

(1944) 10 PAT CK 0004
In the Patna High Court

Sheosaran Singh and Others

APPELLANT

Vs

Amla Co-operative Credit Society Ltd. and Others

RESPONDENT

Date of Decision : 05-10-1944

Acts Referred:

Transfer of Property Act, 1882 — Section 100, 82

Citation : AIR 1945 Patna 192

Hon'ble Judges : Varma, J;Shearer, J

Bench : Full Bench

Judgement

Shearer, J.—This second appeal; which is by certain of the defendants, arises out of a contribution suit. The plaintiff in the suit is a co-operative society, and purchased, at a sale in execution of an award, a 2 annas 8 pies interest in a revenue-paying estate. This was part of a larger property, which belonged originally to the defendants and certain relations of theirs against whom the award had been obtained. All these persons were, at the time the award was made, or, at all events, at the time when the transaction which led ultimately to the making of the award, took place, members of a joint family. Subsequently, there was a "partition, and, at this, the property, with which we are now concerned, was allotted to the contesting defendants. The sale in execution of the award took place in 1981. The property sold and the rest of the property, of which it then formed part, had, in-1914, been mortgaged, the due date for the payment of the mortgage money being 18th June 1915. A suit was instituted on the basis of this mortgage and a preliminary decree obtained on 24th September 1927. This decree was made final on 15th December 1928; but, for some reason or other, there was delay in putting it into execution. It was not until 1986 that the mortgaged property was sold, by which time the plaintiff had, as I have already said, become the owner of a moiety of the equity of redemption. The sale took place on 27th January 1986 and on 26th February 1986 the plaintiff paid into Court the decretal amount together with the statutory compensation, and had the sale set aside. On 25th February 1939 that is, within a period of three years, the plaintiff instituted the present suit and claimed to recover, from the

defendants one-half of the amount he had paid into Court together with interest from the date of payment. The plaintiff further claimed that, by reason of the provisions contained in Sections 82 and 100, T. P., Act, the amount due to him was liable to be charged on the moiety of the property originally mortgaged, of which the contesting defendants were now the sole owners. The suit was decreed by the Courts below, and, as I have said, the contesting defendants have appealed.

2. When the plaintiff made the payment, on which" he based his cause of action, the defendants and himself were co-owners of a property which had been sold in execution of a mortgage decree. By making the payment which he did, the plaintiff recovered the property for the defendants as well as for himself. In England, in cases of this kind, the Courts of Equity have, for long, applied the principle embodied in the maxim "qui sentit commodum, sentire debet et onus," or he who enjoys the benefit must also share in the burden. The co-owner, who had, by his action, preserved the property, was entitled to recover a proportion of the sum he had expended from his co-owner and the amount due to him was made a charge on the interest of the co-owner in the property, the reason for this being that cases might occur in which the amount spent for the preservation of the property was more than it was worth, and, in such an event, the co-owner ought to be at liberty to relinquish his interest and not to be made personally liable for the excess. These broad equitable principles are embodied in Sections 82 and 100, T. P. Act. u/s 83, when property subject to a mortgage belongs, to several co-owners, the several portions in possession of each must contribute proportionately to the mortgage debt. It follows that, when one of several co-owners pays off the entire mortgage debt, a charge arises by operation of law in his favour on the portions of the property belonging to his co-owners who have paid nothing but have been benefited by his payment. Such a charge cannot obviously arise unless and until one of a number of co-owners has paid the entire mortgage money or more than his share of the mortgage money. Only in such a contingency is it possible to say that any particular, portion of the mortgaged property is liable for an ascertainable sum of money which is less than the amount secured by the mortgage. In other words, the period of limitation in a suit by one co-owner for contribution against his other co-owners is 12 years from the date on which he made the payment to the Mortgagee.

3. It is conceded that prior to the amendment of the Transfer of Property Act in 1929, the plaintiff would have been at least in, no worse a position than this, that is, he. would at least have been entitled to a decree for the excess he had paid, the amount to be charged on the portion of the mortgaged property which now belongs to the defendants,, It is however contended that, in consequence of the amendment then made in the Act, this remedy !has been taken away from the plaintiff, and he now has no remedy except, perhaps, a right to sue the legal representatives of some of the original mortgagors who are, dead and,as against them to. obtain an ordinary money decree. In order to understand how such an argument came, to, be,advanced, it is necessary to explain that, although in the

plaint it was/ alleged that the plaintiff, had, a. charge under Sections 82 and 1001, T. P. Act, and a decree for sale "subject to the charge" was asked for it had also been alleged, more or less incidentally, in the plaint that the plaintiff "had been subrogated to the position of the mortgagee of the aforesaid mortgage bond, dated 18th June 1914, so far as one-half of the said amount is concerned." Possibly, in consequence of this, it was assumed in the Courts below that the plaintiff was relying on Sections 92 and 95, T. P. Act, as it now stands, and was suing as an assignee in equity of the mortgage which he had redeemed.

