PETITIONER:
BRAHM PARKASH

Vs.

RESPONDENT:
MANBIR SINGH AND OTHERS

DATE OF JUDGMENT:
14/03/1963

BENCH:
AYYANGAR, N. RAJAGOPALA
BENCH:
AYYANGAR, N. RAJAGOPALA
SINHA, BHUVNESHWAR P.(CJ)
SHAH, J.C.

CITATION:
1963 AIR 1607 1964 SCR (2) 324

ACT:
Mortgage-Marshalling-Purchaser also mortgagee of other property of mortgagor-If disentitled to marshalling-Transfer of Property Act, 1882 (4 of 1882) 8. 56.

HEADNOTE:
MS the owner of properties A, 13 and C created several mortgages over them. The appellant was one of the mortgagees of properties A and B and MG was one of the mortgagees of property C. Subsequently, the mortgagor sold property B to MG. One of the mortgagees of properties A and B filed a suit for recovery of the money due on the mortgage. MG claimed that the mortgage debt should first be satisfied out of property A not sold to him. This claim to marshalling was allowed. The appellant contended that under s. 56 of the Transfer of Property Act a purchaser who was also a mortgagee marshalling and that marshalling should not have been allowed in the present case as it was bound to prejudice the appellant.
Held, that MG was entitled to marshalling. When s. 56 refers to a subsequent purchaser it does not exclude a purchaser who has a mortgage over some other property of the mortgagor not connected with the proceedings. Further, it could not follow as a matter of law that marshalling must necessarily prejudice a subsequent mortgagee. The question of prejudice is purely one of fact and is intimately connected with the value of the property against which the mortgagee is directed to proceed in the first instance. The appellant was not entitled to the benefit of the last portion of s. 56 as he had not raised any plea as to the value of the property showing that marshalling would prejudice him.

JUDGMENT:
CIVIL APPELLATE JURISDICTION Civil Appeals Nos. 76 and 77 of 1961.
Appeals from the judgment and decree dated May 19, 1955, of the Punjab High Court in Regular
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First Appeals Nos. 28, 12 and 13 of 1948 respectively.
Gopal Singh for R. S. Narula, for the appellant (in C. A. No. 76 of 1961).
Achhru Ram and Naunit.Lal, for appellant No. I (in C. A. Nos. 77 and 78 of 1961).
Bishan Narain and B. P. Maheshwari, for respondents Nos. 9 and 18 to 20 (in C. A. No, 77 of 1961).
1963. March 14. The Judgment of the Court was delivered by AYYANGAR J.-These three appeals, which are before us on certificates of fitness granted by the High Court of Punjab, arise out of two suits for the recovery of amounts due on mortgages executed by one Mohinder Singh who was a contractor in Delhi. Mohinder Singh is now deceased and is now represented in these proceedings by his widow and son. Mohinder Singh owned as many as eight properties in Delhi and over one or other of these he created successively 24 mortgages between September 1943 and July 1944 and also executed a sale in respect of one item of these properties. The contentions urged in these appeals arise out of conflicts between the rights of some of these mortgagees inter se, between some of them and the purchaser of one of the properties. It is however unnecessary for the purpose of deciding these points to set out the details of every one of these several mortgages or their history.
Appeals 77 and 78 may first be considered, The facts necessary to appreciate the sole point raised by Mr. Achhru Ram, learned Counsel for the appellant-- Jagdish Chand are these : The property con-
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cerned in the two appeals is plot No. 1, Pusa Road in Block 34 with a bungalow thereon. A mortgage for Rs. 10,000/- was created over this and certain other properties (we are, however not concerned with these other properties) in favour of one Lajwanti by Mohinder Singh by a deed dated October 19,1943. A few days later-on November 7, 1943-another mortgage was executed in her favour for Rs. 16,000/under which the property No. 1, Pusa Road was given as security. Passing over certain intermediate transactions not material for the purposes of the present appeals, a mortgage was created in favour of one Daulatram Narula inter alia on this property on January 21, 1944 to secure a sum of Rs. 60,000/-. Two days later - on January 23, 1944-the appellant, jagdish Chand, lent a sum of Rs. 10,000/- to Mohinder Singh and had a mortgage executed on No. 1, Pusa Road. Daultram Narula, the mortgagee under the deed dated January 21, 1944 obtained two further mortgages over the same. property and others on February 25, 1944 and March 14, 1944, the first for Rs. 9,500/- and the second for Rs. 10,000/-. It ought to be mentioned that the consideration for several of the mortgages referred to earlier was in part a payment in cash to the mortgagor and in part repayment in part satisfaction of previous mortgages but this circumstance not being of any relevance we are not setting out the details of the consideration for the several mortgages. Lastly, and this is the mortgage which is of importance for the point raised in this appeal, on July 13, 1944, Mohinder Singh created in favour of Pandit Sham Sunder an usufructuary mortgage for Rs. 1,25,000/- out of which Rs. 84,000/-was reserved with the mortgagee for payment to Daulatram Narula the sum representing the principal and interest due on his three mortgages. It is common ground that on the date when the mortgage was registered Sham Sunder carried out his obligation and discharged the mortgages of Daulatram by paying him Rs. 84,000/-.
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The amount due to Lajwanti was not paid and she accordingly brought a suit on June 14, 1945, in the Court of the Senior-Sub-judge, Delhi for the recovery of her mortgage money which, after giving credit for the sums paid to her already by several subsequent mortgagees, came to Rs. 11,657/5/4. She impleaded as party defendants to the suit the several subsequent mortgagees. including the appellant -jagdish Chand as well as Daulatram and Sham Sunder's legal representatives as he himself was dead by that date. Just like Lajwanti another mortgagee one Mukhamal--in whose favour two mortgages, one dated February 1, 1944 and another dated May 12, 1944 for Rs. 10,000/-and Rs. 9,000/-- respectively, also filed a suit for the recovery of Rs. 15,302/- and odd. As in Lajwanti's suit, the several subsequent mortgagees including jagdish Chand, Daulatram and the legal representatives of Pt. Sham Sunder were also impleaded as defendants in this suit also.

