

and 10 of the Act on that basis. Therefore, there is no reason for the Collector for refusing to refer the matter to the District Judge, Hissar. I, therefore, set aside the order of the Collector dated the 23rd of September, 1955, dismissing Kako Bai's application under section 18 of the Land Acquisition Act and direct him to refer the matter to District Judge, Hissar, in accordance with law. The petitioner will get costs of this petition from respondents 1 and 2.

Shrimati Kako
Bai
v.
The Land Ac-
quisition
Collector,
Hissar and
others
Bishan Narain.
J.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Bishan Narain, J.

ATMA SINGH AND GIAN SINGH,—*Plaintiffs-Appellants*

versus

MANGAL SINGH AND OTHERS,—*Defendants-Respondents*

Letters Patent Appeal No. 63 of 1953.

Transfer of property Act (IV of 1882)—Sections 58, 92 and 100—Mortgage—Substituted Security—Principle of—Whether applicable even when specific items of joint property transferred—Right of substituted security—Whether creates a mortgage or charge—Subrogation—Principle of—Applicability to Punjab, Extent of.

1956
March, 20th

Held, that the fact, that the co-sharer mortgaged specific fields as distinct from his share in the holding does not affect the applicability of the principle of substituted security if the partition is not challenged on the ground of unfairness or fraud.

Held further, that the equitable right of substituted security does not create a mortgage in favour of the mortgagee from the date of the original mortgage or from a date prior to the date when the security takes new form. The right of substituted security whether on equitable ground or under an agreement can at best create a charge. It is

a right to a security and would be a charge as defined in section 100, Transfer of Property Act, and not a mortgage as defined in section 58, because it does not amount to a transfer of an interest in specific field numbers.

Held also, that the Transfer of Property Act is not applicable to the Punjab. Its provisions as to matters of principle are, however, followed but not its provisions which embody technical rules. The Principles of subrogation are, therefore, applicable in the Punjab but not the technical rule laid down in paragraph 3 of section 92 to the effect that the right of subrogation cannot be exercised unless there is a registered agreement permitting it.

Byjnath Lall v. Ramoodeed Chowdry (1), *Hakim Lal v. Ram Lal* (2), *Lila Dhar-Uttam Chand v. Shewaji Ganesh* (3), *Karam Chand v. Ram Lal* (4), followed.

Appeal under Clause 10 of the Letters Patent from the Judgment of Hon'ble Mr. Justice Dulat, dated the 8th day of June, 1953, passed in R.S.A. 546 of 1951, affirming that of Shri Sheo Parshad, Senior Sub-Judge, with enhanced appellate powers, Gurdaspur, dated the 18th June, 1951, which modified that of Shri E. F. Barlow, Sub-Judge, 1st Class, Batala, dated the 16th April, 1951, to the extent of passing a decree for possession as mortgagee of Khasra Nos. 131 and 466 in favour of the plaintiffs against defendants 1 and 12 with costs and dismissing the appeal against defendants 6 to 11.

H. R. MAHAJAN, for Appellants.

S. D. BAHRI and S. C. MITTAL, for Respondents.

JUDGMENT

BISHAN NARAIN, J. This is an appeal under clause 10 of the Letters Patent from the judgment of a learned Judge in chambers.

Mangal Singh was joint with his brother Bela Singh. The brothers were joint owners of certain fields or lands situated at Hassanpur Kalan, Tahsil

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- (1) (1873) 1 I.A. 106
 - (2) (1907) 6 C.L.J. 46
 - (3) A.I.R. 1946 Nagpur 125
 - (4) A.I.R. 1937 Lah. 665

