

(1939) 11 BOM CK 0013
In the Bombay High Court

Raja Janaki Nath Roy

APPELLANT

Vs

Raja Pramatha Nath Malia
 Kumar Pramatha Nath Roy
Vs Raja Janaki Nath Roy

RESPONDENT

Date of Decision : 10-11-1939

Acts Referred:

Transfer of Property Act, 1882 — Section 92

Citation : (1940) 42 BOMLR 339

Hon'ble Judges : Thankerton, J;Romer, J;George Rankin, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Romer, J.—These are consolidated appeals against the judgment and. decree of the High Court of Judicature at Fort William in Bengal dated December 1, 1936, which varied the judgment and decree of the Additional: Subordinate Judge of Howrah dated January 3, 1933. The question to be decided is whether, as held by the High Court, respondent No. 4, Kumar Pramatha Nath Roy, is entitled to be treated as a mortgagee of the properties A, B and C hereinafter mentioned, ranking in priority to the mortgage thereon of the appellants, or whether, as held by the Subordinate Judge, the appellants' mortgage ranks in priority to any claim of the said respondent—There was also at one time a question as to the relative priorities of the mortgages of the appellants and the said respondent on property D, hereinafter mentioned. It was indeed the question involved in the cross appeal of the said respondent being the second of the two consolidated appeals. This cross appeal was, however, abandoned at the hearing before their Lordships and the priority of the appellants' claims in respect of this property is now admitted.

2. The facts giving rise to the appeals are as follows. On April 8, 1924, Raja Pramatha Nath Malia, being respondent No. 1, executed in favour of the appellants a mortgage on certain properties (hereinafter referred to as "property A") to secure the sum of two lacs of rupees repayable on April 8, 1925, with

interest at the rate of ten per cent, per annum. The mortgage was in the usual English form.

3. On November 30, 1925, respondent No. 1 executed another mortgage in favour of the appellants to secure a loan of one lac of rupees repayable on November 30, 1926, with interest at the rate of twelve per cent, per annum. The mortgage recites that the mortgagor was entitled to certain properties therein mentioned (hereinafter referred to as "property B") and was also entitled to property A subject to the said mortgage of April 8, 1924, on which it recites that the two lacs of rupees and interest were still owing. By the operative part of the deed the mortgagor purported to convey property B to the appellants subject to the proviso for redemption thereafter contained, and also charged property A with the repayment of the one lac of rupees and interest " by way of additional security " ; and also " by way of additional security " charged property B with the repayment of the moneys secured by the mortgage of April 8, 1924. Then followed the proviso for redemption. It in effect provided that if the mortgagor should pay the one lac with compound interest at twelve per cent, per annum on November 30, 1926, and should " on demand " pay all monies secured by the mortgage of April 8, 1924, the mortgagee would reconvey to the mortgagor properties A and B. There then followed a covenant by the mortgagor for payment of the one lac on November 30, 1926, and of the interest thereon on the dates therein mentioned.

4. It is a curious piece of conveyancing, but the effect of it is reasonably clear. The earlier mortgage of April 8, 1924, remained unimpaired. It was in no sense replaced by the later mortgage. The two lacs of rupees that had become repayable on April 8, 1925, remained owing as was recited in the later mortgage, and it was owing by virtue of the covenant to pay it contained in the earlier deed. No demand for repayment was necessary before the appellants could sue for its recovery or enforce the first mortgage on property A by which it was secured. The mortgagor could too for his part pay off the two lacs and the mortgagee could not refuse to accept them. But the mortgagee had by virtue of the later mortgage a second charge on property A to secure the one lac payable on November 30, 1926, and could not therefore before that date have been compelled to perform the several acts in relation to property A specified in Section 60 of the Transfer of Property Act under the headings (a), (b) and (c). The mortgagor could not therefore have redeemed property A as distinct from redeeming, i.e., paying off the first mortgage thereon.

