ALLAHABAD HIGH COURT

Hira Singh

Vs.

Jai Singh

(Thom and Allsop, JJ.)

13.05.1937

ORDER

Thom and Allsop, JJ.

1. wo questions only are raised in this appeal. A prior mortgage was redeemed partly by the mortgagor and partly by vendees, who after the execution of the puisne mortgage, purchased the mortgaged property. In terms of the sale deeds in their favour payments were made by the vendees to the prior mortgagees in part redemption of the prior mortgage. The vendees claim in the present suit by the puisne mortgagees the right of subrogation under Section 92, Transfer of Property Act. The plaintiffs maintain that the vendees are not entitled to the right of subrogation In respect that (1) The part redemption in terms of covenants in the sale deeds, and (2) the prior mortgage was not fully redeemed by any one of the persons mentioned in argument that Clause 3 of Section 91. There are conflicting decisions on the questions raised. In the circumstances, we consider it expedient the point should be referred to a Pull Bench. Let the record be laid before the Hon'ble, C.J. for the constitution of a Pull Bench to decide the following question of law, viz., (1) Where a prior mortgage is redeemed partly by the mortgagor and partly by vendees of the mortgaged property out of the sale consideration and us terms of covenants in the sale deeds in their favor, are the vendees, as against puisne mortgagees, entitled to the rights of subrogation under Section 92, Transfer of Property Act? (2) Does Clause 3 of Section 92, Transfer of Property Act, apply to persons mentioned in Section 91 of the Act?

2. A preliminary objection is taken to the constitution of this Bench. It is contended before us that inasmuch as Bajpai, J. has not taken a fresh oath as required by Section 220(4), Government of India Act, 1935, in the form prescribed in Schedule 4, he is not entitled to enter upon his office as a Judge of this Court. Bajpai, J. was appointed an Additional Judge of this Court in 1932 and since then he has been continuing as a Judge of this Court without a break. The periods of his appointment have been extended from time to time. In December 1936 there was a last extension made by the Governor. General up to 31st March 1937. On 9th March 1937, His Majesty approved of the appointment of Bajpai, J. as a permanent Judge of this Court, and on 17th March 1937 the Royal Warrant for him was duly signed. The words as notified are:

> With effect from 1st April 1937, His Majesty the King-Emperor has been pleased to appoint the Hon'ble Mr. Justice Uma Shankar Bajpai, additional Judge of the High Court

of Judicature at Allahabad, to be the Puisne Judge of the said High Court in a permanent post created with effect from that date.

3. There can, therefore, be no doubt that he was appointed a permanent Judge of this Court on 17th March 1937, though his appointment was to take effect from 1st April 1937, which was in continuation of his appointment as an additional Judge of this Court. Section 231 of the Act lays down that any Judge appointed before the commencement of Part 3 of this Act to any High Court shall continue in office and shall be deemed to have been appointed under this part of the Act, etc. If Bajpai, J. was appointed before the commencement of Part 3 of this Act, as in fact he was, then he must be deemed to have been appointed under this part of this Act and must continue in office, Part 3 of the new Government of India Act came into force on 1st April 1937.

4. All that Section 220(4) requires is that every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some other person appointed by him an oath according to the form prescribed. The oath is necessary before entering upon his office as a Judge. As already pointed out, Bajpai, J. entered upon his office as a Judge of this Court long ago and took the oath which was then prescribed under Clause 3 of our Letters Patent. The mere fact that he has now been made a permanent Judge does not mean that he "enters upon his office" as a Judge of this Court afresh, necessitating a fresh oath which is required for a person who enters upon his office for the first time. If this were not the correct interpretation, then the result would be that every time that an additional Judge's term is extended, he would have to take a fresh oath. This is contrary to the established practice of this Court. It may also be pointed out that under Section 223 of the Act the powers of the Judges of a High Court in relation to the administration of justice in this Court are the same as immediately before the commencement of Part 3 of this Act.

