

1916. implied under section 55 (2) of the Transfer of Property Act.

ISMAIL
ALLARÁKHIA
v.
DATTATRAYA.

We set aside the decree dismissing the suit and pass a decree for the plaintiff for the sum claimed with interest and the cost of suit throughout.

Solicitors for plaintiff : Messrs. *Mulji & Thakurdas*.

Solicitors for defendant : Messrs. *Amin & Desai*.

Decree set aside.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

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July 25.

TANGYA FALA (ORIGINAL PLAINTIFF), APPELLANT v. TRIMBAK DAGA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Contract Act (IX of 1872), section 70—Payment made for another—Non-gratuitous payment—Obligation of person enjoying the benefit—Mortgage—Stranger paying off a subsisting mortgage—Subrogation.

The defendant No. 1 mortgaged his lands in 1893. In 1904, the mortgagee sued on the mortgage and obtained a decree for the mortgage amount, or in default, the sale of the property. The mortgagee applied in 1905 for sale of the mortgaged property. About that time, the plaintiff went into possession of the lands on a ten years' lease from defendant No. 1. Shortly afterwards, defendant No. 2, who held a money-decree against defendant No. 1, brought the property to sale and purchased it himself. In 1907, the property was put up to sale in execution of the mortgagee's decree. But defendant No. 1 borrowed a sum of Rs. 2,463 from the plaintiff and paid off the mortgagee. Subsequently, defendant No. 1 sold a portion of the property mortgaged to plaintiff for Rs. 4,000, the consideration being made up of Rs. 2,463 with other sums lent to defendant No. 1 personally. In 1908 defendant No. 2 sued plaintiff to recover possession of the land; and obtained possession. The plaintiff filed the present suit to recover the amount of Rs. 4,000 from the defendants personally or by sale of the property.

Held, that defendant No. 2 was not personally liable to repay Rs. 2,463 to the plaintiff under section 70 of the Indian Contract Act (IX of 1872), for, it could not be said that the payment was made for defendant No. 2, the plaintiff having, without reference to the second defendant, intruded himself in order to make the payment without the second defendant's knowledge.

Held, further, that the land in possession of defendant No. 2 was chargeable with the sum of Rs. 2,463, because the plaintiff being a stranger who paid off a subsisting mortgage was entitled to be subrogated to the position of the mortgagee.

Held, also, that defendant No. 1 was personally liable to make good the deficiency.

Per BATCHELOR, J.—“Section 70 of the Indian Contract Act makes provision for compensation to be paid by a person enjoying the benefit of a non-gratuitous act, but for the operation of the section certain conditions are prescribed. They are that the thing done shall be lawfully done, that the intention shall not have been to do it gratuitously, and that the other person shall enjoy the benefit.”

FIRST appeal from the decision of S. S. Phadnis, First Class Subordinate Judge at Dhulia.

Suit to recover a sum of money.

On the 23rd August 1893, defendant No. 1 mortgaged his two houses and two lands (Survey No. 19 and a moiety of Survey No. 172) to one Atmaram for Rs. 2,250. Atmaram (mortgagee) filed a suit in 1904 to recover the amount of the mortgage from defendant No. 1 personally or by sale of the mortgaged property. On the 12th June 1905, the mortgagee applied for sale of the property. The execution proceedings were transferred to the Collector. About this time, the plaintiff went into possession of the lands on a ten years' lease from defendant No. 1.

The defendant No. 2 held a money-decree against defendant No. 1. He applied to execute the decree; and in execution proceedings had the lands sold at a Court sale and purchased them himself for Rs. 625 on the 27th June 1905.

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On the 13th April 1907, the Collector, in execution of the mortgage decree, put the property to sale. But defendant No. 1 borrowed a sum of Rs. 2,463 from the plaintiff and paid off the mortgage. On the 17th December 1907, defendant No. 1 sold the moiety of Survey No. 172 to plaintiff for Rs. 4,000, made up of Rs. 2,463 advanced in April 1907 together with other sums lent to defendant No. 1 personally.

In 1908, defendant No. 2 brought a suit against plaintiff to recover possession of the land from him; and recovered the same in 1911.

