

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 30.10.2019	Delivered on .11.2019
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.Nos.28 and 29 of 2014

Mr.R.Nagarajan

rep by N.Chandra Power Agent

...Appellant in S.A NO.28 of 2014/
Plaintiff in O.S.No.2771 of 2013

1. Chandra

2. R.Nagarajan

Rep by his Power Agent

N.Chandra, 1st Appellant

...Appellants in S.A.No.29 of 2014/
Plaintiff in O.S.No.1283 of 2003

vs.

1. K.Mathiazhagan

2. M/s.Park Town Benefit Fund Limited,

Rep. By its Director/Chairman,

No.223 South Mint Street (First Floor)

Chennai.

... Respondents in both the Appeals/
1st and 2nd Defendants in both the Suits

Prayer in SA No.29 of 2014: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree of the Court of the Additional District and Sessions Judge cum Fast Track Court No.III, Chennai in A.S.No.154 of 2009 dated 11.05.2010 in confirming the judgment and decree of the XIV Assistant City Civil Judge, Madras in O.S.No.1283 of 2003 dated 29.11.2008.

Prayer in SA No.28 of 2014: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree of the Court of the Additional District and Sessions Judge cum Fast Track Court No.III, Chennai in A.S.No.68 of 2009 dated 11.05.2010 in reversing the judgment and decree of the IV

Assistant City Civil Judge, Madras in O.S.No.2771 of 2003 dated 04.11.2008.

For Appellants : Mr. V.Raghavachari
in both the Appeals

For Respondent : Mr.V.Manohar for R1
in both the Appeals

R2 :NA in both the Appeals

C O M M O N J U D G E M E N T

These two appeals arise out of practically cross suits in OS No.1283 of 2003 and OS No.2771 of 2003. OS No.1283 of 2003 was filed by the first respondent herein seeking declaration of his title in respect of an extent of 665 sq. feet of land and building situate at No.25-A, Kalaimagal Street, Murugappa Nagar, Choolaimedu, Chennai-94, and for permanent injunction restraining the defendants from interfering with his possession of the property.

2. OS No.2771 of 2003 was filed by the second defendant in OS No.1283 of 2003 seeking declaration of title with reference to an extent of 665 sq.feet of land with building and an extent of 125 sq. feet (a passage) and for recovery of possession of the said property.

3. The common facts that led to the filing of the above two suits are as follows:

The property measuring 1255 sq. feet bearing No.25, Kalaimagal Street, Murugappa Nagar, Choolaimedu, Chennai-94, belonged to one Govindan. The said Govindan had mortgaged the said property with Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., on 24.12.1991. Even during the subsistence of the Mortgage dated 24.12.1991, the said Govindan had sold an extent of 665 sq.feet with building thereon to the plaintiff in OS No.1283 of 2003 under a Sale Deed dated 15.03.1995 and had put him in possession of the property.

4. Subsequently, on 07.02.1996, the said Govindan redeems the mortgage dated 24.12.1991 by borrowing monies from Park Town Benefit Fund Ltd., the third defendant in OS No.1283 of 2003. As a security for repayment of the said borrowing, Govindan executes a first simple mortgage in favour of the Park Town Benefit Fund Ltd. This mortgage covers the entire extent of 1255 sq. feet and it is also agreed between the parties to the mortgage that the Park Town Benefit Fund Ltd., will have a right of subrogation as provided under Section 92 of the Transfer of

property Act, with regard to the mortgage dated 24.12.1991 executed by Govindan in favour of Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., as the mortgage in favour of the said Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., has been discharged out of the monies borrowed from Part Town Benefit Fund Ltd. Since Govindan defaulted in payment of the mortgage money, the Park Town Benefit Fund Ltd., in exercise of the powers conferred on it under the mortgage dated 07.02.1996, invoked Section 69 of the Transfer of Property Act and brought the entire property for sale.

5. It is claimed that a public auction was held on 27.06.2000 and one N.Chandra/the first defendant in OS No.1283 of 2003 was declared the highest bidder. It is also claimed that the said N.Chandra, required the mortgagee viz., the Park Town Benefit Fund Ltd., to execute the Sale Deed in favour of her son Nagarajan/the second defendant, in OS No.1283 of 2003, pursuant to the said request, the mortgagee viz., Park Town Benefit Fund Ltd., executed a Sale Deed in favour of Nagarajan on 12.12.2002. Since the plaintiff in OS No.1283 of 2003 was in possession of the property pursuant to the sale deed in his favour dated 15.03.1995 and he denied the title of the auction purchaser to the extent of 665 sq. feet purchased by him under the Sale Deed dated 15.03.1995, the auction purchaser, viz. Nagarajan, filed the suit in OS No.2771 of 2003 seeking a declaration of his title to the extent of 665 sq. feet and recovery of possession. The purchaser under the Sale Deed dated 15.03.1995 from Govindan, filed the suit in OS No.1283 of 2003 seeking declaration of his title to the very same property and for a permanent injunction.