5. On November 29, 1926, respondent No. 1 executed another mortgage. The money secured this time was one lac of rupees and the primary security for it consisted of a first charge on certain properties, hereinafter called property C. But the one lac was also charged on properties A and B as a third and second charge thereon respectively, and the monies secured by the two prior mortgages were also charged as a first charge on property C. The indenture by which: all this was carried out contains recitals of the two earlier mortgages (although the

indenture of November 30, 1925, is recited as being one to secure the sum of one lac only) and recites that there was then due and owing by the mortgagor to the mortgagees under the mortgage of April 8, 1924, the principal sum of two lacs of rupees with interest and under the mortgage of November 30, 1925, the principal sum of one lac with interest. (This was not quite accurate inasmuch as the one lac was not payable until the following day.) Then there followed a recital that the date of repayment of the amount due under the mortgage of April 8, 1924, having expired the mortgagees called upon the mortgagor to repay the same but that the mortgagor, being unable then to repay it, had offered to furnish additional security for the amounts that were then or might thereafter be due to the mortgagees under the two mortgages of April 8, 1924, and November 30, 1925, in the manner thereafter appearing. By the operative part of the deed the mortgagor, in consideration of the further advance then made to him of another lac of rupees, purported to convey property C to the mortgagees, "subject to the proviso for redemption thereafter contained." It was then witnessed that to secure the repayment of this further lac the mortgagor charged properties A and B and that the same should not be redeemed or redeemable until " the said sum of rupees two lacs and one lac secured by the hereinbefore in part recited indentures of mortgage together with interest and costs as in the said indentures respectively mentioned as also the said further sum of rupees one lac together with interest and costs as herein mentioned are fully repaid and liquidated."

6. The mortgagor then by way of further and additional security, and in consideration of the sums due under the earlier mortgages, charged and mortgaged property C, and then follows this provision : " And the same shall not notwithstanding anything hereinafter contained be redeemed or redeemable until the said principal sums of rupees two lacs, one lac and one lac respectively together with interest thereon as provided by the said recited indentures of mortgage and hereby respectively is fully paid and liquidated." Then there follows a proviso which so far as material is to the following effect : that if the mortgagor should on November 29, 1927, pay to the mortgagees the one lac then advanced with interest thereon and should pay all the outgoings on properties A, B and C, and should also pay all monies that might be owing -under the mortgages of April 8, 1924, and November 30, 1925), then the mortgagees would reconvey the properties A, B and C. Following upon this proviso there is a covenant by the mortgagor for payment on November 29, 1927 of the one lac then advanced together with interest at ten per cent, per annum as therein mentioned.

7. The provisions contained in this indenture relating to redemption of the various properties are somewhat obscure. They overlap and are to some extent redundant. For it is quite plain in their Lordships' opinion that the indenture is not and was not intended to be a comprehensive mortgage of properties A, B and C replacing the two earlier mortgages of April 8, 1924, and November 30, 1925. Those two mortgages are treated as continuing in existence, and the sums

of two lacs and one lac thereby respectively secured would be recoverable by the mortgagees by virtue of the covenants to pay them therein respectively contained, and not by virtue of any covenant to pay them contained in the indenture in question. For there is no such covenant. At any time after November 29, 1926, the mortgagor could have compelled the mortgagees to accept payment of the two lacs and the one lac and so have redeemed the two mortgages. He could not however have redeemed the properties A and B with the results mentioned in Section 60 of the Transfer of Property Act. But this would have been due to the fact that the mortgagees, by virtue of the third mortgage, had a third charge on A and a second charge on B to secure the one lac of rupees advanced when the last-mentioned mortgage was executed. The provisions in this mortgage relating to the redemption of these two properties are, in their Lordships' opinion, merely a recognition of this fact.

8. On November 11, 1927, respondent No. 1 executed yet another mortgage in favour of the appellants, this time on properties hereinafter referred to as property D, and to secure a fresh advance of Rs. 1,25,000, with interest at nine per cent., to be repaid on November 11, 1929. The mortgage (in which respondent No. 2 joined as a guarantor) followed very closely the mortgage of November 29, 1926, though in some respects the conveyancing showed a slight improvement. It recited the three earlier indentures of mortgage and that there was then due and owing to the mortgagees "under and by virtue of" the said indentures respectively the principal sums of two lacs, one lac and one lac with certain sums for interest. There followed a covenant to repay the further sum of Rs. 1,25,000, then being advanced with interest thereon at nine per cent, per annum on November 11, 1929, and a "grant" to the mortgagees of property D subject to the proviso for redemption thereafter contained. This proviso was in the usual English form, viz. that if the mortgagor should on November 11, 1929, pay the Rs. 1,25,000 with interest, the mortgagees would reconvey property D to the mortgagor or as he should direct. But then follows a clause to which the appellants attach much importance. It is in these terms : " And the mortgagor doth hereby declare that all those properties" (being the properties A, B, C and D) "shall be a security for and stand charged with the payment to the mortgagees of the moneys due under the said indentures of mortgage dated, respectively, April 8, 1924, November 18, 1925, and November 29, 1926, and the said sum of Rs. 1,25,000 and the interest thereon according to the covenant hereinbefore contained and shall not be redeemable until payment to them of all moneys due under the said mortgages of April 8, 1924, November 29, 1925, (sic), and November 30, 1926,. (sic), and the sum of Rs. 1,25,000 with interest thereon respectively." It was then provided that all the powers, provisions, covenants and agreements contained in the said three recited indentures of mortgage relating to the title or for securing the repayments of all moneys due thereunder or otherwise should extend to and be applicable for securing the further sum of Rs. 1,25,000 and all interest, costs, charges and expenses in the same manner in all respects as if the same powers, provisions, covenants and

