Sita Ram vs Sharda Narain Singh And Anr. on 10 March, 1950

Equivalent citations: AIR1950ALL682, AIR 1950 ALLAHABAD 682

Bench: Ghulam Hasan, V. Bhargava

JUDGMENT

Kidwai, J.

1. On 14th July 1920, six persons including one Shanker Singh, executed a deed of mortgage to secure repayment of a sum of Rs. 25,719 borrowed from Manharan Nath and Kailash Nath, Among the properties mortgaged was a 1/12th share of Patti No. 228, thok Chauhan, in Hardoi.

2. On 19th February 1929, the mortgagees obtained a decree for sale, They proceeded to execute their decree, but, on 12th September 1933, the judgment-debtors applied for permission to sell the property by private sale, and permission having been granted, three of them, including Shankar Singh, sold their shares of the patti to Raja Durga, Narain Singh of Tirwa, who is now represented by Raja Sharda Narain Singh, respondent No. 1. Another judgment-debtor, Makund Singh, executed a mortgage in favour of the Raja.

3. The money due in respect of their shares of the decretal amount was left by the four transferors with the Raja to be deposited in Court, in order to satisfy the decree. Accordingly on 18th September 1933, the Raja deposited Rs. 24,716-6-0, the exact amount which had been left with him, and the two judgment-debtors, who had not made any transfer, deposited the balance. Thus the decree was satisfied and the execution proceedings terminated.

4. In the meanwhile on 24th July 1925, Shankar Singh had mortgaged his share in the 1/12th share of the patti, along with other properties, to Behari Lal, who on 23rd July 1927, transferred his mortgagee rights to Lala Sita Ram. A final decree for sale was passed on the basis of this mortgage on 1st August 1930. An attempt to get this decree satisfied by the sale of property other than Patti No. 228 thok Chauhan, having failed, the decree-holder applied on 8th March 1943, for execution by sale of Shankar Singh's share in that Patti.

5. The Raja filed an objection under Section 46, Civil P. C. He raised two pleas, with one of which we are not concerned, since it has been decided against the Raja by both the Courts below and is not raised in this appeal. The second plea was that the Raja, having paid off the first mortgagee, was subrogated to the rights of that mortgagee. He was thus not a sub-sequent transferee and the property in his possession could not be sold in execution of Sita Rain's decree.

6. The Court executing the decree held that, in order to bring Section 92, T. P. Act, into operation it

is not necessary that the person claiming the benefit of it should himself have discharged the entire amount of the prior encumbrance, provided that the entire amount hag in fact been discharged. It then proceeded to hold that, since the Raja had only paid the money which was left with him by Shankar Singh, the mortgagor, to pay, he, by making payment, only stepped into the shoes of the mortgagor and could not derive the benefit of Section 92, T. P. Act. The learned Civil Judge distinguished the Pull Bench case of Abdul Hamid v. Lala Ram Kumar, 1942 O. W. N. 165 : (A. I. R. (29) 1942 Oudh 260 F. B.) of the ground that that was a case of mortgage and followed the Pall Bench case of Hira Singh v- Jai Singh, I. L. R. (1937) ALL. 880: (A. I. R. (24) 1937 ALL. 588 F. B.) which was a case of sale. On his view of the law, the learned Civil Judge dismissed the objection.

7. The Raja appealed and the learned District Judge of Hardoi allowed the appeal. He held that the Raja was, at least, a co-mortgagor since he had purchased the share only of three of the mortgagors and not of the remaining three. hi also held that, by reason of the sale to him the Raja also acquired an interest in the property and was entitled, under Section 91, T. P. Act, to redeem it. For both these reasons he held that the Raja came under para. 1 of Section 92. He accordingly allowed the objection.

8. Lala Sita Ram filed a second appeal in the Chief Court of Avadh, which came up for bearing before my learned brother Bhargava J. and myself and, since there appeared to be a conflict of opinion between the decisions of the Chief Court, and those of the former Allahabad High Court, as wall as some conflict in the decisions of each of those Courts themselves, we requested the Hon'ble the Chief Justice to constitute a Fuller Bench for disposal of the appeal. as a result the appeal has now been heard by the present Full Bench.

