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undoubtedly the landlord and the defendant was and is his tenant. The suit was for a declaration that the landlord was entitled to a *nakdi* rent and for a decree for rent. The learned Judge in the Court below has come to the conclusion that as the plaintiff sued not only for arrears of rent but also for a declaration regarding the share of the *bhaoli* rent, the suit was a title suit and the decree was not a rent decree, and consequently Article 6 of Schedule 3 of the Bengal Tenancy Act was inapplicable. I am unable to take the same view. The suit was between landlord and tenant and undoubtedly the provisions of the Act are applicable to them. Further the suit was a rent suit in the strictest meaning of the term, and I do not understand why Article 6 of the third schedule should not apply to the execution of a decree obtained in such a suit just because the landlord asked for a wholly unnecessary declaration in the suit. In my opinion Article 6 of the third schedule of the Bengal Tenancy Act did apply to the application for execution of the decree and the learned District Judge should have dismissed the application for execution.

I would allow the appeal, set aside the orders passed by the Courts below and dismiss the execution petition of the respondents with costs.

COUTTS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Coutts and Das, J.J.

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July, 7.

SIBANAND MISRA

v.

JAGMOHAN LALL.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section 74—suit by puisne mortgagee and purchaser of mortgaged*

* Appeal from Appellate Decree No. 542 of 1921, from a decision of G. Rowland, Esq., District Judge of Gaya, dated the 22nd December, 1920, affirming a decision of M. S. Hasan, Subordinate Judge of Gaya, dated the 17th December, 1919.

property in execution of decree—application by judgment-debtor to set aside sale—prior mortgage paid off by puisne mortgagee—sale set aside—suit by puisne mortgagee to enforce prior mortgage, maintainability of—Subrogation, nature of rights acquired on—limitation for enforcement of rights—right to enforce prior mortgage in suit for reimbursement.

Where a puisne mortgagee has, in execution of his mortgage, purchased the mortgaged properties, and, subsequently, pending an application under Order XXI, rule 90, of the Code of Civil Procedure, 1908, to set aside the sale, pays off a prior mortgagee decreeholder, he is entitled, if the sale is set aside, to enforce the prior mortgage against the properties secured by it.

Moulvie Mohammed Shumsool Hooda v. *Shewukram*(1) and *Syamalarayudu* v. *Subbarayudu*(2), approved.

The rights of a puisne mortgagee who has paid off a prior encumbrance are (*i*) to enforce the prior encumbrance or (*ii*) to be reimbursed the amount paid off.

Limitation for the exercise of the right to enforce the prior encumbrance begins to run from the date on which the money due under the prior encumbrance becomes due, but limitation for the exercise of the right to be reimbursed begins to run from the date on which the prior encumbrance is paid off.

Bora Shiblal v. *Munni Lal* (3), dissented from

Mohamed Ibrahim Hossain Khan v. *Ambika Pershad Singh* (4), applied.

The present suit, which was one by the puisne mortgagee to enforce the prior encumbrance or for a personal decree against the defendants, was held by the High Court to be barred by limitation, but the High Court treated the suit as one for reimbursement and decreed the amount paid off by the plaintiff to the prior encumbrancers.

Appeal by the defendants.

Suit by a puisne mortgagee, who had paid off a prior mortgagee, to enforce the prior mortgage against the properties secured by it, and for a personal decree against the defendants. The suit was decreed by the trial Court.

(1) (1874) 22 W. R. 409.
(2) (1898) I. L. R. 21 M. 143.
(3) (1921) 63 Ind. Cas. 604.
(4) (1912) I. L. R. 39 Cal. 527 P. C.

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The facts of the case material to this report are stated in the judgment of Das, J.

Lakshmi Narain Singh, *Bipin Behari Saran* and *Bhagwan Prasad*, for the appellants.

Siveshwar Dayal, for the respondents.

