FULL BENCH.

Before Mr. Justice Mukerji, Mr. Justice Banerji and Mr. Justice Bennet.

TOTA RAM AND ANOTHER (DEFENDANTS) *v.* RAM LAL AND ANOTHER (PLAINTIFFS).* 1932 *May*, 25.

Transfer of Property Act (IV of 1882), sections 92, 101—Retrospective effect—Transfer of Property (Amendment) Act (XX of 1929), section 63—Successive mortgages—Effect of third mortgagee paying off the first mortgage, money having been left with him by the mortgagor for the purpose—Agency, doctrine of—Subrogation—Merger—Justice, equity and good conscience.

There were three successive mortgages of the same property, in 1915, 1916 and 1926, respectively. Out of the consideration money for the third mortgage a sum was left with the third mortgagee for paying off the two earlier mortgages. The third mortgagee paid off the first mortgage but not the second. On a suit for sale by the second mortgagee,—*Held* that the third mortgagee having redeemed the first mortgage was to that extent subrogated to the position of the first mortgagee and could claim priority.

Sections 92 and 101 of the Transfer of Property Act, as introduced by the amending Act XX of 1929, have retrospective effect. Section 63 of the amending Act does not stand in the way. Sections 47 and 51 of the amending Act which introduced sections 92 and 101, respectively, are not mentioned in the first portion of section 63; nor was there, in the present case, anything already done in connection with any proceeding pending in a court on the 1st of April, 1930, which would be affected by the new provisions.

Even if the said sections 92 and 101 have no retrospective effect, then, having regard to the conflicting decisions which had prevailed before the introduction of those sections, the rule laid down by the legislature in those sections would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the amending Act of 1929.

*Second Appeal No. 1005 of 1930, from a decree of Shankar Lal, Subordinate Judge of Bulandshahr, dated the 27th of March, 1930, confirming a decree of Ramesh Bal Dikshit, First Munsif of Bulandshahr, dated the 5th of April, 1929.

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The principle of subrogation has been brought into existence on the ground that the person who has discharged a burden should not lose the money spent on discharging the burden and a subsequent mortgagee who has contributed nothing to discharge the burden should not have the benefit of the discharge to which he has not contributed.

There is no difference in principle between the case where a person after taking a purchase or a puisne mortgage pays off the mortgage and the case where the purchaser or puisne mortgagee professes to take the transfer for a larger sum than in the earlier case and keeps with him that part of the money which is needed for paying off the earliest mortgage and uses it for that purpose. The doctrine of agency on behalf of the mortgagor, which was sometimes applied to the latter case, has much to be said against it. Section 92 of the Transfer of Property Act as it now stands does not recognize any doctrine of agency. The fact that a part of the so-called mortgage money was left with the mortgagee does not in any way destroy the fact that it is the third mortgagee who has redeemed the first mortgage, and section 92 applies.

The principle of merger, which is contained in a codified form in section 101 of the Transfer of Property Act, does not lay down that there may be a merger where the person paying off the earlier charge is only a chargeholder or mortgagee and not a full owner. It is only in the case of a larger interest being acquired that a smaller interest disappears, on the principle of merger.

Mr. *S. B. L. Gaur*, for the appellants.

Mr. *Panna Lal*, for the respondents.

MUKERJI, BANERJI and BENNET, JJ. :—This case has been referred to a Full Bench for a decision of the following point of law, namely—"Where a third mortgagee professes to keep in his hand a part of the mortgage money in order to pay off the first and second mortgages and pays off only the first mortgage, whether in a suit by the second mortgagee to enforce his mortgage it is open to the third mortgagee to insist on his being treated as a first mortgagee whose mortgage must be paid off before the plaintiff brings the mortgaged property to sale."

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The facts of the case are stated in the referring judgment and briefly are as follows. One Ram Chandra was the owner of a certain property. He mortgaged the same for a sum of Rs.200 to one Paras Ram on 19th of October, 1915. The next year, on 16th of October, 1916, he made a simple mortgage of the same property in favour of one Ram Lal and one Ganga Sahai, son of Tika Ram. The second mortgage was for a sum of Rs.400, and Ram Lal and Ganga Sahai kept a portion of the mortgage money with themselves to pay off Paras Ram. Ram Lal and Ganga Sahai, however, did not pay off Paras Ram and their suit out of which the present appeal has arisen is for recovery of a sum of Rs.176 principal amount and interest.

Ram Chandra sold the property on a date which is unknown to one Ganga Sahai, son of Shimbhoo, and this Ganga Sahai made a simple mortgage of the property sold to the present appellants (defendants 3 to 5) Ram Chandra, Tota Ram and Durga for Rs.2,000 on 29th of July, 1926. Out of the mortgage consideration of Rs.2,000 a sum of Rs. 676-3-0 was left with the mortgagees for payment to Paras Ram, a sum of Rs.730-8-0 was left with the mortgagees to pay the second mortgage held by the plaintiffs respondents Ram Lal and Ganga Sahai, son of Tika Ram, a sum of Rs.557-13-6 was similarly left with the mortgagees to pay off a simple money decree held against the vendor and a sum of Rs.35-7-6 was paid in cash to the vendor. On 29th of November, 1926, the heirs of Paras Ram were paid by the appellants a sum of Rs.704-12-0 in full satisfaction of the first mortgage, dated 19th of October, 1915. The second mortgage not having been discharged, Ram Lal and Ganga Sahai, son of Tika Ram, have claimed their money. The appellants were impleaded as the third mortgagees and they pleaded *inter alia* that they had satisfied Paras Ram's mortgage, and without paying that amount the plaintiffs were not entitled to get the property in question sold by auction.