agreements were therein repeated with such alterations as would be necessary in consequence of the further advance of Rs. 1,25,000.

9. It is contended by the appellants that this mortgage of November 11, 1927, is a comprehensive mortgage of properties A, B, C and D to secure the repayment of the four sums of two lacs, one lac, one lac and 1,25,000 of rupees and that the three earlier indentures no longer subsisted as separate and independent mortgages. Their Lordships are unable to accept this contention. The mortgage is in much the same form *mutatis mutandis* as the mortgages of November 30, 1925, and November 29, 1926 ; and their Lordships have already given their reasons for thinking that neither of these two mortgages put an end to the mortgage or mortgages that preceded them. The same sort of reasoning applies equally to the mortgage of November 11, 1927. This, mortgage recites the three earlier mortgages and treats them as being on foot. Had the mortgagees sought to recover the moneys due under them they would have had to sue the mortgagor upon the covenants therein respectively contained. Such covenants had in no way been abrogated or replaced by any covenant for repayment contained in the fourth mortgage. The moneys, secured respectively by the four mortgages were moreover repayable at different times and did not all carry interest at the same rate. It is almost inconceivable that if the intention of the parties had been to create a fresh and comprehensive mortgage on all the four properties to secure the sum of Rs. 5,25,000,. the indenture of November 11, 1927, would have assumed the form that it did, even though the parties may have wished that the four items making up that sum should be repayable at different times and carry varying rates of interest. There would have been a new covenant for payment covering all four sums and a new charge of the entire sum on all the four properties A, B, C and D. It is, however, to be observed that the result of doing this and abrogating the existing mortgages on A, B and C would have been to give priority to any intermediate charge the mortgagor might, unknown to the appellants, have created upon those properties. To avoid this it was essential for the appellants to keep the three existing mortgages on foot, and this in their Lordships' opinion they successfully accomplished.

10. How material it is to arrive at a proper conclusion upon this point will" become apparent at a later stage in this judgment. In the month of December, 1927, respondent No. 1 was desirous of paying off the appellants, and accordingly arranged that respondent No. 4 should advance him the sum of Rs. 7,25,000 on the security of properties A, B, C and D and certain other Immovable properties of his. But though the dates fixed for repayment of the first three of the mortgages had passed, the repayment date provided in. the fourth mortgage had not yet arrived. In these circumstances respondent No. 1 by an indenture dated December 27, 1927, purported to grant and convey to respondent No. 4, by way of mortgage, properties A, B, C and D and other the properties set forth in the schedule thereto to secure repayment of the sum of Rs. 7,25,000. In this mortgage the four previous mortgages to the appellants were recited, and then there followed a recital in these terms :-

Whereas the said last mortgage of the eleventh day of November one thousand nine hundred and twenty-seven not having yet fallen due the mortgagor and the said Kumar Pasupathinath Maliah have requested the mortgagee to retain in his hands on account of the mortgagor out of the. said sum of Rupees Seven Lacs and Twenty-five thousand the sum of Rupees one Lac and fifty thousand to be held and applied by the mortgagee for and on account and on behalf of the mortgagor in payment of the said mortgage of the eleventh, day of November one thousand nine hundred and twenty-seven as and when the same may fall due and to pay to the mortgagor at the execution of these presents the balance of Rupees Five Lacs and seventy-five thousand with a view to enable him simultaneously therewith to pay off thereout the moneys under the said three several recited indentures of mortgage of the eighth day of April one thousand nine hundred and twenty-four, thirtieth day of November one thousand nine hundred and twenty five and the twenty-ninth day of November one thousand nine hundred and twenty-six " This recital was substantially repeated in the operative part of the indenture which also contained a clause to the following effect :-

It is hereby agreed and declared by and between the parties to these presents that upon payments of the amounts due to the said Raja Janaki Nath Roy and Jadu Nath Roy under the said several mortgages of the eighth day of April one thousand nine hundred and twenty-four, thirtieth day of November one thousand nine hundred and twenty-five, twenty-ninth day of November one thousand nine hundred and twenty-six and eleventh day of November one thousand nine hundred and twenty-seven 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.