The plaintiff filed the present suit to recover the amount of Rs. 4,000 from the defendants personally or by sale of the property.

The Subordinate Judge held that defendant No. 1 had no saleable interest in the property at the time when he passed the sale-deed to the plaintiff; and that the plaintiff had no charge on the property in suit. He held that defendant No. 2 was not personally liable, as section 70 of the Indian Contract Act had no application, the payment not having been made for him. A decree for Rs. 3,113 was, however, passed against defendant No. 1 personally.

The plaintiff appealed to the High Court.

G. S. Rao, for the appellant:—We submit defendant No. 2 is personally liable for Rs. 2,463. The payment was made for his benefit; and he enjoyed the benefit. Section 70 of the Indian Contract Act applies, for the payment was lawfully made, there was no intention to make the payment gratuitously, and defendant No. 2 had enjoyed the benefit of such payment: see *Suchand Ghosal v. Balaram Mardana*⁽¹⁾ and *Jarao Kumari v. Basanta Kumar Roy*.⁽²⁾

⁽¹⁾ (1910) 38 Cal. 1.

⁽²⁾ (1904) 32 Cal. 374.

Further, the plaintiff, who was a stranger having paid off a subsisting mortgage, was entitled to be subrogated to the position of the mortgagee; and, as such, had charge for the money advanced on the land: see *Butler v. Rice*;⁽¹⁾ *Gokuldoss Gopaldoss v. Rambux Sechand*.⁽²⁾

M. V. Bhat, for respondent No. 2, was called upon to reply on the second point:—The doctrine of subrogation can never be applied in aid of a mere volunteer. There must be an assignment or an agreement for subrogation: see *Gurdeo Singh v. Chandrikah Singh*;⁽³⁾ *Apaji Bhivrav Rayrikur v. Kavji*;⁽⁴⁾ *Vishnu v. Rango Ganesh Purandare*⁽⁵⁾ and *Khushal v. Punamchand*.⁽⁶⁾ The principles laid down in English cases should not be applied to Indian cases. Here we are governed by the provisions of the Transfer of Property Act (IV of 1882), section 91 of which gives a list of persons entitled to redeem a mortgage. Neither plaintiff nor defendant No. 1 would have any right to pay off the prior mortgage as defendant No. 2 had become its owner at a Court-sale.

BACHELOR, J.:—In 1893, the property in suit and certain other properties were mortgaged by their owner Daga Lahnu to one Atmaram to secure a sum of Rs. 2,250. In 1904, the mortgagee, Atmaram, brought a suit on his mortgage and obtained a decree for payment of Rs. 2,247 and costs within six months, or in default, the sale of the property. On the 12th June 1905, Atmaram as decree-holder presented an application for sale of the mortgaged property. This application was transferred for execution to the Collector. On the 27th June 1905, the present second defendant, in execution of

⁽¹⁾ [1910] 2 Ch. 277.

⁽²⁾ (1884) L. R. 11 I. A. 126.

⁽³⁾ (1907) 36 Cal. 193 at p. 217.

⁽⁴⁾ (1881) 6 Bom. 64.

⁽⁵⁾ (1893) 18 Bom. 382.

⁽⁶⁾ (1897) 22 Bom. 164.

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a money decree which he had obtained against Daga, brought the property to sale and purchased it himself. On the 13th April 1907, in execution of Atmaram's decree on the mortgage, the Collector put the property to sale. Thereupon Daga Lahnu, who was the first defendant in the suit, borrowed a sum of Rs. 2,463 from the plaintiff in order to pay off Atmaram's decretal amount, and, with the money so borrowed from the plaintiff, Atmaram's decree was in fact satisfied and the threatened sale was averted. On the 17th December 1907, Daga executed a sale deed in the plaintiff's favour in regard to the property now in suit, namely, a moiety of Survey No. 172. The total consideration of the sale deed is Rs. 4,000 made up of Rs. 2,463 advanced in April 1907 by the plaintiff together with other sums lent to Daga personally. In 1905, the plaintiff went into possession of the lands on a ten years' lease from Daga, but in 1908 he was ejected from possession in a suit filed by the second defendant for the recovery of possession. Thereafter the plaintiff brought the present suit in which he claimed to recover Rs. 4,000, the consideration of the sale deed, from the first defendant, while as against the second defendant the claim was that since Atmaram's mortgage had been paid off with the plaintiff's moneys, the plaintiff should be decreed to stand in the shoes of the mortgagee, Atmaram, with the result that his advance of Rs. 2,463 should be recoverable by the sale of the mortgaged land in the hands of the second defendant. There was also a prayer that the sum should be decreed from the second defendant personally. The learned Judge of the lower Court has given the plaintiff a decree for Rs. 3,113 against the first defendant only, and the claim against the second defendant has been rejected.

