

(1922) 07 PAT CK 0016
In the Patna High Court

Sibanand Misra and Others

APPELLANT

Vs

Babu Jagmohan Lal and Others

RESPONDENT

Date of Decision : 07-07-1922

Acts Referred:

Contract Act, 1872 — Section 69
Transfer of Property Act, 1882 — Section 74

Citation : AIR 1922 Patna 499 : 68 Ind. Cas. 707

Hon'ble Judges : Das, J;Cotts, J

Bench : Division Bench

Judgement

Das, J.—The material facts are these: On the 13th December 1904 the defendants Nos. 1 to 5 (who will be referred to as the defendants throughout this judgment) borrowed a sum of money from Musammat Chandra Badan Koer and executed a mortgage bond in her favour, the due date of the payment fixed in the mortgage, bond being the 29th May 1905. Thereafter the defendants executed three successive mortgages in favour of the plaintiffs to cover the properties mortgaged to Musammat Chandra Badan Koer. The plaintiffs sued upon their mortgages and got a preliminary decree on the 28th August 1916, and a final decree on the 11th May 1917. Musammat Chandra Badan Koer also sued on her mortgage, and got a preliminary decree on the 2nd September 1916 and a final decree on the 2nd March 1917. In execution of the plaintiffs' decree the mortgaged properties were put up for sale and were purchased by the plaintiff on the 3rd January 1918. The defendants then presented an application under Order XXI, Rule 90 for setting aside the sale. Musammat Chandra Badan Koer commented her execution proceedings on the 16th November 1917, and the plaintiffs on the 17th April 1918 as puisne mortgagees and for their own protection paid off Musammat Chandra Badan koer whose execution, proceedings thereupon came to an end. It is important to remember that the discharge of the prior security by the plaintiffs took place at a time when the equity of redemption was in them, though an application for setting aside the sale was pending at the instance of the mortgagor. The application of the mortgagors for setting aside the

Bale in favour of the plaintiffs ended in a compromise, the mortgagors paying off the plaintiffs and the sale being set aside. On the 4th January 1919 the plaintiffs commenced this action to enforce Musammat Chandra Badan's security against the defendants or in the alternative, for a personal decree as against the defendants. Their case in the plaint is a simple one. They say that on raying off Musammat Chandra Badan which they were obliged to do for their own protection, they were subrogated to the securities held by Musammat Chandra Badan and were entitled to enforce these securities as against the defendants, the defendants, The Courts below have allowed the plaintiffs' claim and the defendants appeal to this Court.

2. Two questions have been argued before us by Mr. Lachmi Narein Singh on behalf of the appellants: First", that in the circumstances of the case, the plaintiffs are not entitled to the benefit, of the security held by Musammat Chandra Badan; and, secondly, that in any event, the right to enforce the security is barred by limitation. The argument as to the extinction of the security rests on the settled view of equity that a person who is primarily liable to discharge the debt and does discharge it is not entitled to claim a cession or assignment of the security. It was argued that, at the time when the plaintiffs discharged the debt of Chandra Badan, the equity of redemption was in them and that they were in fact in the position of the mortgagors primarily liable to discharge the debt due to Chandra Badan. In my opinion, the argument is not ertitled to succeed. I acu(sic)sded to the argument that the right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound, and that the right cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage debt without having any interest to protect, but I am not prepared to agree with the view that the plaintiffs, after their purchase of the equity of redemption, were in the position of the mortgagor. It must be remembered that their purchase was not left unchallenged by the defendants and that an application for setting aside the sale was actually pending. That sale was ultimately set aside, and the moment it was net aside, equity will place the plaintiffs in the same position as that which they would have occupied but for the transaction which for the time being vested the equity of redemption in them.

3. A purchaser of the mortgaged premises, not under a covenant to pay, who pays off in(sic)umbrarces on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside." See Ghose on Mortgage, 4th Edition, Volume 1, page 349. See also Moulvic Mahomed Shumsool Hooda Shewukram 22 WR 409 : 14 BL 226 :LR 2 I. A. 7 : 3 SPCJ 405 (PC); Syamalarayudu v. Subbarayudu 21 ML 142 : 7 Ind. Dec 457 and the cases cited at Page 349 of Ghose on Mortgage]. I am of opinion that, on paying off Musammat Chandar Badan and on their own purchase being set aside, the plaintiffs became entitled to the securities held by Musammat Chandra Badan.

