ONE THOUGHT ON “THE DOCTRINE OF SUBROGATION UNDER TRANSFER OF PROPERTY ACT”

M.V. Chandramathi
Assistant Professor, Symbiosis Law School, Hyderabad, India

ABSTRACT

Transfer of Property Act has provided with five modes of transfer, mortgage is one of them. The very essential nature of mortgage is that, it is a transfer of interest in some immovable property. It is given by way of security for a loan. A person who takes a loan and furnishes some security for repayment of a loan in the form of transfer of some interest in any immovable property, it is called a mortgage of a property. Any person who has advanced to 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 so subrogated (Section 92 of Transfer of Property Act).

The doctrine of Subrogation is based on the principles of Equity, justice and good conscience. The core of the doctrine is that the party who pays off a mortgage obtains with, all the rights of the mortgagee. This doctrine was made pertinent even in those parts of India where the Act itself was not applicable. This paper analyses as to how this doctrine evolved and was made applicable in India and how it is applied in the present day scenario.

Key words: Transfer of Property Act, Section 92, Subrogation, Mortgage, Repayment, and Loan.

Cite this Article: M.V. Chandramathi, One Thought on “The Doctrine of Subrogation under Transfer of Property Act”, International Journal of Mechanical Engineering and Technology 8(11), 2017, pp. 942–948.

http://www.iaeme.com/IJMET/issues.asp?JType=IJMET&VType=8&IType=11

1. INTRODUCTION TO THE DOCTRINE OF SUBROGATION

The expression of the word subrogation has different meaning in different legal systems. It is pertinent to state that it is principally concerned with the doctrine of subrogation according to the English common law and the way it is adopted under the Transfer of Property Act, 1882 enacted for India by the British. The Doctrine of Subrogation cropped up independently of the Roman law as a purely English law theory. It has its origins in the courts of equity. Buckland[1] has expressed his view about subrogation by commenting on the Roman Equity that subrogation was a concept unknown to Romans in the manner in which it emerge in the English common law today. Subrogation under Roman law was a term, which was well
known in Constitutional Law, signifying the replacement of one official by another official or by replacement of their actions too.[2] Buckland talks about the concept of subrogation in the Private Law wrote:

It is not until the time of Justinian that it [subrogation] certainly appears in private law, and even then it is not in our sense. In an enactment in the code Justinian says [C.6.23.28.4], dealing with testators who cannot for certain reasons get all the witnesses present together, that those who came later can be 'subrogated,' being formally notified as to what has been done in their absence.'[3]

Under the English law doctrine, there is no need for express transfer of rights; the conveyance of rights was stated to be ipso jure. What was needed is only an actual transference of rights must have take place.[4] Equity’s early use of subrogation came into operation by the English courts. They linked subrogation to the equitable principle of contribution. By 1748 judges did not use the term subrogation, in cases justifiably deserving contribution, or in cases concerning problems of indemnities such as suretyship and insurance.[5] The common law courts in England had acknowledged the doctrine of subrogation and were using it as if it had always been a part of the common law. In Mason V. Sainsbury,[6] Lord Chief Justice Mansfield stated that “Everyday, the insurer is put in the place of the insured. The insurer uses the name of the insured.” In the middle of nineteenth century, the word subrogation entered the English legal terminology. Whether or not, subrogation was of Roman origin was only a matter of slightest importance. Judges were quite content that equity was what created it. This conviction appears to be enhanced by the justification tendered by Hardwicke in Randal v. Cockran.[7] This case was marked with the identification with equity. Lord Hardwicke expressed a possible notional basis for the doctrine and the role of equity in the area of contribution. He in a letter to Kames, “new commercial conditions, new methods of dealing with property, and different forms of property made it necessary for equity to play a novel part in the further development of subrogation.” This case came out of a decree by King George II who allowed compensation to be paid to those who suffered losses in war with Spain. A number of individuals had already been indemnified by their insurers for the losses that they had suffered, and the insurers effectively sought to be subrogated to the rights of the insured to obtain this compensation.