5. It is contended before us that the appointment of Bajpai, J. has been under the new Government of India Act. This argument cannot possibly be accepted. The very language of Section 231 shows that a Judge who had been appointed before the commencement of Part 3 of the Act is to be "deemed" to have been appointed under this part of this Act, that is to say, although he was not in fact appointed under this Act he would be considered to have been so appointed. But Bajpai, J. was actually appointed before this Act came into force, and was therefore appointed by His Majesty under the old1 Government of India Apt, although his-appointment was to take effect from a later date. There was no restriction on-the power of His Majesty to make such an appointment. All that Section 101 of the old Government of India Act required was that the High Court should be so constituted that among its permanent Judges there are at least 1/3 Judges who are members of the Indian Civil Service, and 1/3 who are Barristers of a certain standing. This restriction was removed under the new Act with effect from 1st April 1937. Accordingly although the appointment was made earlier, it was foreseen that there would be no such defect at the-time when Bajpai, J. would become a permanent Judge. We must, therefore, hold that there was no invalidity in the appointment itself and that this High Court is validly constituted. We are accordingly of the opinion that there is no force in the objection raised, which we overrule.

Sulaiman, C.J.

6. The facts of this case may be briefly stated as follows: On 7th May 1925, a mortgage was made by Bam Anant Singh in favour of Badha Charan Singh and Ram Lalit Singh for ₹ 9,000 of seven items of properties including properties in Bisaura and Binauli. On 21st May 1926, five out of these mortgaged properties, excluding a grove and occupancy lands, were mortgaged by the mortgagor to the present plaintiff. On the death of the mortgagor his widow Mt. Sumitra succeeded. On 26th June 1929 Mt. Sumitra, along with certain reversioners, executed three sale deeds in favour of two sets of defendants and a third person, not a party to the suit, for three different sums of money. Under the first sale deed, which was in favour of defendants 11 and 12 and related to the share in Bisaura, ₹ 10,651-9-6 were left for payment to the prior mortgagee. Similarly under the second sale deed, which was in favour of defendants 20 and the father of defendant 21 and related to Binauli, a sum of Rupees 1425-1-0 was left for payment to the prior mortgagee. A sum of ₹ 2,000 was left in the hands of the third vendee for payment of the same mortgage. On 2nd July 1929 all the three vendees made the payments to the prior mortgagee and the deficiency of ₹ 47 in the aggregate amount was made good by the mortgagor himself, and the receipt was acknowledged by the mortgagee on the back of the mortgage deed. There is no doubt that as a result of all these payments the prior mortgage was completely redeemed. The present suit was brought by the plaintiff on the basis of the two mortgages dated 21st May 1926 against the mortgagor's representative and two sets of the vendees, the third vendee not being impleaded because the property acquired by him had not been included in the plaintiff's mortgage. The two sets of vendees have pleaded inter alia that having paid off the amounts left in their hands for the discharge of the prior mortgage, they are subrogated to the rights of the prior mortgagee. The Court below has not accepted the defendants' contention. The case has been referred to the Full Bench for decision on the questions of law that arise in this connexion.

7. The foundation of the right of subrogation is the well-known equitable principle of reimbursement now embodied in Section 69, Contract Act, that a person who is interested in the payment of money which, another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. But the Contract Act confers a personal right only whereas a right of subrogation involves an equitable charge on the property. When subrogation exists the previous encumbrance that is paid off is not at all extinguished but is kept alive and its benefit transferred to the person who has paid it off. Before the Transfer of Property Act of 1882 their Lordships of the Privy Council applied the English equitable rule of intention to a mortgagee paying off a prior mortgage unless he was bound by his con-tract to make the payment. In *Mohesh Lal v. Mohant Bawan Das*[1] their Lordships laid down that:

> Whether a mortgage, paid of, has been kept alive or extinguished depends upon the intention of the parties, the mere fact that it has been paid of not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred either one way or the other.

[1](1883) 9 Cal 961

8. In that case, on 15th May 1872, the balance due to the estate of a prior mortgagee Lachminarain on his mortgage was paid off through the plaintiff, and a receipt for the amount was endorsed in the following words:

> Received in full ₹ 8,382 up to 15th May 1872, through Mohan Misser, gomashta of Babu Mehesh Lal, Mahajun, and returned the bond (page 975).

9. The bond was then delivered to the gomashta and retained by the plaintiff. Their Lordships after laying down the rule quoted above, remarked:

10. Although the money was paid by the plaintiff's gomashta to Lachminarain's estate, it was paid with money borrowed from the plaintiff by Mangal, and for which Mangal was liable to him. The mortgage was therefore paid off by Mangal, and not by the plaintiff. It must be presumed that, when the plaintiff lent the money to Mangal to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he speculated. Equity cannot give him an additional security because the security relied upon turns out to be bad as regards the portion of the lands included in it (page 977).

