APPELLATE CIVIL.

Before Nasim Ali J.

MUKARAM MARWARI

v.

MAHAMMAD HOSAIN.*

1935

Jan. 9, 10, 11.

Mortgage—Equity of redemption—Subrogation—Transfer of Property (Amendment) Act (XX of 1929), ss. 47, 48.

Where the purchaser of a portion of the equity of redemption at the time of his purchase retained a part of the price and expressly agreed by a covenant embodied in his conveyance to discharge the prior mortgages and absolved the mortgagor from payment of the prior mortgage debts, thus taking upon himself the unconditional liability of paying off those debts,

held that such a purchaser of a portion of the equity of redemption was not entitled to subrogation, having simply discharged his own obligation under the covenant, when he paid off the prior mortgages.

If the debt is the debt of the person, who paid it, or is a debt, which he has covenanted to pay, his payment of it raises no right of subrogation, but is simply a performance of his own obligation or covenant.

In re *W. Tasker & Sons, Limited. Hoare* v. *W. Tasker & Sons, Limited* (1) and *Jagmohan Das* v. *Jugal Kishore* (2) referred to.

This principle has been expressly recognised by the legislature in the Transfer of Property (Amendment) Act.

SECOND APPEAL by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Ramaprasad Mukherji and *Panchanan Chaudhuri* for the appellant.

Bijaychandra Chakrabarti and *Jajneshwar Majumdar* for the respondent.

NASIM ALI J. This appeal arises out of a suit on a mortgage bond, which was executed by the predecessor-in-interest of the defendant No. 1 in favour of the plaintiff on the 6th November, 1919. Defendant No. 2, who contested the suit, was impleaded on the ground that he was a purchaser of a portion

*Appeal from Appellate Decree, No. 1190 of 1932, against the decree of B. N. Mukherji, Additional District Judge of Burdwan, dated Feb. 16, 1932, modifying the decree of Anangamohan Lahiri, Subordinate Judge of Asansol, dated Jan. 13, 1928.

(1) [1905] 2 Ch. 587. (2) (1931) 36 C. W. N. 4.

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of the equity of redemption. His defence was that he satisfied two prior mortgages in respect of the property, which he purchased and consequently he was entitled to stand in the shoes of the prior mortgagees, whose claims were satisfied by him.

The trial court repelled the defence of the defendant No. 2 and decreed the suit in full. On appeal by the defendant No. 2 the lower appellate court dismissed the appeal on the ground that the appeal was incompetent. A Second Appeal (S. A. 505 of 1930) was taken to this Court by the defendant No. 2 and this Court set aside the judgment of the lower appellate court and directed a re-hearing of the appeal according to law. Thereupon the lower appellate court has reheard the appeal and has allowed it in part. It has come to the conclusion that the defendant No. 2 was entitled to get credit for Rs. 210 for satisfying the prior mortgages. Hence the present appeal by the plaintiffs.

The following points were taken by the learned advocate in support of the appeal:—

(i) that the defendant No. 2 was not entitled to claim subrogation, inasmuch as he satisfied the prior mortgages under a covenant, under which he was bound to discharge the prior mortgage;

(ii) that the payment by defendant No. 2 being only a payment as agent of the mortgagor, defendant No. 2 was not entitled to claim any subrogation;

(iii) that the lower appellate court, in coming to the conclusion that the intention of the defendant No. 2 was to keep the mortgage alive, did not take into consideration the fact that the previous mortgage bonds were not taken back at the time, when they were alleged to have been satisfied;

(iv) that out of the five items of the property mortgaged by Ex. E only one is included in the plaintiff's mortgage and consequently defendant No. 2, who paid off Ex. E, was not entitled to claim the entire amount paid for the satisfaction of Ex. E by way of subrogation;

(v) that the lower appellate court has not come to any definite finding that the prior mortgages, which were satisfied, were for consideration;

(vi) that the satisfaction of the prior mortgage, Ex. E, was not a proper satisfaction, inasmuch as the money was not paid to the mortgagee but to the son-in-law of the mortgagee; and

(vii) that, in any view of the case, the lower appellate court should not have allowed full costs to the defendant No. 2.

As regards the first point, the contention of the learned advocate for the appellant is that the defendant No. 2, at the time of his purchase, retained a part of the price and expressly agreed by a covenant in the deed of his purchase to discharge the prior mortgages out of the same and consequently he having discharged his own obligation under the covenant was not entitled to claim subrogation. It cannot be disputed and, in fact, it was not disputed, by the learned advocate for the respondent that, if the mortgagor, *i.e.*, the vendor of defendant No. 2, had himself paid off the previous mortgages out of the price, he could not claim subrogation, because, in that case, he would have performed his own obligation. This principle has now been expressly recognised by the legislature in the Transfer of Property (Amendment) Act, *i.e.*, Act XX of 1929. It is, however, contended by the learned advocate for the respondent that the rule against subrogation of the mortgagor cannot be extended to defendant No. 2, who as purchaser satisfied the prior mortgages in order to protect his own interest. In other words the contention is that the continuance of the prior mortgages paid up by him must be presumed to be for his benefit, unless the contrary is shown and consequently his intention at the time of the satisfaction of the prior mortgages must be taken to keep them alive as a shield against any other encumbrance, which might be discovered later on.

