

APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

ABDUL GHAFUR KHAN (PLAINTIFF) Appellant,

versus

MANGAT RAI-GANGA SAHAI AND OTHERS
(DEFENDANTS) Respondents.

1937

May 25.

Civil Regular Second Appeal No. 1098 of 1936.

Mortgage — One of several co-mortgagors redeeming the whole mortgage — Whether subrogated as a mortgagee in respect of the share of the other co-mortgagees.

One of the sons of a deceased mortgagor redeemed the mortgaged property by paying the entire mortgage money. Another son's share in that property was subsequently sold in execution of a money decree passed against him for a personal debt. The son, who had redeemed the property, objected and sued for a declaration, that the sale of the other son's share was subject to the mortgage which he had redeemed.

Held, that in the Punjab, there being no statute law applicable to cases of this sort, the case must be decided on principles of equity, justice and good conscience, and under those principles there was no reason, why one of the co-mortgagors, who pays off the entire mortgage, should not be subrogated to the rights of the co-mortgagor whose debt he had discharged in the same way as a subsequent mortgagee or purchaser who pays off a mortgage is subrogated to the rights of the prior mortgagee whose debt he discharged. Also that the present case was even stronger than that of a subsequent mortgagee who pays off a mortgage, for under the law the co-mortgagor had to pay the entire mortgage charge before he could redeem his own share and was admittedly entitled to contribution from the other co-mortgagors for their *pro rata* shares of the amount paid by him.

Asansab Ravuthan v. Vamana Rau (1), *Ashfaq Ahmad v. Wazir Ali* (2), and *Jagan Nath v. Abdullah* (3), relied upon.

(1) I. L. R. (1879) 2 Mad. 223. (2) I. L. R. (1892) 14 All. 1 (F. B.).

(3) I. L. R. (1934) 15 Lah. 746.

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ABDUL GHAFUR KHAN *v.* **MANGAT RAI-GANGA SAHAI.** *Second appeal from the decree of Lala Ram Narayan, Senior Subordinate Judge, Lyallpur, dated 19th May, 1936, affirming that of Lala Gulal Chand Jain, Subordinate Judge, 4th Class, Jullundur, dated 25th August, 1934, dismissing the plaintiff's suit.*

MELA RAM, for Appellant.

KRISHNA SWARUP, for Respondent No. 1, MOHAMMAD AMIN KHAN for MOHAMMAD DIN JAN, for Respondent No. 3, for Respondents.

The order referring the case to a Division Bench, dated 15th April, 1937—

BHIDE J.

BHIDE J.—The house in dispute belonged to one Jahangir Khan who mortgaged it in favour of defendant No.1 on 14th July, 1920. After the death of Jahangir Khan the house was redeemed by Abdul Ghafoor, one of the sons of Jahangir Khan. It was subsequently attached in execution of a decree in favour of defendant No.1 against Abdul Majid, defendant No.2, another son of Jahangir Khan. Abdul Ghafoor put in an objection that he was entitled to claim a mortgage charge of Rs.284 on the house. This objection having been dismissed, he instituted a suit for a declaration that the house could only be sold in execution subject to his mortgage charge. The trial Court dismissed the suit and the decision was confirmed in appeal by the learned Senior Subordinate Judge. From this decision the present appeal has been preferred.

The learned Senior Subordinate Judge has held that Abdul Ghafoor was entitled to claim contribution from his other two brothers, Abdul Majid and Abdul Shakur, as he had redeemed the house by payment of the whole of the mortgage charge but that he

did not stand in the position of a mortgagee and, therefore, had no right to claim that the house should be sold subject to a mortgage-charge of Rs. 284.