11. In that case however there was an intermediate encumbrance and the lender was claiming the prior rights because the greater part of the security was found to be invalid as the mortgagor had not authority to hypothecate it. In Jones on. Mortgages, Vol. 2, Para. 864 (Edn. 7) it is also stated:

> When a mortgage debt is paid by one who is bound by contract to pay it, an assignment of it to him upon payment operates as a discharge. His payment of the amount of the mortgage debt will be held to operate as an extinguishment of the mortgage, and he will not be allowed to hold it as a subsisting encumbrance, as the payment was in pursuance of his agreement, and may be regarded as made with the mortgagor's money.

12. In *Gokaldas Gopaldas v. Puranmal Premsukhdas* [2] their Lordships had to consider the case of a person who had purchased the equity of redemption at auction sale and was therefore under no contractual obligation to discharge the debt. The mortgagor's rights had been sold subject to the first and the second mortgage and the auction, purchaser paid off the first mortgage. In a suit brought by the second mortgagee their Lordships held that the auction-purchaser had a right to extinguish the prior charge or to keep it alive and the question was what, intention was to be ascribed to him, and that in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. At page 1044 their Lordships observed:

> In the case before their Lordships the debt to the Bank was not paid off out of the purchase money. The appellant purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that debt. When he paid the Bank some six months afterwards it was not because he was under an obligation to do so.

13. Their Lordships then went on to hold that the rule laid down in *Toulmin v. Steere*[3] was

[2](1884) 10 Cal. 1035
[3](1817) 3 Mer. 210

not applicable in India. It is thus clear that their Lordships in that

case had emphasized that the auction-.purchaser was paying money out of his own pocket and was not paying anything which he was bound by the contract to pay himself. In the Transfer of Property Act (4 of 1882) there were provisions in Sections 74 and 75 relating to subrogation, although the word itself was not used therein. A subsequent mortgagee paying off the next prior mortgagee acquired all his rights and powers. Although the words used in Section 74 were "the next prior mortgagee" the principle was extended to cases where even an earlier mortgagee had been paid off, and the same principle was applied to other transferees as well who had made payments out of their own funds. In *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*[4] the defendant had purchased a property at auction sale which had been mortgaged to the plaintiff. There were two earlier mortgages and in the mortgage deed in favour of the plaintiff the mortgagor expressly mentioned that he was borrowing ₹ 40,000 in order to pay off the two prior mortgages and charging the property with that amount, and it contained the agreement:

> I promise that after repaying the money due on the aforesaid two mortgages I shall cause a reconveyance of those properties to be executed and registered and shall make over to you the mortgage deeds which I shall get back.

14. On ₹ 40,000 being advanced, the two mortgages were paid off and the mortgagor reconveyed the property to the plaintiff. It was in these circumstances that their Lordships held that the intention of the parties was that the earlier mortgages should not be extinguished on being paid off but were to be kept alive for the benefit of the plaintiff. Their Lordships approved of the statement that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention:

‘

> Here the mortgagor was paying off his own debts, but he was doing so for the benefit of Mustafi and in performance of the agreement; with him.

15. It may also be pointed out that the case was governed by the Transfer of Property Act of 1882. Section 74 was applicable to a subsequent mortgagee. The case in *Mahomed ibrahim Hossain Khan v. Ambika Pershad Singh*[5] was also a case of a subsequent mortgagee governed by the Transfer of Property Act of 1882. No doubt the zarepeshgi lease had been of 1874, but the simple mortgage in favour of Mt. Alfan for ₹ 12,000 was executed in 1883 for the express purpose of liquidating the zarepeshgi debt. The amount was of course paid subsequently. She could claim the benefit of Section 74, Transfer of Property Act. Accordingly, applying the principle laid down in the previous cases in *Mohesh Lal v. Mohant Bawan Das*[6] and *Gokaldas Gopaldas v. Puranmal Premsukhdas*[7] their Lordships remarked that the charge created by the zarepeshgi lease was kept alive for the benefit of Mt. Alfan. But her claim actually failed because it wad barred by the 12 years' rule of limitation.

