

section 439 of the Criminal Procedure Code cannot be invoked for setting aside that order.

The result, therefore, is that the application in revision does not lie and is consequently dismissed.

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APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Verma

PIAREY LAL AND OTHERS (PLAINTIFFS) v. DINA NATH
AND OTHERS (DEFENDANTS)*

1938
October,
27

Transfer of Property Act (IV of 1882), section 92, paragraph 1—Subrogation—Equity—Right by subrogation to enforce a mortgage can not be claimed in equity, apart from the section—Auction purchaser of equity of redemption paying off decree on prior mortgage—No right to bring a second suit for sale, as against puisne mortgagee, on the prior mortgage—Transfer of Property Act, section 59A—“Mortgagor” includes auction purchaser of equity of redemption—Covenant running with the land—Undertaking by puisne mortgagee to pay off prior mortgage—Whether auction purchaser of mortgagor’s rights can sue the puisne mortgagee for breach of the contract—Transfer of Property Act, section 65.

Cases of subrogation fall under two heads: (1) Where payment by a defendant of a mortgage or of the decree on a mortgage is allowed to be set up by way of a shield as an equitable defence; and (2) Where a person paying off a mortgage is allowed to bring a suit to enforce that mortgage. The second class of claim can not be made in equity but can lie only under the terms of section 92 of the Transfer of Property Act.

The language of section 92, paragraph 1, appears to contemplate a suit for sale against a mortgagor. The rights that could be acquired under that section and paragraph would be for sale as against the mortgagor, and as against other mortgagees would presumably merely be rights of priority. Where the plaintiff, having acquired the mortgagor’s equity of redemption at an auction sale, and having paid off a prior mortgage, brings a suit for sale on that mortgage, impleading as defendants the puisne mortgagee and the original mortgagor

*Second Appeal No 553 of 1935, from a decree of Jagan Nath Singh, Additional Civil Judge of Muttra, dated the 13th of August, 1934, modifying a decree of Ram Nath Sharma, Additional Munsif of Muttra, dated the 5th of April, 1933.

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who had lost all his rights, the suit for sale is not as against a mortgagor and does not satisfy the requirements of section 92, paragraph 1.

Again, section 92, paragraph 1, bars subrogation by the mortgagor, and according to section 59A of the Act "mortgagor" includes a person who has purchased the equity of redemption; such a person can not therefore claim subrogation under that section. A distinction is drawn by section 59A between the two categories of mortgagors and mortgagees, the former including those persons who derive title as a mortgagor and the latter those who derive title as a mortgagee.

Further, section 92 uses language which appears to postulate an existing mortgage and not a mortgage which has merged in a decree. The section confers "the same rights as the mortgagee whose mortgage he redeems may have." But where a mortgage has already been the subject of a suit and a decree has been passed in favour of the mortgagee, it can not be said that the mortgagee has an existing right to obtain a second decree for sale on that mortgage. The language of section 92 does not imply that such a right is granted by subrogation to a person who has paid off the mortgage decree.

Where a puisne mortgagee is under a contractual obligation to the mortgagor to pay off a prior mortgage and fails to do so, and an auction purchaser of the mortgagor's interest satisfies the decree obtained on the prior mortgage, he can not sue the puisne mortgagee for damages for breach of the contractual obligation. The benefit of such a contract can not be deemed to be attached to the mortgagor's equity of redemption and to pass to the auction purchaser along with the equity of redemption. Section 65 of the Transfer of Property Act is a provision in favour of the mortgagee and transferees from him; but there is no similar provision in favour of transferees from a mortgagor in regard to a contract or undertaking made by the mortgagee.

Dr. N. P. *Asthana* and Mr. B. N. *Sahai*, for the appellants.

Mr. B. S. *Darbari*, for the respondents.

BENNET and VERMA, JJ.:—This is a second appeal by the representatives of the plaintiff against a decree of the lower appellate court dismissing the suit of the plaintiff. The facts which give rise to this case are as follows. Phul

Singh owned certain zamindari property and made three mortgages as follows: (1) to Dina Nath, defendant No. 1, for Rs.200 on the 22nd of December, 1909, simple mortgage; (2) simple mortgage to Sukhdeo for Rs.1025 on the 13th of August, 1910; of this Rs.74 cash alone was paid and the balance which was for debts was not paid; and (3) usufructuary mortgage to Dina Nath, defendant No. 1, on the 2nd of August, 1912, for Rs.525; out of this Dina Nath was to pay Rs.93 to Sukhdeo to redeem the second mortgage which was the amount then outstanding on it.