9. The sole question for determination in this appeal is whether the Raja, having paid off the first mortgage out of money left with him by the vendor (mortgagor) and being bound by his contract to pay it, can claim to be subrogated to the mortgagee whom he has paid off.

10. As remarked by Sulaiman C. J. in Hira Singh v. Jai Singh, I. L. R. (1937) ALL. 880. (A. I. R. (21) 1937 ALL. 638 (F. B.)).

> "the foundation of the right of subrogation in the well known equitable principle of reimbursement now embodied in Section 69, Contract Act, this a person who is interested in She payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other."

11. Although subrogation is founded in equity, it is now a legal right conferred by statute and dependent upon the words of that statute. The first thing, therefore, to do is to consider the relevant provisions of the statute. These are Sections 92, 91 and 59A, T. P. Act. Section 92 reads as follows :

> "Any of the persons referred to in Section 91 (other thin 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 subrogated.

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

In this case also, as in Hira Singh v. Jai Singh, I. L. R. (1937) ALL, 880 : (A. I. R. (24) 1937 ALL. 588 F.B) :

"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."

Paragraph 1 of Section 92 refers back to Section 91. It is agreed that Clauses (b) and (c) of the latter section are not relevant to the question involved in the present appeal. The relevant provisions of Section 91 are as follows :

"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property, namely :

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in or charge upon, the property mortgaged or in or upon the right to redeem the same."

Section 91 although it mentions the mortgagor also does not confer a right to redeem upon him: that right is conferred by Section 60. It will be seen that the para. 1 of Section 92 excepts a mortgagor from its operation. One of the questions to be considered is whether, having regard to the provisions of Section 69A, T. P. Act, the Raja is a 'mortgagor' and, as such, not entitled to the benefits of Section 92. Section 59A reads as follows :

"Unless otherwise expressly provided, reference in this Chapter to mortgagor and mortgagees shall be deemed to include references b persons deriving title from them respectively."

The three provisions to which reference has been made did not occur in the Transfer of Property Act till they were added by Act XX [20] of 1929. Prior to that addition, the right of subrogation was conferred only upon subsequent mortgagees by Section 74 of the Act, which has now been repealed. Before the enactment of the Transfer of Property Act, the rules of equity, laid down by the English Courts, were applied. Under these rules, the mortgagor himself could not, on redeeming, claim the right of subrogation,

12. On a construction of the provisions of the Transfer of Property Act which I have quoted the questions which arise for decision are : (1) Can it be said that, in the circumstances of the present case, the mortgagor has himself redeemed the prior mortgage and that consequently no right of subrogation has arisen? or (2) Is the Baja, being a person, other than the mortgagor, mentioned in Section 91 as a person who had a right to redeem the first mortgage, entitled to the benefit of Section 92 since he has paid off that mortgage, even though he did so with money which was a part of the consideration of the sale and was left with him for the purpose of making the payment ? (3) Is the Baja, who derives his title from the mortgagor by virtue of the sale in his favour a mortgagor within the meaning of Sections 91 and 92, or is there anything in those sections which may be construed as an express provision otherwise ? and (4) Was the Raja, being a transferee of the mortgagee rights of four out of the six mortgagees a co-mortgagor who had redeemed and was he, as such entitled to the benefit of Section 92 ?

13. Decisions given before the amendment of the Transfer of Property Act cannot assist in the interpretation of that Act. Since, however, the principles mostly remain the same, they may legitimately be relied upon for the purpose of deducing those principles. It is, however, not necessary for me to refer to any of them independently because all the earlier decisions to which reference was made in the course of arguments, have been fully considered in the three Fall Bench decisions to which I shall refer.

14. The fourth question may, first, very shortly be disposed of. In the present case we are concerned only with the property of Shanker Singh and the rights which have accrued in it by reason of the redemption of a prior mortgage of it. If the money due in respect of the share of Shanker Singh was paid or is deemed to have been paid by Shanker Singh himself, the fact that other co-mortgagors discharged their respective shares of the debt, either themselves or through their transferee, would not give them, or their transferee, any right to claim subrogation in the capacity of co. mortgagor. Each is paying his own share of the debt and not the share of any one else; that is to say, the payment made by each person is in the capacity of mortgagor and not in that "of co-mortgagor. The Raja cannot, therefore, claim the benefit of Section 92 as a co mortgagor paying off a prior mortgage.