[4](1902) 29 Cal. 154 [6](1883) 9 Cal 961

[5](1912) 39 Cal. 527 [7](1884) 10 Cal. 1035

16. In *Malireddi Ayyareddi v. Gopalakrishnayya*[8] their Lordships pointed out that the rule of intention had been embodied in Section 101, Transfer of Property Act, 1882. After laying down that it was now settled law that where there are several mortgages, the owner of the property, subject to the mortgages, may, if he pays off an earlier charge, treat himself as buying it and

stand in the same position as his vendor, or he may keep the incumbrance alive for his benefit and come in before a later mortgagee, their Lordships observed:

> This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there wag no such personal covenant.

17. Their Lordships thus again had in mind the exception where the owner of the property had covenanted to pay the later mortgage debt. In a very recent case *Jagmohan Das v. Jugal Kishore*[9], their Lordships of the Privy Council expressed their complete agreement with the judgment of the Oudh Chief Court and regarded that all the points urged before the Board in respect of the appeal had been effectively dealt with by that judgment. In that case seven villages had been mortgaged in 1896 for ₹ 27,000 and the mortgagor's representative had in 1910 sold a half share in two villages Dayanatpur and Badshahpur to the plaintiff, expressly stating that half of the money due to the mortgagee would be paid by the vendee out of his own pocket while the remaining half would be paid by the vendor. Later, she made a mortgage of her half share in four villages to the defendants, which was followed by a usufructuary mortgage of that half share in favor of the plaintiff. When the prior mortgagee obtained a decree on his mortgage the plaintiff paid off a large sum of money of ₹ 47,278-3-0 (including a sum of ₹ 1,300 paid as penalty) to which the mortgage debt had swollen. The trial Court gave him credit for half of Rupees 45,978-3-0 (excluding ₹ 1,300) that is to a pay, for ₹ 22,989-1-6. The appellant maintained that as the mortgagor's representative had got back one anna in the villages and he was left only with seven annas, his liability under the terms of the deed of sale should be reduced from half to 7/16ths. The learned Judges of the Oudh Chief Court held that this plea had been rightly repelled. As the vendee obtained a half share and agreed to pay for the half share, the fact that the vendee chose afterwards to give away a portion of what he had purchased can in no sense affect his liability; and that there was therefore no force in the plea on that point. They also observed:

> The second paint which he takes is that he should be given credit foe the full amount to satisfy the decree. He was obliged under the terms of the deed of sale to satisfy one half of the liability. This brings us to the next point. He states that in these circumstances his liability is confined to ₹ 11,000 because the total debt was placed at ₹ 22,000. But the deed of sale, Ex. 20 shows dearly that his liability was not confined to one half of ₹ 22,000, but that he was obliged to satisfy half of the debt due which was estimated at being on 27th July 1910 of the amount of ₹ 22,000. The debt grew considerably greater as time went on. The vendee has not agreed to spay only half of ₹ 22,000 but to satisfy half the debt at the time or in

[8] A.I.R. 1924 P.C. 36

[9] AIR 1932 PC 99 : 1932-36-LW 85

> future.

18. They then rejected that plea regarding ₹ 1,300. It would therefore seem that the vendee was held not entitled to claim credit for half the amount paid which he was under the terms of the sale

