APPELLATE CIVIL.

1938.

September, 27, 28. *November*, 16.

Before Khaja Mohamad Noor and Chatterji, JJ.

DULHIN KAMLAPATI DEVI

v.

JAGESHAR DAYAL.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 92—*Transfer of Property* (*Amendment*) *Act*, 1929 (*Act XX of* 1929)—*subrogation, suit to enforce claim of—cause of action, when arises—limitation—redemption of prior mortgage by more than one person—right of subrogation, whether can be claimed by all proportionately.*

Although a subrogee acquires the rights and powers of the incumbrancer whom he has paid off, yet it does not follow that the remedies for enforcing those rights are the same as those that were available to the prior incumbrancer.

Gopi Narain Khanna v. *Bansidhar*(1), followed.

Where, under a new contract of mortgage, a person advances money to the mortgagor for the express purpose of paying off a prior mortgage decree, he acquires a right of subrogation under a contract and the cause of action for a suit to enforce this right of subrogation arises (even under the old law as it stood before the Amending Act XX of 1929) from the date when the mortgage decree is paid off. Limitation does not run from the accrual of the cause of action on the original mortgage.

Alam Ali v. *Beni Charan*(2), followed.

Mamillapalli Kotappa v. Pamidipati Raghavayya(3), dissented from.

Mahomed Ibrahim Hossain Khan v. *Ambika Pershad Singh*(4) and *Sibanand Misra* v. *Jagmohan Lall*(5), distinguished.

* Appeal from Original Decree no. 56 of 1936, from a decision of Rai Bahadur Bhubaneshwar Prashad Pande, Subordinate Judge of Shahabad, dated the 16th August, 1935.

(1) (1905) I. L. R. 27 All. 325, P. C.
(2) (1935) I. L. R. 58 All. 602, F. B.
(3) (1926) I. L. R. 50 Mad. 626.
(4) (1912) I. L. R. 39 Cal. 527, P. C.
(5) (1922) I. L. R. 1 Pat. 780.

In order to give rise to a right of subrogation it is not necessary that the redemption must be effected entirely by the particular person who claims subrogation: all that is necessary is that the mortgage dues must have been fully satisfied.

Where, therefore, more than one person advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid.

Hira Singh v. *Jai Singh*(1), followed.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Chatterji, J.

Khursaid Husnain (with him *D. N. Varma* and *Kanhaiyaji*), for the appellant.

Mahabir Prashad (with him *M. N. Pal*, *Harians Kumar*, *Brahmadeva Narayan*, *A. B. N. Sinha* and *Harinandan Singh*), for the respondents.

CHATTERJI, J.—This is an appeal by the plaintiff who brought a suit to enforce a simple mortgage, dated the 12th February, 1930, executed by defendants nos. 1 to 5 and 10 for Rs. 5,000 carrying compound interest at 1 per cent. per mensem with yearly rests. The defendants nos. 1 to 10 constitute a joint Mitakshara family of which defendant no. 1 is the karta. The properties covered by the mortgage bond in suit are (*1*) sixteen annas share of mauza Sahiara, Tauzi no. 4690; (*2*) five annas four pies share out of sixteen annas of mauza Sahiara, Tauzi no. 9522 and (*3*) sixteen annas share of mauza Moap Khurd, Tauzi no. 11828. These three together with some other properties had been hypothecated under two earlier simple mortgage bonds, dated the 25th May, 1913, and 18th August, 1914, in favour of one Sakhi Chand. He sued on those two mortgage bonds and obtained a preliminary decree for

(1) I. L. R. [1937] All. 880. F. B.

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Rs. 9,000 on the 16th February, 1928, which was made final on the 27th September, 1928. The decree was put to execution and the mortgaged properties were sold. It was to set aside that sale that the loan on the mortgage bond in suit was taken. The mortgagors raised further sums by loan and it is not disputed that those sums with the Rs. 5,000 borrowed under the bond in suit were deposited in the execution case of Sakhi Chand with the result that his mortgage decree was satisfied and the execution sale was set aside. In the mortgage suit of Sakhi Chand the present defendant no. 13 who held a subsequent mortgage, dated the 1st June, 1916, was impleaded as a defendant and he was a party to the mortgage decree and the execution case that followed. His mortgage, dated the 1st June, 1916, comprised two out of the three properties mortgaged under the bond in suit, namely, (*1*) sixteen annas share in mauza Sahiara, Tauzi no. 4690, and (*2*) sixteen annas share in mauza Moap Khurd, Tauzi no. 11828.

