

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai .

CHUNNI LAL (PLAINTIFF) v. LAKSHMI CHAND
AND OTHERS (DEFENDANTS)*

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Transfer of Property Act (IV of 1882), section 92 (as amended) —Retrospective effect—Subrogation—Money left with puisne mortgagee to pay off prior mortgage—No registered agreement for right of subrogation—Transfer of Property (Amendment) Act (XX of 1929), section 63—Transfer of Property Act, section 101.

According to section 92 (as amended) of the Transfer of Property Act a subsequent mortgagee, with whom money has been left to pay off a prior mortgagee and who accordingly pays him off, cannot be subrogated to the rights of the prior mortgagee unless there is a written and registered agreement to that effect.

Held, following the Full Bench case of *Hira Singh v. Jai Singh* (1), that those sections of the Transfer of Property Act which are not enumerated in section 63 of the Amending Act XX of 1929 have retrospective effect, at least in those cases where no action was pending on the 1st April, 1930; and the amended section 92 has, therefore, retrospective effect in cases where no action was pending on the 1st April, 1930.

[*Per IQBAL AHMAD, J.*—Apart from the authority of the Full Bench case, the proposition that all the sections of the Transfer of Property Act that are not enumerated in section 63 of the Amending Act XX of 1929 have retrospective effect would appear to be unsound, and in particular the proposition that the third paragraph of section 92 has retrospective effect would appear to be unsound.]

A subsequent mortgagee obtains only a mortgage and does not *acquire the rights* in the property of the mortgagor or owner, within the meaning of section 101 of the Transfer of Property Act; that section, therefore, can have no application to a claim by him to obtain subrogation.

Messrs. *Raj Bahadur Jaini* and *M. A. Kazmi*, for the appellants.

*Second Appeal No. 1070 of 1936, from a decree of S. C. Chaturvedi, First Civil Judge of Saharanpur, dated the 14th of April, 1936, confirming a decree of Bijeypal Singh, Munsif of Haveli, dated the 26th of January, 1935.

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Messrs. *G. S. Pathak* and *K. C. Mital*, for the respond-

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BAJPAI, J.:—This is an appeal by Seth Chunni Lal who was the plaintiff in the court below and who had brought a suit for the recovery of a sum of Rs.2,800 on the basis of a mortgage, dated the 28th of April, 1922. The defendants to the suit were Bharat Singh, Ranjit Singh and Ram Singh defendants 1 to 3 who might loosely be described as the original mortgagors, and Lachhmi Chand, Hargu Lal and Rameshwar Das defendants 4 to 6 who were impleaded as subsequent mortgagees under a mortgage of the 19th of January, 1929. The mortgage was executed by Bharat Singh in his own right and as the guardian of Ranjit Singh and Ram Singh. The defence of Ranjit Singh and Ram Singh was that they were separate from Bharat Singh defendant No. 1 and the latter had no right to execute the mortgage on their behalf and the mortgaged property so far as their share was concerned was unaffected. Defendants 4 to 6 pleaded—and it is only with this plea that I am concerned—that they had priority to the extent of Rs.3,230 because under the mortgage of 1929 the above sum was credited towards an earlier mortgage in their favour of the 28th of January, 1921, a mortgage earlier than the mortgage in suit of the plaintiff.

The trial court held in favour of defendants 2 and 3 and said that defendant No. 1 Bharat Singh was not entitled to execute a mortgage on behalf of defendants 2 and 3 and that the property of defendants 2 and 3 was unaffected by the mortgage. It also held in favour of defendants 4 to 6 and declared that they were entitled to priority with respect to the sum of Rs.3,230. On these findings the learned Munsif decreed the plaintiff's suit for Rs.2,800 but exempted defendants 2 and 3 and their share of the property. All the defendants were given six months' time from the date of the decree to redeem the plaintiff's mortgage and in case of their failure to do so the plaintiff was given three months'

time from the expiry of the six months aforesaid to pay off the amount of Rs.3,230 for the prior mortgage of defendants 4 to 6 and in case of such payment being made within the period above mentioned the plaintiff was to be entitled to realise the amount due on the mortgage in suit as also the sum of Rs.3,230 plus the costs of the suit by sale of Bharat Singh's one-third in the property in dispute.

There was an appeal by the plaintiff and the lower appellate court confirmed the decree of the trial court.

In second appeal before us it is contended that defendants 4 to 6 are not entitled to any priority. For the rest no grievance is made so far as the decrees of the courts below are concerned. The submission on behalf of the plaintiff is that defendants 4 to 6 are mortgagees under the mortgage of the 19th of January, 1929, and to that extent their mortgage is subsequent to the plaintiff's mortgage of the 28th of April, 1922. The mortgage of the 19th of January, 1929, was executed for a sum of Rs.5,500 and, out of this, Rs.3,230 were credited towards a mortgage of the 28th of January, 1921, in favour of defendants 4 to 6 and a sum of Rs.1,200 was left for payment to the present plaintiff upon his mortgage of the 28th of April, 1922. It is contended on behalf of the plaintiff appellant that the mortgagees of 1929 are not entitled to subrogation so far as the sum of Rs.3,230 is concerned and reliance is placed on section 92 of the Transfer of Property Act (Act IV of 1882 as amended by Act XX of 1929). Section 92 provides amongst other things: "A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated." This provision of law means that before a subsequent mortgagee can claim to be subrogated to the rights of a prior mortgagee to whom money has been paid under the terms of the subsequent mortgage there

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must be a registered instrument agreeing to such subrogation. This was the view taken by a Full Bench of this Court in *Hira Singh v. Jai Singh* (1) to which I was a party. It was held in that case that "Where a person himself redeems a mortgage, that is to say, pays the mortgage money out of his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the rights of subrogation under the first paragraph if he is one of the persons enumerated in section 91. But where the person does not himself redeem the mortgage, that is to say, does not himself pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilised for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is paid through the hands of the mortgagee, the latter acquires the right of subrogation only if the mortgagor has by a registered instrument agreed that he shall be so subrogated. In this view when a person with whom money has been left for payment to a prior mortgagee pays it off, he is really not himself redeeming the mortgage but redeeming it as the agent of the mortgagor and has in substance advanced money to the mortgagor with which the mortgage has been redeemed. He cannot get the rights of subrogation unless there is a written and registered agreement to that effect."