6. While the plaintiff in OS No.1283 of 2003 would contend that after the sale dated 15.03.1995, he was entitled to the equity of redemption in respect of the property purchased by him. Once the mortgage is redeemed he would become the absolute owner of the property, in view of Section 43 of the Transfer of Property Act. Therefore, the mortgagor, viz., Govindan had no right to create the mortgage dated 07.02.1996, in respect of entirety of the property and also to assign the rights of the mortgagee under the mortgage dated 24.12.1991 to Park Town Benefit Fund Ltd., so as to enable Part Town Benefit Fund Ltd., to bring the entire property to sale. It is also the further contention of the plaintiff in OS No.1283 of 2003 that there was no auction sale as claimed on 27.06.2000. It is also contended that the auction sale is vitiated by various fraudulent acts on the part of the Park Town Benefit Fund Ltd.,/the Mortgagee.

7. While defending the suit in OS No.1283 of 2003, the auction purchaser, who is the plaintiff in OS No.2771 of 2003 would contend that the purchaser, viz., the plaintiff in OS

No.1283 of 2003 would not get a better right than what is vendor had under the Sale Deed dated 15.03.1995. Therefore, what was conveyed to the purchaser viz., the plaintiff in OS No.1283 of 2003 was only an equity of redemption in the property. Since the mortgage is indivisible neither the mortgagor nor the purchaser could have redeemed only their portion of the property. Either of them could have redeemed the entire mortgage. The person who redeems the entire mortgage steps into the shoes of the mortgagee and the rights of the mortgagee stands subrogated in favour of the person who redeems the entire mortgage, in view of Section 92 of the Transfer of Property Act. Therefore it is, Govindan upon redemption of the entire mortgage had a right to enter into an agreement to subrogate the rights of the first mortgagee, viz., Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd.

8. Once the right of Govindan to enter into an agreement of subrogation is recognised then the mortgagee under the mortgage deed dated 07.02.1996 would be entitled to proceed against the whole extent of 1255 sq. feet, de hors the fact that Govindan had title only to a lesser extent on the date of creation of the mortgage. On the above substantial pleadings apart from others, the rival claimants, viz. the plaintiffs in OS No.1283 of 2003 as well as OS No.2771 of 2003 sought for the reliefs stated above.

9. The suits were however, tried by different Courts and separate trial took.

10. While the plaintiff in OS No.1283 of 2003 was examined as P.W.1 in the said suit and Exhibits A1 to A17 were marked on his side. The first defendant in the said suit viz. Chandra was examined as D.W.1 and one D.Manoharan, an employee of the third defendant viz., Park Town Benefit Fund Ltd., was examined as D.W.2. Exhibits B1 to B12 were marked on the side of the defendants.

11. In OS No.2771 of 2003, Chandra/the mother of the plaintiff was examined as P.W.1 and Exhibits A1 to A5 were marked. The first defendant/plaintiff in OS No.1283 of 2003 was examined as D.W.1 and Exhibits B1 to B10 were marked.

12. The suit in OS No.1283 of 2003 was disposed of on 29.11.2008 while the suit in OS No.2771 of 2003 was disposed of on 04.11.2008. The 14th Assistant Judge, City Civil Court, who tried OS No.1283 of 2003 concluded that since Govindan did not have title to the entirety of the property on the date of the mortgage in favour of Park Town Benefit Fund Ltd., viz. 07.02.1996, the mortgage in favour of Park Town Benefit Fund Ltd., would be valid only to the extent of the property that

Govindan was entitled to on the date, viz. 590 sq. feet. On the said conclusion, the learned Trial Judge decreed the suit granting a declaration of title and permanent injunction as prayed for.

