

APPELLATE CIVIL.

Before Hilton J.

JAGAN NATH (DEFENDANT) Appellant

versus

ABDULLAH (PLAINTIFF)
KHUDA BAKHSH (DEFENDANT) } Respondents.

Civil Appeal No. 1238 of 1933.

*Mortgage—Joint—by two mortgagors—on two houses—
one owned by each—position of mortgagor—who pays off the
whole debt—Subrogation.*

A. and his son K. jointly mortgaged two houses, one of which was owned by each of them, respectively, to J. Subsequently K. mortgaged the one house which was his own property to the same J. The latter obtained preliminary and final decrees on both the mortgages, the decrees on the second mortgage preceding those on the first mortgage. A. paid the money due on the decree on the first mortgage. Afterwards J. had the house of K. sold under his decree on the second mortgage. A. objected in execution proceedings to the sale of the house, and being unsuccessful therein brought a suit for a declaration that the house of K. was not liable to sale under the decree of J. on the second mortgage, without preserving the mortgagee-rights of A. which he claimed to have acquired by paying off the first mortgage charge, secured on the two houses.

Held, that the mortgage-debt was single and A. and K. were co-debtors, and a co-debtor is a principal debtor in respect of his own share, and a surety in respect of his co-debtor's share, and when a surety has paid the whole debt, he is entitled to avail himself of all the creditor's securities; A. was therefore subrogated to the rights of J. in respect of the first mortgage.

Mulla's Transfer of Property Act, edition 1933, page 476, followed.

Held also, that A. by paying off the sum due on the first mortgage to J. did not merely become the decree-holder of

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the decree on the first mortgage, but was subrogated to the original rights of *J.* as mortgagee. He did not, therefore, lose the priority of his mortgage in consequence of the decree on the second mortgage having been made before the decree on the first mortgage.

Kotappa v. Raghavayya (1), and *Gopi Narain Khauna v. Bansidhar* (2), followed.

Held further, that as the person paying off the prior mortgage (*A*) and the person who made the subsequent mortgage (*K*) were not the same person no enquiry was necessary as to an intention to keep the debt alive.

Muhammad Shafiqullah Khan v. Mohd. Samiullah Khan (3), distinguished.

Second appeal from the decree of Mr. H. B. Anderson, District Judge, Amritsar, dated 22nd June, 1933, affirming that of Sheikh Ata Ullah, Qureshi, Subordinate Judge, 4th Class, Amritsar, dated 1st March, 1932, decreeing the suit against defendant No. 1 and discharging the defendant No. 2.

DIN DAYAL KHANNA, for Appellant.

DEV RAJ SAWHNEY, for Respondents.

HILTON J.—On 31st January, 1927, Abdullah and his son, Khuda Bakhsh mortgaged jointly two houses, one of which was owned by each of them respectively, for Rs. 1,000 to Jagan Nath.

On 2nd November, 1929, Khuda Bakhsh mortgaged the one house which was his own property for Rs. 500 to the same Jagan Nath.

On 5th December, 1930, Jagan Nath obtained a preliminary decree and on 7th April, 1931, a final decree on the first mortgage while on 27th November,

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(1) (1927) I. L. R. 50 Mad. 626. (2) (1905) I. L. R. 27 All. 325 (P. C.).

(3) (1930) I. L. R. 52 All. 139.

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1930, he obtained a preliminary decree and on 3rd February, 1931, a final decree on the second mortgage. It will thus be seen that the decrees passed on the second mortgage preceded the decrees passed on the first mortgage.

On 22nd June, 1931, Abdulla paid the money due on the decree, on the first mortgage, namely Rs. 1,300, principal and interest.

On 10th October, 1931, the mortgagee, Jagan Nath, had the house of Khuda Bakhsh sold under his decree against that house.

On 5th October, 1931, before the house had been sold, Abdulla, whose objection in execution proceedings to the sale of the house had been dismissed on 6th August, 1931, brought the present suit asking for a declaration that the house of Khuda Bakhsh was not liable to attachment and sale under the decree of Jagan Nath, dated 3rd February, 1931, without preserving the mortgagee rights of the plaintiff Abdulla which he claimed to have acquired by paying off the mortgage charge that had been secured on the two houses.

The trial Judge granted the plaintiff a decree declaring that the house of Khuda Bakhsh can only be attached and sold subject to the mortgagee rights of the plaintiff Abdulla. The defendant Jagan Nath appealed unsuccessfully to the learned District Judge and has now preferred this second appeal.