15. The next questions that I will consider are the first two. They are closely connected and may be dealt with together. For the purpose of deciding those questions, it is necessary to determine if the Court may go into the question whether the Raja made the payment as the agent of the mortgagor or must the Court accept the payment as one made by a person who was entitled, by reason of Section 91(a) to redeem, even though it was not his own money that was paid. It is on this point that there is a difference of opinion between the decision in Tota Ram v. Ram Lal, A. I. R. (19) 1932 ALL. 489:

(54 ALL. 897 F.B), which was decided by a Bench of three Judges, and the subsequent case of Hira Singh v. Jai Singh, I. L. R. (1937) ALL. 880 : (A.I.R. (24) 1937 ALL. 588 F.B.) which was decided by a Bench of five Judges and in which the earlier view was not accepted. I will consider the latter case first.

16. In that case, Ram Anant Singh executed a mortgage deed in favour of Radha Charan Singh and Ram Lalit Singh on 7th May 1925, to secure a loan of Rs. 9000. The mortgage deed covered 7 items of property including Bisaura and Binauli. On 21st May 1926, Ram Anant executed two mortgage deeds in favour of Jai Singh. Thereafter, Ram Anant having died, his widow, Mt. Sumitra, along with certain reversioners, executed on 26th June 1929, three sale, deeds in favour of three different sets of persons for three different sums of money. Under all the three deeds various sums were left with the vendees for payment to the first mortgagee which, together with a sum of Rs. 47, paid by the mortgagor himself in cash, was sufficient to discharge the debt due to the first mortgagee,, and this debt was discharged on 2nd July 1929.

17. After this Jai Singh instituted the suit out of which the appeal arose, on the basis of his mortgage deeds. He impleaded the mortgagor and two sets of vendees, the property sold to the third set not being covered by his mortgage. The two sets of vendees pleaded, inter alia, that, since they had discharged the first mortgage, they were subrogated to the rights of that mortgagee. This plea was accepted by the trial Court but, on appeal, a Bench of the High Court found a conflict of opinion to exist and referred the following two questions for decision to a Full Bench:

> "(1) Where a prior mortgage is redeemed partly by the mortgagor and partly by the vendees of the mortgaged property out of the sale consideration and in terms of covenants in the sale-deeds in their favour, are the vendees, as against puisne mortgages, entitled to the rights of subrogation under Section 92, T. P. Act ?
>
> (2) Does Clause 3 of Section 92, T. P. Act apply to persons mentioned in Section 91 of the Act ?"

18. The second question does not arise in this case, consequently, although I do not agree fully with the view expressed on this question by the Full Bench, it is not necessary for me to enter into a discussion of it.

19. The reply of the Fall Bench to the first question was that the vendees, in paying off the prior mortgage, acted only as agents of the mortgagor and that, consequently, the redemption was effected by the mortgagor himself and did not give rise to a right of subrogation. Sulaiman C. J., who delivered the judgment of the Full Bench, discussed a great many authorities, including some decisions of their Lordships of the Judicial Committee. He was well aware that there was a difference of opinion on this point between various Judges of his own Court. He noted this difference with particular reference to Tota Ram's case, A. I. R. (19) 1932 ALL, 489 : (54 ALL. 897 F. B.) and he came to the conclusion that :

> "It may be conceded that the mechanical process of payment or the 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 oat by their Lordships of the Privy Council in Mohesh Lal v. Bawan Das, 10 I. A. 62 : (9 Cal. 961 P. C.).
>
> Whether the money is paid by the mortgagee out of money left in his hands by the mortgagor it is money belonging to the mortgagor and not money belonging So the mortgagee."

20. Again, at another place in his judgment, the learned Chief Justice says:

> "If the older view which had prevailed in this Court and which had been emphasised by their Lordships of the Privy Council in 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 gay, pays the mortgage money out of 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 pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilised 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 should 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."