In these two suits the genuineness of the several mortgages was not seriouly disputed and the only point on which contest was centred was as regards the respective rights of the several mortgagees inter se. We are concerned in these two appeals with the claim made by the legal representatives of Sham Sunder that they were entitled by reason of their discharging the mortgage-debt of Daultram to whom they had paid Rs. 84,000/- out of the mortgage amount of Rs. 1,25,000/-to be subrogated to the rights and priorities of Daulatram under the mortgage dated January 21, 1944 for Rs. 60,000/- as against the later mortgage of January 23, of Jagdish Chand even though there was no agreement in writing under which he stipulated for such a right. This contention was raised both in the suit by Lajwanti as well as in Mukhamal's suit. It was contended on their behalf that though the Transfer of Property Act did not in terms apply, yet the equitable principle underlying its s. 92 viz., the right

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of a secured creditor who had discharged a prior encumbrancer to be subrogated to the rights and priorities of the mortgagee who he had redeemd, could nevertheless be invoked under s. 6 of the Punjab Laws Act. The learned trial judge, however, while acceding to this in principle, held on the basis of certain authorities to which he referred that in the absence of a specific agreement stipulating for subrogation the subsequent mortgagee was not entitled to such an equity. On this ground the right of the subrogation claimed by the legal representatives of Sham Sunder was rejected. From the rejection of this claim in the two suits Sham Sunder's representatives preferred two appeals to the High Court and the learned judges allowed the appeal holding that it was not an essential condition for claiming the right of subrogation that the creditor redeeming the mortgage should have entered into an express agreement to that effect. It is from this decision of the High Court that these two appeals have been preferred.

Mr. Achhru Ram, learned Counsel for the appellant did not dispute before us the correctness of the view expressed by the learned judges of the High Court that in order to entitle a creditor to claim a right of subrogation it was not necessary that he should have entered into a written agreement stipulating for such a right His submission, however, was on the following lines : Accepting the Law, as expounded by Sir Richard Couch in Gokuldass Gopaldass v. Ram Bux Scochand (1), in the following terms :

> "In India the art of conveyancing has been and is of a very simple character. Their Lord-

> ships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed..... The obvious question to ask in the interests of
> (1) (1884) L. R. 11 1. A. 126,133-134.
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> justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways;. shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid."

as laying down the correct test for determining whether the right of subrogation could be claimed or not, Mr. Achhru Ram submitted that the law was that even where there was no express agreement stipulating for subrogation, the law would presume such a right on the ground that the payer intended to act in a manner most advantageous to him, but that this was only a rebuttable presumption which would be negatived on positive proof from the conduct or statements of such a creditor pointing to a contrary intention. In other words, that there was nothing to prevent its being shown that the creditor paying off the charge did not intend to preserve the mortgage which he discharged so as to obtain the priority which the discharged encumbrance enjoyed. He urged that in the present case, on the terms of the documents to which Sham Sunder was a party,, such an intention not to keep alive the discharged encumbrance of Daulatram was clearly made out. In this connection he drew to our attention
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first the terms of the mortgage executed in favour of Sham Sunder on July 13, 1944, in which this Rs. 84,000/- left with the mortgagee is referred to as being held by the latter in trust for the payment of the previous en-cumbrancer--Daulatram. Next, he referred us to the endorsements of discharge on the mortgages of Daultram which read as if the amount due had been paid by Sham Sunder on behalf of the mortgagor--Mohinder. On this basis the contention was urged that any intention to obtain the benefit of suborgation was clearly negatived.