4. On behalf of the defendants it was contended that his right to sue in that capacity was barred by limitation, the period for such a suit being 12 years from the date fixed in the mortgage bond for the repayment of the mortgage money, which, as I have said, was 18th June 1915. For this reliance was placed on the decision of Das and Coutts JJ. in *Sibanand Misra v. Jagmohan Lall* A. I. R. 1922 Pat. 499. For the plaintiff, it was contended that limitation ran either from the date of the payment or from the date fixed for payment in the mortgage decree, and reliance was placed on two decisions of Chatterji J. in one case *Kamlapati Devi v. Jageshar Dayal* A. I. R. 1939 Pat. 375, sitting with Khaja Mohamad Noor J., and in the other *Babu Lal Bay v. Bindhyachal Rai* A. I. R. 1943 Pat. 305, with Meredith J. The learned advocate for the appellants invited us to say that the subsequent two decisions were at variance with the earlier decision and that the point now requires further consideration by a larger bench. One of these cases was a case of conventional subrogation and the other two were cases in which a puisne mortgagee had paid off a prior mortgage and claimed that he was subrogated to the rights of this prior mortgagee. None of them was a case, in which one of several co-owners or co-mortgagors had recovered property which had been sold in execution of a decree passed in a suit on the mortgage. Nevertheless, the question of limitation and the correctness of these decisions would have arisen if the plaintiff had asserted any right of priority over the holder of a Second mortgage created before he himself purchased an interest in the equity of redemption, or over a purchaser of a portion of the property for value and without notice of the charge he claims. This, however, is not the position, and it is apparently sufficient for the plaintiff if he is given a decree for money and a mere charge on the property. That being so, it is not necessary for us to consider whether there is a conflict between the earlier and the later decisions of this Court. For my own part, however, I must say that, as at present advised, I entertain some doubt as to the soundness of some of the reasoning by which: the two later decisions are supported.

5. So far then as this second appeal is concerned, the question that arises is whether, as a result of the amendment made in the Transfer of Property Act in 1929, the plaintiff did not, when he made the payment into Court which he did, obtain, by operation of law, a charge on the property of the defendants. Put in a nut shell, the argument is that the right,, which, prior to 1929, he would have admittedly had to a charge, was taken away from him, and, instead, there was given to him a right to sue as a subrogee or as an assignee in equity of the

mortgage which he had redeemed. This argument was based, in the main, on an observation of Rankin C. J. in *Umar Ali and Another Vs. Asmat Ali and Others*, of the report, Kan-kin C. J. said this:

It may here be observed that Section 95, T. P. Act, has, by Act 20 of 1929, been amended in such a way that Sections 92 and 95, as they now stand, make it dear that the right of the co-mortgagor redeeming is the "same right as the mortgagee whose mortgage he redeems may have against the mortgagor." In effect, therefore, the decision in *Rajkumari's case* A. I. R. 1921 Cal. 166 is now statute law.

6. The Full Bench, over which the learned Chief Justice was presiding, had, it should be explained, been constituted to consider the correctness of the decision in *Rajkumari Devi v. Mukundalal Bandopadhyaya* A. I. R. 1921 Cal. 166. In that case, which was decided in 1920, the facts were similar to those with which we have to deal here, namely, a co-mortgagor, who had paid off the entire mortgage money had sued the other co-mortgagors for contribution, and the suit had not been brought until the expiration of more than 12 years after the due date fixed in the mortgage bond for the payment of the mortgage money. Chatterji J., in the decisions to which I have referred, took the view that these observations of Rankin C. J. must be regarded as obiter dicta, and it is, I think; probable that, in making them, Rankin C. J. was not considering at all the point of limitation with which Chatterji J. had to deal. In any case, assuming that Rankin C. J. was endorsing the broad general proposition that a subrogee, being an assignee in equity of the mortgage, must sue within the period prescribed for a suit on the mortgage bond, it does not follow that a co-mortgagor, who has redeemed a mortgage, must stand on his rights if any, as a subrogee, and has, apart from that, no other right whatever. It is clear that the object of the Legislature in inserting Section 92 in the Act was to give the redeeming co-mortgagor priority over mortgages created by any of his co-mortgagors on the property subsequent to the mortgage he had redeemed. Whether or not he had such a priority under the Act, as it stood prior to 1929, was a point which was open to doubt and on which there had been conflicting decisions. Subrogation is, as a rule an additional remedy, the subrogee being regarded as an assignee in equity of the security as still subsisting, although, in law, it has been extinguished, and to sue on it as one of the means open to him to recover the money which is due to him. This was clearly recognized by Das J. in 1 Pat. 7801 in "which the plaintiff was given a money and not a mortgage decree, it being held that, while a suit on the mortgage was barred by limitation, a suit for contribution was not. It is true that, in that case, the sum decreed was not made a charge on the property of the defendants ; but although this was not stated, the reason would appear to have been that the defendants were personally liable. As I have already pointed out the reason why in cases in which property, subject to a mortgage, has passed into the hands of several different persons, and one of these pays off the mortgage, the sum, which he has paid in excess of his own share, is made a charge on the interest in the property of his co-owners is that the amount which