deed himself bound to pay, although he had in fact discharged the whole of the mortgage debt. This case also supports the view, that where there is a contractual liability to discharge a prior debt no subrogation can be claimed in respect of such payment. There were a number of cases of this Court in which the same principle had been accepted. I may refer to the leading Full Bench case in *Muhammad Sadiq v. Ghaus Muhammad*[10] In that case a purchaser of the mortgaged property had undertaken to discharge out of the purchase money two subsisting mortgages, and in fact discharged only the earlier one, but did not discharge the later mortgage. It was held that it was not competent to him to hold up the earlier mortgage as a shield against the suit of the puisne mortgagee for sale. In that case however there was an undertaking to discharge even the second mortgage which was sued upon. The Full Bench however referred to the rule regarding the real intention of the parties and held that it was clearly the intention at the time when the sale was effected that the prior mortgage would be extinguished and not kept alive and that the same must be deemed to be the intention when the mortgage was discharged. The same view appears to have been followed in *Makkhan Lal v. Nathi*[11] and *Maqsud Ali Khan v. Abullah Khan*[12], as also the earlier case in *Tufail Fatma v. Bitola*[13] On the other hand a somewhat contrary opinion was expressed in *Gur Narain v. Shadi lal*[14] *Jamilunnissa v. Pitambar Das*[15] and lastly in *Madho Singh v. Pancham Singh*[16], In the last mentioned case it was considered that *Dhinobundhu Shaw Chowdhury's v. Jogmaya Dasi*[17] was really conclusive on the point. But with respect, it may be pointed out that that case was of a mortgagee governed by Section 74, Transfer of Property Act, and not that of a vendee as in *Madho Singh v. Pancham Singh*[18], This view was distinctly confirmed in the recent Full Bench case in *Tota Ram v. Ram Lal*[19], The Court rejected the principle of agency involved in the proposition that the money with which a subsequent mortgagee pays the first mortgage may be the property of the mortgagor and so no subrogation should be allowed, as the subsequent mortgagee in making the payment is acting only as an agent of the mortgagor and so is not entitled to be subrogated to the position of the first mortgagee, and considered that there does not appear to be any difference in principle between a case where a purchaser or a third mortgagee advances some money to the vendor or the mortgagor and then pays off the first mortgage, and the case where a purchaser or a third mortgagee professes to take the transfer for a larger sum than in the earlier case and keeps with him the money needed for paying off the earliest mortgage and actually does not hand over the money to the vendor or the mortgagor but uses the money to pay off the first mortgage. There may not be a very great difference between these two cases, but they certainly differ from a third case where the subsequent mortgagee or the vendee pays off a prior mortgage out of his own funds and is thus out of pocket in excess of the amount of the mortgage money or the sale consideration which had been fixed by the deed. In the latter case he is certainly entitled to the right of subrogation while he may not be in the former cases. It may be conceded that the mechanical process of payment or the

[10](1911) 33 All. 101
[11] A.I.R. 1923 All.101
[12] AIR 1928 All 77: (1928) ILR 50 All 218 : 108 Ind. Cas. 728
[13](1905) 27 All.400
[14](1912) 34 All.102
[15](1913) 11 A.L.J. 127
[16] AIR 1927 All 211: (1927) ILR 49 All 233: 101 Ind. Cas. 409
[17](1902) 29 Cal. 154
[18] AIR 1927 All 211 : (1927) ILR 49 All 233 : 101 Ind. Cas. 409
[19] AIR 1932 All 489 : (1932) ILR 54 All 897

particular hand which makes the payment is not so material so long as it is known definitely to whom the money belongs and whose money it is that is being paid. As pointed out by their Lordships of the Privy Council in *Mohesh Lal v. Mohant Bawan Das*[20] whether the money is paid by the mortgagee out of the money left in his hands by the mortgagor, it is money belonging to the mortgagor and not money belonging to the mortgagee. Of course where the mortgagee or

vendee pays a sum in addition to what he is under his contract bound to pay, he is paying his own money.

19. In the Full Bench case it was thought that the question had become very much simplified and has entirely disappeared from the arena of controversy owing to the language of Section 92, Transfer of Property Act. But unfortunately attention was concentrated on para. 1 of that section only and para. 3 which causes considerable difficulty was not referred to at all. The Full Bench ruling of this Court has been expressly dissented from by a Full Bench of the Madras High Court in *Lakshmi Amma v. Shankar Narayan Menon*[21] both on the question of their interpretation of Section 92 as well as on the question of its retrospective effect. One of the learned Judges has also noted that the special Committee which considered the bill assumed that under the previous state of the law a transferee from a mortgagor who has undertaken to discharge a prior mortgage debt cannot by the mere fact of paying off a prior mortgage claim subrogation, though in certain circumstances the Court may presume an intention on his part to keep alive the security. It may be doubtful how far it is legitimate to refer to the Report at all. It should be borne in mind that Sections 74 and 75, old Transfer of Property Act, which had embodied a restricted principle of subrogation have been repealed and the entire law is now contained in Sections 91 and 92 and also in Sections 95 and 101 of the new Act. Under Section 91 a large number of persons are empowered to redeem or institute a suit for redemption of the-mortgaged property. Para. 1, Section 92, provides that any of the persons referred torn 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 redeemed may have against the mortgagor or any other mortgagee.

