

APPELLATE CIVIL

*Before Mr. Justice G. H. Thomas, Acting Chief Judge and
Mr. Justice Ziaul Hasan.*

BABU KUNDAN LAL (DEFENDANT-APPELLANT) v. HAJI
SHEIKH FAQIR BAKSH (PLAINTIFF-RESPONDENT)*

1935
March, 28

*Transfer of Property Act (IV of 1882), section 92, paragraphs 1,
2 and 3—Redemption of mortgaged property by purchaser
of a portion of it—Purchaser, if a co-mortgagor and entitled
to be subrogated to the rights of mortgagee.*

Where a person purchases a portion of the mortgaged property from some of the mortgagors and redeems such property, his position is that of a co-mortgagor and his case comes under paragraph 1 and not under paragraph 3 of section 92 of the Transfer of Property Act and on redemption he will, according to paragraph 2 of section 92, be subrogated to the rights of the original mortgagee.

Messrs. *Radha Krishna, L. S. Misra and P. L. Varma,* for the appellant.

Messrs. *Hyder Husain, Rameshwar Dayal and H. H. Zaidi,* for the respondent.

THOMAS, A. C. J. and ZIAUL HASAN, J:—These appeals against decrees of the learned Civil Judge of Lucknow dated the 9th of April, 1935, have been brought by a common defendant to two suits for redemption filed by Shaikh Faqir Baksh and Shaikh Muhammad Abdulla respectively.

Some properties comprising houses, shops, land and trees known as Amlak Rahimganj situate in mohalla Ganeshganj, Lucknow, originally belonged to one Khuda Baksh. Khuda Baksh died leaving a widow, Musammat Mariam Begum, three sons Karim Baksh, Rahim Baksh and Nabi Baksh and ten daughters. Seven out of the ten daughters relinquished their rights in the property left by their father in favour of their mother and

*Second Civil Appeal No. 194 of 1935, against the decree of Mr. Sheo Gopal Mathur, 1st Additional Judge, Small Cause Court, Lucknow and Additional Civil Judge, Lucknow, dated the 9th of April, 1935, reversing the decree of Mr. Akhtar Ahsan, Munsif, South, Lucknow, dated the 9th of August, 1934.

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brothers. Musammat Mariam Begum died in 1905 but before that, namely, on the 12th of February, 1904, she and her sons had mortgaged the entire property for Rs. 20,000 with possession to the then Maharaja of Balrampur. The Balrampur estate obtained a decree on foot of this mortgage on the 9th of December, 1919. On the 21st of September, 1920, Rahim Baksh, Karim Baksh and Nabi Baksh, the three sons of Khuda Baksh, sold a portion of the property to Murlidhar (defendant No 29) and out of the consideration for the sale, left a sum of Rs. 20,885 for payment of the decree of the Balrampur estate. Murlidhar deposited this amount in court and redeemed the mortgage. After that possession of the property was delivered by court to Rahim Baksh and Murlidhar on the 28th of December, 1920. Murlidhar had himself mortgaged a portion of the property purchased by him to Babu Kundan Lal (defendant No. 24), the present appellant. Kundan Lal put his mortgage in suit and in execution of his decree for sale sold the property and purchased it himself in February, 1932.

Among the daughters of Khuda Baksh who had not relinquished their shares in favour of their mother and brothers, were Musammat Zainab and Musammat Sakina. Musammat Zainab's share in the property was sold in execution of a decree and was purchased by Faqir Baksh, plaintiff respondent in appeal No. 194. Shaikh Abdulla, the respondent in appeal No. 195, is the transferee of Musammat Sakina's share from her successors in-interest.

The suits which have given rise to these appeals were brought by Faqir Baksh and Shaikh Abdulla for redemption of the shares of Musammat Zainab and Musammat Sakina respectively on payment of the proportionate amounts due against those shares.

The suits were contested by some of the defendants including the present appellant. The latter raised

various pleas but most of them were overruled by the trial court, the learned Munsif, South, Lucknow. The suits were however dismissed by the trial court as time barred and on the plea of adverse possession raised by the present appellant. The plaintiffs appealed and the learned Civil Judge who heard the appeals reversed the findings of the trial court and holding that the suits were governed by article 148 of the Indian Limitation Act decreed both the suits, that of Shaikh Faqir Baksh for redemption of a 5362/14080th share on payment of Rs.436 and of Shaikh Abdulla for redemption of a 5362/14080th share on payment of Rs.270-5-4. Kundan Lal, defendant No. 24, therefore brings these appeals against the learned Additional Civil Judge's decrees.

The appeals were set down for hearing before a single Judge but one of us before whom they were put up directed that they be laid for hearing before a Bench. They were accordingly put up before a Bench and the Bench referred the following question for decision by a Full Bench:

"Have the provisions of the amended section 92 of the Transfer Property Act retrospective effect or not?"

The question was thereupon argued at length before a Full Bench of which both of us were members and the Full Bench unanimously gave the following answer to the question referred to them:

"Our answer to the question referred to the Full Bench is that the provisions of the amended section 92 of the Transfer of Property Act have retrospective effect except in regard to acts done before the 1st of April, 1930. in any proceeding pending in any court on that date."

It will thus be seen that the Full Bench upheld the view of the learned Additional Civil Judge that section 92 of the Transfer of Property Act as amended by Act XX of 1929 has retrospective effect and is therefore appli-

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cable to the present case, so that the appellant as the representative-in-interest of Murlidhar must be deemed to have been subrogated to the position of the original mortgagee, namely, the Balrampur estate, and therefore the cases were governed by article 148 and not by article 144 of the Indian Limitation Act.