In Simpson V. Thompson,[8] Lord Chancellor Cairnes did use the word subrogation to indicate the right of a person who, agreeing to indemnify the other will on the making good the indemnity will be entitled to succeed to all the means by which the person indemnified might have protected himself or reimbursed himself for the loss.[9]

Stringer V. The English Scotch Marine Insurance Co was the first case to take on the word “subrogation”. The facts of this case were-- the plaintiffs insured a ship cargo with the defendants for “taking at sea, arrests, restraints, and detainment of all Kings, princes and people.” The ship was subsequently captured by a United States cruiser and taken into New Orleans, where a suit was instituted for its condemnation. The plaintiffs challenged the action successfully and the captors appealed. The court ordered the plaintiffs to furnish security against costs, which they could not manage to pay for. As a result, the ship was fated; the plaintiffs gave prescribed notice of leaving behind of the cargo, and asked the insurers pay for their total loss. The court, in holding for the plaintiff, noted that the plaintiff as the assured was free to choose between defending the appeal before the American court or claiming a loss under the policy. Since the assured chose the latter, the insurers were constrained to pay. However, having paid, the insurers were entitled ‘to be subrogated to them, and get what they can out of the hands of the Americans for their own benefit’.
Although, there has been some disagreement in English courts regarding—subrogation is an equitable or legal doctrine. Canadian courts have treated it as an equitable doctrine. The leading case on the point concerning Canada is National Fire Insurance Co. V. McLaren which states:

“The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company.”

However even if the Doctrine of Subrogation is equitable or not, the rights under the same do not come from the contract of indemnity but it arises by the operation of law which governs the relationship of the such a contract it creates. In accordance with the common law, subrogated rights do not arise until the insured is fully indemnified for its loss. Once the loss is indemnified, the insurer gets the right to commence proceedings against the wrong doer in the name of the insured and thereby make all the decisions in the litigation. Nevertheless the insured has an obligation to co-operate in the litigation in matters such as giving evidences etc., at trial.

In London Assurance Co. V. Sainsbury the doctrine of subrogation established by equity were taken and forged into the common law. However, the common law also assumed a major role in styling the future progress of the wholly equitable doctrine. The Court of Exchequer in the case of Deering v. Winchelsea, held that The basis of 'bottom of contribution' was said to be a set principle of Justice, and is not founded in Contract.

The assessment of the ‘subrogation’ as one of the most attractive legal concept of insurance industry has provided an accurate picture of it. In spite of its Roman law roots, subrogation is a mixture of civil law and common law doctrines. This blended nature of subrogation brings several resemblances and peculiarity of two legal systems to the forefront. It should also put up with in mind that although subrogation was first used by common law courts in 1850, in contrast to civil law jurisdictions, there have been made staple steps in order to modify this legal concept in common law jurisdictions. In support of this opinion, the doctrines designed to fructify the harshness of subrogation could be best examples.