20. Paragraph 3 lays down that 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. The difference in the languages of the two paragraphs is obvious. Para. 1 refers to a person who redeems and who on redeeming the property acquires the rights of the person, whose mortgage he redeems. Para. 3 refers to a person who has advanced to a mortgagor, money, with which the mortgage has been redeemed who acquires the rights of the mortgagee whose mortgage has been redeemed. Thus para. 3 does not require that the person who has. advanced to a mortgagor the money, should himself have redeemed. All that it requires is that the money advanced by him should have been utilized for the purpose of redeeming the mortgage. That is why instead of the words 'whose mortgage he redeems' as used in para. 1, we have the words 'whose mortgage has been redeemed.' Now, it is well known that subrogation can arise in two ways : (1) by agreement and (2) by operation of law. Para. 1 deals with subrogation arising by operation of law and para. 3 deals with subrogation by agreement. It is

[20](1883) 9 Cal. 961

[21] A.I.R. 1936 Mad. 171

necessary that there should be an agreement for subrogation, that the agreement should be in writing and that it should be a registered instrument. It would be impossible to hold that these two paragraphs overlap each other, for para. 3 requires oertain stringent conditions which are not found in para 1. They must therefore be mutually exclusive. The basic difference underlying these two paragraphs consists in this that para. 1 refers to a person redeeming property and para. 2 to a person who advances money with which a mortgage is redeemed.

21. If the older view which had prevailed in this Court and which had been emphasized by their Lordships of the Privy Council in the cases before the Transfer of Property Act, and not cases arising under that Act, be adhered to, Section 92 would create no difficulty whatsoever. Where a person himself redeems a mortgage, that is to say pays the mortgage money out off his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the rights of subrogation under para. 1 if he is one of the persons enumerated in Section 91. But where the person does not himself redeem the mortgage, that is to say does not himself pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilized for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is paid through the hands of the mortgagee the latter acquires the right of subrogation only if the mortgagor has by a registered instrument agreed that he shall be so subrogated. In this view when a person with whom money has been left for payment to a prior mortgagee pays it off, he is really not himself redeeming the mortgage but redeeming it as the agent of the mortgagor and has in substance advanced money to the mortgagor with which the mortgage has been redeemed. He cannot get the rights of subrogation unless there is a written and registered agreement to that effect. But where a person has had to pay off a prior mortgage out of his own funds and pays money in addition to any money that might have been left in his hands by the mortgagor or vendor, he himself has redeemed the mortgage, he comes under para. 1 of the section.

22. If this view be not accepted then we would be driven to the conclusion that para. 3 cannot apply to any of the persons who are mentioned in Section 91. Now the words 'who has advanced to a mortgagor money' are very wide and are not restricted to a case where the person advancing money is a simple money creditor and not a mortgagee who also is specified in Section 91. In this connexion it is important to bear in mind that Section 58 defines a mortgage as the transfer of an interest in specific Immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to. a pecuniary liability. The words 'money advanced' are used in connexion with the mortgage money lent on security. Those words have not been used exclusively for a simple money creditor.

23. For the purposes of para. 3 it matters little whether the person advancing the mortgage money has done so with or without security. If he has advanced money to the mortgagor, he is nevertheless the person who has advanced money although he also takes security from his mortgagor. It is very difficulty to confine the scope of para 3. to the case of a simple money creditor only. We cannot do that without introducing new words into this paragraph which are not there. We would, instead of 'a person' have to say 'and other persons' or to say 'who has advanced to a mortgagor money without security.' No doubt the word 'advanced' is ordinarily not appropriate to the case of a vendee, but is certainly quite appropriate to the case of a mortgagee. If a subsequent mortgagee advancing money on his mortgage for the purpose of paying off a prior mortgage comes under para. 3, then he would not come under para. 1, if the two paragraphs are mutually exclusive. It would be anomalous to hold that a Vendee who under his contract under, takes the liability to pay a prior mortgage comes under para. 1 and is therefore in a better position than a subsequent mortgagee. He should either not come in under either of these two paragraphs or come in only under para. 3. The other alternative view is that the result should depend entirely on whether the money is paid through the hands of the mortgagor, in which event

it would be a case of advancing money to him, or whether it is kept by the mortgagee and paid by the mortgagee himself, in which case it would not be a case of advancing money at all. In view of the observations made by their Lordships of the Privy Council in *Mohesh Lal v. Mohant Bawan Das*[22] it is difficult to hold that the mechanical process of payment or the instrumentality of the person making the payment is the crucial test. The real teat should be as to whom the money belongs which is paid. If the vendee or the mortgagee has taken the property and undertaken as a part of the sale consideration or the mortgage money to discharge a prior debt, he is making the payment out of the money which really belongs to his transferor and is not paying money which belongs to him, himself.