Now it is well established that "when the owner "of an estate pays charges on the estate *which he is*

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"*not personally liable to pay*, the question whether "those charges are to be considered as extinguished or "as kept alive for his benefit is simply a question of "intention. You may find the intention in the deed, "or you may find it in the circumstances attending the "transaction or you may presume an intention from "considering whether it is or is not for his benefit that "the charge should be kept on foot." *Thorne* v. *Cann* (1). See also *Mohesh Lal* v. *Mohant Bawan Das* (2), *Gokaldas Gopaldas* v. *Rambaksh Seochand* (3), *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (4), *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (5). It is equally well established on authorities that "if the debt is the debt of the person "who paid it, or is a debt which he has covenanted to "pay, his payment of it raises no right of subrogation, "but is simply a performance of his own obligation "or covenant." See Jones on Mortgages, 7th edition, Volume II, page 419. See also Coote on Mortgages, 9th edition, Volume II, pages 1452-1453, Story's Equity Jurisprudence, 14th edition, Volume II, section 707, In re *W. Tasker & Sons, Limited. Hoare* v. *W. Tasker & Sons, Limited* (6), *Surjiram Marwari* v. *Barhamdeo Persad* (7), *Bisseswar Prosad* v. *Sarnam Singh* (8), *Satnarain Tewari* v. *Chowdhuri Sheobaran Singh* (9) and *Jagmohan Das* v. *Jugal Kishore* (10).

In the present case it is clear from the deed of defendant No. 2's purchase that he absolved the mortgagor from the payment of the prior mortgage debts and took upon himself the unconditional liability of paying off those debts. There can be no doubt, therefore, that he simply performed his own obligation when he paid off the prior mortgages. Sir Dinshah Mulla in his

(1) [1895] A. C. 11, 18-9.
(2) (1883) I. L. R. 9 Calc. 961; L. R. 10 I. A. 62.
(3) (1884) I. L. R. 10 Calc. 1035; L. R. 11 I.A. 126.
(4) (1901) I. L. R. 29 Calc. 154; L. R. 29 I. A. 9 (16).
(5) (1912) I. L. R. 39 Calc. 527; L. R. 39 I. A. 68.
(6) [1905] 2 Ch. 587, 603.
(7) (1905) 2 C. L. J. 288, 299.
(8) (1907) 6 C. L. J. 134, 138.
(9) (1911) 14 C. L. J. 500, 505.
(10) (1931) 36 C. W. N. 4.

commentary on the Transfer of Property Act has observed at page 481 as follows:—

> The rule against the subrogation of a mortgagor is extended to any purchaser of the equity of redemption or incumbrancer who discharges a prior incumbrance which he is by contract express or implied bound to discharge. A person cannot claim subrogation when he simply performs his own obligation or covenant.

Referring to the decision of the Privy Council in *Jagmohan's* case (1), referred to above, the learned author has observed as follows:—

> In a recent case before the Privy Council [*Jagmohan* v. *Jugal Kishore* (1)] a purchaser covenanted to pay half the amount due on a mortgage and retained part of the price for that purpose. He did not pay until after the mortgagee had brought the property to sale. He then paid the whole of the decretal amount and set aside the sale. He was not entitled to subrogation as to half the mortgage debt *he had covenanted to pay*, nor as to the five *per cent.* paid to the auction purchaser. But he was subrogated as to the other half, which he had not covenanted to pay.

I have already stated that defendant No. 2 was under an obligation under a covenant contained in the deed of his purchase to pay the prior mortgage debts. Therefore, when he paid off those debts he simply discharged an obligation, which was upon him under an express contract. Under these circumstances, I am of opinion that the first contention of the learned advocate must prevail. In view of my conclusion on the first point it is not necessary to discuss the other points raised by the learned advocate for the appellant in this appeal.

The result, therefore, is that this appeal is allowed, the judgment and decree of the lower appellate court are set aside and the decree of the trial court is restored. The plaintiff will be entitled to get from defendant 2 the costs incurred by him in this appeal and in S. A. 505 of 1930 in this Court as well as the costs of the lower appellate court after remand.

Leave to appeal under section 15 of the Letters Patent has been asked for in this case and is refused.

Appeal allowed.

G.S.

(1) (1931) 36 C. W. N. 4.