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We have to consider whether in the circumstances of the case the appellants were subrogated to the position of Paras Ram.

The point raised in this appeal has given rise to conflicting decisions, although it must be said that in this Court the majority of cases has decided that a third mortgagee paying off the first mortgage in the circumstances of the present case is not entitled to be subrogated to the position of the first mortgagee.

The earliest important case on this point is the Full Bench decision in *Muhammad Sadiq* v. *Ghaus Muhammad* (1). It was a case of a purchaser from the mortgagor paying off the first mortgage, and it was held in the circumstances of the case that it was never the intention of the purchaser to keep the first mortgage alive. It was pointed out that at the date of the sale the intention of the purchaser was to pay off and extinguish the first mortgage and not to keep it alive. Then it was pointed out that if the date of payment be the crucial date on which the intention to keep alive or extinguish was to be entertained, then the written statement showed that no idea of keeping alive the first mortgage was entertained at the date of payment, because it was not even mentioned by way of defence and the point was raised subsequently as an "afterthought".

This case and the Privy Council case of *Mohesh Lal* v. *Bawan Das* (2) were cases of purchasers whose interest it might be to extinguish the mortgage and to hold the property free from it for their own benefit. Both the cases were decided on the peculiar facts of the case and their Lordships took care to point out the questions of fact which determined their decision.

The principle of merger, which was contained in a codified form in section 101 of the Transfer of Property Act before its amendment and which is still to be found in the amended section of the same Act, does not lay

(1) (1910) I.L.R., 33 All., 101. (2) (1883) I.L.R., 9 Cal., 961.

down that there may be a merger where the person paying off the earlier charge was only a chargeholder or mortgagee and not a full owner. It is only in the case of a larger interest being acquired that a smaller interest disappears on the principle of merger. This was entirely overlooked in some subsequent cases decided in this Court and a doctrine of agency was evolved. It was said that the money with which the third or any subsequent mortgagee pays the first mortgage is the property of the mortgagor and, as no subrogation is allowed to a mortgagor, the third or subsequent mortgagee in making the payment is acting only as an agent of the mortgagor and he is not entitled to be subrogated to the position of the first mortgagee. Such a case was that of *Makkhan Lal* v. *Natthi* (1). There the learned Judges applied the case of *Muhammad Sadiq* v. *Ghaus Muhammad* (2) without distinguishing the feature of the earlier case that there the person making the payment was a purchaser from the mortgagor.

This case has been followed by other cases in this Court, but a contrary view has also been taken in this Court: See, for example, *Shyam Lal* v. *Bashir-ud-din* (3), and *Chhote Lal* v. *Bansidhar* (4). In Madras the case of *Vanmikalinga Mudali* v. *Chidambara Chetty* (5) and in Calcutta the case of *Jagatdhar Narain Prasad* v. *A. M. Brown* (6) take the same view as this Court did in the two cases just mentioned.

The doctrine of agency has much to be said against it. To start with, there does not appear to be any difference in principle between a case where a purchaser or a third mortgagee advances some money to the vendor or the mortgagor, as the case may be, and then pays off the first mortgage and the case where a purchaser or a third mortgagee professes to take the transfer for a larger sum than in the earlier case and keeps with him the money

(1) (1929) 21 A.L.J., 382.
(2) (1910) I.L.R., 33 All., 101.
(3) (1906) I.L.R., 28 All., 778.
(4) (1926) 24 A.L.J., 570.
(5) (1905) I.L.R., 29 Mad., 37.
(6) (1906) I.L.R., 33 Cal., 1133.

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needed for paying off the earliest mortgage and actually does not hand over the money to the vendor or the mortgagor but uses the money to pay off the first mortgage. It is conceded that in the first case a subrogation does arise, but it is denied that it arises in the second case. The principle of subrogation has been brought into existence on the ground that the person who has discharged a burden should not lose the money spent on discharging the burden, and a subsequent mortgagee who has contributed nothing to discharge the burden should not have the benefit of the discharge for which he has not contributed. The Privy Council cases of *Dinobundhu Shaw* v. *Jogmaya Dasi* (1) and *Mahomed Ibrahim Hossain* v. *Ambika Pershad* (2) are entirely, in our opinion, inconsistent with the theory of agency propounded in some cases by the High Courts.

The question, however, has become very much simplified and, it may be said, has entirely disappeared from the arena of controversy owing to the amendment of the Transfer of Property Act.