11. This indenture having been (or being about to be) executed, a representative of respondent No. 4, together with a representative of respondent No. 1, called upon the first of the two appellants on December 27, 1927, and tendered him a cheque for the amount due under the first three mortgages. The said appellant was not at first willing to accept the money unless the amount which was owing but had not yet become payable under the fourth mortgage was paid at the same time. But on the next day, upon being made acquainted with the provision of the mortgage of December 27, 1927, relating to the payment of this last mentioned amount when it fell due, he withdrew his objection and he was then paid on behalf of himself and the other appellant the full sum due under the first three mortgages.

12. It has not, however, been proved that the appellants or either of them were at this time made acquainted with the provisions in the mortgage of December

27, 1927, as to respondent No. 4 being subrogated to the rights of the appellants under the first three mortgages.

13. For reasons into which it is not now material to inquire respondent No. 4 was not willing to pay off the remaining amount secured by the fourth mortgage when it fell due for payment on November 11, 1929, and such mortgage has accordingly never been discharged in full. In these circumstances the appellants on January 21, 1931, instituted the present suit for the purpose of enforcing their rights under the fourth mortgage. They impleaded as defendants the mortgagor respondent No. 1, and respondents 2 and 3 to whom respondent No. 1 had in the meantime assigned his equity of redemption. Taking the view that the only effect of the payments to them of the moneys due under the first three mortgages was to leave them in the position of first mortgagees of properties A, B, C and D for the amount still remaining due to them under the fourth mortgage, they also impleaded respondent No. 4 as a person who by reason of the mortgage in his favour of December 27, 1927, was entitled to redeem the fourth mortgage. They prayed a decree for the sum remaining due under the fourth mortgage and in default of payment a sale of properties A, B, C and D. The defence of respondent No. 4 (the only defendant whose position has to be considered on this appeal) was, so far as is now material, that in the circumstances he was in the position of first mortgagee of the properties A, B and C as having been surrogated to the position of the appellants under the first three mortgages.

14. The Subordinate Judge, however, decreed the suit. He thought that the fourth mortgage contained a contract to the contrary within the meaning of Section 61 of the Transfer of Property Act and that the appellants had a right of consolidation that was fatal to the contention of respondent No. 4. That being so, he said, the principle of subrogation "has no room to play." He nevertheless considered the law as to subrogation at some length, and came to the conclusion that it could not in any event have availed the said respondent inasmuch as (1) the first three mortgages had been paid off not by the said respondents but by the mortgagor and (2) that there could never be subrogation where a mortgagee is not paid off in full.

15. The matter then went to the High Court by way of appeal. The appeal was successful. The Court held that though by reason of the express contract contained in the fourth mortgage the appellants had not been deprived by Section 61 of a right to consolidate their mortgages, yet the doctrine of consolidation could not avail them inasmuch as at the date of the payment off of the first three mortgages the money due under the fourth mortgage had not then become payable. As to the question of subrogation they observed that the proposition laid down by the Subordinate Judge upon that point had not been supported in the arguments before them, but considered that the equitable right of subrogation was recognised in India. The High Court accordingly varied the decree of the Subordinate Judge by dismissing the suit against respondent No. 4

with costs there and below, by decreeing the suit against respondents Nos. 1 to 3 alone, and by ordering in default of payment of the sum decreed a sale of property D only.

16. From that judgment an appeal is now brought by the appellants to His Majesty in Council.

17. With all respect to the learned Judges in the Courts below, the doctrine of consolidation has nothing to do with the case. That doctrine can only apply where a mortgagee holds (say) a mortgage on property A and also a separate mortgage on property B belonging to the same mortgagor. In such a case after the expiry of the legal right of redemption the mortgagor in cases where the right of consolidation is still applicable is only allowed to exercise his equitable right of redemption of the one property on the terms of redeeming the other. In the case, however, of a mortgagee holding a first mortgage on property A and also a second mortgage on the same property the mortgagor cannot on payment off of the first mortgage redeem the property, that is to say, claim a reconveyance and delivery up of the title deeds, and so forth, unless he repays what is due on the second mortgage. But this is not because of the doctrine of consolidation but by reason of the fact that he has a second mortgage on the property.