DAS, J.—The material facts are these: On the 13th December, 1904, the defendants 1 to 5 (who will be referred to as the defendants throughout this judgment) borrowed a sum of money from Mussammat Chandra Badan Koer and executed a mortgage bond in her favour, the due date of payment fixed in the mortgage bond being the 29th May, 1905. Thereafter the defendants executed three successive mortgages in favour of the plaintiffs to cover the properties mortgaged to Mussammat Chandrabadan Koer. The plaintiffs sued upon their mortgages and got a preliminary decree on the 28th August, 1916, and a final decree on the 11th May, 1917. Mussammat Chandrabadan Koer also sued on her mortgage, and got a preliminary decree on the 2nd September, 1916, and a final decree on the 2nd March, 1917. In execution of the plaintiffs' decree the mortgaged properties were put up for sale and were purchased by the plaintiffs on the 3rd January, 1918. The defendants then presented an application under Order XXI, rule 90, for setting aside the sale. Mussammat Chandrabadan Koer commenced her execution proceedings on the 16th November, 1917, and the plaintiff, on the 17th April, 1918, as puisne mortgagees, and for their own protection, paid off Mussammat Chandrabadan Koer, whose execution proceedings thereupon came to an end. It is important to remember that the discharge of the prior security by the plaintiffs took place at a time when the equity of redemption was in them, though an application for setting aside the sale was pending at the instance of the mortgagors. The application of the mortgagors for setting aside the sale in favour of the plaintiffs ended in a compromise, the mortgagors paying off the plaintiffs and the sale being set aside. On the 4th

January, 1919, the plaintiffs commenced this action to enforce Mussammat Chandrabadan's security as against the defendants or, in the alternative, for a personal decree as against the defendants. Their case in the plaint is a simple one. They say that on paying off Mussammat Chandrabadan which they were obliged to do for their own protection, they were subrogated to the securities held by Mussammat Chandrabadan and were entitled to enforce these securities as against the defendants. The Courts below have allowed the plaintiffs' claim and the defendants appeal to this Court.

Two questions have been argued before us by Mr. *Lakshmi Narain Singh* on behalf of the appellants: *First*, that in the circumstances of the case, the plaintiffs are not entitled to the benefit of the security held by Mussammat Chandrabadan; and, *secondly*, that, in any event, the right to enforce the security is barred by limitation. The argument as to the extinction of the security rests on the settled view of equity that a person who is primarily liable to discharge the debt and does discharge it is not entitled to claim a cession or assignment of the security. It was argued that, at the time when the plaintiffs discharged the debt of Chandrabadan, the equity of redemption was in them and that they were in fact in the position of the mortgagors primarily liable to discharge the debt due to Chandrabadan. In my opinion, the argument is not entitled to succeed. I accede to the argument that the right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound, and that the right cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage debt without having any interest to protect; but I am not prepared to agree with the view that the plaintiffs, after their purchase of the equity of redemption, were in the position of the mortgagor. It must be remembered that their purchase was not left unchallenged by

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the defendants and that an application for setting aside the sale was actually pending. That sale was ultimately set aside, and the moment it was set aside, equity will place the plaintiffs in the same position as that which they would have occupied but for the transaction which for the time being vested the equity of redemption in them.

"A purchaser of the mortagaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside." [*See* Ghose on Mortgages (4th Edition), Volume I, page 349.]

See also *Moulvie Mohammed Shumsool Hooda* v. *Shewukram* (1) and *Syamalarayudu* v. *Subbarayudu*(2), and the cases cited at page 349 of Ghose on Mortgage. I am of opinion that, on paying off Mussammat Chandrabadan and on their own purchase being set aside, the plaintiffs became entitled to the securities held by Mussammat Chandrabadan.

