

“A Critical Analysis on the Doctrine of Subrogation under Transfer of Property Act”

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Abstract

The concept of doctrine of Subrogation depends on the standards of equity and great still, laconic. The doctrine is that the gathering who pays off a mortgage gets with, every one of the privileges of the mortgagee. This paper study about the doctrine and it related with in those parts of India where the Act itself was not appropriate. This paper examine in the matter of how this doctrine advanced and was made relevant in India and how it is connected in the property. One of these standards is the doctrine of subrogation. The doctrine of subrogation is the outcome of confluent equities one expressed by the term substitution, and another in the nature of a salvage claim. The subrogate owes his right not merely to the fact of payment, but more to the fact that he had made it for the debtor, to his relief and with his express or implied consent. This explains about the subrogation and two kinds: legal and conventional. Where a third mortgagee redeems the first mortgage then he will be subrogated to the position of the first mortgagee as against the second mortgagee. This is known as the legal subrogation. Conventional subrogation is somewhat different and it takes place where the person who pays off debt has no interest to protect but advances money under an agreement express or implied that he would be subrogated to the rights and remedies of the first encumbrancer.

Keywords: (Subrogation, Debtor, Mortgagor, Creditor and Redemption)

Introduction

Transfer of Property Act, 1882 is an important Act which was formed in the nineteenth century. The main objective of this Act is to render the transfer of immovable property system of public transfer. For completing the transfer, registration is required. Property is wide term which would include some value of a thing and the ownership exercised by the owner. It includes rights of a person over the property. The term subrogation has different meanings in different legal systems. The term subrogation means substitution. The doctrine of subrogation is derived from Roman law. In Roman law, the term subrogation was well known for constitution law, denoting the replacement of one official by another, or replacing one official's actions with another's action. This section is new and gives legislative sanction to the ancient doctrine of subrogation founded on the plain principle of natural justice that he

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who removes another's burden should also have another's right, and for that purpose to step into his shoe. Subrogation is thus nothing but substitution and it is under this title that it finds a place in the civil law which gave a surety upon a bond or security on paying it to the creditor the right to all the rights and auctions of the latter against the debtor, the security being unextinguished. Section 95 and 101 are based on some unrevealed doctrines. As such, it underlay several provisions of the unamended Act and was applied independently of statutory sanction. Now the entire law regarding the right of subrogation is contained in sec.91 and 92 and also in sec 95 and 101, as amended.

Being a doctrine of equity jurisprudence it does not depend on privity of contract, express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. But being an equitable doctrine, it cannot be extended to a mere volunteer or an officious intermeddler who has no interest in the property at the time of payments.

Aim of the study

1. To study about the doctrine of subrogation in India.
2. To know the types of subrogation under Transfer of Property Act.

Research methodology

The present research is conclusive, descriptive. The study was conducted on secondary source of data books, articles, journals, e-sources and the relevant case laws.

Hypothesis

H0: Registration is not necessary for legal subrogation.

H1: Registration is necessary for legal subrogation.

Review of literature

1. In this article, the author (chandramathi)² defines the subrogation as a right of a person to stand in the place of the creditor after paying off his liabilities. The author explains how the subrogation was evolved and how it applies in transfer of property Act. The types of subrogation under property law also explained by the author and how it was applicable in present laws.
2. This article was written by M. L. MARASINGE,³ broadly enumerates the historical perceptive of subrogation and how it was brought into existence. He says that the word subrogation was derived from the roman law . He was principally concerned the word subrogation in the English Common Law. This article was divided into two parts. First part deals with the bases of subrogation in english notion and second part examines about roman use of subrogation.
3. Law of property article has been written by G.C. Venkata Subbarao.⁴ This article broadly explains about the interest in property. He defines the term property as the

²Chandramathi, M. L, Thought on the Doctrine of Subrogation under Transfer of Property Act, http://www.iaeme.com/MasterAdmin/UploadFolder/IJMET_08_11_095/IJMET_08_11_095.pdf.

³Maransinge, M.L. An Historical Introduction to Doctrine of Subrogation. <https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1680&context=vulr>.

⁴G.V, Subbarao Venkata. Law of Property.

subject matter over which the right of ownership is explained. He discuss about the changes brought in doctrine of subrogation after the amendment of the Transfer of Property Act. Section 92 has been inserted after the amendment and brought change in the registration.