We do not propose to discuss the merits of this contention, and it is not as if it is not capable of cogent refutation, because we are satisfied that the appellant should not be permitted to raise such an argument at this stage. In both the suits the legal representatives of Sham Sunder filed written statements in which they specifically stated that the discharge of the encumbrances of Daulatram was under circumstances in which they were entitled to claim the

relief of subrogation. The question regarding the intention with which a prior encumbrance is discharged, whether it is with a view to obtain the priority of the mortgage paid off or not, in circumstances like the present would be a question of fact and would have to be answered on a conspectus of the entire circumstances of the case. If the appellant was disputing the plea of Sham Sauder's re-presentatives that the intention of Sham Sunder in discharging Daulatram's mortgages was to retain the benefit of suborgation, it was for him to have raised it by proper pleading when an issue would have been struck and evidence led for and against such a contention. At the stage of the trial the only objection raised to the claim for subrogation was based on the absence of a written agreement which the appellant contended was a requirement of the law which had not been complied with. In one

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sense such plea would appear to assume that the intention of the party paying off the mortgage was to obtain the benefit of subrogation but that he had failed to comply with a requirement of the law in having that intention embodied in a document. This plea was accepted by the learned trial judge and the claim for subrogation was disallowed but Sham Sunder's representatives filed an appeal to the High Court. Again, at the stage of the appeal the only contention urged before the learned judge was as regards this supposed requirement of the law that there should be a written agreement. When this plea was rejected it is obvious that on the pleadings the right to subrogation should be held to be established. The matter, however, does not stop here, because even at the stage of appeal to this Court no point was made that in the instant case the presumption in favour of a person having acted to his interest and so entitled to claim subrogation was displaced by clear evidence of the party's statements or conduct. Nor can even a trace of such plea be found in the statement of case filed in these appeals. We do not therefore consider it proper to permit learned Counsel to urge any such ground before us.

This was the only point urged in these appeals which fail and are dismissed with costs-one set payable to the executors of the will of Pt. Sham Sunder.

Civil Appeal 76 of 1961.

This appeal arises out of the suit by Lajwanti already referred to. The appellant is one Brahm Parkash in whose favour Mohinder Singh executed a mortgage for Rs. 15,000/- on May 2, 1944. The property mortgaged was plot No. 44 in Block 17 A with the superstructure on it and plot No. 19 in Block No. 5. Brahm Parkash was the twentieth defendant in Lajwanti's suit. Plot No. 14 of Block No. 13 was sold by Mohinder to one Mukhamal Gokul Chand by deed dated April 28, 1944. It is

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the claim of this Mukhamal to marshalling that is the main subject of controversy in this appeal. As we have stated earlier Lajwanti's mortgage dated October 19, 1943, for Rs. 10,000/- comprised of several properties including plot No. 14 which on April 28, 1944, had been sold to Mukhamal. Now Mukhamal who had been impleaded as a subsequent transferee in Lajwanti's suit claimed that he was entitled to marshalling on the principle to be found in s. 56 of the Transfer of Property Act which runs as follows :

> "56. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person., the buyer is, in the absence of a

> contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend,
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> but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

This claim was however disallowed by the trial Judge for reasons to which it is not necessary to advert. Mukhamal Gokul Chand filed an appeal to the High Court in which he made the same prayer, The learned judges of the High Court upheld Mukhamal's contention that he was entitled to marshalling and directed that Lajwanti should proceed first against plot 44 and only for the deficiency, if any against plot 14 which Mukhamal had purchased. 'It is the correctness of this decision that is challenged by Brahm Parkash in this appeal. Mukhamal Gokul Chand has not entered appearance and the appeal has been heard ex parte. Before dealing with the correctness of this direction as regards marshalling it is necessary to mention one further fact. Mukhamal's appeal to the