The learned counsel for the appellant contended that this view of the learned Senior Subordinate Judge was not correct and that, in accordance with the principles of sections 92 and 95 of the Transfer of Property Act as amended in 1929, the appellant was entitled to claim a mortgage-charge in respect of the amount paid by him on account of the shares of his two brothers in the house in dispute. The learned counsel was not able to cite any authority directly in point but relied on *Mohammad Abdullah v. Mohammad Yasin* (1) in which the principles of the Transfer of Property Act, as amended in 1929, were applied though the point in dispute in that case was different. The learned counsel for the respondent on the other hand relied on three rulings of the Punjab Chief Court, *Basanta v. Dhanna Singh* (2), *Wazir v. Gir-dhari* (3) and *Narain Das v. Siraj Din* (4), in which it was held that a co-mortgagor has merely a charge in respect of the amount paid by him in redeeming a mortgage and that he does not occupy the position of a mortgagee. The first of these rulings was followed by a Division Bench of this Court in *Jhandu v. Nur Mohammad* (5). The principle of the amended section, however, appears to have been applied in another ruling of this Court reported as *Jagan Nath v. Abdullah* (6). In the Division Bench ruling *Jhandu v. Nur Mohammad* (5) the question whether the principles of sections 92 and 95 of the Transfer of Pro-

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(1) 1933 A. I. R. (Lah.) 151.

(4) (1926) 92 I. C. 980.

(2) (1920) 55 I. C. 450.

(5) I. L. R. (1931) 12 Lah. 671.

(3) (1923) 71 I. C. 847.

(6) I. L. R. (1934) 15 Lah. 746.

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erty Act, as amended in 1929, should or should not be adopted was not considered. In view of the Division Bench ruling reported as *Mohammad Abdullah v. Mohammad Yasin* (1), in which the principles of the amended sections of the Transfer of Property Act were preferred, the matter is not free from doubt. It seems to me that the question is of sufficient importance to be referred to a Division Bench. I accordingly refer this case to a Division Bench for decision.

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The judgment of the Division Bench—

TEK CHAND J.

TEK CHAND J.—The house in dispute originally belonged to one Jehangir Khan who, on the 14th of July, 1920, mortgaged it to defendant 1, firm Mangat Rai-Ganga Sahai, for Rs.400. Some time after the mortgage Jehangir Khan died, leaving three sons Abdul Ghafur Khan, plaintiff, Abdul Majid Khan, defendant 2, and Abdul Shakur Khan, defendant 4, who succeeded to the equity of redemption. On the 2nd of January, 1932, Abdul Ghafur Khan alone redeemed the mortgage, paying the entire mortgage-money. Subsequently in execution of a money-decree, obtained by defendant 1, Mangat Rai-Ganga Sahai, against Abdul Majid Khan for a personal debt of his, the one-third share of Abdul Majid Khan in this house was attached and sold to Jan Muhammad, defendant 3. Before the confirmation of the sale, Abdul Ghafur Khan objected before the executing Court that he, having paid the entire amount due on the mortgage of the 14th of July, 1920, had stepped into the shoes of the mortgagee *qua* the share of his brothers and, therefore, Abdul Majid Khan's share in the house could only be sold subject to his rights as a mortgagee. The

objection was dismissed by the executing Court and Abdul Ghafur Khan instituted a suit for a declaration under Order 21, rule 63, Civil Procedure Code.

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The suit was resisted by the auction-purchaser Jan Mohammad who pleaded that on payment of his brothers' share of the mortgage-money, the plaintiff had acquired merely a 'charge' on their share of the property, and had not been subrogated as a mortgagee, and as the auction-purchaser had purchased the property in good faith without notice of the charge, the plaintiff could not claim priority for it. The trial Judge upheld the plea and dismissed the suit. This decision was affirmed on appeal by the Senior Subordinate Judge. On second appeal, the case came up before Bhide J. sitting in Single Bench, who has referred it to a Division Bench.

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It is common ground between the parties that after the death of Jehangir Khan the position of his three sons, Abdul Ghafur Khan, Abdul Majid Khan and Abdul Shakur Khan, was that of co-mortgagors of the property, and under the law any one of them could not redeem his own share of the mortgaged property only, but it was incumbent upon him to redeem the mortgage as a whole on payment of the entire amount due on foot of the mortgage. It is also admitted that the redeeming co-mortgagor is entitled to contribution from the other mortgagors for their *pro rata* share of the amount paid by him. The question for decision is whether for the purpose of claiming this contribution the redeeming co-mortgagor is placed in the position of the mortgagee, whom he had redeemed.