21. The view expressed in the two paragraphs is fully supported by authorities upon which the learned Chief Justice relies and it is not necessary to refer to them independently. So long as the law recognises the principle that a man may do through an agent what he can do himself the principle upon which the decision proceeds is, if I may say so with respect, undoubtedly correct, nor is any lengthy discussion required to demonstrate its correctness. Nevertheless, the principle of agency has not been accepted in Tota Ram v. Ram Lal, A. I. R. (19) 1932 ALL. 489 : (54 ALL. 897 F. B.).

22. In that case Mukerji J., who delivered the judgment of the Full Bench, differentiated the case of Muhammad Sadiq v. Ghaus Mohammad, 33 ALL. 101 : (7 I. C. 200), on the ground that "there the person making the payment was a purchaser from the mortgagor." He then proceeded :

> "The doctrine of agency has much to be said against it. To start with, 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 mortgagor, as the case may be and then pays off the first mortgage and the case where a purchaser or a third mortgagee purchases for a larger sum than in the earlier case and keeps with him the money needed fox paying off the earliest mortgage and actually does not hand over the money to the vendor or the mortgagee but uses the money to pay off the first mortgage. It is conceded that, in the first case, subrogation does arise, but it is denied that it arises in the second case. The principle of subrogation has been brought into existence on the ground that the person who has discharged a burden should not lose the money spent on discharging the burden, and a subsequent mortgagee who has contributed nothing to discharge the burden should not have the benefit of the discharge for which he has not contributed. The Privy Council cases of Dino Bundhu v. Jogmaya, 29 I. A. 9 : (29 Cal. 154 P. C.) and Ibrahim Hosain v. Ambika Prasad, 39 I. A. 68 : (39 Cal. 527 P. C.), are entirely, in our opinion, inconsistent with the theory of agency propounded in some cases by the High Courts. The question, however, has become very much simplified and It may be said has entirely disappeared from the arena of controversy owing to the amendment of the Transfer of Property Act."

23. With all respect to the learned Judges, I am unable to agree with the various propositions propounded in the above paragraph. Firstly there is a great deal of difference between a case in which a person who has purchased (I am not concerned with a subsequent mortgagee) the property subject to a mortgage and retained with himself part of the consideration in order to pay off the mortgage and the case in which a person purchases the equity of redemption only and there is no contract between him and the mortgagor that he will pay a specified sum to redeem. In the former case the money in his hands belongs to the mortgagor being a part of the consideration for the sale. If the mortgage is redeemed on payment of a lesser sum the vendor is entitled to recover it from the vendee and if a larger amount has to be paid, the vendor and not the vendee is liable to pay it, as happened in Hira Singh's case, I. L. R. (1937) ALL. 880 : (A. I. R. (24) 1937 ALL. 588 F. B.).

24. Further in such a case, the vendor, in effect, purchases the property free from the mortgage and consequently he cannot at the same time, maintain that mortgage and claim the right of subrogation in respect of it.

25. In the case where the equity of redemption is sold, the property is sold subject to the mortgage and, the vendee in redeeming it, pay a his own money. Thus if a sum larger than that contemplated is required to discharge the mortgage it is the vendee who is responsible and he cannot claim anything from the vendor. Similarly, if the vendee is able to discharge the mortgage by making a smaller payment than that contemplated or if, for instance, the mortgage becomes time barred, it is the vendee who benefits and the vendor can make no claim.

26. In the first case the vendee is nothing more than an agent paying out money belonging to his principal--the vendor--to satisfy the former's liability. On him does not fall any loss not does he gain by reason of the money left with him not being equal to the money required to satisfy the prior mortgage. In the latter ease he is acting for himself and paying money which belongs to himself in order to discharge a liability which has become his own.

27. Then the judgment of Mukerji J., discusses the principle underlying the sight of subrogation but it states the principle in too general terms and ignores an important exception, namely, that the mortgagor himself by paying off a prior mortgagee cannot claim the right of subrogation, In a case such as the present one, it is in fact the mortgagor himself that is making the payment. That he does cot pay it directly but through an agent is immaterial. the money used is his and the vendee is acting for him in making the payment. Thus the principle upon which Mukerji J,, relied for this part of his reasoning is not really applicable.