13. By the time, the judgment in OS No.1283 of 2003 was delivered on 29.11.2008, the IVth Assistant City Civil Judge, before whom the suit in OS No.2771 of 2003 was tried was disposed of on 04.11.2008. The IVth Assistant Judge, City Civil Court, Chennai, decreed OS No.2771 of 2003 accepting the case of the plaintiff therein that Govindan had a right to enter into an agreement of subrogation, subrogating the rights of the mortgagee under the first mortgage dated 24.12.1991 in favour of Park Town Benefit Fund Ltd., on 07.02.1996. On the said conclusion, the learned IVth Assistant City Civil Judge, decreed the suit filed by the plaintiff/auction purchaser as prayed for.

Aggrieved by the judgment and decree in OS No.2771 of 2003 dated 04.11.2008, the first defendant in the said suit/plaintiff in OS No.1283 of 2003 preferred an appeal in AS No.68 of 2009. Aggrieved by the judgment and decree in OS No.1283 of 2003, the defendants 1 and 2 therein/plaintiff in OS No.2771 of 2003 and his mother, preferred AS No.154 of 2009.

14. Fortunately, the counsels for the parties at least in the Appellate Court realised the need for the appeals being heard together and the appeals were disposed of by the Appellate Court by a common judgment thereby preventing a possibility of another set of conflicting judgments as it happened before the Trial Court.

15. The Lower Appellate Court on a reconsideration of the evidence on record concluded that the mortgagor Govindan did not have a right to mortgage the entire property on 07.02.1996, since he had parted with a portion of the property under the Sale deed dated 15.03.1995 in favour of the plaintiff in OS No.1283 of 2003. The Lower Appellate Court also concluded that on redemption, the equity of redemption that was possessed by the plaintiff in OS No.1283 of 2003, pursuant to Sale Deed dated 15.03.1995, blossomed into an absolute right in view of Section 43 of the Transfer of Property Act. Therefore, according to the Lower Appellate Court, the mortgage of the entire extent of property by Govindan on 07.02.1996 cannot be upheld.

16. The Lower Appellate Court also found that the subrogation created by the mortgagor would also be invalid or unenforceable, because of the fact that he has no title to the property on the date when he entered into an agreement of subrogation. On the above conclusions, the lower Appellate Court allowed the Appeal in AS No.68 of 2009, dismissing the suit in OS No.2771 of 2003. The Appeal in AS No.154 of 2009 was

dismissed and confirming the judgment and decree in OS No.1283 of 2003.

17. Aggrieved the plaintiff in OS No.2771 of 2003 has come up with Second Appeal in SA No.29 of 2014, while the defendants 1 and 2, viz. the plaintiff in OS No.2771 of 2003 and his mother/Chandra have come up with the Second Appeal in SA No.28 of 2014 against the decree in OS No.1283 of 2003.

18. The following questions of law were framed at the time of admission:

1. Whether the lower Appellate Court is justified in dismissing the suit filed by the appellant for declaration and for recovery of possession after recognising the right of the second mortgagee as a subrajee of Purasaiwakkam Hindu Janopakara Nidhi?
2. Is the lower Appellate Court justified in recognizing the sale in favour of the first respondent when such sale is subject to mortgage in favour of Purasaiwakkan Hindu Janopakara Nidhi?
3. Whether the order of the lower Appellate Court is not against the provisions of Transfer of Property under Section 58 & 92?
4. Whether the lower Appellate Court ought not to have appreciated the pleadings and evidence are totally at variance proving that the transaction under Ex.B1 (O.S.2771/2003 is only a sham and nominal document and Mathiazhagan, the first respondent, is not a bonafide purchaser for value?
5. Whether a sale under Section 69 of Transfer of Property be impeached by the mortgagor or any person claiming under him as against a purchaser for value?

19. I have heard Mr.V.Raghavachari, learned counsel appearing for the appellants in both the appeals and Mr.V.Manohar, learned counsel appearing for the first respondent in both the appeals. The second respondent in both the appeals though served is not appearing either in person or through counsel duly instructed.

20. The following facts are admitted.

- (i) Govindan was the owner of the entire extent of property measuring 1255 sq. feet.

(ii) Govindan had mortgaged the entire property in favour of Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., on 24.12.1991.

(iii) On 15.03.1995, Govindan had sold an extent of 665 sq. feet to the first respondent herein. (first respondent acquires an equity of redemption in a portion of the hypotheca)

(iv) Govindan borrows from Park Town Benefit Fund Ltd. (the second respondent herein) and discharges the mortgage dated 24.12.1991.

(v) The amount outstanding under the mortgage dated 24.12.1991 is paid over to the mortgagee, viz. Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., on 06.02.1996.