In the Punjab there is no statute law applicable to cases of this kind and, therefore, the matter has to be decided on principles of equity, justice and good

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conscience, and I have no doubt that on these principles the answer to this question must be in the affirmative. It is well-settled that if a subsequent mortgagee or purchaser pays off a mortgage, he is subrogated to the rights of the prior mortgagee whose debt he discharges. If this is so, there is no reason why one of the co-mortgagors, who pays off the entire mortgage, should not be equally subrogated. Indeed, it seems to me that the position of the co-mortgagor is much stronger than that of a subsequent mortgagee or purchaser who pays off a prior mortgagee, for under the law it is incumbent on the co-mortgagor to pay the entire mortgage charge before he can redeem his own share of the mortgage. This equitable principle has long been recognised in England, and it appears to have been followed by the Courts in India before the Transfer of Property Act was passed in 1882. (See *inter alia* *Asansab Raruthan v. Vamana Rau* (1) and *Ashfaq Ahmad v. Wazir Ali* (2). In 1882, however, the Transfer of Property Act was enacted, section 95 of which ran as follows:—

“ Where one of several mortgagees redeems the mortgaged property and obtains possession thereof, he has a *charge* on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.”

But as observed by Dr. Rashbehary Ghose in his *Law of Mortgages in India*, 5th edition, Vol. I, page 372, this “ unskilfully drawn and clumsily worded section ” gave rise to considerable confusion in the applicability of the equitable doctrine mentioned above. In some Courts, the view was taken that the word “ charge ” in this section must be construed strictly

(1) I. L. R. (1879) 2 Mad. 223, 235. (2) I. L. R. (1892) 14 All. 1 (F. B.).

according to the definition given in section 100 of the Act and, therefore, a redeeming co-mortgagor was not subrogated to all the rights of the mortgagee to whom he had redeemed. In other Courts it was held, on the contrary, that notwithstanding the wording of section 95 the correct legal position was that the redeeming co-mortgagor stepped into the shoes of the mortgagee and was subrogated to his rights and remedies. In this state of the law, the Legislature intervened in 1929, when the relevant sections of the Transfer of Property Act were amended, and it has now been clearly laid down in section 92 that 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. The position, therefore, has now been put beyond doubt in the provinces where the Transfer of Property Act is in force.

In the Punjab, where that Act has never been applied, the legal position, has all along been that the equitable doctrine of subrogation applied to the case of a redeeming co-mortgagor. Reference has, however, been made to three Single Bench rulings of this Court in *Basanta v. Dhanna Singh* (1), *Wazir v. Girdhari* (2) and *Narain Das v. Siraj Din* (3), in which, it is contended, the contrary view was taken. The point involved in all these cases was that of limitation, that is, whether Article 148 or Article 144 of the Indian Limitation Act governed a suit brought by one of the co-mortgagors against the others after one of them had redeemed the entire mortgage. For

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(1) (1920) 55 I. C. 450. (2) (1923) 71 I. C. 847.

(3) (1926) 92 I. C. 980.

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the purposes of the case before us, it is not necessary to decide whether these cases laid down the law correctly on the particular question relating to limitation. It is sufficient to say, that none of them is an authority for the broad proposition that the redeeming co-mortgagor is not subrogated to the rights of the original mortgagee, as regards his right to claim contribution from the co-mortgagors by foreclosure or sale of their share in the mortgaged property.

As I have already stated, in this province the matter must be governed by the principles of equity, justice and good conscience. These principles are very clearly explained in Pomeroy on *Equity Jurisprudence*, Vol. III, Arts. 1221-2, as follows:—

“ Where a party interested in the premises, who is not personally and primarily liable as the principal debtor for the whole mortgage debt, pays the mortgage to the holder thereof, he is entitled to regard the transaction as an equitable assignment of the mortgage to himself and to keep it alive as security of his own rights against others, who are owners of or interested in the land. Any such person who redeems, no matter how small a portion of the premises he may own, or how partial may be his interest, must redeem the entire mortgage by paying the whole mortgage debt. The doctrine of contribution among all those who are interested in having the mortgage redeemed, in order to refund the redeмпtor the excess of his payment over and above his own proportionate share, and the doctrine of equitable assignment in order to secure such contribution, are the efficient means by which equity completely and most beautifully works out perfect justice and equality of burden.”