28. Next reliance was placed upon two Privy Council cases as negativing the doctrine of agency. The first thing to be remembered in connection with those cases is that they are of a time when the right of subrogation--under the Transfer of Property Act--was confined to the case of a subsequent mortgagee by Sections 74 and 75 of the Act. Secondly, in both these cages, the question was whether there was any intention to keep the mortgage alive. The facts of those cases make them mere cases of the nature covered by Section 101, T. P. Act, as the judgments of the Judicial Committee clearly show, though that section is not mentioned.

29. In Din Bandhu v. Jogmaya, 29 I. A. 9 : (29 Cal. 154 P. c.), it was the mortgagor who made the actual payment but it was made in pursuance of a contract with the mortgagee from whom the money was borrowed for the purpose. Their Lordships say, at p. 161 of the report:

> "The law upon this subject and its application to transactions in India will be found in Mohesh Lal v. Mohunt Bawan Das, 10 I. A. 62: (9 Cal. 961 P. C.), and Gokul Dass Gopal Dass v. Ram Bux, 11 I.A. 126: (10 Cal. 1035 P. C) The Subordinate Judge has summed it up accurately thus: 'When the owner of an estate pays charges on the estate which ho 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. The intention may be found in the circumstances attending the transaction, or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot. Here the mortgagor was paying off his own debts, but he was doing so for the benefit of Mustaphi and in performance of the agreement with him."

30. It was in these circumstances that the heirs of Mustaphi, not the mortgagor, who actually made the payment were held entitled to be subrogated to the rights of the mortgagee who had been redeemed.

31. The facts of Ibrahim Hosain v. Ambika Prasad, 39 I. A. 68: (39 Cal. 527 P. C.), are more complicated, but, in that casa also the money lent by a subsequent mortgagee was actually handed to the over mortgagor who paid off a prior mortgage in pursuance of an agreement with the subsequent mortgagee and for his benefit and the same principles were applied as in Din Baddhu's case, (29 I. A 9 : 29 Cal. 154 P. C.).

32. These two eases seem to be the foundation of para. 3 of Section 92. There is, however, nothing in them which militates against the principle of agency: rather emphasis is laid upon the fact that,

though the payment was made by the mortgagor himself, it was made in pursuance of an agreement with the subsequent mortgagee and for his benefit.

33. Finally Mukerji J. says in the passage from his judgment in Tota Ram's case, (A.T.R. (19) 1932 ALL. 489: 54 ALL. 897 F. B.), which I have quoted above, that the question may be said to have entirely disappeared from, the arena of controversy by the amendment of the Transfer of Property Act. That is begging the whole question. No doubt Section 91(a) confers a right upon all persons interested in the mortgaged property to redeem it, but Section 60 also confers a similar right upon the mortgagor himself and this is recognised in Section 91. Section 92 provides that all the persons mentioned in Section 91, other than the mortgagor, can claim the right of subrogation. It has, therefore, to be determined whether the payment has been made by the mortgagor himself or by some other person. There 'is nothing in Section 92, or any other of the sections mentioned by me, which prevents ft mortgagor from acting through an agent, which be is entitled, under the general law, to do. Further there is nothing either in Section 91 or Section 92, which limits the choice of the agent and can be read as making it impossible for a person interested in redeeming, within the meaning of Section 91(a), to act as agent.

34. Thus, with all respect to the learned Judges who decided Tota, Ram's case, (A. I. R. (19) 1932 ALL. 489; 54 ALL. 897 F. B) I have come to the conclusion that none of the reasons assigned by the judgment for negativing the plea of agency is a good reason. The result is that there is nothing in this judgment which may be taken as in any way, derogating from the cogency of the reasoning in the subsequent case of Hira Singh, (I. L. R. (1937) ALL. 880: A. I. R. (24) 1937 ALL. 588 F. B,)

35. Then there is the Avadh Full Bench case of Abdul Hamid v. Ram Kumar, 1942 O.W.N. 165 : (A.I.R. (29) 1942 Oudh 260 F. B.) That was also the case of a mortgage. Bennett J. expressed the opinion that "a subsequent mortgagee who redeems a prior mortgage with money left with him for that purpose by the mortgagor is not subrogated to the rights of the prior mortgagee under Section 92, T. P. Act, if the mortgagor has not, by a registered instrument, agreed that he should be so subrogated."