(vi) On 07.02.1996 Govindan mortgages the entire property measuring 1255 sq. feet in favour of the second respondent viz., Park Town Benefit Fund Ltd.

(vii) The said registered mortgage contains an agreement of subrogation as provided under part 3 of Section 92 of the Transfer of Property Act.

(viii) On 27.06.2000, Park Town Benefit Fund Ltd., sells the property in a public auction. The first appellant in Second Appeal No.28 of 2014, Chandra, is declared the highest bidder.

(ix) She transfers the right to her son/the second appellant and a sale deed is executed by the Park Town Benefit Fund Limited, the Second respondent, on 12.12.2002, in respect of the entire extent of the property.

21. Mr.Raghavachari, learned counsel appearing for the appellant would vehemently contend that the Sale Deed dated 15.03.1995 would not confer an absolute right on the first respondent. What he had purchased was only an equity of redemption, because the mortgage dated 24.12.1991 was subsisting on the said date. He had a right to redeem the entire mortgage. If he had redeemed the entire mortgage, the rights of the mortgagee viz. Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., would automatically stand subrogated to him in view of part I of Section 92 of the Transport of Property Act. Since he has not exercised the right of redemption, there is no question of Section 92 operating in his favour. The Mortgagor, viz. Govindan had redeemed the property by borrowing monies from Park Town Benefit Fund Ltd, he had created a mortgage in favour

of Park Town Benefit Fund. The said mortgage contains a Clause by which Govindan had agreed to subrogating the rights of the mortgagee, viz. the Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., in favour of Park Town Benefit Fund Ltd. Therefore, according to Mr.Raghavachari, even though Govindan was not the owner of the entire mortgaged property on 07.02.1996, he had a right by virtue of Clause 3 of Section 92, to subrogate the rights of the mortgagee under the mortgage dated 24.12.1991 in favour of the Park Town Benefit Fund Ltd. Therefore, according to Mr.Raghavachari, Park Town Benefit Fund Ltd had the power to bring the entire property to sale, since it had stepped into the shoes of the earlier mortgagee, viz. Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd.

22. It is also the further contention of the learned counsel that having purchased only the equity of redemption under the Sale Deed dated 15.03.1995 and having not exercised the said right, the first respondent cannot be heard to contend that Govindan did not have a right to create a mortgage in respect of the entirety of the property and also to subrogate the rights of the first mortgagee, viz. Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., in favour of the second respondent, viz. Park Town Benefit Fund Ltd.

23. Mr.V.Raghavachari, would invite my attention to the judgment of the Division Bench of this Court in Vedantam Subbarayudu and others v. Chattapalli Lakshminarasamma and others reported in Vol (50) LW 618, The Division Bench on a consideration of the various provisions of the Transfer of Property Act, had observed as follows:

"In the case of a person who advances money for the purpose of paying off a mortgage and takes a mortgage or sale, the principle would be that prima facie the prior mortgage is discharged unless there is an agreement that it should be kept alive or the mortgagee or the vendee shows that there is some reason for presuming or implying such an agreement in his favour as the subsistence of an intermediate incumbrance, that is, the onus is on him to prove it. The presumption and onus are not the same as in the two classes of cases, that is, in the case where a person having an existing interest discharges a prior mortgage and a person acquiring an interest discharges a mortgage. The result of the case-law in regard to presumption and onus in cases where a charge is not discharged by a mortgagor and in the absence of an expression of intention or an express

agreement to have the charge kept alive may be summarised thus."

In sub para 4 of the said summary, the Division Bench has observed as follows:

"4) Where a person advances money to discharge a mortgage and takes a mortgage or sale, the presumption is that the mortgage is extinguished. But if it is shown that there is an intermediate encumbrance or other circumstances which raise equity in his favour, the presumption shifts or is rebutted and an agreement with the borrower that the mortgage was to be kept alive is presumed or implied. The agreement is often implied from such circumstances as an arrangement with the mortgagor that after the discharge of the mortgage the mortgage deed should be surrendered to him and a new document would be executed in his favour or a sale free from encumbrance. Vide Dinabandhu Shaw Chowdhry v. Jogmaya Dasi (1901) 12 M.L.J. 73 and Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh (1912) 22 M.L.J. 468. The onus is on him to prove them. Purnamal Chand v. Venkata Subbarayadu (1897) 7 M.L.J. 198.