Batala, District Gurdaspur. Bela Singh died some time before 1943 but the date of his death is not clear on the record. Mangal Singh on the 2nd January, 1943, mortgaged ten specific fields measuring 32 *kanals* 7 *marlas* with possession with Atma Singh and Gyan Singh. About five months later on the 19th May, 1943, Mangal Singh for himself and as guardian of Shangara Singh minor son of Bela Singh mortgaged with possession certain other fields measuring 26 *kanals* 7 *marlas* with Bishan Kaur. On Shangara Singh's application the lands were partitioned by the revenue authorities sometime in September, 1943. By this partition Shangara Singh was allotted lands measuring 65 *kanals* 2 *marlas* including some of the fields under mortgage with Atma Singh and Gyan Singh. Mangal Singh was allotted lands measuring 65 *kanals* 5 *marlas* including all the fields under mortgage with Bishan Kaur and some of the fields under mortgage with Atma Singh and Gyan Singh. Out of the fields allotted to Mangal Singh certain fields measuring 19 *kanals* 6 *marlas* including some of the fields already mortgaged with Atma Singh and Gyan Singh were made subject to their charge, while all the fields under mortgage with Bishan Kaur were held subject to her mortgage. This led Atma Singh and Gyan Singh to file the present suit out of which this appeal has arisen for possession of specific fields measuring 21 *kanals* 13 *marlas*. Mangal Singh had been allotted two of these disputed fields measuring 3 *kanals* 9 *marlas* subject to the mortgage of one Buta Singh and the remaining five of the fields in dispute in the present case measuring 18 *kanals* 4 *marlas* were subject to Bishan Kaur's mortgage. The Senior Subordinate Judge, Gurdaspur, decreed possession of Buta Singh's fields to the plaintiffs and this decree has become final as Buta Singh did not file any appeal against this decree. For the purposes of this judgment, therefore, I shall take it that the plaintiffs were in possession of

Atma Singh
and Gian
Singh
v.
Mangal Singh
and others

—————
Bishan Narain.
J.

Atma Singh and Gian Singh
 v.
 Mangal Singh and others
 ———
 Bishan Narain
 J.

this area at the time of the suit and shall ignore it. The plaintiffs' suit claiming possession of fields measuring 18 *kanals* 4 *marlas* has been dismissed by all the Courts and this claim is repeated in this appeal. Thus the contest in this appeal is between two sets of mortgagees mentioned above.

The plaintiffs' claim to the possession of these fields is based on the principle of substituted security as modified by agreement with their mortgagor Mangal Singh. The plaintiffs' case is that as on partition some of the fields mortgaged with them were allotted to Shangara Singh they are entitled to substitute other fields of their own choice. The case of Bishan Kaur (represented by her legal representatives) on the other hand is that plaintiffs have no right to claim possession of fields mortgaged with her and that in any case she is entitled to precedence over plaintiffs' claim.

Now it is not the plaintiffs' case that the partition between the family members was unfair or was effected to defeat or defraud the plaintiffs or other creditors. In fact the suit is based on the acceptance of the partition effected by the revenue authorities inasmuch as the plaintiffs admit that on partition they have lost possession of the fields which have been allotted to Shangara Singh. In similar circumstances the principle of substituted security was enunciated by the Privy Council in *Byjnath Lall v. Ramoodeed Chowdry* (1), in these terms—

“Can it be doubted that the mortgagee of the undivided share of one cosharer (and for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other cosharers, would

(1) (1873) I.A. 106

have no recourse against the lands allotted to such cosharers; but must pursue his remedy against the lands allotted to his mortgagor, and as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed." *Atma Singh and Gian Singh v. Mangal Singh and others* Bishan Narain, J.

In this new form the charge would comprise the entire lands allotted to the mortgagor in the proportion in which the mortgagees have lost their security. In this judgment it is also laid down that in such circumstances the mortgagees' sole right is to accept substituted security and that they cannot seek to charge any other parcel of the estate in the hands of any of the former cosharers. This proportionate value is obviously to be determined according to the valuation at the time of partition as it is at that time that the right to substituted security accrues (vide *Hakim Lal v. Ram Lal*, (1)). The fact that the cosharer mortgaged specific fields as distinct from his share in the holding does not affect the applicability of this principle if the partition is not challenged on the ground of unfairness or fraud (vide *Liladhar Uttamchand v. Shiwaji Ganesh*, (2)). Applying these principles to the present case it is clear that the plaintiffs are claiming possession of land which at the time of partition Bishan Kaur was occupying under a mortgage effected by Mangal Singh in her favour before the partition. On partition of the property these very fields were allotted to Mangal Singh and therefore this right of hers still remains attached to this property and the plaintiffs who claim this property in this suit can only take it subject to the rights of Bishan Kaur. In this view of the matter the plaintiffs' suit for possession of these lands must fail.

(1) (1907) 6 C.L.J. 46

(2) A.I.R. 1936 Nag. 125

Atma Singh and Gian Singh
 v.
 Mangal Singh and others

 Bishan Narain.
 J.

