
(1916) 06 AHC CK 0015
In the Allahabad High Court

Umrai Lal

APPELLANT

Vs

Musammat Rukmin Kuar and Others

RESPONDENT

Date of Decision : 17-06-1916

Acts Referred:

Transfer of Property Act, 1882 — Section 100

Citation : AIR 1916 All 44 : 35 Ind. Cas. 647

Hon'ble Judges : Piggott, J; Lindsay, J

Bench : Division Bench

Judgement

1. The sole question for decision in these two appeals is whether a mortgage executed by the respondent Musammai Rukmin Kuar in favour of the appellant Uumrai Lal on the 15th September 1908 is entitled to priority over two mortgages executed by the same mortgagor in favour of Krishen Sarup and Munnu respectively. Krishen Sarup's mortgage was executed on the 7th November Id JO, that in favour of Munnu on the 10th July 1907.
2. This question of priority has arisen in two suits, one filed by Krishen Sarup and the other by Umrai Lal. The Court below has held in both suits that Umrai Lal's rights as mortgagee must be postponed to those of the two mortgagees who hold the earlier mortgages, and hence these two appeals.
3. A brief statement of the fact, leading up to the present litigation is necessary in order to show the material points on which the parties are at issue.
4. Musammat Rukmin Kuar is the widow of a man named Khushbakht Rai, who owned a 20-biswas share in Mauza Rampura.
5. At the time of Kbushbakht Rai's death the property was subject to two mortgages in favour of one Ishwar Das.
6. Kushbakht Rai appears to have got this village recorded in the name of his daughter Musammat Bitola and she came into possession. During her lifetime her husband one Banke Behari Lal acting as her agent made mortgages of the

property to satisfy the debts created by Kushbakht Rai.

7. Bitola died leaving a daughter Musammat Rania, whose legal guardian was one Rashak Behari Lal. The latter in order to pay off the debts on the estate sold a portion of the property and after this had been done, Musammat Rukmin Kuar filed a suit against Rania and her guardian for recovery of the village, claiming as her husband's heir. She also asked for avoidance of the transfers which had been made on behalf of Musammat Bitola and Musammat Rania

8. This case was fought out upto this Court and was decided by the judgment of a Bench dated the 1st August 1908.

9. Musammat Rukmin was found to be entitled to the property, but it was held that she could not recover possession without paying to the guardian of the defendant, Musammat Rania, a sum of Rs. 5,391-0-9 which had been Spent in the discharge of debts which were binding on the estate.

10. Accordingly" a conditional decree was prepared, by which Musammat Rukmin was declared to be entitled to recover possession provided she paid the above sum with interest within a period of three months from the date of the decree.

11. The decree does not state expressly that failure on the part of the plaintiff Musammat Rukmin to pay this amount within the time fixed was to involve the dismissal of her suit, but we take it that that was the intention of this Court when it fixed the period for payment. As a matter of fact the money was so paid and was raised for the purpose by the mortgage executed by Rukmin in favour of the appellant, Umrai Lai, and Rukmin obtained possession over the property.

12. The only other fact of which it is necessary to take notice is that the sums owing to Krishen Sarup and Munnu on their respective mortgages were advanced by them to Musammat Rukmin in order to enable her to prosecute the suit against Rania, which resulted in the decree to which we have referred.

13. The case for the priority of his mortgage which the appellant set up in the Court below is to be found in the third paragraph of the plaint which he filed in the suit brought by him to recover his mortgage-money (see page 5 of the printed book in First Appeal No. 5 of 1915).

14. There it is stated that Musammat Rukmin borrowed the money in order to pay the sum she had to pay as a condition of her recovering the property. This money is described as having been paid in order to discharge debts due by her husband" which had been contracted before the loans were taken from Krishen Sarup and Munnu.

15. From the statement of the case it would appear that Umrai Lal's claim to priority "was based upon the doctrine of subrogation. His money had been applied for the purpose of extinguishing an earlier incumbrance, and he was entitled, therefore, to be protected against the claims of persons holding securities of later dates.

16. The Subordinate Judge was of opinion that Umrai Lal could not claim priority. He pointed out that the case was not- one in which a subsequent mortgagee by paying off an earlier incumbrancer stepped into the latter's shoes. He further observed that it could not be maintained that the plaintiff's money went to satisfy the debts of Khushbakht Rai, as those debts had long since been paid off by the persons who were in possession of the property after his death. In short the Subordinate Judge held that in fact there was no payment of prior debts by Umrai Lai. Musammat Rukmin was in accordance with the High Court decree under an obligation to pay a certain sum of money to the defendants as a conditions of her being allowed to recover the property; if she failed to find the money within the time prescribed she lost her suit. She borrowed the money from the plaintiff under the mortgage and the plaintiff as her agent had the money paid into Court in fulfilment of the condition. For these reasons the lower Court held, that there was no ground upon which Umrai Lal could claim priority.

17. Mr. Hamilton who has argued both the appeals on behalf of Umrai Lal, has contended that he can claim priority on either of two grounds. One of these is that the money advanced by his client was the means whereby the property was saved to Musammat Rukmin.