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The learned counsel for the appellant however argues that though section 92 of the Transfer of Property Act, as it stands at present, is applicable to these cases, it is paragraph 3 of that section which governs these cases and that as Murlidhar had not obtained a registered agreement from the mortgagor to the effect that he will be subrogated, neither Murlidhar nor the present appellant can be deemed to have been subrogated to the position of the Balrampur estate. Paragraph 3 of section 92 runs as follows:

“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.”

We are of opinion, however, that the case of Murlidhar clearly comes under paragraph 1 of the section which is 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.”

It is not denied that Musammats Zainab and Sakina had shares in the property in question. It is also undisputed that Murlidhar was purchaser of a portion of the property from Khuda Baksh's sons. Therefore, he was in the position of a co-mortgagor of the property with Musammats Zainab and Sakina. It is also beyond doubt that by its order dated the 18th December, 1920 (exhibit B-14), the Court allowed Murlidhar to

redeem the property which he did by payment of the amount of the decree in favour of the Balrampur estate. Thus murlidhar was clearly a co-mortgagor who had redeemed the property which was subject to the mortgage of the Balrampur estate. He was thus according to paragraph 2 of section 92 subrogated to the rights of the Balrampur estate, the original mortgagee, and as the present appellant is the representative-in-interest of Murlidhar he also stands in the same position as against the present plaintiffs.

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The learned counsel for the appellant relies on the cases of *Jaidevi Kunwar v. Sripal Singh* (1) and *Mohammad Raza v. Bilqis Jehan Begam* (2). Neither of these cases in our opinion helps him as the facts of both the cases were totally different from those of the cases before us. In both those cases the persons who claimed subrogation were the purchasers of the equity of redemption from the sole mortgagors, so that the provisions of paragraph 1 of section 92 relating to the rights of a co-mortgagor who has redeemed the property could not be applied to them. In the present case, however, as we have noted above, Murlidhar's case clearly falls under that paragraph. In the first of the cases mentioned above the learned Judge who decided it relied on the following passage occurring in Sir Dinshaw Mulla's commentary on the Transfer of Property Act:

"The rule against the subrogation of a mortgagor is extended to any purchaser of the equity of redemption or encumbrancer who discharges the prior encumbrance 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."

This must obviously refer to the purchaser of a sole mortgagor as the case of a co-mortgagor is governed by paragraph 1 of section 92. In the latter case referred to there was further this distinction that the money with which the mortgage was redeemed was not paid to the

(1) (1933) 11 O.W.N., 139.

(2) (1934) 11 O.W.N., 619.

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mortgagee by the purchaser himself. The whole of the purchase money was paid in the registration office to the mortgagor who himself redeemed the mortgage. Indeed some of the passages in the case of *Mohammad Raza v. Bilqis Jahan Begam* (1) so far from helping the present appellant support the case of the plaintiffs-respondents. At page 625 referring to the case of *Gokuldos Gopaldoss v. Rambax Seochand* (2) the learned Judges say—

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“It would therefore appear that that was a case where the payment had been made by a subsequent purchaser in order to protect his own interest and so that case cannot help the respondents.”

Again at page 627 it is said—

“In the case of legal subrogation, the third encumbrancer redeems the first mortgage in order to protect his own interest. Similarly a man who purchases the equity of redemption of the mortgagor and who redeems the first mortgage does so in order to protect his own interest. Their cases are governed by the first clause of section 92 of the Transfer of Property Act which enacts . . .”

This clearly shows that in the view of the learned Judges who decided Mohammad Raza's case, the case of a purchaser who redeems the first mortgage falls under paragraph 1 of section 92 for this reason also that he is a person “interested” in the property within the meaning of section 91. Further, the learned Judges give with approval the following quotation from the judgment of SULAIMAN J., in the case of *Shafiq-Ullah Khan v. Sami-ullah Khan* (3):

“If the mortgagee intended to keep it alive one would have expected him to take care to have a clear statement recorded to that effect . . . We also have the fact that the amount was taken by the mortgagors in cash and paid by them directly and not left in the hands of the mortgagee for the discharge of the prior debt. It could never have been the intention of the parties that the previous mortgage debt would be kept alive for the benefit

(1) (1934) 11 O.W.N., 619.

(2) (1884) L.R., 11 I.A., 126.

(3) (1929) I.L.R., 52 All., 139.

of the subsequent mortgagee as against the mortgagors. In the absence of any direct evidence or of any circumstances indicating why there should have been a reason for entertaining the intention to keep the previous mortgage debt alive, it is impossible to hold that the previous mortgage debt was not extinguished by the payment but was kept alive for the benefit of the subsequent mortgagee."

This remark of SULAIMAN, J., fully supports the view that we have taken above, namely that the cases before us are distinguishable from Mohammad Raza's case inasmuch as in the latter case, the mortgage was redeemed by the mortgagor himself and not by the purchaser.

For all the above reasons we are of opinion that the learned Additional Civil Judge was perfectly right in holding that the suits are governed by article 148 of the Indian Limitation Act and that there is no force in the contention that paragraph 3 of section 92 of the Transfer of Property Act is applicable to the present cases.

The learned counsel for the appellant tried to show that Murlidhar was in possession of the property adversely to Musammat Zainab and Musammat Sakina but in view of the finding that we have arrived at as to the applicability of section 92 of the Transfer of Property Act, no question of adverse possession arises.

The result is that the appeals have no force and are dismissed with costs.

Appeal dismissed.

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