Doctrine of subrogation

The doctrine of subrogation is in essence a simple matter. It means that the substitution of one person for another. The section deals with the rights of subrogation of two completely different categories of persons. Firstly it deals with the rights of persons who have an existing interest within the property and secondly it deals with rights of strangers who acquires an interest within the property. No doubt underneath sec.92 of the Transfer of property Act, any co-mortgagor shall on redeeming property to the creditor have up to now as regards redemption, proceeding or sale of such property, a similar rights because the mortgagee whose mortgage he redeems might have against the mortgagor or any other creditor. (Bansal) The proper is named the proper of subrogation. However the rule of subrogation doesn't entitle the redeeming co-mortgagor to claim to be the mortgagee but it entitle him to hunt reimbursement of no matter cash he has spent before possession is wanted to be recovered from him by the co-mortgagor. The proper of redeeming co-mortgagor is simply to say the amount that was really spent before surrendering possession. For settling this, it's not necessary that the co-mortgagor ought to be compelled to file a separate suit for redemption. The matter could be settled in final decree proceeding in the present suit itself. Sec 92 of the transfer of property act specially provides the right of subrogation shall not be conferred on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

The foundation of the right of legal subrogation, is the equitable principle of reimbursement. In the present case, what has happened in that the second mortgagee filed the suit on his mortgage without impleading the first mortgagee, obtained a decree and brought the hypothecate to sale, purchased it himself and entered part satisfaction of the decree. A sum of money is still owing to him under the mortgage decree. When such a person pays off a prior encumbrance, the question that arises is whether he can step into the shoes of the first mortgagee. The first mortgagee's right to enforce his mortgage has not become barred by limitation on the date when the second mortgagee redeemed his mortgage.

In *Mst. Azizunnissa V. Komal singh*,⁵ it was held that the purchaser of the mortgaged properties in execution of a mortgagee decree, acquired not only the interest of the mortgage but also the equity of redemption of the mortgagor, and that he is entitled to redeem other mortgages on the same property created by the mortgagor.

<http://14.139.60.114:8080/jspui/bitstream/123456789/15524/18/Law%20of%20Property%2028561-588%29.pdf>.

⁵ AIR. 1930 Pat. 579.

Right of subrogation available on equitable principles even where transfer of Property act does not apply:

Even where transfer of Property Acts was not in force, a redeeming co-mortgagor discharging the entire mortgage debt, which was the joint and several liability of himself and his co-mortgagor, was equity entitled to be Subrogated to the right of the mortgagee redeemed and to treat the non-redeeming co-mortgagor as his mortgagor to the extent of the latter's portion or share in the hypotheca and to hold that portion or share as security for the excess payment made by him. This equitable right of the redeeming co-mortgagor stems from doctrine that he was principal debtor in respect of his own share only, and his liability in respect of his co-debtors share of the mortgage debt was only that of a surety, and when the surety had discharged the entire mortgage debt, he was entitled to be Subrogated to the securities held by the creditor, to the extent of getting himself reimbursed for the amount paid by him over and above his share to discharge the common mortgage debt.

Though the provisions of sec.92 of the Act, as such are not applicable to the State of Punjab, but the said principles being based on justice, equity and good conscience, have always been made applicable. In fact, *Ganeshi Lal's*⁶ case, decided by the Supreme Court, was from Punjab and the principle contained in SC.92 of the Act were made applicable as it was held there in that the doctrine of subrogation which means substitution of one person in place of another and giving him the rights of The latter is essentially an equitable doctrine in its origin. Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognised that where are several joint debtors, the person making the payment is a principal debtors as regards part of the liability he is to discharged and a surety in respect of the shares of the rest of the debtors. The principle of subrogation, as embodies in sec.92, has been applied to the Punjab although the Transfer of property Act has not been extended to his part.

Essential requisites for a valid claim for subrogation:

The essential requisites for a valid claim for subrogation are:

- A person claiming the right must have an interest in or charge upon the property mortgaged entitling him to redeem the mortgage
- He must redeem the mortgage or
- A person must have advanced money to a mortgagor to redeem a mortgage with an agreement under a registered instrument that he shall be subrogated to the rights of the mortgagee whose mortgage is discharged.

The real position of law is that in addition to the two requisite conditions about the plaintiff having pre existing interest or charge on the property and about his having redeemed the same in full, he has further to show that he was paying the amount from his own pocket and his own money for the protection of his own interest and not out of the amount retained by

⁶ A.I.R. 1953 S.C. 1

him – as of the mortgagor- for that purpose under a covenant so as to be said that he acted and redeemed the property as an agent or a representative to the mortgage. That is an essential condition fulfilled before falling under paragraph 1 of section 92 of the Act. Before one can fall under sec 92 of the Act, he has to show that he was not redeeming it on amount of the mortgagor.

In accordance with sec.92 of the transfer of property Act the person entitled to subrogation is one other than the mortgagor. In view of sec-59-A the expression ‘mortgagor’ includes a person deriving title from him. A person in the position of a mortgagor cannot therefore be entitled to subrogation under sec.92.