On the question of limitation, however, I am of opinion that Mr. *Lakshmi Narain Singh's* arguments ought to prevail. In order to understand the argument it is necessary to remember three important dates in the history of these transactions. Mussammat Chandrabadan was entitled to receive the mortgage money from the defendants on the 29th May, 1905, so that her cause of action to enforce the mortgage of the 13th December, 1904, accrued to her on the 29th May, 1905. The plaintiffs discharged the mortgage debts due to Chandrabadan on the 17th April, 1918, and commenced the present action on the 4th January, 1919. The argument of Mr. *Lakshmi Narain Singh* is this: That, in so far as the plaintiffs are seeking to enforce the security of Chandrabadan, the suit is barred by limitation under Article 132 of the Limitation Act inasmuch as they can only do so not in their own right, but in the right of Chandrabadan. The plaintiffs, on the other hand, maintain that on paying off Chandrabadan they acquired a right as against the defendants

(1) (1874) 22 W. R. 409. (2) (1898) I. L. R. 21 Mad. 143.

to be reimbursed the money which they had paid for the benefit of the mortgagors, and, as a consequence, to a cession of the securities held by Chandrabadan, and that they acquired this right on the 17th April, 1918, when they discharged the debt due to Chandrabadan. This argument receives considerable support from the decision of Banerji, J., in *Bora Shiblal* v. *Munni Lal* (1); but, with all respect, I am unable to agree with the view expressed by that learned Judge in the case cited. The argument of Banerji, J is this: that a puisne mortgagee in paying off the prior mortgage is entitled, under secton 69 of the Indian Contract Act, to be reimbursed by the mortgagor the money which he pays to the prior mortgagee. He also acquires a charge on the property which he relieves of liability on general principles and under section 74 of the Transfer of Property Act. And the conclusion at which that learned Judge arrives may be stated in his own words: "This charge he acquires not when the prior mortgage was made nor when that prior mortgage could be enforced but the date on which he pays off the amount of the prior mortgage. The right also to be reimbursed accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which under the decree exists on them."

Speaking with all respects, I quite agree with the view that the right to be reimbursed accrues to the person paying off the debt on the date on which he pays it off; but I wholly deny that a second mortgagee paying off a prior mortgagee "acquires" a charge on the property or that he acquires it on the date on which he pays off the prior mortgagee. The charge, in my view, was already there; all that he acquires is a right to enforce the charge and to a cession in his favour of the securities held by the prior mortgagee. Section 74 of the Transfer of Property Act, to which Mr. Justice Banerji refers, does not provide that, on paying off a prior mortgagee the subsequent mortgagee acquires

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a charge on the property; but it does porvide that he acquires "all the rights and powers of the prior mortgagee as such." It is one thing to say that a person acquires a charge on the property; it is quite another thing to say that he acquires the rights and powers of the prior mortgagee, one of which is to enforce the charge already existing subject to the law of limitation.

In my opinion the right to reimbursement stands on one footing; the right to enforce a security by virtue of subrogation stands on another footing. The right to reimbursement arises on a contract, express or implied to reimburse; and the party who claims the right enforces it in his own right, and not in the right of another. Consequently the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person who, not being primarily liable to discharge an obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor, and only because the person discharging the obligation becomes clothed with the rights and powers of the original creditor. The subrogee is an assignee in equity, and it is difficult to understand how an assignee in equity stands on a better footing than an assignee at law. If, for instance, a creditor assigns his security for valuable consideration to a person who thereupon sues upon the security, it cannot be argued that, though the right to enforce the security in the hands of the creditor may be barred by limitation, the assignee may proceed to enforce it if he brings his suit within twelve years from the date of the assignment. It may be that the right to enforce the security in his own name arises on the date of the assignment; but the limitation has already commenced to run and will not cease to operate just because the creditor has assigned the security to another person. An equitable assignee,

in my opinion, stands on no better footing and can only enforce the security in the right of the creditor and therefore subject to the law of limitation that would affect the creditor. As has been pointed out, subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security, to the right to a simple action for reimbursement, and the fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems often to be overlooked, to the confusion of both doctrines. [*See* Pomeroy's *Equity Jurisprudence* (5th Vol.), page 5183.]