Where there is no intermediate incumbrance or any other circumstances which would raise an equity in his favour, the original presumption that the mortgage is extinguished will not give place to a rebutting presumption in his favour and the onus is on him to prove that there was an express agreement to keep the mortgage alive. This principle is exemplified by the cases in Mohesh Lal v. Mohant Bawan Das (1883) L.R. 10 I.A. 62 and Kalagayya v. Yanadamma (1910) 21 M.L.J. 180."

In dealing with Section 92 of the Transfer of Property Act, the Division Bench observed as follows:

"In order therefore to avoid questions of intention and onus being gone into by Courts and with a view to place the right of subrogation on a statutory basis the Legislature enacted Section 92 of the Transfer of Property Act. As remarked by Mulla, Section 92 deals with the case of a person having an existing interest and Section 92 (iii) deals with the case

where under the previous state of the law the right of subrogation was invoked on the doctrine of conventional subrogation. This follows from the plain language of the section and there is very good reason why the Legislature adopted this view. In the case of a person having an existing interest, there is no need to resort to any agreement express or implied and Section 74 of the Transfer of Property Act before the amendment gave partial recognition in favour of second and subsequent mortgagees and Section 92 only extended the said principle. In other cases the Court had to go into questions of intention, in certain cases coming to the conclusion that there was an intention to keep the mortgage alive and in certain other cases, that there was no such intention. The Legislature therefore enacted the rule in Section 92(iii) as it is always open to a person who advances money to enter into an agreement. I do not see any injustice in enacting such a rule. The legislature does give the benefit of the principle of subrogation even in such cases but the legislature requires that the person intended to take advantage of the benefit must comply with certain requirements, the requirements being a registered instrument for keeping alive the prior mortgage which can always be done even by the very transaction--sale or mortgage - under which the money was advanced by making a declaration that it was agreed between the parties that the prior mortgage was intended to be kept alive."

24. In order to buttress his submission that a mortgage is indivisible, Mr.V.Raghavachari, would rely upon a judgment of the Division Bench of this Court in Marakar Akath Kondarakayil Mamu v. Punjapatath Kuttu, reported in (1182) ILR 6 Mad 61. The proposition that a mortgage is indivisible and there cannot be a partial redemption of a mortgage is too well settled and I do not think it requires an authority to support the same. Though the learned counsel had relied upon a few judgments in support of the said proposition, I do not think that it is necessary for me to refer to them individually.

25. Mr.V.Raghavachari, would also rely upon the judgment of this Court in L.M.L.L.Lakshmanan Chettiar v. V.AR.Alagapa

Chettiar and others reported in 1981 (1) MLJ 232, to contend that a purchaser of property during the subsistence over mortgage would only acquire a right of equity of redemption. This proposition is also, in my considered opinion, well settled and there is no need for any reiteration of the said principle of law. He would also invite my attention to the judgment of the Full Bench of Allahabad High Court in Hira Singh and others v. Jai Singh, reported in AIR 1937 Allahabad 688, wherein, it was held that Part III of Section 92, is applicable even to a secured creditor. The said position was reiterated by a Full Bench of this Court in Narayani Amma and others v. Sankara Narayana Menon, reported in AIR 1936 Mad 171. Before the Full Bench, a contention was raised to the effect that the Part III Section 92 of the Transfer of Property Act, would apply only to an unsecured creditor and not to a person who takes a mortgage of the property. The said contention was repelled by the Full Bench.

26. Reference is also made to the judgment of a Division Bench of this Court in Chullikana Shambha and others v. Cherakoodlu Narayana Bhatta and others, reported in Vol 64 (LW) 497, where a co-mortgagor redeemed the entire mortgage and entered into an agreement of subrogation. The Division Bench upheld the right of the co-mortgagor to enter into an agreement of subrogation with a person who advanced monies to enable him to redeem the mortgage. In fact the Division Bench has referred the judgment of the privy council in Rajah Janakinath Roy v. Raja Pramathnath Malia, reported in ILR 1940 (1) Cal 291, wherein, the privy council had quoted the judgment of the Calcutta High Court in Gurdeo Singh v. Chandraika Singh, reported in ILR 36 Cal 193, wherein the law as it stood prior to the introduction of part III of Section 92 was explained as follows:

"It may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgage premises that his interest cannot otherwise be adequately protected."

It is this equitable doctrine that was made part of the law by the Transfer of Property Amendment Act, 1929, by introducing Section 92.