Applying the above principle to the facts of the present case it is clear that the subsequent mortgagees of 1929, namely defendants 4 to 6, cannot be subrogated to their rights under the prior mortgage of the 28th of April, 1922, because there is no written and registered agreement to that effect, and the view taken by the courts below is not sound.

It was contended on behalf of the respondents defendants 4 to 6 that the facts of the Full Bench case just now mentioned were slightly different from the facts of the present case and in any event section 101 of the Transfer

(1) I.L.R. [1937] All. 880 (893-4).

of Property Act was not discussed by the Full Bench. The facts may be somewhat different but the principle is clearly applicable. Section 101 of the Transfer of Property Act says: "Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto." The argument is that defendants 4 to 6 were mortgagees under the mortgage of the 20th of January, 1921, and they in 1929 *acquired* the rights in the property of the mortgagor or owner by the mortgage of the 19th of January, 1929, and therefore they did not cause the earlier mortgage of 1921 to be merged as between themselves and the plaintiff who was the subsequent mortgagee under the mortgage of the 28th of April, 1922. This argument assumes that when the defendants 4 to 6 took the mortgage of 1929 they *acquired* the rights in the property of the mortgagor or owner. In my view it is clear that in 1929 defendants 4 to 6 *obtained only a mortgage* and did not acquire the rights in the property of the mortgagor or owner. Section 101 of the Transfer of Property Act has, therefore, no application to the facts of the present case.

It was then argued that section 92 of the Transfer of Property Act had no retrospective effect inasmuch as all the transactions with which one has to deal in the present case took place before the Amending Act of 1929 and therefore the condition laid down in section 92 that subrogation could be had only under the third paragraph of the section by means of a registered instrument did not apply. The simple reply to this is that the point was considered in the Full Bench case of *Hira*

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Singh v. Jai Singh (1) to which a reference has already been made, and it was held there that effect ought to be given to the language of the Act as it stands and those sections of the Transfer of Property Act which are not dealt with in the sections enumerated in section 63 of the Amending Act have retrospective effect, at least in those cases where no action was pending on the 1st of April, 1930. Section 92 is not one of the sections enumerated in section 63 of the Amending Act and the present action was not pending on the 1st of April, 1930, but was instituted on the 8th of May, 1934. The position, therefore, is that section 92 of the Transfer of Property Act applies to the present action and the plaintiff is justified in saying that by reason of that provision defendants 4 to 6 have no priority so far as his mortgage of the 28th of April, 1922, is concerned.

For the reasons given above I would allow this appeal with costs against defendants 4 to 6 in all courts and modifying the decrees of the courts below substitute the following decree: The plaintiff's suit for the amount claimed is decreed with costs and future and *pendente lite* interest at the contractual rate till the 26th of July, 1935, and then at Rs.6 per cent. per annum. The decree is *ex parte* against defendant No. 1. Defendant Nos. 2 and 3 are exempted. The defendants are given six months' time from today to redeem the plaintiff's mortgage and in case of their failure to do so Bharat Singh's one-third share in the property in dispute shall be sold. A preliminary decree for sale will now be drawn up under order XXXIV, rule 4 of the Civil Procedure Code on the lines indicated above. The plaintiff is entitled to his costs against defendants Nos. 1, 4, 5 and 6 in all courts.

IQBAL AHMAD, J.:—In view of the Full Bench decision referred to by my learned brother which is binding on me, I agree in the order proposed. But for the Full Bench decision I would not have assented to the proposi-

tion that all the sections of the Transfer of Property Act that are not enumerated in section 63 of the Amending Act (XX of 1929) have retrospective effect, and in particular I would have held that paragraph 3 of section 92 of the Transfer of Property Act has no retrospective effect. I note that on the question whether the amended section 92 has retrospective effect there is great divergence of judicial opinion and speaking generally the Madras, Rangoon, Patna and Nagpur High Courts have held that the section is not retrospective, while this Court and the Calcutta and Bombay High Courts and the Oudh Chief Court have taken the view that that section is retrospective in effect except in proceedings pending on the 1st of April, 1930, on which date the Amending Act came into force.

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Before Mr. Justice Rachhpal Singh

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MANSA RAM AND SONS (PLAINTIFF) v. HIRA LAL SANON
AND ANOTHER (DEFENDANTS)*

Limitation Act (IX of 1908), article 85—Mutual, open and current account—Test of—Shifting balance in favour of one party and the other—Number of transactions—Banker—Current account and overdraft—Limitation.

The real test of whether a case is governed by article 85 of the Limitation Act is whether the balance was shifting from time to time, now in favour of one party and then in favour of the other.

For determining the question of mutuality it is not necessary that there must be a large number of transactions between the parties.

Where the defendant opened a current account with the plaintiff banker and deposited a certain sum, and subsequently the banker gave the defendant an overdraft, on a promissory note, on that current account, it was held that the account thereupon became a mutual, open and current account within the purview of article 85 of the Limitation Act.

Mr. G. S. Pathak, for the applicant.

Mr. S. N. Katju, for the opposite parties.

RACHHPAL SINGH, J. :—The plaintiff firm Mansa Ram and Sons instituted a suit against Hira Lal Sanon and