Similarly it is stated in Sheldon on *Subrogation* (Art. 169):

“ One of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his co-debtors, by means thereof, their proportional share of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his co-debtors as to that part of the debt which ought to be discharged by them.”

The iniquity of the opposite view is very well brought out in an American case, *Walker versus Eaton* (50 Am. Dec. 639) cited at page 371 of Ghose's *Law of Mortgages in India* :—

“ If one who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co-tenant as security and to obtain a reimbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation. And yet his co-tenant without making any payment might be entitled to the full possession and benefit of his share of the land discharged from the incumbrance. The law cannot justly be charged with such results as produced by conformity to its provisions. The principle is well established and is of frequent application in the redemption of mortgages, that one having an interest in an estate under incumbrance, may redeem the whole estate when necessary to redeem his own share or to relieve his own title from incumbrance even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interests.”

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The whole position is very clearly put by Straight J. in *Ashfaq Ahmad v. Wazir Ali* (1) in the following words:—

“ A co-mortgagor redeeming the whole mortgage stood in the shoes of the original mortgagee and was entitled to all the rights and the incidents connected with his estate. The principle that underlies that is, that he, having paid off the obligation to the creditor, is entitled to take advantage of all the incidents connected with the security as it stood in the hands of the mortgagee, or, in other words, he is entitled to all the rights and incidents connected with the mortgage as they were in the hands of the mortgagee at the time the redemption took place.”

In a case recently decided in this Court *Jagan Nath v. Abdullah* (2) Hilton J. sitting in Single Bench held that a mortgagor redeeming the entire mortgage was entitled to avail himself of all the creditor's securities and was, therefore, subrogated to his rights in respect of the mortgage. Applying this principle to this case, it must be held that the auction-sale of Abdul Majid Khan's share in the house in execution of the money-decree obtained by defendant 1 against him, was subject to the rights to which the plaintiff had been subrogated on his redeeming the entire mortgage, and that he is entitled to claim priority for the amount, which was due to the original mortgagee by Abdul Majid Khan as his proportionate share of the mortgage charge. This amount has been determined by the Courts below to be Rs.175, and this finding has not been impugned by any of the parties before us.

I would accordingly accept this appeal, set aside the judgment and decree of the learned Senior Subordinate Judge and, in lieu thereof, pass a decree in

(1) I. L. R. (1892) 14 All. 1, 5 (F. B.). (2) I. L. R. (1934) 15 Lah. 746..

favour of Abdul Ghafur Khan, plaintiff, declaring that the sale of Abdul Majid Khan's one-third share in the house to Jan Muhammad, defendant No. 3, is subject to the plaintiff's mortgage charge of Rs.175. Having regard to all the circumstances, I would leave the parties to bear their own costs throughout.

ABDUL RASHID J.—I agree.

A. N. K.

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Appeal accepted.

MISCELLANEOUS CIVIL.

Before Tek Chand and Abdul Rashid JJ.

HAJI GHULAM RASUL-KHUDA BAKHSH

(ASSEESSES) Petitioners,

versus

COMMISSIONER OF INCOME-TAX, PUNJAB—

Respondent.

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July 1.

Civil Miscellaneous No. 214 of 1937.

Indian Income-tax Act (XI of 1922) Ss. 2 (14), 26 (A) — Change in constitution of a Firm — introducing new partners — Registration of — whether Income-tax authorities can refuse registration on finding that the change was not a genuine transaction.

The assessee Firm, consisted of two partners, the two brothers G. R. and K. B. till 1st July, 1932, G. R. having a 12/16 and K. B. a 4/16 share in the firm. On 1st July, 1932, the constitution of the firm was changed and the three sons of G. R. became partners in the firm to the extent of 3/16, 3/16 and 2/16 respectively, G. R.'s share being reduced from 12/16 to 4/16. A partnership deed was executed evidencing the fact that the firm in future consisted of five partners with shares as stated above, and an application was presented to the Income-tax authorities under s. 26 (A) of the Indian Income-tax Act for the registration of the firm. The Income-tax Officer rejected the application holding that the deed of partnership was a bogus one and that the three sons of G. R. were merely 'dummies' and not real partners in the firm.