27. Contending contra, Mr.V.Manohar, learned counsel appearing for the first respondent would assail the auction sale

said to have taken place on 27.06.2000. Pointing out the contents of the sale deed dated 12.12.2002, Mr.V.Manohar, would contend that the very fact that the second respondent/Park Town Benefit Fund Ltd, had received a portion of the sale consideration from the highest bidder even on 20.06.2000, when the sale itself is said to have been taken place on 27.06.2000, would show that there is no such auction sale. He would further contend that once the prior mortgage is discharged on 06.02.1996, the mortgagor, viz. Govindan had no right to enter into an agreement of subrogation, thereby creating a right in favour of the second respondent, viz. Park Town Benefit Fund Ltd., in respect of the property which he had no right to deal with on 07.02.1996.

28. Drawing my attention to the pleadings in the plaint in OS No.2771 of 2003, Mr.V.Manohar would submit that it is a categorical case of the plaintiff/respondent that the prior mortgage was discharged. While acknowledging the equitable doctrine of subrogation incorporated in Section 92 of the Transfer of Property Act, Mr.V.Manohar, would contend that the very fact that the statute require such subrogation should be by way of a registered instrument executed by the mortgagor would show that the mortgagor should also have an interest in the hypotheca, on the date he executes the agreement of subrogation.

29. He would also draw my attention to the judgment of this Court in A.P.N.Venkatachalam Chettiar and another v. Alagaraswami Chettiar and others, reported in AIR 1936 Mad 264, wherein this Court has held that a mere volunteer who discharges a prior encumbrance can have no right to claim subrogation. It is also held that mere possession alone is not sufficient to support a claim of subrogation unless that possession is accompanied by some interest in the property which the person in possession is entitled to protect. The Court, however, applied the principle the person who holds the property under a voidable title is entitled to claim subrogation to the rights of the mortgagee whom he has discharged.

30. Mr.V.Manohar, would also draw my attention to the judgment of the Division Bench of this Court in Arulanandam Vethakannu Nadar and others v. Bhagavathi Pillai Thankachi and others, reported in AIR 1972 Mad 207, wherein, the Division Bench has pointed out that subrogation by operation of law or legal subrogation rests on the same equity of reimbursement is enacted in Section 69 of the Contract Act. My attention also drawn by Mr.V.Manohar to the judgment of the Hon'ble Supreme Court in Krishna Pillai Rajasekharan Nair v. Padmanabha Pillai, reported in (2004) 12 SCC 754, wherein the Hon'ble Supreme Court pointed out that the subrogation rests upon the doctrine of

equity and the principles of natural justice and not on the privity of contract. One of the principles is that a person, paying money which another is bound by will have to pay, is entitled to be reimbursed by other. This principle is enacted in Section 69 of the Contract Act, 1872.

31. Of course the Hon'ble Supreme Court was dealing with the case to which the first para of Section 92 would apply, since it was redemption by a co-mortgagor, but I have no doubt to conclude that the same principles of equity, good conscious and natural justice should apply to a right claimed under para 3 of Section 92 also as the entire right of subrogation is based on concept of equity and it is subject to the principle of law that he who seeks equity must do equity.

32. Mr.V.Manohar, learned counsel appearing for the first respondent would of course attack the very sale on the ground that there are several irregularities in the conduct of the sale, I do not think that those questions could be gone into the present suits which are for recovery of possession, declaration and injunction regarding the title to the property. The sale as such is not subject matter of attack in the suits. Therefore, the only question that looms large at present is, as to whether, Govindan could validly assign the right of the Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., under the mortgage dated 24.12.1991 in favour of the second respondent, viz. Park Town Benefit Fund Limited, on 07.02.1996. If the answer to the above question is no, then the appellants will have to necessarily fail, because the entire claim of the appellants is based on the subrogation made by Govindan in favour of Park Town Benefit Fund Ltd., on 07.02.1996.

33. The right of subrogation enumerated under Section 92 of the transfer of Property Act, was based on the old doctrine of equity as held by the privy council in Rajah Janakinath Roy v. Raja Pramathnath Malia, reported in ILR 1940 (1) Cal 291. I have already extracted from the judgment of the Calcutta High Court in Gurdeo Singh v. Chandraika Singh, where the law relating to subrogation was succinctly explained by the Calcutta High Court. Prior to introduction of Section 92 in the year 1929 by the Transfer of Property Amendment Act 1929, the right of subrogation was more based on equity. It is the said right which has given a legal basis by introduction of Section 92.