In the case of *Piarey Lal v. Dina Nath*,⁷ the plaintiff had purchased the equity of redemption, and thus had derived his title from the mortgagor and being, a mortgagor within the meaning of sec.59-A he was held not to be entitled to the right of subrogation under sec.92.

The same view was taken in *Taibai vs Wasudeorao Gangadhar*,⁸ where the money is paid by the mortgagee out of the money left in his hand by the mortgagor it a money belonging to the mortgagor and not the money belonging to the mortgagee. The test applied is as to whom the money belonged which 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 the transferor and is not paying the money which belongs to him.

Types of subrogation

Subrogation is of two types: 1) legal subrogation or subrogation by operation of law, and 2) conventional subrogation.

1. Legal subrogation

The foundation of the right of legal subrogation is that the just principle of reimbursement. If an individual is interested in the payment of money that another person is bound by the law to pay and thus pays it he's entitled to be compensation by the other. the personal obligation arising underneath the circumstances is embodied in sec.69 of the Indian Contract Act and also the equitable right of subrogation underneath sec.92 of transfer of Property act.

In other words it can be explained as someone having interest within the property will avail it and not any other person having no obligation to repay. It carries a equitable charge with it. someone having an interest within the property, like possession, might pay cash to prevent a sale and an equitable charge is formed in his favour for this amount that he ought to be paid. A puisne mortgagee redeeming prior mortgage is lawfully subrogated to the rights of the prior mortgagee regardless of any question of intention.

Mallireddi Ayyareddi v. Gopalakrishnayya,⁹

⁷ AIR. 1939 AII. 190

⁸ A.I.R. 1937 Nag. 372 (F.B).

⁹ (1924) 47 Mad 190: 51 IA 140: AIR 1924 PC 36

It was held that the purchaser may by paying off an earlier charge, treat himself as buying it and stand in the same position as his vendor, but it would not apply if the owner of the property (by which expression is meant the purchaser) has covenanted to pay the latter mortgage debt. The judges then proceed to hold the covenant must be with the original mortgagor who was personally bound to pay the mortgage or his heir at law. The learned judges thereafter held that the stipulation that the sale was to be free of all encumbrances implied a covenant that the vendee was to be entitled to subrogation on redeeming prior mortgage from out of consideration for the sale.¹⁰

2. Conventional subrogation

After the amendment of Sec.92 of Transfer Property Act, a right of conventional subrogation can be claimed on condition that there is a particular contract to the effect between the mortgagor or seller and also the mortgagee or the customer, respectively. Wherever there for an individual purchases property which is subject to a mortgage or takes a puisne mortgage and therefore the consideration for the sale or puisne mortgage is that the discharge of the amount due on the mortgage that he's directed to pay off, the case falls under sec.92 of the Transfer of Property Act. It has been said that subrogation is conventional, when there's an agreement which is specified in either of form express or implied, that the person making the payment shall exercise the rights and powers of the original creditor, and that very slight evidence is spare to determine such an agreement. However the law on conventional subrogation has been amended, sec.92 which acquires that the agreement of subrogation ought to be in writing and that the writing ought to be registered. Therefore, if even a volunteer or a mortgagor pays the mortgage money he doesn't stand in the shoes of the creditor. Any individual who discharge a mortgage debt, is not entitled to the advantage of the protection held by the creditor. In the absence of a registered, no one merely discharging a mortgage debt, are often entitled to the benefit of mortgagee's security.

Volunteer cannot claim for the grit of subrogation

In *Surjug Devi v. Dulhin Kishori Kuer*,¹¹ it was held that a person who has no interest in the equity of redemption or the property mortgaged but the person pays off the mortgage and got the possession, he is a mere volunteer with no equities in his favour and is not subrogated to the rights of the mortgagee. A suit for possession against him by the owner of the equity of redemption without paying the mortgage money, is maintainable.

The difference between the legal and conventional subrogation is that in the case of legal subrogation it arises by operation of law, whereas the convention subrogation takes place under an agreement expressed or implied. In legal subrogation the person having the interest to discharge the mortgage and to protect the mortgagee from his liabilities but in conventional subrogation the person does not have any interest in discharging the mortgage, he would discharge it only under certain specific agreement.

¹⁰ A.I.R. 1951 Mad. 917.

¹¹ A.I.R. 1960 Pat. 474.

Conclusion

It was concluded that there is no registration is required to confer the rights of subrogation which applied in a case a person who have virtue interest in the property and he was entitled to redeem a mortgage on it, discharging the mortgage, a claim to legal subrogation may be sustained. On other hand, a claim for conventional subrogation can be made only if the convention or agreement is in the written form and that the writing should be registered only in a case where a person had no interest in the property and the person does not have right to redeem, advances money to the mortgagor for discharging a mortgage. This change was brought after the amendment of Act. Before amendment a claim for conventional subrogation is based on the expressed agreement.