The plaintiff had a simple money decree against Phul Singh and he caused the property of Phul Singh to be put up to auction sale and he purchased his equity of redemption. Subsequent to this, defendants 2 to 8, second party, the successors of Sukhdeo, got a decree No. 946 of 1922 on the second mortgage to Sukhdeo and applied for a final decree for sale. On the 28th of August, 1926, the plaintiff paid the decretal amount Rs.382-4-0. The plaintiff now claims that by paying off this decree he was subrogated to the position of the mortgagee, Sukhdeo, in the second mortgage and the plaintiff has now brought a suit on the second mortgage to recover the amount which he paid Rs.382-4-0 with interest now amounting to Rs.657-4-0. The persons whom the plaintiff has sued are Dina Nath, defendant No. 1, first party, who is the usufructuary mortgagee in possession under the third mortgage; secondly, defendants second party who represent Sukhdeo. These persons naturally have no interest in the matter as the decree of Sukhdeo has been paid off in full. The defendants, third party, represent Phul Singh, and Phul Singh also has no interest in the matter as his equity of redemption was sold in the simple money decree and purchased by the plaintiff. The only person now interested in the property among the defendants is defendant No. 1, Dina Nath, and he alone has filed a written statement. The trial court decreed the suit of the plaintiff for Rs.258. The plaintiff brought an appeal and defendant No. 1

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filed a cross-objection and the point before the court below was "whether the plaintiff is entitled to bring the suit by paying the amount of the decree based on the second mortgage and can he get the property sold in this suit?" The court below held that he could not. The claim of learned counsel Dr. *Asthana* for the plaintiff is that by paying the decretal amount due to Sukhdeo under the second mortgage the plaintiff acquired the rights of Sukhdeo under the second mortgage. This claim is based on the provisions of section 92, first paragraph, of the Transfer of Property Act which states 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 same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee."

Now no ruling has been produced by learned counsel in a parallel case. The rulings which have been produced fall under two heads. Firstly, there are a large number of rulings where it has been held that payment by a defendant of a mortgage charge may be set up as a shield as an equitable defence. Such a claim may be made by a person paying off a decree on a mortgage. This equitable defence has also been held good by their Lordships of the Privy Council in *Jagmohan Das v. Jugal Kishore* (1). The second class of case is a suit to enforce a mortgage charge by a person paying off the charge. Such a claim, in our opinion, cannot be made in equity but can only lie under section 92 of the Transfer of Property Act. If the plaintiff is entitled to bring the present suit, the plaintiff must show that he does come under section 92. The rulings which deal only with the right of an equitable defence do not justify us in applying to the same circumstances the positive right to bring a suit on the mortgage or decree which has been paid off. The rulings which deal with an equitable

(1) A.I.R. 1932 P.C. 99.

defence to which reference was made are *Tota Ram v. Ram Lal* (1), *Ganga Ram v. Harihar Prasad*, (2), *Alam Ali v. Beni Charan* (3) and *Ayyareddi v. Gopalkrishnayya* (4). For the second class of case in which there is a suit to enforce a mortgage charge reference was made by learned counsel to *Shib Lal v. Munnii Lal* (5). In that ruling it was held that when a second mortgagee discharged a decree obtained by the first mortgagee, he acquired a charge on the mortgaged property as from the date upon which he made payment in satisfaction of the decree, as well as a right to be reimbursed by the mortgagor personally; but he was in no sense an assignee of either the mortgage or the decree. Now that case is to be distinguished from the present case because it is a payment by a mortgagee and the suit was brought against the mortgagor. In the present suit there is no one representing the mortgagor other than the plaintiff himself because he has acquired the equity of redemption of the mortgagor by purchase at an auction sale. His suit for sale is therefore brought naming the former mortgagor as a party and the only defendant who is interested in making a defence is the subsequent mortgagee. The language of section 92, paragraph 1, appears to contemplate a suit for sale against a mortgagor. The section states that the rights which are acquired are "the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee." Those rights against the mortgagor would be for sale and against other mortgagees would presumably merely be rights of priority. The present suit is brought against defendants, none of whom is the mortgagor who actually possesses an equity of redemption at present or any of his representatives. The mere joining as defendants of defendants second party does not satisfy the conditions required by section 92 because defendants second party have no longer any right of equity of redemption whatever.

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(1) (1932) I.L.R. 54 All. 897.

(2) [1936] A.L.J. 281.

(3) (1935) I.L.R. 58 All. 602.

(4) (1923) I.L.R. 47 Mad. 190.

(5) (1921) I.L.R. 44 All. 67.

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Another point on which we have considerable doubts is whether the plaintiff comes within the first part of this paragraph of section 92. The paragraph bars subrogation by the mortgagor in the words "other than the mortgagor" and the argument is made by learned counsel for the respondent that under the new section 59A the word "mortgagor" will include persons deriving title from the mortgagor. Section 59A provides: "Unless otherwise expressly provided, reference in this chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively." Dr. *Asthana* for the plaintiff appellant argued that there was an express provision in the context in section 91 and the plaintiff would be a "person interested" in the property mortgaged, having acquired the equity of redemption by auction purchase. We do not think that this provision mentioned in section 91 is an express provision such as is mentioned in section 59A. If section 92 intended to include the auction purchaser of the equity of redemption, this fact would have been clearly stated in that section and it would not be a mere matter of inference from the words "who has any interest in" in section 91(a).