The defendant no. 13 brought a suit (no. 6/125 of 1930) in the First Court of Munsif at Arrah to enforce his mortgage, impleading, besides the mortgagors, the present plaintiff as a subsequent transferee. In that suit the plaintiff did not appear and an ex parte preliminary decree was passed on the 27th February, 1933. The plaintiff made an application under Order IX, rule 13, for setting aside the ex parte decree but it was dismissed and the order of dismissal was upheld on appeal. The final decree was passed on the 7th of April, 1934.

The present suit was filed on the 6th September, 1934. The plaintiff has asked for a mortgage decree, claiming a right of subrogation as against the defendant no. 13 in respect of the prior mortgagee Sakhi Chand's decree of 1928. The plaintiff has further asked for a declaration that the mortgage decree obtained by the defendant no. 13 in his suit no. 6/125 of 1930 in the Court of First Munsif at Arrah is ultra vires and inoperative.

The defendants nos. 11, 12, 14 and 16 have been impleaded as subsequent transferees. The defendant no. 15 has been impleaded as he is a benamidar for the mortgagors in respect of some of the mortgaged properties.

The defendants nos. 2 to 5 and 10 filed written statements but they did not contest the suit at the final hearing. One of the objections raised by them is that the rate of interest is hard and unconscionable. The suit was contested by defendant no. 13 only on the grounds, inter alia, that his decree in suit no. 6/125 of 1930 operates as res judicata, that the plaintiff's claim for subrogation is not tenable and is also barred by limitation.

The learned Subordinate Judge has accepted the plea of res judicata and dismissed the suit as against defendant no. 13. He has, however, overruled the other defences raised by that defendant. He has passed a mortgage decree against all the remaining defendants. He has ordered that out of the three properties in suit only one, namely, five annas four pies share out of sixteen annas of mauza Sahiara, Tauzi no. 9522, shall be sold free from incumbrance while the remaining two properties shall be sold subject to the prior incumbrance of defendant no. 13 under his mortgage decree in suit no. 6/125 of 1930. The plaintiff has preferred this appeal.

The only point raised on behalf of the appellant is that the claim for subrogation is not barred by res judicata. It is pointed out that the decree of the defendant no. 13 in suit no. 6/125 of 1930 was passed by the Court of Munsif at Arrah whereas the present suit which is valued at Rs. 8,625 was filed in the Subordinate Judge's Court at Arrah. Obviously the Munsif's Court which passed the decree in favour of defendant no. 13 in suit no. 6/125 of 1930 was not competent to try the present suit. For the bar of res judicata under section 11 of the Civil Procedure Code to apply one of the essential conditions is that

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the Court which decided the former suit must be competent to try the subsequent suit. Consequently the present suit cannot be barred by res judicata by reason of the decision in the previous suit no. 6/125 of 1930 of the Munsif's Court at Arrah. The learned Subordinate Judge has altogether overlooked this aspect of the case and his decision on the question of res judicata must be set aside. It has been contended on behalf of the respondent that the question of competency of the former Court to try the subsequent suit must be decided with reference to the point of time when the decree in the former suit was passed. Even then the plaintiff's claim for subrogation would exceed Rs. 5,000 at the time when the decree in the suit of defendant no. 13 was passed. This contention, therefore, is of no avail to the respondent.

Mr. Mahabir Prashad, the learned Counsel appearing for the respondent, has attempted to support the decree of the learned Subordinate Judge on the ground that the plaintiff's claim for subrogation is barred by limitation. His contention is that by subrogation the plaintiff merely acquired the rights under the prior mortgages, dated the 25th May, 1913, and 18th August, 1914, and the suit to enforce the claim for subrogation should have been brought within 12 years from the accrual of the causes of action on those two mortgages and the present suit, having been brought on the 6th of September, 1934, is barred by limitation. In the first place, there are no materials on the record to show when the causes of action on the two prior mortgages in question arose. In the second place, the argument proceeds on a misconception of the rights and powers acquired by subrogation. Subrogation, of course, means substitution, for the person redeeming is substituted for the incumbrancer whom he has paid off. The incumbrance that is paid off is treated as assigned to the subrogee who is regarded as an assignee in equity. The supposed assignment,

however, does not necessarily carry with it all the consequences that would flow from a legal assignment.