Before its amendment in 1929 the Transfer of Property Act did not even contain the word "subrogation" and the law of subrogation had to be deduced from English cases and from general principles of equity. Section 74 of the Transfer of Property Act, which has since been repealed, contained only the rudiments of the law of subrogation and was not of much use. Section 92, as it now stands after the amendment of 1929, does not recognize any doctrine of agency. It is couched in the simplest, widest and clearest language possible and the relevant portion runs as follows: "Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the

(1) (1901) I.L.R., 29 Cal., 154. (2) (1912) I.L.R., 39 Cal., 527.

same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee." Mr. *Panna Lal*, who has argued the case for the respondents with his usual ability, has not denied that, if the first paragraph of section 92 applied to the case, the appeal must succeed and the appellants must be treated as the first mortgagees. This is also clear, because the appellants as the third mortgagees are among the persons who are entitled under section 91 of the Transfer of Property Act to redeem the property; they have redeemed the property subject to the first mortgage and they have thereby, according to the terms of the rule of law, the same rights as the first mortgagee, whose mortgage they have redeemed, against the mortgagor and any other mortgagee, the last expression including the plaintiffs respondents. The fact that a part of the so-called mortgage money was left with the third mortgagees does not in any way destroy the facts that the appellants are the third mortgagees and it is they who have redeemed the first mortgage. It is clear, therefore, that if section 92 as amended by Act XX of 1929 applies, the appeal must succeed.

Mr. *Panna Lal*, however, argued that section 92 had no application because of the provision contained in section 63 of Act XX of 1929. Section 63 deals with two portions of the amending Act. It first says that certain provisions of the Act (XX of 1929) shall not be deemed in any way to affect the terms or incidents of any transfer of property made or effected before the 1st day of April, 1930, or to affect the validity or invalidity, effect or consequences of anything done or suffered before the aforesaid date; and so on. The provisions contained in sections 92 and 101 of the Transfer of Property Act are dealt with by sections 47 and 51 and these are not to be found in the first provision of section 63 of Act XX of 1929. The second portion of section 63 of Act XX of 1929 runs as follows: "and nothing

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in any other provision of this Act shall render invalid or in any way affect anything already done before the 1st day of April, 1930, in any proceeding pending in a court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed." Section 47 of Act XX of 1929 dealing with section 92 of the Transfer of Property Act, and section 51 of Act XX of 1929, dealing with section 101 of the Transfer of Property Act, fall under this second clause of section 63 of Act XX of 1929. In our opinion there is nothing in the second clause which affects the present case. These sections are to have retrospective effect except in so far as they are not to have that effect according to the rule laid down. Now is there anything in this case which has already been done before the 1st day of April, 1930, in any proceeding pending in a court on that date? Then again, is there any remedy and any such proceeding as is referred to in Act XX of 1929 which is being affected by the new provisions of sections 92 and 101? We do not find that such is the case. Indeed Mr. *Panna Lal* has not been able to point out to us what has been done in this case before 1st of April, 1930, which is being undone by the new rule of law and what is the remedy or proceeding which is being affected by the new provisions of sections 92 and 101. All that has been done is to lay down a rule of subrogation which was not contained in the unamended Act. The rule was based on general ideas of equity, and it cannot be said that the new Act is going to affect any remedy or any proceeding which was lawful under the old Act. In our opinion, therefore, sections 92 and 101 of the amending Act have retrospective effect.

Supposing, however, that the said sections have no retrospective effect, we have got this position. This

Court itself was divided as to the rule of subrogation in the circumstances of this case and there are conflicting decisions of other High Courts. Opinion is likely to differ as to how far the Privy Council cases in *Dinobundhu Shaw* v. *Jogmaya Dasi* (1) and *Mahomed Ibrahim Hossain* v. *Ambika Pershad* (2) quoted above affect the decisions of the High Courts. In the circumstances, the rule laid down by the legislature would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of Act XX of 1929.

The result is that in our opinion the question for our decision must be answered in favour of the appellants, and we must hold and do hold that the appellants are subrogated to the position of the first mortgagee.

We direct that the case be returned to the Bench making the reference with the answer given above.

APPELLATE CIVIL.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Young.

1932 May, 25

BADRI PRASAD MISIR (PLAINTIFF), *v.* BIJAI NAND TEWARI AND ANOTHER (DEFENDANTS).*

Agra Pre-emption Act (Local Act XI of 1922), *section* 4(10)—*"Sale"—Sale of property not in possession of vendor and requiring litigation to recover it—Sale consideration a fixed sum and unaffected by the future litigation—Accretion to value of property by vendee's successful litigation for its recovery—Pre-emptor entitled to benefit of accretion but must pay the costs of the vendee's litigation—Transfer of Property Act (IV of* 1882), *section* 54.

Where the property sold was not in the possession of the vendor but was held by a third party against whom a suit had

*Second Appeal No. 1534 of 1930, from a decree of Rup Kishan Agha, District Judge of Allahabad, dated the 15th of June, 1930, modifying a decree of Muhammad Taqi Khan, Munsif of Mirzapur, dated the 9th January, 1928.

(1) (1901) I.L.R., 29 Cal., 154. (2) (1912) I.L.R., 39 Cal., 527.