Section 92 of the Transfer of Property Act, reads as follows:

Section 92 Subrogation.- 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.

The right conferred by this Section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

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 persons shall be so subrogated.

Nothing in this Section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

34. While the first part of Section 92 creates a right of subrogation in favour of certain class of persons who redeem a mortgage, the third paragraph of Section 92 provides for a contractual subrogation. Even that contractual subrogation, in my considered opinion, is governed by principles of equity and good conscience. The first paragraph of Section 92, as could be seen from the language, excludes the mortgagor in its applicability. Therefore, there is a clear disentitlement of a mortgagor who redeems the property to have a right of subrogation.

35. The third paragraph of Section 92 provides for a situation where a person advances monies for discharging of mortgage, would be entitled to a right of subrogation upon it being created by the mortgagor. This would essentially mean that on the date of creation of the said right of subrogation, the mortgagor should have a subsisting interest over the hypotheca.

36. On the facts of the present case, the mortgage created in favour of Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., was in the year 1991 was discharged on 06.02.1996, in the interregnum the first respondent has purchased a portion of the property from the mortgagor on 15.03.1995. The effect is once the mortgage is redeemed or discharged, Section 43 of the Transfer of Property Act, would come into play and the equity of redemption that vested in the first respondent by virtue of the Sale Deed dated 15.03.1995 would blossom into an absolute estate

almost instantly. Therefore, on the date when Govindan created a mortgage in favour of the second respondent, viz. Park Town Benefit Fund Ltd., he was not the owner of the entire hypotheca nor did he have a right of redemption over the said property. It is not known, as to whether, there was any agreement between Govindan and the first respondent regarding the discharge of the mortgage since the Sale Deed in favour of the first respondent is silent on that. Therefore, if Govindan had lost his right title and interest over the property on redemption of the mortgage dated 24.12.1991, he could not created a valid mortgage in respect of entirety of the property dated 07.02.1996 and consequently, he could not have entered into an agreement of subrogation in respect of the property over which had no right.

37. I find it very difficult to accept the contention of Mr.V.Raghavachari, learned counsel appearing for the appellant, when he seeks to argue that even a person who lost title over a portion of the property can still transfer is liability to another and make the entire property liable to answer his liability. This contention of the learned counsel is clearly opposed to principles of equity and good conscience on which the entire Section 92 is based. In Variavan Saraswathi and another v. Eachampi Thevi and others, reported in 1993 Supp (2) SCC 201, the Hon'ble Supreme Court had an occasion to deal with a right of co-mortgagor who redeems the entire property, after discussing the law on the question, the Hon'ble Supreme Court observed as follows:

"A plain reading does not warrant a construction that the substitutee become a mortgagee. The expression is 'right as the mortgagee' and not right of mortgagee. The legislative purpose was statutory recognition of the equitable right to hold the property till the co-mortgagor was reimbursed. And not to create relationship of mortgagor and mortgagee".

38. The above observations of the Hon'ble Supreme Court would amount to reiteration of the principles of equity on which Section 92 is based. The essential conclusion on the analysis of the judgments referred to above would be that the third paragraph of Section 92 enables the person who lends money for discharge of a mortgage to enter into a contract with the mortgagor to have the rights of the mortgagee who is redeemed subrogated in his favour. But the said right to get the subrogation is subject to a qualification that the mortgagor should have an absolute power of disposition on the date he seeks to subrogate the rights in favour of the person with whose money he had redeemed the earlier mortgage. In the absence of such right the mortgagor cannot subrogate the rights of the

mortgagee whose mortgage is redeemed in favour of the person with whose money the mortgage was ready.

39. Even in the judgment relied upon by Mr. Raghavachari, in Vedantam Subbarayudu and others v. Chattapalli Lakshminarasamma and others reported in Vol (50) LW 618, the Division Bench has held that the presumption is that the mortgage is extinguished, but if it is shown that there is an intermediate encumbrance or other circumstance which raise an equity in his favour the presumption shifts or is rebutted and an agreement with a borrower that the mortgage was to be kept alive is presumed or implied.