In the Transfer of Property Act, as it stood before the amending Act XX of 1929, the term "subrogation" was nowhere used but the principle of subrogation was imperfectly expressed in sections 74 and 75 of the Act which have been repealed by the amending Act XX of 1929. The new section 92 which has been introduced by the amending Act XX of 1929 expressly deals with subrogation. However, even under the old law though section 74 was by its terms limited to any second or other subsequent mortgagee paying off the next prior mortgagee, it was consistently held that the right of subrogation could be claimed by persons and under conditions other than those mentioned in section 74. In the cases of *Gokaldas Gopaldas* v. *Purnamal Premsukhdas*(1) and *Gobind Lal Roy* v. *Ramjanam Misser*(2) their Lordships of the Judicial Committee upheld the rights of subrogation even in favour of purchasers. In the case of *Gopi Narain Khauna* v. *Bansidhar*(3) decided by the Judicial Committee the right of subrogation was allowed in favour of a subsequent incumbrancer paying off a decree on a prior mortgage. Again in the case of *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*(4) their Lordships of the Judicial Committee held that the subsequent mortgagee who advanced money with which a prior mortgage was paid off was entitled to subrogation against an intermediate mortgagee. The law as laid down by these and other judicial decisions has now been enacted and clearly expressed in the new section 92 of the Transfer of Property Act. In the present case the transactions in question took place before the new section 92 came into force. There is some

(1) (1884) I. L. R. 10 Cal. 1035, P. C.
(2) (1893) I. L. R. 21 Cal. 70, P. C.
(3) (1905) I. L. R. 27 All. 325, P. C.
(4) (1912) I. L. R. 39 Cal. 527, P. C.

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controversy as to whether section 92 is retrospective in its operation. But without going into that controversy I shall deal with the case as if it is governed by the law as it stood before the new section 92 came into force. It is not disputed that even under the old law a person in the position of the present plaintiff would acquire a right of subrogation.

Now the question is, how is this right to be enforced? The subrogee, no doubt, acquires the rights and powers of the incumbrancer whom he has paid off. He cannot acquire any higher rights. But it does not follow that the remedies for enforcing those rights are the same as those that were available to the prior incumbrancer. The decision of the Judicial Committee in *Gopi Narain Khauna* v. *Bansidhar*(1), which I have already referred to, furnishes a clear example. In that case a prior mortgage decree was paid off by the subsequent mortgagee who was a party to the decree and by virtue of his right of subrogation thereby acquired he wanted to be substituted in the place of the decree-holder and to continue the proceeding but he was not permitted to do so on the ground that the decree was satisfied and the proceeding came to an end. He then brought a suit to enforce his right of subrogation which was decreed and the decree was upheld by their Lordships. The decision is completely destructive of the idea that the position of a subrogee is exactly that of an assignee of the prior incumbrance. Of course there the question of limitation did not arise but the effect of the decision is that though the rights acquired by subrogation may be the same as those of the original creditor the remedies for enforcing such rights may be different. In other words, the remedies of a subrogee are not co-extensive with those of the original creditor. The remedies for enforcing the right of subrogation will depend on the equities of each particular case. In

(1) (1905) I. L. R. 27 All. 325, P. C.

the present case, as in the case of *Gopi Narain Khauna* v. *Bansidhar*(1) the remedy to enforce the right of subrogation would be by way of suit and not by execution after substitution in the place of the original decree-holder. That being so, the question is, when would the cause of action for such suit arise? To hold that the cause of action would arise from the date when the right to sue on the original mortgage accrued would amount to a denial of the very right of subrogation that was unquestionably acquired upon payment of the mortgage decree, because a suit on the original mortgage might have already become barred when the decree was paid off or even when the decree was passed. The result would be that though the original creditor could execute his mortgage decree the subrogee would be in the position of bringing a suit on the original mortgage which had already become barred by lapse of time. Again, when a mortgage has ripened into a decree the mortgagee's rights are determined by the decree and he can no longer lay any claim on the basis of his original mortgage and consequently the subrogee who has paid off his decree cannot put forward any claim on the basis of the original mortgage; his claim must be limited by the decree. He can only claim to recover the amount of the decree he has paid off with such interest as was allowed by the decree. Thus the position would be quite inconsistent if we were to hold that the remedy of a subrogee who has paid off a mortgage decree is to bring a suit on the original mortgage. His cause of action for a suit to enforce the right of subrogation would arise from the date when the mortgage decree was paid off. To hold otherwise would be, in my opinion, opposed to justice, equity and good conscience. In the present case, the defendant no. 13 was a party to the mortgage decree of Sakhi Chand and was liable to pay the decree. The decree was, however, satisfied partly out of the money advanced by the plaintiff and

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partly out of funds raised by the mortgagor himself. So by the plaintiff's payment the defendant no. 13's property has been saved and it would be most inequitable to hold that the plaintiff by his payment acquired no rights at all. I am supported in this view by the Full Bench decision of the Allahabad High Court in *Alam Ali* v. *Beni Charan*(1).