24. The learned advocate for the appellants relies on the case in *Umed Singh v. Babu Ram*[23], decided by a Bench of which I was a member. But it must be pointed out that the Division Bench was bound by the ruling of the Full Bench in *Tota Ram v. Ram Lal*[24], it was expressly said that it was not necessary to express any independent opinion on the retrospective character of the Amending Act as the opinion of the Full Bench was binding on the Division Bench, and it was pointed out that the Full Bench after discussing the cases in which the question of the agency of the transferee was considered had come to the conclusion that that question had now entirely disappeared from the arena of controversy owing to the amendment of the Transfer of Property Act. It may also be pointed that in view of the opinion expressed by the Full Bench, the significance of para. 3 of Section 92 was not considered.

25. In *Ganga Ram v. Harihar Prasad*[25], it was no doubt held by a Division Bench that para. 3 of Section 92 obviously referred to persons other than subsequent mortgagees who advanced money to a mortgagor to enable him to redeem the mortgage. In *Ram Sarup v. Sahu Bhagwati Prasad*[26], the Full Bench ruling was followed. But some hesitation was expressed by one member of the Bench in *Shyamsundar Lal v. Qurban husain*[27] It was there remarked:

> One view might have been that all persons mentioned in Section 91 except the mortgagor, who redeemed a previous mortgage by payment of money out of their pocket are entitled to the right of subrogation under para. 1 of Section 92, but that if the mortgage is discharged by payment of money which has been left by the mortgagor in the hands of the mortgagee or purchaser, then there would be no

[22](1883) 9 Cal. 961.
[23] AIR 1934 All 1035 : 1934 AWR (H.C.) 4 221 : 150 Ind. Cas. 937,
[24] AIR 1932 All 489 : (1932) ILR 54 All 897
[25] AIR 1936 All 336 : 1936 AWR (H.C.) 274
[26] AIR 1936 All 636 : 1936 AWR (H.C.) 516
[27] *S.A. No. 1025 of 1934*

> such right of subrogation unless there is an express covenant in the registered document. This view finds some support from the opinions expressed by Sir D.P. Mulla in his Transfer of Property Act at pp. 488 and 488 and by Sir Lai Gopal Mukerji in his Transfer of Property Act, Article 239, and also by observations made by the Calcutta High Court in *Mukaram Marwari v. Muhammad Hosain*[28], *Ram Hait v. Pohkar*[29] and *Mohommad Raza v. Bilqis Jehan begam*[30], According to this view where a prior mortgage is discharged by making a payment in addition to the amount left in the hands of the mortgagee or to the sale consideration left with a purchaser, then a right of subrogation would arise but such a right would also arise if money is paid out of the amount left

provided there is an express Covenant of subrogation in a registered deed.

26. On a consideration of the section it seems that this view expresses the real intention of the Legislature in enacting para. 1 of Section 92. Another question which arises in this case is whether Section 92 is retrospective, for if it were not so, it would not apply to the case before us. Here the two mortgages as well as the sale deed had been executed before 1st April 1930, when the Amending Act 20 of 1929 came into force. The Full Bench in *Tota Ram v. Ram Lal*[31], pointed out that Section 47, dealing with Section 92, T. P. Act, and Section 51, dealing with Section 101, Transfer of Property Act, were not mentioned in Section 63 and that therefore, there was nothing in that clause which affected the case before the Full Bench. It was held that Sections 92 and 101 have a retrospective effect for there was nothing which had already been done before 1st April 1930 in any proceeding pending in a Court on that date. Apparently the Full Bench thought that the fact that the suit was already pending did not exclude the applicability of Section 92. It is not necessary to express any opinion on this point, as in the case before the Full Bench the suit had been instituted before 5th April 1929 and was therefore, pending when the new Act came into force. The case before us was however instituted after the new Act had come into force. Mukerji, J. who apparently delivered the judgment in the Full Bench case, however, decided later in *Gauri Shankar v. Gopal Das*[32], that Section 53-A, Transfer of Property Act, was not retrospective in its operation although the reasoning in *Tota Ram v. Ram Lal*[33], applied with equal force to Section 53-A just as much as to Section 92. In *Gajadhar Misir v. Bechan*[34], one of us differed and held that that section was retrospective. This question was considered by a Division Bench of which two of us were members in *Shyam Sunder Lal v. Din Shah*[35], and it was held that in view of the provisions of Section 63(d), the section was retrospective. The Bench observed:

> It follows that the Legislature intended that where no such action was pending on 1st April 1930, then the provisions o these sections would be applicable even though the transactions came into existence prior to that date.