18. Now on December 28, 1927, the position of the appellants in relation to properties A, B and C was that they were in effect first mortgagees of such properties to secure the sums advanced under the first three mortgages. But they also held a charge upon the properties to secure the sum advanced under the fourth; mortgage, a sum, however, which had not then become due. In those circumstances they could not have refused to accept payment of the former sums when tendered. But the properties themselves could not be wholly redeemed because of the charge thereon of the sum advanced under the fourth mortgage, a position that was recognised by the express terms of that mortgage. This did not, however, in any way affect the right of a person other than the mortgagor himself on paying or providing for the payment of the sums due under the first three mortgages to be subrogated to the rights of the appellants under those "documents."

19. In this connection reference must now be made to Section 92 of the Transfer of Property Act, of which the third and fourth paragraphs are in these terms :-

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

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

This Section was inserted in the Act by the Amending Act XX of 1929 and was not therefore in force in December, 1927, though there have been conflicting decisions in India upon the question whether or not the Section has a retrospective effect. Their Lordships do not find it necessary to express any opinion upon this question, because whether the case now to be decided be governed by the Section or by the law applicable in India before this Section was passed, respondent No. 4 is, in their Lordships' judgment, entitled to the right of subrogation that he claims.

20. Taking first the law as it stood in December, 1927, it has nowhere been better expressed than it was by Mookerjee J., in the case of *Gurdeo Singh v. Chandrikah Singh* : *Chandrikah Singh v. Rashbehary Singh* ILR (1907) Cal. 193. That learned Judge said this (p. 217):

...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.

21. As already stated, respondent No. 4 in terms contracted with the mortgagor that on payment off of the first three mortgages out of the money advanced by him he was to be subrogated to the rights of the appellants under those mortgages. Mookerjee J., however, went on to point out that a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question. Payment of a portion only of the incumbrance is not sufficient. It is obvious, he said, that the contrary views would lead to endless difficulties. With these observations of the learned Judge their Lordships desire to express their entire agreement. It is indeed to be observed that such a qualification of the right of subrogation applies whether the right be claimed under the statute or under the pre-existing law.

22. Turning now to the statute the first thing to be observed) is that; the third paragraph of Section 92 only applies where the mortgage has been redeemed. In the present case it is said that the mortgage has not been redeemed inasmuch as there has been no reconveyance, or what in India takes the place of a reconveyance. This contention, however, loses sight of the distinction between the redemption of a mortgage and the redemption of the property mortgaged. In their lordships' opinion it is clear that the words in the Section " mortgage has been redeemed " refer merely to the payment off of the mortgage money and not to an extinction" of the mortgagees' rights over the mortgaged property. If such rights had become extinguished there would be none to which the person advancing the money could be subrogated. The fourth paragraph moreover seems to contemplate that a mortgage may be redeemed in part, and this clearly shows that by redemption is meant no more than payment of the mortgage money. That being so and the mortgage of December 27, 1927, having been duly

registered, respondent No. 4 is entitled to be subrogated to the rights of the appellants under the first three mortgages by virtue of the plain terms of Section 92 if such Section be applicable. If it is not applicable, he has a conventional or contractual right to be so subrogated under the pre-existing law. But in neither case could he have been so subrogated if only a part of the moneys due under the incumbrances in respect of which he claims to be subrogated has been paid. Now it is contended by the appellants as to this that the result of the transactions between them and their mortgagor culminating in the mortgage of November 11, 1927, was as if there had been but one mortgage of the whole of the properties A, B, C and D for the total amount due on the whole of the mortgages, that is to say that the fourth mortgage was a comprehensive mortgage of all the properties taking the place of and putting an end to the first three mortgages. If the appellants are right as to this they are entitled to succeed ; for only part of the money secured by the fourth mortgage has been paid.

23. It was in order to ascertain whether this contention could prevail that their Lordships thought it necessary in the earlier part of this judgment to consider the provisions of the appellants' mortgages in some detail. Having done so and for the reasons there given, their Lordships, as already stated, are unable to accept the appellants' contention upon this point.

24. Their Lordships are accordingly of opinion and will humbly advise His Majesty that both the appeal and the cross appeal should be dismissed.

25. In the circumstances they think that the proper order to make as to costs is to direct the appellants to pay nine-tenths of the costs of respondent No. 4 of the consolidated appeals.