Mr. Mahabir Prashad has referred to the cases of *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(2), *Sibanand Misra* v. *Jagmohan Lall*(3) and *Mamillapalli Kotappa* v. *Pamidipati Raghavayya*(4). In the Privy Council case of *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(2) the facts, briefly stated, were these: There were successive mortgages in respect of certain properties, the earliest being for Rs. 12,000 under a zerpeshgi deed, dated the 20th November, 1874, and the latest being for Rs. 12,000 under a simple mortgage bond, dated the 17th February, 1888. The money under the zerpeshgi deed was repayable at the end of Jeth 1294 Fasli (June, 1887—'September, 1887', in the judgment is a mistake). The zerpeshgi was redeemed on the 15th July, 1888, with the money borrowed under the last mortgage of the 17th February, 1888. The assignee of the last mortgage brought a suit to enforce it on the 22nd September, 1900, claiming priority in respect of the zerpeshgi against certain intermediate mortgagees who were impleaded in the suit. The intermediate mortgagees themselves had already sued on their respective mortgages and obtained decrees in execution of which the respective mortgaged properties were sold. To all these decrees except one the last mortgagee was a party. Their Lordships held that in the suit on the last mortgage the claim for priority in respect of the zerpeshgi was barred by constructive res judicata as against those

(1) (1935) I. L. R. 58 All. 602, F. B.
(2) (1912) I. L. R. 39 Cal. 527, P. C.
(3) (1922) I. L. R. 1 Pat. 780.
(4) (1926) I. L. R. 50 Mad. 626.

intermediate mortgagees in whose suits the last mortgagee was made a party. As against the remaining intermediate mortgagee who in his suit failed to implead the last mortgagee the latter's claim for priority, though otherwise tenable, was held to be barred by limitation. Their Lordships observed as follows "But as the Rs. 12,000 were under the zerpeshgi 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". In the first place, it is to be noticed that the suit was brought after 12 years not only from the date when the money on the zerpeshgi deed was repayable but also from the date when it was repaid with the money borrowed on the last mortgage, the latter date being the 15th July, 1888. It was on this latter date that the right of subrogation accrued. The question whether limitation would run from the date when the money on the zerpeshgi deed was repayable or from the date when the right of subrogation accrued upon payment of that money was not raised or decided as it was immaterial, the claim being barred in either case. In the second place, the mortgage under the zerpeshgi deed had not ripened into a decree. In cases where subrogation is claimed by reason of payment of a prior mortgage decree to which the intermediate incumbrancers were parties different considerations may arise. On these grounds the said decision of the Privy Council is really of no assistance to the respondents.

In the case of *Sibanand Misra* v. *Jagmohan Lall*(1) the facts were these: A subsequent mortgagee obtained a decree on his mortgage in execution of which he purchased the mortgaged properties. The judgment-debtors made an application under Order XXI, rule 90, of the Civil Procedure Code to set aside that sale. Pending that application the decree-holder paid off a

(1) (1922) I. L. R. 1 Pat. 780.

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decree on a prior mortgage which had in the meantime been put to execution. The proceeding under Order XXI, rule 90, ended in a compromise by which the sale was set aside on the judgment-debtors paying the decretal amount. The subsequent mortgagee then brought a suit against the mortgagors to enforce the earlier mortgage by right of subrogation or, in the alternative, for a personal decree against them. The claim to enforce the earlier mortgage was dismissed as barred by limitation as the suit was brought more than 12 years after the accrual of the cause of action on that mortgage. The suit was, however, decreed, being treated as a simple action for reimbursement. Das, J., who delivered the judgment (Coutts, J. concurring), relied on the decision of the Privy Council in *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(1). While dealing with the facts of that Privy Council case the learned Judge fell into an obvious error in supposing that the suit was well within time if the right to enforce the earlier security under the zerpeshgi deed could be considered to have arisen on the date on which the zerpeshgi was redeemed. In fact the suit was beyond 12 years even from that date, the date of institution of the suit being the 22nd September, 1900, and the date of redemption being the 15th July, 1888 (not 17th February, 1888, as stated by Das, J.). There is also some distinction between the case where (as in the Patna case) a person interested in a mortgaged property, either as subsequent mortgagee or otherwise, pays off a prior mortgage out of his own pocket in order to protect his own interest and the case where (as in the present case) under a new contract of mortgage a person who thereby becomes a mortgagee advances money to the mortgagor for the express purpose of paying off a prior mortgage. In the former class of cases subrogation arises by operation of law whereas in the latter class it arises under a contract. When there is a contract there is no reason

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

why it should not be deemed to give rise to a new cause of action.

