question as we are of opinion that the right to

consolidate, when the mortgages are on the same property is a statutory right given impliedly, as the Judicial Committee pointed out, by Section 61

of the Transfer of Property Act, 1882.

47. It is then said that the law as to consolidation must be the one that exists on the date when the right consolidate is claimed in the suit. There

does not seem to be any basis for this limitation. It is true no doubt that the occasion for putting forward the right of consolidation arises when the

mortgagor seeks to redeem only one of the mortgages leaving the others unpaid and till then the mortgagee holds on to his securities and he is not

disturbed. The moment he is disturbed he can claim that all the securities must be redeemed at one and the same time. It is true, that if a mortgagee

who gets in all the mortgages and parts with some of them, he can no longer claim consolidation with respect to the mortgages which he has parted

with, but that is because of the inherent nature of the right. It is only those mortgages which the person who claims consolidation has at the time of

the suit that can be the subject of the claim for consolidation. A right of consolidation means a right to insist that all the mortgages which are united

in one person must be redeemed all together or not at all. Therefore it presupposes the union of several mortgages in the person claiming

consolidation and that at the time when he claims that right. But this does not mean that the law applicable to such cases is that which prevails on

the date of the suit. That right accrued when all the mortgages became combined in him--and that was obviously in 1929 in this case--that is,

before the Amending Act came into force.

48. The next argument is that the doctrine of consolidation is more in the nature of an obligation laid on the mortgagor rather than a right conferred

upon the mortgagee. This again is merely expressing the right given to the mortgagee in terms of the liability imposed on the mortgagor. There is undoubtedly a right in the mortgagee to claim consolidation and it is a valuable right.

49. It is then said that a subrogee cannot acquire a right of consolidation. Mr. Krishnaswami Aiyar urges that even though a mortgagee as such or an assignee of the mortgagee can claim consolidation a mere subrogee is not entitled to consolidation. This argument is fallacious. Subrogation is in our opinion tantamount to an assignment in law. The rights of a subrogee are those of an assignee of the mortgagee and we see no reason to think that his position is not that of an assignee at law.

50. Then it was said that all the mortgages must be live mortgages, that is, they must not have been barred at the time of the suit. No decision has been brought to our notice laying down such a proposition. So far as the law of subrogation is concerned, several decisions of this Court have held that, to enable a defendant to use a mortgage as a shield by way of subrogation, the mortgage need not be alive on the date of the suit--see C.S.

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Rau Vs. Kotigari M. Rangiah Chetti and Others, . It is suggested that this rule does not apply to cases of consolidation. We see no reason to

differentiate between the case of consolidation and the case of subrogation so far as this point is concerned. On the date when the right of

consolidation arises, the several mortgages must have been live mortgages. Consolidation arises by the fact that several encumbrances became

united in one person, and on the date when they so became united in one and the same person they must all have been live mortgages. To that

extent we agree that the mortgages must have been alive; but, if a mortgagee has a right to insist upon redemption of all the mortgages which have

become united in him, he can hold on to the property and claim that the mortgagor, when redeeming the one, must redeem all; and in such cases,

there does not seem to be any reason or principle which necessitates all mortgages being alive on the date of the suit.

51. In the result, we reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate

Court.

(This second appeal having been set down on 23rd January, 1946, to be mentioned the Court made the following Order:

52. Time for payment 15th April, 1946.