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High Court-Appeal 28 of 1948 was filed out of time with a petition for condonation of delay under s. 5 of the Indian Limitation Act and the learned judges condoned the delay and entertained the appeal. The legality and propriety of this order condoning the delay is convassed before us by learned Counsel for the appellant. The facts relevant for the consideration of this point are briefly as follows : The prelliminary decree of the trial judge from which the appeal No. 28 of 1948 was filed was dated April 28,1947. An application for the grant of certified copies was made on October 16, 1947 and the copies were ready for delivery on October 28, 1947. The appeal, however, was actually filed only on March, 10, 1948-admittedly after the period of limitation had expired. The application to the High Court for condoning this delay was supported by an affidavit by one Amar Nath. Before setting out the contents of this affidavit it must be mentioned that the disturbed state of the Punjab at the time of the partition was taken into account by the legislature and by East Punjab Act 16 of 1947 the period from September 19, 1947, to November 15, 1947, was directed to be excluded in computing limitation for any purpose of the Limitation Act including S. 5, In the affidavit in support of the application for the condonation of the delay it was stated that the firm of Gokul Chand had handed over the papers to their Munim on or about November 1, 1947, for filing an appeal but the Munim who was a Muslim went away to Pakistan without handing over the certified copies of the judgment to the parties and that the copies were received from Pakistan on March 4, 1948, a few days before the affidavit was sworn and that immediately after the receipt of the papers the appeal was filed at Simla on March 10, 1948. The learned Judges in dealing with this application observed :

> "In 1947-48 unprecedented events occurred in Delhi with the result that in some cases the
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> whereabouts of close relations were not known for months. In the present case not a syllable is to be found on the record to show that the affidavit of Amar Nath was untrue in any particular. That being so, I have no

doubt that there was sufficient cause for not filing the appeal in time. In these circumstances I condone the delay in filing the appeal-Regular 1st Appeal No. 28 of 1948."

Learned Counsel for the appellant submitted that the learned judges had not required the petitioner for condonation to explain each day's delay, thus departing from the accepted tests for condonation under s. 5 of the Limitation Act. We are not, however, persuaded that the learned Judges were either unmindful of the principles on which delay should be excused or went wrong in the exercise of the discretion which they undoubtedly possessed and that, in any event, we do not consider that this is a fit case in which we should interfere in appeal.

Coming now to the merits of the appeal, learned Counsel strenuously urged that the learned judges of the High Court had misapplied the principles underlying s. 56 of the Transfer of Property Act in directing Lajwanti to proceed first against the property not sold to Gokul Chand. In this connection learned Counsel urged two points : (1) that on a proper construction of s. 56 and the principle underlying it the benefit of marshalling could not be claimed by a purchaser who happened to be a mortgagee in respect of any property belonging to the mortgagor. Learned Counsel pointed out that Mukhamal Gokul Chand had a mortgage under a deed dated February 9, 1944, over certain properties with which the appellant is not concerned. We consider this submission wholly without substance. When s. 56 refers to a subsequent purchaser it does not obviously exclude ;a purchaser who has

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some mortgage over property with which these proceedings are not concerned. His mortgage rights over some other property of the mortgagor is wholly irrelevant for considering his rights gua purchaser of one of the properties to which opening words of s. 56 apply. The construction contended for, in our opinion, has only to be stated to be rejected.

(2) The other submission of learned Counsel was that the learned judges failed to give effect to the last portion of s. 56 under which marshalling is not to be permitted so as to prejudice the rights inter alia of the mortgagees or other persons claiming under him, i.e., under the original mortgagor. Learned Counsel pointed out that the appellant having proved his mortgage and the fact that it was subsisting, the learned judges of the High Court ought to have held that any direction as to marshalling must necessarily prejudice him. We are unable to agree that this follows as any matter of law. The question of prejudice is purely one of facts which has to be pleaded and the necessary facts and circumstances established. It is obvious that the question of prejudice would be intimately connected with the value of the property against which the-mortgagee is directed to proceed in the first instance. If even after paying off such a mortgage there is enough left for payment over to the subsequent encumbrancer referred to in the last portion of s. 56 it would be manifest that there would be no question of prejudice. If therefore the appellant desired to invoke the benefit of the last portion of s. 56 he should have made some plea as to the value of the property and shown how it would prejudice his rights as a subsequent encumbrancer. He however made no such plea and no evidence was led as to the value of the property. Even at the stage of the appeal in the High Court the contention that to allow marshalling in favour of the subsequent purchaser-Mukhamal-would result in prejudice to him was

admittedly
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never put forward before the learned judges. As the point is one not of pure law but springs from the factual inadequacy of the property mortgaged to him to discharge his debt it is too late for the appellant to raise such a plea in this Court.
The appeal fails and is dismissed.
Appeals dismissed.
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