The case of *Mamillapalli Kotappa* v. *Pamidepati Raghavayya*(1) appears to have been decided on the assumption that inference deducible from the Privy Council decision in *Gopi Narain Khauna* v. *Bansidhar*(2) is that limitation would run from the accrual of the cause of action on the original mortgage. With all respect I am unable to agree with this view or with the view also expressed therein as to the applicability of the Privy Council decision in *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh*(3).

In my opinion the cause of action for the present suit, so far as the claim for subrogation is concerned, arose on the 13th of February, 1930, when the prior mortgage decree was paid off and therefore no question of limitation can arise.

Another question was raised as to whether the plaintiff who paid only a part of the mortgage decree could claim the right of subrogation. The law on the subject is that a right of subrogation cannot be claimed unless the prior mortgage has been redeemed in full. It does not mean that the redemption must be effected entirely by the particular person who claims subrogation. All that is necessary is that the mortgage dues must have been fully satisfied. For instance if three persons, *A*, *B* and *C*, advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid. In support of this proposition I may refer to the case of *Hira Singh* v. *Jai Singh*(4).

The question then arises as to the extent of the amount in respect of which the plaintiff will be

(1) (1926) I. L. R. 50 Mad. 626.
(2) (1905) I. L. R. 27 All. 325, P. C.
(3) (1912) I. L. R. 39 Cal. 527, P. C.
(4) I. L. R. [1937] All. 880, F. B.

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entitled to claim priority against the defendant no. 13. As I have already indicated, the plaintiff's claim must be limited by the decree that has been paid off. It has been satisfactorily proved that the entire sum of Rs. 5,000 advanced by the plaintiff was utilised for the satisfaction of the decree. She is entitled to recover this sum with interest at the rate allowed by the decree. She has, however, claimed compound interest at the rate of 12 per cent. per annum according to the stipulation in her own mortgage bond which is not enforcible against the defendant no. 13. A certified copy of the decree has been filed in this Court and we accepted it in evidence as we considered it necessary for the ends of justice. The copy has been marked Ext. 3. It shows that the decretal amount carried interest at Rs. 1-2-0 per cent. per mensem, the decree being on compromise. The plaintiff would, therefore, be entitled by virtue of subrogation to recover Rs. 5,000 with interest at Rs. 1-2-0 per cent. per mensem thereon from the 13th February, 1930. But on behalf of the minor respondents nos. 6 to 9 it has been contended that in view of the Bihar Money-Lenders Act (Act III of 1938) which came into force on the 15th of July, 1938, the plaintiff is not entitled to interest at more than 9 per cent. per annum. It is not necessary to go into the question whether the Bihar Money-Lenders Act is applicable in this case, because the learned Advocate on behalf of the plaintiff-appellant has agreed to reduce the interest to 9 per cent. simple. The plaintiff's claim, therefore, will be reduced accordingly against all the defendants.

In the result the appeal is allowed and the decree of the lower Court will be modified as follows: The suit will be decreed for Rs. 5,000 principal with simple interest at 9 per cent. per annum from the 13th February, 1930, till the expiry of 3 months from this date together with proportionate costs of the lower Court and full costs of this Court (the

appeal being valued at Rs. 2,500 only). If the defendants do not pay within three months from this date the amount that will be thus found due, the mortgaged properties shall be sold for realisation of the same with interest thereon at 6 per cent. per annum from the expiry of the said period of three months till realisation.

KHAJA MOHAMAD NOOR, J.—I entirely agree.

Appeal allowed.

Decree modified.

S. A. K.

APPELLATE CIVIL.

Before Fazl Ali and Varma, JJ.

BIRANCHI SINGH

v.

NAND KUMAR SINGH.*

1938.

December, 1, 23.

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *Schedule III, article* 2(*b*)(*ii*), *whether retrospective—suit for produce rent instituted after the Act came into force—accrual of cause of action before passing of the Act—suit, whether governed by shorter period of limitation.*

A suit for produce rent instituted after the Bihar Tenancy Act, 1885, came into force is governed by the period of limitation provided by that Act, although the cause of action for the claim accrued before the passing of the new Act.

Shaikh Reyasat v. *Gopi Nath Missir*(1), followed.

A statute which takes away or impairs rights acquired under the existing law must not be construed to have a

*Appeal from Appellate Decree no. 740 of 1936, from a decision of Babu Nirmal Chandra Ghosh, Subordinate Judge of Monghyr, dated the 20th June, 1936, confirming a decision of Babu Jauki Prashad Singh, Munsif of Monghyr, dated the 17th March 1935.

(1) (1938) I. L. R. 18 Pat. 1.