40. The Bench has reiterated the requirement of law particularly para 3 of Section 92, viz. the presence of a written contract by the mortgagor in the absence of such declaration or a contract, there cannot be a subrogation under para 3 of Section 92, in favour of a person with whose money the mortgage is redeemed. It is always the requirement of law when the law provides a contractual right the contracting parties must have the capacity to contract. Admittedly on redemption by a mortgagor the mortgage stands extinguished that is the precise reason why first paragraph of Section 92, excludes its application to a mortgagor. No doubt para 3 of Section 92 confers a right on the mortgagor to subrogate the rights of a mortgagee who is redeemed with the money provided by another person in favour of that other person, but the said right cannot be exercised by a mortgagor who had lost his right over the hypotheca.

41. Admittedly, the mortgagor Govindan had sold a portion of the property in 1995, the sale deed executed by Govindan in favour of the first respondent has been produced as Ex.A1 in OS No.1283 of 2003. There is no reference to the mortgage in the sale deed, it does not also provide for discharge of the mortgage by the purchaser. Of course the sale will be subject to the mortgage and the right acquired by the first respondent as purchaser would only be a equity of redemption. However, when Govindan redeems the entirety of the property the equity of redemption, as already pointed out by me, blossoms into an absolute right, in view of Section 43 of the Transfer of Property Act. Once it is concluded that the equity of redemption blossoms into an absolute right, Govindan loses his right to the extent of property sold by him under the Sale dated 15.03.1995. Therefore, the agreement of subrogation between Govindan and Park Town Benefit Fund Ltd./the second respondent would operate only to the extent of Govindan's interest in the property on the date of the said agreement, i.e. 07.02.1996.

42. In the light of the above conclusions, the questions of law raised are answered as follows:

42. (i). Since I have held that the subrogation agreement itself would operate only to the extent of the right of Govindan, the Lower Appellate Court was justified in dismissing the suit filed by the appellant for recovery of possession of the properties sold by Govindan to the first respondent and the subrogation agreement entered into between Govindan and the Park Town Benefit Fund Ltd., will not confer any right on the Park Town Benefit Fund Ltd., to sell the entirety of the property.

42 (ii). The second question of law is answered to the effect that the Lower Appellate Court was perfectly justified in concluding that the sale in favour of the first respondent would be valid, since the mortgage in favour of the Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., had been discharged and redeemed on 06.02.1996.

42 (iii). In view of the conclusion that Govindan had no capacity to enter into the subrogation agreement, since he had lost the right title and interest over the property prior to, I find that there is no violation of para 3 of Section 92 or Section 58 by the Lower Appellate Court. The third question of law is therefore answered against the appellant.

42 (iv). On the fourth question of law, I do not think that the appellant would be entitled to raise the question, as to whether, the first respondent as the bona fide purchaser for value, since the appellants in their suit for declaration and recovery of possession had not chosen to implead the said Govindan. Therefore, I do not think that the appellants will have a right to contend that the first respondent is not a bona fide purchaser for value. The hallowed status given to the sale under Section 69 of the Transfer of Property Act is not immortal.

42 (v) A who person has better title than that of the mortgagor can definitely seek declaration of his title dehors the sale under Section 69. In the case on hand, the sale by Govindan in favour of the first respondent was prior to the mortgage dated 07.02.1996, I have concluded that on redemption of the mortgage dated 24.12.1991, the first respondent had become the absolute owner and therefore, Govindan had no right to create the mortgage over the entirety of the property on 07.02.1996.

42 (vi). In the light of such conclusion, it is definitely open to the first respondent to contend that the sale will not be binding on the property that was sold by Govindan to the

first respondent. May be, if the sale has been effected by the Madras Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd., on the basis of the mortgage dated 24.12.1991, the first respondent cannot impeach the said sale, but that is not the case here. The mortgage dated 24.12.1991 was discharged and the property was redeemed. The subsequent mortgage was created on the entirety of the property including the property that is alienated by the mortgagor during the interregnum, I have already held that in view of Section 43 of the Transfer of Property Act, on redemption the equity of redemption that vested with the first respondent had blossomed into an absolute right. Therefore, the fifth question of law is also answered against appellant.

43. In the upshot, both the second appeals are dismissed confirming the judgment and decree of the Lower Appellate Court, dismissing OS No.2771 of 2003 and decreeing OS No.1283 of 2003. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Additional District and Sessions Judge
cum Fast Track Court No.III
Chennai.
2. The XIV Assistant City Civil Judge
Chennai.
3. The IV Assistant City Civil Judge,
Chennai.

Copy to

The Section Officer,
V.R.Section,
High Court of Madras.

+2cc to Mr.V.Manohar, Advocate Sr.98191 and 98192

S.A.Nos.28 and 29 of 2014

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srg 22/09/2020