That this is the right view is completely borne out by the decision of the Judicial Committee in the case of *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (1). The facts are somewhat complicated and it is unnecessary to set out all the different transactions which had to be considered by the Judicial Committee in order to enable them to decide points which do not arise here. But it is necessary to set out the following transactions:

On the 20th November, 1874, certain persons, who will be referred to as mortgagors, executed a *zarpeshgi* deed in favour of Girwar Singh by which they borrowed Rs. 12,000 from Girwar Singh and gave as security for the loan eight items of properties. The loan was for a period of twelve years from the date of the mortgage. On the 7th January, 1888, the mortgagors executed a simple mortgage in favour of Gajadhar for Rs. 2,500 and gave one of the properties already mortgaged to Girwar Singh as a security for the loan. On the 17th February, 1888, they obtained a loan of Rs. 12,000 from Mussammat Alfan for the express purpose of liquidating the *zarpeshgi*, and executed in her favour a simple mortgage of the properties mortgaged to Girwar Singh including the property mortgaged to Gajadhar. On the 22nd September, 1900, the appellants as successors in

(1) (1912) I. L. R. 39 Cal. 527, P. C.

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interest of Mussammat Alfan commenced their suit to enforce the mortgage of the 17th February, 1888, and they sought to have the benefit of the mortgage covered by the *zarpeshgi* deed of the 20th November, 1874, and they claimed priority to the various mortgages executed by the mortgagors between the date of the *zarpeshgi* and the mortgage of the 17th February, 1888, including the mortgage in favour of Gajadhar. It was assumed that the plaintiffs by discharging the mortgage covered by the *zarpeshgi* deed were subrogated to the securities held by Girwar Singh, the first mortgagee; but the question still arose whether, having regard to the lapse of time, they were entitled to enforce these securities as against Gajadhar. If it be considered that their right to enforce the security of Girwar Singh arose on the 17th February, 1888, that is to say the date on which they discharged the mortgage debt of Girwar Singh, their suit was well within time; but the Judicial Committee came to the conclusion that the suit, in so far as it sought to enforce the security of the 20th November, 1874, as against Gajadhar, was barred by limitation. In rejecting the contention advanced on behalf of the plaintiffs, the Judicial Committee said as follows:

"But as the Rs. 12,000 were under the *zarpeshgi* deed of the 20th of November, 1874, repayable in *Jeth*, 1294, *Fasli* (September 1887), and this suit was not brought until the 22nd of September, 1900, the claim of the plaintiffs to priority is barred by Article 132 of the second Schedule of the Indian Limitation Act, 1877." I regard the decision of the Judicial Committee as a complete answer to the argument advanced before us on behalf of the respondents. I hold that the present suit in so far as it seeks to enforce the security of the 13th December, 1904, is barred by Article 132 of the Limitation Act.

The question still remains whether the plaintiffs' action can be regarded as a simple action for reimbursement, and I am of opinion that it can be so regarded. All the necessary facts are stated in the

plaint to enable us to give the appropriate relief to the plaintiffs and they expressly ask for a personal decree against the defendants. The Courts below have concurrently found that on the 17th April, 1918, the plaintiffs paid Mussammat Chandrabadan Koer the sum of Rs. 1,546-14-5 and thereby discharged her mortgage. This money the defendants were bound by law to pay Mussammat Chandrabadan Koer, and the plaintiffs were undoubtedly interested in the payment of the money. The plaintiffs are accordingly entitled to be reimbursed by the defendants, and the action, regarded as an action for reimbursement, is well within time. The plaintiffs are also entitled to interest at the rate of 2 *per cent.* per month, from the 17th April, 1918, to the date of the decree, and are also entitled to interest on the amount decreed at the rate of six *per cent. per annum*, from the date of the decree up to the date of realization.

I would allow this appeal, set aside the judgments and decrees of the Courts below and in lieu thereof give the plaintiffs a decree as against defendants 1 to 5 for Rs. 1,546-14-5 with interest as already stated. There will be no order as to costs.

COUTTS, J.—I agree.

Appeal decreed.