18. Had the money not been advanced and paid, Rukmin would have lost her suit and the two mortgagees Krishen Sarup and Maunnu would have lost the security they held for the money lent by them on their mortgages. The appellant, therefore, is entitled to priority in accordance with what is known as the doctrine of salvage. The other ground urged in support of the appellant's claim is that taken in the Court below; this rests upon the doctrine of subrogation.

19. With regard to the first of these contentions, it might be sufficient to say that the doctrine of salvage has not been recognised by this Court [see the Full Bench ruling reported as Seth Chitor Mal v. Shib Lal 14 A. 273 : A.W.N. (1892) 117 (F.B.)]. But apart from this and assuming that we could apply the principles of salvage to the facts of this case, it seems clear to us that there is no valid reason for postponing the claims of Krishen Sarup and Munnu to that of Umrai Lai. In the -first place, it is apparent that when Umrai Lal advanced the money to Musammat Rukmin, he had no interest in the property impelling him to make the expenditure nor had he any right or duty in relation to Musammat Rukmin in virtue of which he was called upon to spend money on her behalf. He was, to quote the language of Phear, J. in Moran v. Mittu Bibee 2 C. 58 "a stranger to the estate and in the situation of an ordinary money-lender with no other motive than the expectation of pecuniary profit from the bargain itself"; and in the next place, it is not pretended that Umrai Lal, before he advanced the loan, consulted the prior mortgagees though he was well aware of the mortgages in their favour. To quote again from the judgment in the Calcutta" case referred to above (see. page 96 of the report):

The plaintiffs failing to prove knowledge and acquiescence on the part of the defendants (i.e., the prior mortgagees), there is nothing, as it seems to me, in

the contention that the matter can be treated as in the nature of a case of salvage. The defendants had a first mortgage as security for a large sum advanced for the season's manufacture, and no reference was made to them before the further advances were taken from the plaintiffs. I am wholly at a loss to comprehend on what principle of equity they, who were present on the spot and might at any time have been appealed to, can be held liable to give priority to the plaintiffs, who were strangers brought in over their heads, without their consent, by the mortgagor's manager.

20. So much for the contention Regarding any right in the nature of salvage claimed on behalf of the appellant. There remains then the claim to priority based upon the doctrine of subrogation,, which means the right of one creditor to stand in the place of another and to avail himself of that other's security. The mere fact that money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit just mentioned depends upon the existence of an agreement between the borrower and the lender, an agreement which in certain cases may be presumed having regard to the circumstances of the transaction. And this agreement must be one by which it is provided that the subsequent lender shall be substituted for the earlier creditor.

21. It is clear enough from the language of the appellant's mortgage deed that there was an agreement in this sense between Musammat Rukmin and himself. It was stipulated that the money advanced by Umrai Lal was to be a first charge upon the property, a charge which was to attach as soon as Rukmin recovered the property by payment of the sum mentioned in the High Court's decree.

22. But the question remains as to the legal relation created between Musammat Rukmin and Rashak Sihari Lal under the decree of the 1st August 1908. As we have already said, that decree provided that Rukmin should recover possession on condition other paying to Rashak Bihari a sum of. Rs. 5,000 odd within three months of the date of the decree; in default her suit was to stand dismissed. If subrogation is the right of one creditor to stand in the shoes of another and to avail himself of the latter's security, it necessarily follows that before the right " can arise in favour of the subsequent creditor there must have been an earlier creditor whose rights devolve upon the later creditor after the latter's debt has been discharged. In what way is it possible to hold that the relation of creditor and debtor existed between Rashak Behari Lal and Musammat Rukmin under the decree? And what security, what remedies had Rashak Behari Lal by virtue of the decree, which can be made available to the appellant by reason of the fact that his money has been applied in discharge of the condition which the decree imposed upon Musammat Rukmin?

23. The fact is that the decree did not place Musammat Rukmin and Rashak Behari in the relation of debtor and creditor. As the lower Court observes, Rashak Behari was certainly not the mortgagee of this property and unless it can be held that the decree gave ? him the status of a charge-holder, there can be no case of

creditor and debtor. Section 100 of the Transfer of Property Act defines what a charge is. "Where, Immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

24. And the person who holds the charge is by the same section declared to have the rights of a mortgagee entitled to sue for the sale of the property.

25. Having regard to this definition, it is apparent that the rights which the decree created in favour of Rashak Behari were not those of a charge-holder. He was not given any right which would have enabled him to sue for sale of the property in order to recover the sum specified in the decree. His right was one to retain the property absolutely in case the plaintiff Musammat Rukmin failed to pay him that sum within three months from the date of the decree.

26. In no way can it be said that the legal effect of this decree was merely to constitute the property in suit a security for the payment of money to Rashak Behari, nor is it possible for the appellant to contend that because his money was applied as it was, he is entitled to the right of Rashak Behari under the decree.

27. We are satisfied, therefore, that the doctrine of subrogation cannot be resorted to by the appellant for the purpose of claiming priority over Krishen Sarup and Munnu. In our opinion the decision of the Subordinate Judge is correct. Both these appeals fail and are dismissed with costs accordingly, including in this Court fees on the higher scale.