Another argument was that a mortgagee would also derive title from a mortgagor and therefore section 59A would also apply to mortgagees. We do not think that that is a correct interpretation of section 59A because that section states in regard to mortgagors and mortgagees that references to them shall include "references to persons deriving title from them respectively." A distinction is therefore drawn by section 59A between the two categories of mortgagors and mortgagees and doubtless the intention is that the persons who derive title from them are to be persons who derive title as a mortgagor or as a mortgagee. That is, under the head "mortgagor" would be included persons succeeding by inheritance or by will or by sale or by auction sale to the right of the equity of redemption held by a mortgagor

and those words would not include persons who subsequently take a mortgage from the mortgagor.

Another difficulty in the way of the plaintiff appellant is that section 92 uses language which appears to postulate an existing mortgage and not a mortgage which has merged in a decree. The words used are, "on redeeming property subject to the mortgage . . . the same rights as the mortgagee whose mortgage he redeems may have." Both these expressions indicate that there is a subsisting mortgage. Now if we turn to the part of chapter IV which deals with the rights of the mortgagees, we find that this part begins with section 67. That section gives "a right to obtain from the court a decree that the property be sold". Now where a mortgage has been the subject of a suit and a decree has been passed in favour of the mortgagee, it cannot be said that the decree-holder has an existing right under section 67 to obtain from the court a decree that the property be sold. It has already made a decree and therefore he could not again file a suit and ask for another decree to be passed in his favour. But this is exactly what the present plaintiff has asked the court to do. The heirs of Sukhdeo brought a suit on the second mortgage and obtained a decree. The plaintiff satisfied that decree and now he asks the court again to allow his suit on the mortgage in favour of Sukhdeo and to grant him a second decree on that mortgage. We do not consider that the language of section 92 implies that such a right is granted by subrogation. If the section did allow a second decree to be passed on a mortgage on which a decree had already been passed, then there seems to be no reason why the process should not be repeated indefinitely and why a series of decrees should not be passed on the same mortgage. This appears to be a *reductio ad absurdum* of the proposition of the appellant.

Learned counsel for the appellant based his claim on a further ground, namely that Dina Nath by the usufructuary mortgage in his favour was bound to pay off the

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second mortgage to Sukhdeo to the extent of Rs.93 which was then due on it and that Dina Nath did not make this payment and that eventually the plaintiff had to make this payment and therefore the plaintiff is entitled to the damages which he suffered and that he should recover those damages from Dina Nath. Now the mortgage of Dina Nath was in 1912 and the payment made by the plaintiff was on the 28th of August, 1926. The suit has been brought within a period of six years from the payment, namely on the 27th of August, 1932. The plaintiff therefore considers that a contractual obligation exists between Dina Nath and himself and that Dina Nath has broken his contract and that the plaintiff is therefore entitled to sue for damages under section 73 of the Indian Contract Act. Now it is obvious that the plaintiff and Dina Nath were not the two parties to the contract of the usufructuary mortgage of 1912. Those parties were Phul Singh on the one side and Dina Nath on the other. The claim for the appellant is that the benefit of this contract was attached to the equity of redemption of Phul Singh and passed to the plaintiff by his purchase of the equity of redemption at auction sale. To establish this proposition, in our view, it is necessary for learned counsel to show some section of the Transfer of Property Act or some other law providing that the benefit of such a contract can be attached to immovable property and pass in such a manner. As regards the sale deeds there is a provision in section 55(2) in regard to the implied contract with the buyer that the interest which the sale deed professes to transfer subsists and that he has power to transfer the same. It is stated at the end of this subsection that the benefit of that contract shall be annexed to and go with the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. Similarly in section 65 of the Transfer of Property Act it is provided that certain contracts by the mortgagor shall be implied to exist with the mortgagee

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and at the end of that section there is a similar provision that the benefit of these contracts may be enforced by every person in whom the interest of the mortgagee is from time to time vested. This is a provision in favour of the mortgagee. But learned counsel is not able to show that there is any such provision in favour of a mortgagor in regard to a contract or undertaking made by the mortgagee. The Act is silent on this point. Without a specific provision that such a benefit of a contract by a mortgagee shall pass with the interest of the mortgagor and be enforceable by every person in whom the equity of redemption from time to time shall vest, we consider that the claim cannot be made on behalf of the plaintiff that he is entitled to claim damages from Dina Nath on account of the alleged breach of contract by Dina Nath. It may also be pointed out that the suit was not brought by the plaintiff as one for damages for breach of contract. By the relief (a) the plaintiff asks us for sale of the property mortgaged, in case the plaintiff's claim was not paid to him. That is, he brought a suit to enforce a mortgage charge and not a suit for damages for breach of a contract. But in our view even if he had put his suit in the proper form, he would not be entitled to such damages as the contract is not one by which he is entitled to any benefit.

For these reasons we dismiss this second appeal with costs.

There is a cross-objection by the respondent in regard to the order of the lower appellate court which dismissed the suit of the plaintiff but directed that the parties should bear their own costs. We note that the respondent defendant has caused loss to every one concerned by his failure to pay the small amount of Rs.93 to Sukhdeo which amounted to a much larger amount when payment was made by the plaintiff. In these circumstances we do not think that we should interfere with the court below in regard to costs and we dismiss the cross-objection with costs.