4. On the question of limitation, however, I am of opinion that Mr. Lachmi Narain Singh's arguments ought to prevail. In order to understand the argument it is necessary to remember three important dates in the history of these transaction. Musammat Chandra Badan was entitled to receive the mortgage money from the defendants on the 29th May 1905, so that her cause of action to enforce the mortgage of the 13th December 1904 accrued to her on the 29th May 1905. The plaintiffs discharged the mortgage debts due to Chandra Badan on the 17th Apr 1 1918, and commenced the present action on the 4th January 1919. The argument of Mr. Lachmi Narain Singh is this: That, in so far as the plaintiffs are seeking to enforce the security of Chandra Badan, the suit is barred by limitation under Article 132 of the Limitation Act inasmuch as they can only do so, not in their own right, but in the right of Chandra Badan, They plaintiffs, on the other hand, maintain that on paying off Chandra Badan, they acquired a right as against the defendants to be reimbursed the money which they had paid for the benefit of the mortgagors, and, as a consequence, to a cession of the securities held by Chandra Badan, and that they acquired this right on the 17th April 1918 when they discharged the debt due to Chandra Badan. This argument relieves considerable support from the decision of Banerji, J., in the case of Bora Shib Lal v. Munni Lal 63 Ind. Cas. 604 : 3 UPL (A) 193 : 19 AL 840 : 44 AC 67 but, with all respect, I am unable to agree with the view expressed by that learned Judge in the case cited. The argument of Banerji, J., is this: That a puisne mortgagee in paying off the prior mortgage is entitled u/s 69 of the Indian Contract Act, to be reimbursed by the mortgagor, the money, which he pays to the prior mortgagee. He also acquires a charge on the property which he relieves of liability on general principles and u/s 74 of the Transfer of Property Act. And the conclusion at which that learned Judge arrives may be stated in his own words. "This charge he acquires not when the prior mortgage was made nor when that prior mortgage could be enforced but on the date on which he pays off the amount of the prior mortgage. The right also to be reimbursed accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which under the decree exists on them."

5. Speaking with all respect, I quite agree with the view that the right to be reimbursed accrues to the person paying off; the debt on the date on which he pays it off; but I would deny that a second mortgagee paying off a prior mortgagee "acquires" a charge on the property or that he acquires it on the date on which he pays off the prior mortgagee. The charge, in my view, was already there, all that he acquires is a right to enforce the charge and to a cession in his favour of the securities held by the prior mortgagee. Section 74 of the Transfer of Property Act, to which Mr. Justice Banerji refers, does not provide that, on paying off a prior mortgagee the subsequent mortgagee acquires a charge on the property: but it does provide that he acquires all the rights and powers of the prior mortgagee as such". It is one thing to say that a person acquires a charge on the property; it is quite another thing to say that he acquires the rights and powers of the prior mortgagee one of which is to enforce

the charge already existing subject to the law of limitation.

6. In my opinion the right to reimbursement stands on one footing; right to enforce a security by virtue of subrogation stands on another footing, The right to reimbursement arises on a contract, express or as implied, to reimburse; and the party who claims the right enforces it in his own right, and not in the right of another. Consequently, the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person who, not being primarily liable to discharge an obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor and only because the person discharging the obligation becomes clothed with the rights and powers of the original creditor. The subrogee is an assignee in equity, and it is difficult to understand how an assignee in equity stands on a better footing than an assignee at law. If, for instance, a creditor assigns his security for valuable consideration to a person who thereupon sues upon the security, it cannot be argued that, though the right to enforce the security in the hands of the creditor may be barred by limitation, the assignee may proceed to enforce it if he brings his suit Within 12 years from the date of the assignment. It may be that the right to enforce the security in his own name arises on the date of the assignment; but the limitation has already commenced to run and will not cease to operate just because the creditor has assigned the security to another person. An equitable assignee, in my opinion, stands on no better footing and can only enforce the security in the right of the creditor and, therefore, subject to the Law of Limitation that would affect the creditor. As has been pointed out, subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security, to the right to a simple action for reimbursement, and the fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems often to be overlooked, to the confusion of both doctrines. (See Pomeroy's Equity Jurisprudence, 5th Volume p. 5183).