The plaintiffs in the present case are, however, relying mainly on the right given to them in the mortgage deed and therefore it is necessary to determine what that right is. This clause in effect is that if the mortgagees lose any portion of the mortgaged land then they would be entitled to make good that loss by selecting any land of the same kind from other lands of the mortgagor. It cannot be said that the equitable right of substituted security creates a mortgage in favour of the mortgagee from the date of the original mortgage or from a date prior to the date when the security takes new form. Similarly it cannot be said that the right of selection in the present case confers on the mortgagee a right of mortgage in the property, that is, subsequently selected by the plaintiffs from the date that the mortgage was effected. The right of substituted security whether on equitable grounds or under an agreement can at best create a charge. It is a right to a security and would be a charge, as defined in section 100, Transfer of Property Act. It cannot be considered to be a mortgage as defined in section 58, Transfer of Property Act, as it does not amount to a transfer of an interest in specific immovable property. After this right has accrued or properties are allotted to the mortgagee in exercise of this right, then those properties may be held to be subject to mortgage but not before that right has accrued or has been exercised. This right could not be exercised till after the partition had been effected between the mortgagor and his cosharers. It must be remembered that Bishan Kaur or her legal representatives admittedly had no knowledge of the prior charge of the plaintiffs and they are not bound by the recitals in the document executed by Mangal Singh in the plaintiffs' favour. This being so, Bishan Kaur a mortgagee of the properties prior to partition without notice of charge would have priority over the plaintiffs' charge. In these circumstances

if the plaintiffs insist on selecting these fields it is in accordance with the principles of equity that the mortgagee rights of Bishan Kaur should follow into the plaintiffs' hands and take precedence over the mortgage effected on these fields by virtue of the plaintiffs' selection of these fields. For this reason, also the plaintiffs' suit for possession of these fields must be dismissed.

is Atma Singh
and Gian
Singh
v.
Mangal Singh
and others
Bishan Narain,
J.

Even if it be assumed that the above conclusions are not sound the plaintiffs have no case. Mangal Singh on his own behalf and on behalf of his nephew Shangara Singh mortgaged certain lands including the lands now claimed by the plaintiffs in this suit for Rs. 1,850 with Bishan Kaur. Out of this amount Rs. 1,235 were left with her to pay Ishar Singh who was the mortgagee of two of these fields since 5th January 1923, and Rs. 550 were left with her to pay Wassan Singh who had purchased the mortgagee rights in 1934 from Hakam Singh. Hakam Singh was the mortgagee of the remaining fields since 1925. In these circumstances Bishan Kaur has claimed that she subrogated to the rights of Ishar Singh and Hakam Singh and if this be so then obviously she takes precedence over the plaintiffs' mortgage which was effected in 1943. It was conceded by the learned counsel for the plaintiffs appellants that Bishan Kaur would be subrogated to Ishar Singh and Hakam Singh if the mortgagors had by a registered instrument agreed that Bishan Kaur should be so subrogated as laid down in third paragraph of section 92 of the Transfer of Property Act. The Transfer of Property Act is not applicable to the Punjab. Its provisions as to matters of principle are, however, followed in the Punjab but not its provisions which embody technical rules. The principles of subrogation are therefore applicable in the Punjab but not the technical rule laid down in paragraph 3 of section 92 to the effect that the right

Atma Singh of subrogation cannot be exercised unless there is a registered agreement permitting subrogation. This was so held in a well considered judgment by a Division Bench of the Lahore High Court in *Karam Chand v. Ram Singh*, (1). This decision is fully applicable to the facts of the present case. Following this decision it must therefore be held that Bishan Kaur is subrogated to the rights of Ishar Singh and Hakam Singh and she has precedence over the plaintiffs' mortgage.

and Gian Singh
v.
Mangal Singh
and others
Bishan Narain
J.

Finally Shri Hem Raj Mahajan, the learned counsel for the appellants, submitted that his clients were entitled to possession of fields Nos. 1499, 1508 and 1509 as these fields were not specially mortgaged with Bishan Kaur. There is no substance in this argument. The mortgage in favour of Bishan Kaur shows that these fields were specifically mortgaged with her.

The result is that this appeal fails and I would dismiss it. Considering that the plaintiffs have lost part of their security by partition between the family members, I would order the parties to bear their own costs of this appeal.

Bhandari, C.J.

BHANDARI, C. J. I agree.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Bishan Narain, J.

S. HARBHAJAN SINGH,—Appellant

versus

MUNSHI RAM,—Respondent

Letters Patent Appeal No. 38 of 1952.

1956

March, 20th

Landlord and Tenant—Notice to quit—Acceptance of rent after the expiration of the notice period—Whether constitutes a waiver of the notice.

(1) A.I.R. 1937 Lah. 685