In this appeal Mr. Rao on behalf of the plaintiff-appellant raises two contentions, the first being that

under section 70 of the Indian Contract Act, defendant No. 2 is personally liable to repay to the plaintiff Rs. 2,463 advanced by the plaintiff to the first defendant. Section 70 of the Indian Contract Act makes provision for compensation to be paid by a person enjoying the benefit of a non-gratuitous act, but for the operation of the section certain conditions are prescribed. They are that the thing done shall be lawfully done, that the intention shall not have been to do it gratuitously, and that the other person shall enjoy the benefit. I will assume in the plaintiff's favour that these three conditions are in the present case satisfied. There remains the condition expressed in the first words of the section which are "where a person lawfully does anything for another person." The plaintiff's case here is that the payment of Atmaram's mortgage was the thing done by him for the second defendant. I am of opinion, however, that that claim is not substantiated. There is no doubt about the facts which are that the payment was made not only without the consent, but without the knowledge, of the second defendant. On the evidence on the record I am of opinion that the object of the payment was to benefit the plaintiff himself. Moreover, while it does not appear that the second defendant would not have paid off the mortgage himself if the matter had been brought to his attention, it does appear that the plaintiff, in making the payment behind the back of the second defendant, was depriving the second defendant of an option which the law allowed him to exercise. For, to the second defendant it was open either to pay off the mortgage or to stand by and let the property be sold. When, therefore, the plaintiff, without reference to the second defendant, intruded himself in order to make the payment without the second defendant's knowledge, I am of opinion that it cannot be said that such payment was made for the second defendant. That is the view of the learned Judge of

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the lower Court. As was observed by Sir Lawrence Jenkins in *Suchand Ghosal v. Balaram Mardana*⁽¹⁾ the question which the Courts have to decide under section 70 of the Indian Contract Act is almost entirely, if not entirely, a question of fact. I may add that the case before us is on its facts readily distinguishable from *Suchand's case* inasmuch as there the person who paid the money had an incontestable tenant's right and the payment was made for the benefit both of himself and of the other tenants who were liable under the decrees and had no alternative but to pay the decretal debts. I agree with the learned trial Judge that upon the facts of this case the plaintiff's claim to compensation under section 70 of the Indian Contract Act is not established.

There remains Mr. Rao's second contention which is based upon the equitable doctrine allowing a stranger who pays off a subsisting mortgage to be subrogated to the position of the mortgagee. The facts, here again, are not in dispute. The mortgage of Atmaram was paid off with the help of the plaintiff's moneys by the first defendant, and it cannot, in my opinion, be doubted that the first defendant had an interest in paying off that mortgage. Therefore, if the doctrine is made out, the first defendant could claim to stand in the mortgagee's shoes, and if that be so, the same position would be occupied by the plaintiff who claims through the first defendant and whose moneys were advanced to the first defendant precisely in order that Atmaram's mortgage should be discharged. That the legal doctrine for which Mr. Rao contends is established is illustrated, I think, by Mr. Justice Warrington's decision in *Butler v. Rice*.⁽²⁾ There is no objection to our reference to this English decision for the purpose of verifying a doctrine which, though not in terms contained in

⁽¹⁾ (1910) 38 Cal. 1.⁽²⁾ [1910] 2 Ch. 277.