the latter or some of the latter may thus owe him maybe greater than the value of their interest, and, therefore, they ought, in fairness to be allowed to part with their property instead of paying it : see Freeman on Co-tenancy and Partition, para. 176. Section 95, T. P. Act, as it stood prior to 1929, was enacted to meet the case of a co-mortgagor who, having redeemed a mortgage by conditional sale or a usufructuary mortgage, obtained possession of the mortgaged property. It enacted that he should have a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession. Attempts were made from time to time so to construe the section as to deprive a redeeming co-mortgagor of any right to a charge in cases where the mortgage was a simple one and possession did not pass on the execution of the mortgage and re-pass on redemption. But this view was ultimately negatived. No doubt, the reason given by the Judicial Committee in *Malik Ahmad Wali Khan v. Mt. Shamsi Jahan Begum* (06) 28 All. 482 was that the words "and obtain possession" in Section 95 had to be construed distributively. But it is clear that, unless the words were so construed, Section 95, which was most inartistically drafted, purported, by implication, to take away from a co-mortgagor, redeeming a simple mortgage, a right to contribution and a charge on the property which was expressly conferred by Sections 82 and 100 of the Act. In order to give such a co-mortgagor a charge, it is not necessary to go beyond these sections. Section 95 had to be inserted in order to give a co-mortgagor redeeming a usufructuary mortgage a charge on the property, not merely for the excess of the mortgage money which he had paid, "but for the expenses which he had incurred in recovering possession of the property. The wording of the sections as they stood in the old Act is, I think, sufficient to leave no doubt on this point; but, if authority is needed for the view I take, I may refer to the observations of Bannerji J. in *Ibn Hasan v. Brijbhukan Saran* 26 All. 407 and to the observations of Richards C. J. in *Bhagwan Das v. Karim Husain* (11) 33 All. 708. Sections 82 and 100 of the Act as they now stand, are not precisely the same as they were in the Act prior to 1929, but such alterations as have been made in them do not affect this particular matter. If Sections 82 and 100, as they stood prior to 1929 and as they stand now, give to a redeeming co-mortgagor in the position of the plaintiff a right to a charge, what is the result of the removal from the Act of the old Section 95 and the insertion of the new Sections 92 and 95? Is it not that, under the Act as it now stands, a co-mortgagor redeeming a simple mortgage, and suing the other co-mortgagors for contribution, may either stand on the mortgage he has redeemed if he can, or, if he cannot, may rely on a charge. If he cannot stand on his mortgage as a suit on it is barred by limitation, he may lose his priority as against some subsequent mortgages but he does not lose his right to have the property sold. The learned advocate for the appellants endeavoured to meet this point in two ways. In the first place, he invited our attention to certain observations of Rankin C. J. in 58 Cal. 11674 and suggested that these support his view that the existence of a right of subrogation side by side with a right to a charge was impossible. What the learned Chief Justice there

said was this:

Here the difficulty is that the statute which by Section 74 gave this right of subrogation to a puisne mortgagee gives to a Co-mortgagor something deliberately different. He may be worthy of all possible protection; one may think that a charge is insufficient. But will it do as a matter of construction to say "Let the worthy man have both. And when the other mortgagor wants to redeem him he must not redeem the statutory charge but the original mortgage within the statutory period from the due date thereof.

7. It is, I think, quite clear that the learned Judge was construing Section 95 of the Act as it stood prior to 1929, and not laying down any broad general proposition that a right of subrogation with its ancillary right to priority over subsequent encumbrances, and a right to a charge without any such right of priority, could not co-exist. As I have already said, a right of subrogation is, as a rule, an additional right given by equity to a creditor to enable him the more effectively to realize his debt. Secondly, the learned advocate relied on the words "and the transaction does not amount to a mortgage" which occur in Section 100, The plaintiff, he said, when he paid the amount due under the decree into Court and had the sale set aside, acquired the rights of the mortgagee. It is true that he became an assignee in equity of the mortgage bond, but if a suit on the mortgage bond was barred by limitation, the security was worthless and had become a mere scrap of paper. Apart from this, the words on which reliance is placed have to be read with the words "by act of the parties" and not with the words "by operation of law," as pointed out by Rankin C. J. in *Umar Ali and Another Vs. Asmat Ali and Others*, . The plaintiff, as I have said, asked in his plaint for a decree for money to be realized by the sale of that portion of the mortgaged property in the possession of the defendants, and to such a decree he is, in my opinion, entitled. He did, not sue primarily as a subrogee, and the point of limitation, that has been argued at such length, and, if I may say so with much ability, does not, properly speaking, arise. On one small point, the Courts below were in error. The plaintiff is not entitled to recover half of the sum of Rs. 140 which he paid as compensation, nor is he entitled to interest prior to the date of the institution of the suit. To this extent the appeal must be allowed, and the decree of the Courts below varied. But, as the appellants have substantially failed, they must pay the respondents their costs in this Court.

Varma, J.

8. I agree.