7. That this is the right view is completely borne out by the decision of the Judicial Committee in the the case of Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh 14 Ind. Cas. 496 : 39 AC 527 : 11 MLT 265 : (1912) MWN 367 : 9 ALJ 832 : 14 Bom L 280 : 16 CWN 505 : 15 CriLJ 411 : 22 MLJ 468 : LR 39 I. A. 68 (PC) The facts are somewhat complicated and it is unnecessary to set all the different transactions which had to be considered by the Judicial Committee in order to enable them to decide points which do not arise here. But it is necessary to set out the following transactions.

8. On the 20th November 1874 certain persons who will be referred to as the mortgagors executed a zarpeshgi deed in favour of Girwar Singh by which they borrowed Rs. 12,000 from Girwar Singh and gave as security for the loan eight items of properties. The loan was for a period of 12 years from the date of the

mortgage. On the 7th January 1988 the mortgagors executed a simple mortgage in favovr of Gajadhar for Rs. 2,500 and gave one of the properties already mortgaged to Girwar Singh as a security for the loan. On the 17th February 1888 they ob(sic)ained a loan of Rs. 12,000 from Musammat Alfam for the express purpose of liquidating the zarpeshgi and executed in her favour a simple mortgage of the properties mortgaged to Girwar Singh including the property mortgaged to Gajadhar. On the 22nd September 1900, the appellants as successors-an-interest of Musammat Alfam commenced their suit to enforce the mortgage of the 17th February 1888, and they sought to have the benefit of the mortgage covered by the zarpeshgi, deed of the 20th November 1874, and they claimed priority to the various mortgages executed by the mortgagors between the date of the zarpeshgi and the mortgage of the 17th February 1888 including the mortgage in favour of Gajadhar. It was assumed that the plaintiffs by discharging the mortgage covered by the zarpeshgi deed were subrogated to the securities held by Girwar Singh, the first mortgagee; but the question still arose whether, having regard to the lapse of time, they were entitled to enforce those securities as against Gajadhar. If it be considered that their right to enforce the security of Girwar Singh arose on the 17th February 1888, that is to say, the date on which they discharged the mortgage debt of Girwsr Singh, their suit was well within time: but the Judicial Committee came to the conclusion that the suit, in so far as it sought to enforce the security of the 20th November as against Gajadhar, was barred by limitation. In rejecting the contention advanced on behalf of the plaintiffs the Judicial Committee said as follows: "But as the Rs. 12,000 were under the zarpeshgi deed of the 20th of November 1874, repayable in Jeth 1294 Fasli (September 1887), and this suit was not brought until the 22nd of September 1900, the claim of the plaintiffs to priority is barred by Article 132 of the Second Schedule of the Indian Limitation Act, 1877," I regard the decision of the Judiciel Committee as a complete answer to the armaments advanced before us on behalf of the respondents. I hold that the present suit in so far as it seeks to enforce the security of the 13th December 1904 is barred by Article 132 of the Limitation Act.

9. The question still remains whether the plaintiffs' action can be regarded as a simple action for reimbursement, and I am of opinion that it can be so regarded. All the necessary facts are stated in the plaint to enable us to give the appropriate relief to the plaintiffs and they expresely ask for a personal decree against the defendants, The Courts below have concurrently found that tin the 17th April 1918, the plaintiffs paid Musammat Chandra Badan Kuer the sum of Rs. 1,546-14-5 and thereby discharged her mortgage. This money the defendants were bound by law to pay Musammat Chandra Badan Kuer, and the plaintiffs were undoubtedly interested in the payment of the money. The plaintiffs are accordingly entitled to be reimbursed by the defendants, and the action regarded as an action for reimbursement is well within time. The plaintiffs are also entitled to interest at the rate of 2 per cent, per month from the 17th April 1918 to the date of the decree, and are also entitled to interest on the amount

decreed at the rate of six per cent, per year from the date of the decree up to the date of realization.

10. I would allow this appeal, set aside the judgments and decrees of the Courts below and in lieu thereof give the plaintiffs a decree as against defendants Nos. 1 to 5 for Rs, 1,546-14-5 with interest as already stated. There will be no order as to costs.

Coutts, J.—I agree.