36. My learned brother, Ghulam Hasan J. with whom Agarwal J. agreed, however, distinguished the case of a mortgagee from that of a vendee on the ground that, in the case of a mortgage, the unpaid mortgage money is not the property of the mortgagor and that, consequently, the money paid by the mortgagee, with whom it has been left, for the redemption of the, earlier mortgage is not paid by the mortgagor. It is true that, in the judgment, the reasoning of. Sulaiman C. J. on the question of agency was not accepted but the matter was not pursued because it was considered that the view express. ed by the Chief-Justice in respect of mortgage was obiter dictum and the same principles did not apply.

37. Thus, quite apart from the question whether the view of Ghulam Hasan and Agarwal JJ. is correct or not, the case does not purport to decide the question of subrogation when it is a vendee who pays the money and restricts itself to the case of a mortgagee paying off the prior mortgage.

38. The only other subsequent decision to which reference was made in the course of arguments in which the question arose was Vishnu Balkrishna v. Shankareppa Gurlingappa, (A. I. R. (29) 1942 Bom. 227: (202 T. C. 392.) In that case the view expressed in Hira Singh's case, (I. L. R. (1937) ALL. 880: A. I. R. (24) 1937 ALL. 588 F. B.), was accepted and followed.

39. Having considered the matter carefully, and for the reasons which I have already stated, I respectfully agree with the view expressed by the Pull Bench in Hira Singh's case, (I. L. R. (1937) ALL. 880: A.I.R.(24) 1937 ALL. 588 F.B.), on this question. In this view of the matter, it is not necessary to decide the third question upon which the learned advocate for the appellant advanced no arguments.

40. I would hold that in the circumstances of the present case, the Raja cannot' claim to be subrogated to the rights of the prior mortgagee. The appeal ought therefore, to be allowed and the order of the Civil Judge dismissing the Raja's objections under Section 47, Civil P. C., ought to be restored. The appellant is entitled to his costs of all the Courts from the respondent 1, the Raja.

Ghulam Hasan, J.

41. I have had the advantage of perusing the judgment prepared by my learned brother Kidwai J. I agree with'. him that the only question arising in the appeal before the Full Bench is whether the Raja having paid off the first mortgage out of the money left with him by the vendor (mortgagor) and being bound by his contract to pay it, can claim to be 'subrogated to the mortgagee whom he has paid off. This question has been answered by him in the negative and he has followed the view of the Pull Bench of five Judges in Hira Singh v. Jai Singh, I. L. R. (1937) ALL. 880: AIR (24) 1937 ALL. 588 F.B. in preference to the view expressed by the Pull Bench of the Allahabad High Court in the earlier case of Tota Ram v. Ram Lal. 54 ALL. 897: (AIR (9) 1932 ALL. 489 F.B.). I had an occasion to consider both these cases in Abdul Hamid v. Ram Kumar, 1942 O W N 165: (AIR (29) 1942 Oudh 260 F B), along with several other cases. The question which fell for consideration in the above case was formulated thus:

> "Is a subsequent mortgagee who redeems prior mortgage with money left with him for that purpose by the mortgagor subrogated to the rights of the prior mortgagee under Section 92, T. P. Act, if the mortgagor has not by a registered instrument agreed that he shall be so subrogated ?"

My learned brother, Bennett J., answered this question in the negative, while I answered it in the affirmative and my learned brother Agarwal J., expressed his concurrence with my view. In returning the answer which I did I had accepted the view of the Pull Bench Tota Ram's case, (54 ALL. 897: AIR (19) 1932 ALL. 489 F.B-), as that was a case of the mortgagee, and while disagreeing with some of the observations in Hira Singh's case (ILR (1937) ALL. 880: AIR (24) 1937 ALL. 588 F.B) I was content to distinguish the latter case as being the case of a purchaser. Several other cases cited in that judgment were distinguished on a similar ground, I do not think I am called upon to reiterate what I said in that case, for while not agreeing in its entirety with the reasoning adopted in Hira Singh's case, (ILR (1937) ALL. 880: AIR (24) 1937 ALL. 588 F.B.) I would agree in answering

the question arising in this appeal in the manner proposed by my learned brother Kidwai J.