27. In view of the language of the last portion of Section 63 already discussed, this view appears to be sound. An examination of the Amending Act shows that all the important sections which brought about alterations in the law affecting substantive rights have been made prospective. Had Section 63 said nothing more, it might well have been argued, as was suggested in the judgment of one of the learned Judges of the Madras High Court, in

[28] AIR 1936 Cal 42 [30] AIR 1934 Oudh 213 [32] AIR 1934 All 701
[29] A.I.R. 1932 Oudh 54 [31] AIR 1932 All 489 : (1932) ILR 54 All 897
[33] AIR 1932 All 489 : (1932) ILR 54 All 897
[34] AIR 1934 All 768 [35] AIR 1934 All 312 : 1933 AWR (H.C.) 2 1190

Lakshmi Amma v. Shankar Narayan Menon[36] that this might well be a provision inserted ex majore cautela. But that section expressly refers to other provisions of the Act as well and provides:

> And nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st April 1930 in any proceeding pending in a Court on that date and any such remedy and any such proceeding as is herein referred to may be

enforced, instituted or continued, as the case may be, as if this Act had not been passed.

28. Thus the other provisions of the Act were made inapplicable only when anything had already been done before 1st April 1930 in any proceeding pending in a Court on that date. The Legislature obviously intended that if there was no proceeding pending in a Court on 1st April 1930, the retrospective character of the f other provisions of the Act should not be excluded. No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so. In India there is the provision in the General Clauses Act, Section 6, to a similar effect. But in this Amending Act there is much more than a mere omission. There is an express reference to certain specified sections which are not to be retrospective and there is an express reference to all the other provisions of the Act which are not to be retrospective in a certain contingency. It seems to follow that barring that contingency the other provisions of the Act were intended to have a retrospective effect. The reason is not far to seek. The Legislature had apparently thought that these other sections are merely explanatory in their character and declare the law which had existed prior to this amendment. Whether the Legislature was right or wrong in this assumption is not a matter for us to consider. We must give effect to the language of the Act as it stands and hold that the sections of the Transfer of Property Act not dealt with in the sections enumerated in Section 63 have a retrospective effect, at least where no action was pending on 1st April 1930. In the present case as the appellants do not allege that there was any agreement by a registered instrument that the vendee would be subrogated to the rights of the prior mortgagee who was to be paid off, it is wholly unnecessary to consider whether para. 3 of Section 92 can at all apply to a vendee. If the point had arisen, the question would have been whether the word "advanced" can be applicable to a vendee who had undertaken to pay a previous mortgage debt in addition to paying the full price of the equity of redemption as it then stood.

29. The last question raised in this case is whether the fact that there were three sets of vendees who made payments, the balance being paid by the mortgagor himself, would show that the requirements of para. 4 of Section 92 were complied with. That section does not require that the person claiming subrogation should himself have paid the entire amount of the previous mortgage debt. It merely says that no right of subrogation is conferred on any person "unless the mortgage in respect of which the right is claimed has been redeemed in full". The idea is that no claim for subrogation should be entertained to long as the mortgage debt is still outstanding and the mortgage has not been extinguished. If such a claim were entertained, there would be a considerable confusion if different persons had discharged different portions of the mortgage debt at different times. In the

[36 A].I.R. 1936 Mad. 171

present case the entire mortgage debt has been discharged and the mortgage has been redeemed in full. The three sets of vendees who paid the mortgage money (other than the mortgagor) would have been entitled to the rights of subrogation in proportion to the amounts paid by them, if they had really redeemed the mortgage on their own behalf and come within the purview of para. 1 of Section 92. But having paid the amounts which under their contracts of sale they were bound to pay as part of their sale consideration, and not having obtained any agreement in writing registered that they would be subrogated to the rights of the prior mortgagee, they are not entitled to any such benefit.

Bennet, J.

30. I agreed with the above judgment.

Thom, J.

31. I concur.

Harries, J.

32. I concur.

Bajpai, J.

33. I agree.
.