It has been argued here that Abdulla was not a co-mortgagor under the first mortgage and that section 92 of the Transfer of Property Act does not, therefore, apply, the reason put forward being that there were

mortgaged two houses of which he owned one and Khuda Bakhsh owned the other. The contention has no force. The mortgage debt was single, and Abdulla and Khuda Bakhsh were co-debtors. As pointed out at p. 476 of Mulla's Transfer of Property Act, Edition 1933 "a co-debtor is a principal debtor in respect of his own share and a surety in respect of his co-debtor's share, and when a surety has paid the debt he is entitled to avail himself of all the creditor's securities." Abdulla was, therefore, subrogated to the rights of Jagan Nath in respect of the first mortgage.

It was next urged on the strength of *Parvati Ammal v. Venkatarama Iyer* (1) that Abdulla is, in any case, subrogated to a charge created by the decree of 7th April, 1931, and not to the mortgage charge in its original form. As the decree of 7th April, 1931, was made subsequent to the decree obtained on the 3rd February, 1931, by Jagan Nath against Khuda Bakhsh alone, it is argued that Abdulla's charge has not priority to that of Jagan Nath. The authority quoted above, however, was reconsidered in *Mamillapalli Kotappa v. Pamidipati Raghavayya* (2) where a contrary view was taken which followed the ruling of their Lordships of the Privy Council in *Gopi Narain Khauna v. Bansidhar* (3). The view of their Lordships was that payment of the amount due into Court and acceptance of that sum by the mortgagee resulted in the decree being spent and becoming discharged and satisfied and the person who made the payment did not, therefore, obtain the status of a decree-holder; nor did he subrogate himself into the position of the decree-holder.

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(1) 1925 A. I. R. (Mad.) 80. (2) (1927) I. L. R. 50 Mad. 626.

(3) (1905) I. L. R. 27 All. 325 (P. C.).

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Adopting this view here, I hold that Abdullah by paying off the sum due on the first mortgage to Jagan Nath did not merely become the decree-holder of the decree of 7th April, 1931, but was subrogated to the original rights of Jagan Nath as mortgagee. He did not, therefore, lose the priority of his mortgage in consequence of the decree of 3rd February, 1931, having been made before the decree of 7th April, 1931.

It was then argued that the decree now under appeal does not help Abdulla and that he will have to get a further decree if he wishes to enforce his rights or to have the sale stopped. At present, however, there is no question of Abdulla enforcing his rights or having the sale stopped since all that Abdulla seeks by way of relief is that his mortgagee rights should be declared for the purpose of Order XXI, rule 66, sub-section 2 (c) of the Civil Procedure Code and this is what the decree under appeal has done.

Finally the point was taken, which is raised in the first ground of appeal, that Abdulla had not reserved his right as subrogee of the first mortgage at the time when he paid off the first mortgage, although he had full notice of the second mortgage at that time. It was maintained that Abdulla had no intention of keeping alive the first mortgage.

This point does not appear to have been raised in the Courts below. No inquiry as to an intention to keep the debt alive would be necessary however in such circumstances as the present, where the person paying off the prior mortgage (Abdulla) and the person who made the subsequent mortgage (Khuda

Bakhsh), are not the same. The authority *Muhammad Shafiqullah Khan v. Mohd. Samiullah Khan* (1) upon which the appellant's counsel relied is distinguishable on this score.

The appeal fails on all points and is dismissed with costs

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Appeal dismissed.

FULL BENCH.

Before Tek Chand, Abdul Rashid and Rangil Lal, JJ.

LABH SINGH (PLAINTIFF) Appellant
versus

JAMNUN AND ANOTHER (DEFENDANTS)
Respondents.

Letters Patent Appeal No. 37 of 1931.

Punjab Tenancy Act, XVI of 1887, Section 60: Mortgage by occupancy tenant—without landlord's consent—set aside at the instance of the landlord—Mortgagee—whether entitled to sue mortgagor for refund of mortgage money—Indian Contract Act, I of 1872, Section 65.

Held, that where an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord in a suit brought under section 60 of the Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage money.

Satgur Prasad v. Har Narain Das (2), and *Bassu Kuar v. Dhum Singh* (3), relied upon.

Kulla Mal v. Umra (4), and Letters Patent Appeal No. 131 of 1921, overruled.

Other cases referred to.

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| (1) (1930) I. L. R. 52 All. 139. | (3) (1899) I. L. R. 11 All. 47, 56 (P. C.). |
| (2) (1932) I. L. R. 7 Luck. 64, 70 (P. C.). | (4) (1921) 61 I. C. 604. |

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