Chandiramani, J.

42. I have seen the judgment of my learned brothers, Ghulam Hasan and Kidwai JJ.

43. The relevant facts have been fully given by my learned brother Kidwai J., and I fully agree with him for reasons given by him that in the case of a vendee, who under the terms of the contract is bound to discharge the previous mortgage, no rights of subrogation are acquired without a registered instrument expressly creating such rights of subrogation being executed by the mortgagor vendor. I, therefore, agree with the order proposed by him.

B.M. Lal, J.

44. I have read the judgment of my learned brother Kidwai J. I agree with him that this appeal be decreed with costs.

45. Under the Transfer of Property Act, as amended by Act (XX[20] of 1929), a person who claims the right of subrogation must bring himself under either para, 1 or para. 3 of Section 92, In the present case, Raja Shard a Narain Singh (hereafter described as respondent), who claims the right of subrogation, concedes that his case does not fall under para. 3. It is, therefore, to be seen whether he can claim the benefit of para. 1.

46. Under Para. 1, subrogation can be claimed by (1) a co-mortgagor, or (a) any person (other than mortgagor) referred to in Section 91. It is true that the respondent represents four of the mortgagors out of a total number of six and therefore, as regards the remaining two, he may, loosely speaking, be described as a co-mortgagor. But a co-mortgagor claiming the benefit of subrogation under para, l must be one who has redeemed property relating to the share of other co-mortgagors. If he redeems his own portion of the property and nothing more, he is not a co-mortgagor as contemplated by Section 92. The respondent has paid the debt relating to his share of the property only, and not a pie more. He has not redeemed any portion of the property of which the equity of redemption is owned by his co-mortgagors. In the circumstances he cannot get the benefit which is conferred by para, l of Section 92 on co-mortgagors.

47. The respondent is certainly a person enumerated in Section 91. He can claim subrogation provided he is not the mortgagor or his agent. But one finds that the money with which he paid off the prior encumbrance had been left with him by the mortgagor. It is that money which he paid in satisfaction of the mortgage. Nothing was paid by him out of his own funds. In the circumstances I am of the opinion that the view taken by the Full Bench case of Hira Singh v. Jai Singh, 1937 A L J 659 : (ILR (1937) ALL. 880 : AIR (24) 1937 ALL. 588 F.B.), which says that in a case like the present, the person paying off the mortgage debt is the agent of the mortgagor, is correct. Since the respondent has made the payment as the agent of the mortgagor, he is in a position no better than that of a mortgagor. As such he cannot claim subrogation.

Harish Chandra, J.

48. On the principles laid down in the case of Hira Singh v. Jai Singh, (ILR (1937) ALL. 880: AIR (24) 1937 ALL. 688 F.B.) it seems to me that it is immaterial whether it is the vendee, or the mortgagee who pays the money for the redemption of a mortgage in accordance with the term of the contract entered into between him and the vendor or the mortgagor as the case may be Bat this is a case of sale and as my learned brother Kidwai has pointed out, it is not necessary for us to enquire whether the majority view of the Oudh Chief Court in Abdul Hamid v. Lal Bam Kumar, (1942 O W N 165 : AIR (29) 1942 Oudh 260 FB) is correct or not. I accordingly agree with my brother Kidwai that the appeal ought to be allowed and that the order of the learned Civil Judge dismissing the application of respondent 1 under Section 47, Civil P. C., restored. The appellant decree-holder would be entitled to his costs throughout as against respondent 1.

Wanchoo, J.

49. I have read the judgment of my brother, Kidwai and am in general agreement with it and would told that, in the circumstances of the present case, the Raja cannot claim to be subrogated to the rights of the prior mortgagee. I would, therefore, allow the appeal and restore the order of the Civil Judge dismissing the Raja's objections under Section 47, Civil P. C., with coats of all Courts to the appellant from respondent 1, the Raja.

Y. Bhavgava, J.

50. I agree with my brother Kidwai and would for the reasons given by him, allow the appeal with costs.