the Transfer of Property Act, is not inconsistent with any provision of that Act. Indeed section 95 of the Act suggests that the doctrine was at least in part formally accepted by the Indian legislature. Reference may also be made upon this point to the decision of their Lordships of the Judicial Committee in *Gokuldoss Gopaldoss v. Rambux Seochand*.⁽¹⁾ Now *Butler v. Rice*⁽²⁾ was a case where the plaintiff Butler upon an agreement to receive a mortgage for £300 advanced a sum of money to Rice in order that Rice might pay off certain mortgages of property belonging to Mrs. Rice. The money was accordingly paid and the mortgages were released, but all this was done without the knowledge of the mortgagor Mrs. Rice. It was contended in argument that mortgages in these cases are only kept alive where the charge is paid off at the express or implied request of the mortgagor. That argument, however, was rejected by Mr. Justice Warrington who observed that the statement of claim, or as we should say the plaint, proceeded on the well-known equitable doctrine that if a stranger pays off a mortgage on an estate, he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit. I pause to observe that in our own case we have not only that presumption, but the sworn testimony of the plaintiff that such was in fact his intention. As to the argument that Mrs. Rice's knowledge was essential, the learned Judge observed that her concurrence was immaterial inasmuch as her position was not affected, for the only alteration in her position was that instead of owing the money to one creditor she owed it to another, and in the first words of the judgment in language which is perfectly apt to our present case, the learned Judge said that the question he had to determine was whether the mortgagor was entitled to hold the property discharged from the

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debt of £450, not one penny of which she had paid off herself, or whether the person who paid it was entitled to treat the charge as still on foot in his favour. As the learned Judge answered that question against the mortgagor, so we must answer in the present case, where the similar question is whether the second defendant is entitled to hold this land free of an incumbrance of Rs. 2,463, not one rupee of which he has ever paid himself, but every rupee of which has come from the pockets of the plaintiff. I may add that the plaintiff's position is, if there be any difference, somewhat stronger than was Butler's position, for while Butler was a mere stranger, the plaintiff is claiming through a person with a clear interest in releasing the mortgage. On these grounds I am of opinion that Mr. Rao's second contention must be conceded and that the land in possession of the second defendant must be held chargeable with the sum of Rs. 2,463.

In my opinion, therefore, we should reverse the lower Court's decree and substitute for it a decree allowing the plaintiff the sum of Rs. 2,463 to be recovered with interest at 6 per cent. from the date of suit to the date of payment by the sale of one-half of Survey No. 172. Any deficiency between this sum and the total of Rs. 3,113 should be recovered from the first defendant, being made payable in annual instalments of Rs. 800 until complete satisfaction, the first such instalment to be due three months after the amount of the deficiency has been ascertained. The plaintiff must have his costs here and in the Court below. The sum if not paid by the second defendant within six months may be recovered by sale of the property.

SHAH, J. :—I agree. I desire to add a word with reference to Mr. Bhat's argument that neither the plaintiff nor defendant No. 1 was interested in satisfying the mortgage claim of Atmaram at the time, when the sum

of Rs. 2,463 was paid by the plaintiff. It is clear that, in spite of the previous purchase by defendant No. 2 at a Court sale of the two survey numbers, the equity of redemption in the other property mortgaged to Atmaram was vested in defendant No. 1 at the time. The mortgage decree in favour of Atmaram was against him and was being executed against him at the time. He was, therefore, clearly interested in satisfying Atmaram's decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so; and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage decree to Atmaram at the instance of defendant No. 1.

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Decree reversed.

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August 7.

*Before Sir Stanley Batchelor, Kt, Ag. Chief Justice
and Mr. Justice Shah.*

VINAYAKRAO BALASAHEB INAMDAR AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS v. SHAMRAO VITHAL KALKUNDRI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 3 (w), 12 and 13—Suit for redemption—Mortgage superseded by consent decree—Allegation of fraud—Form and reality of the suit.

The plaintiffs' father executed a mortgage in 1894. In 1899 the mortgagee sued the mortgagor for the recovery of the mortgage debt and for sale of the property. In 1900 there was a consent decree by which a new sum was taken as capitalized principal and provision was made for payment of money by instalments. The security under this arrangement differed in some particulars from the security of the earlier mortgage. On the same day as this consent-decree

* First Appeal No. 192 of 1913.