2. DOCTRINE OF SUBROGATION IN INDIA

Subrogation is a right of a person to stand in the place of the creditor after paying off his liabilities. In case of mortgage, subrogation takes place only by redemption. Therefore, in order to be entitled to subrogation a person must pay off the entire amount of a prior mortgage. A partial payment of the mortgage-debt cannot give rise to a claim for a partial subrogation. Right of Subrogation is statutorily recognized and described in Section 92 of the Transfer of Property Act, 1882. The doctrine of subrogation is based on the principles of equity, justice and good conscience. The essence of the doctrine is that the party who pays off a mortgage gets clothed with all the rights of the mortgagee. This doctrine was made applicable even in those parts of India where the Act itself was not applicable. [10]
The Privy Council applied the principle of subrogation to a purchaser of the equity of redemption in the case of Gokuldas V. Puranmal held that Gokuldas was subrogated to the rights of the prior mortgagee whom he had paid off and that this claim could not be disposed unless it was redeemed. As per the facts of the case Gokuldas, was the creditor of the mortgagor, purchased the equity of redemption at a sale in execution of a money decree and got possession. He paid off a prior mortgagee but was sued for possession by a puisne mortgagee. Further the council through this decision declared the inapplicability of the rule in Toulmin V. Steere[11] in this case, it was held that a mortgagee purchasing the equity of redemption and discharging other mortgagees was in no better position than the mortgagor would be if he had discharged the mortgages. It was further held that the purchaser could not use either his own mortgage or the mortgages he had redeemed against a subsequent encumbrance of which he had notice. The effect of this case[12] is that when a purchaser of equity of redemption is redeeming a mortgage there is no presumption that he intends to keep it alive against a subsequent encumbrance of which he has no knowledge but may have had constructive notice. This rule however has been held not applicable in India.

Where mortgagor redeems, subrogation not applicable. The mortgagor who discharges a prior debt is not entitled to be subrogated to the rights and remedies of his creditor. This is because by discharging a prior encumbrance created by himself, he is discharging his own obligation to his creditor.[13]

It has been held by the Madras High Court that when a subsequent mortgagee redeems a prior mortgage, no question arises as to whether the payment is for the benefit of the mortgagor or mortgagee. For the applicability of section 92 it is necessary only to see that whether the person claiming the benefit of this section was a mortgagee at the time when he made the payment.[14]

2.1. The Subrogation is of two types

- Legal Subrogation
- Conventional Subrogation.

Legal Subrogation takes place by operation of law where as conventional subrogation takes place where the person paying off the debt has no interest to protect but he advances the money under an agreement that he would be subrogated to the rights and remedies of the creditor.

**Legal Subrogation**

Legal subrogation takes place by operation of law and is based on the principle of re-imbursement. Where a person interested in making some payment which another person is legally bound to make, than such person must be re-imbursed when he makes the payment.

**Legal Subrogation may be claimed by the following persons**—

- Puisne mortgagee
- Co-mortgagor.
- Surety
- Purchaser of equity of redemption.

(a) Puisne Mortgagee—A puisne (subsequent) mortgagee is person who has an interest in the right to redeem the mortgaged property under the prior mortgage. He may institute a suit for redemption of the prior mortgage. Where a prior mortgagee obtains a decree without
impleading the puisne mortgagee, he becomes entitled to sue for redemption of earlier mortgage.

(b) Co-mortgagor—Co-mortgagor is also a co-debtor. He is liable only to the extent of his share of the debt. When besides redeeming his own share, he pays off the share of the other mortgagor also; he becomes entitled to be subrogated in place of such other mortgagor. Hence a co-mortgagor is considered to the principle debtor for his own share and is presumed to be the surety for other co-mortgagors (co-debtors). Where act of the several mortgagors each having entitlement to a share in the suit property, if one of them had redeemed the property by paying the entire mortgage money and had singularly entered into possession over the entire mortgaged property, the other co-owner of the property asked for the partition of the property commensurate with his share, the question arose that what were the rights and liabilities the parties qua each other and whether a suit for partition was maintainable. It was held that it was not a case of subrogation by agreement but subrogation by operation of law. Section 92 does not have the effect of substitute becoming a mortgagee. Section 92 of Transfer of Property Act confers certain rights on the redeeming co-mortgagor and also provides for remedies of redemption, foreclosure, and sale being available to the substitutes as they were available to the substituted. Therefore, the suit for declaration, partition and recovery of possession by non-redeeming co-mortgagor was held to be maintainable.[15]

(c) Surety—Person standing as surety in a mortgage for re-payment of a loan in case the mortgagor fails to do so, is also entitled to redeem the mortgaged property under section 91 of the Transfer of Property Act. When the surety of the mortgagor redeems the property he is subrogated to the position and rights of the creditor.

(d) Purchaser of Equity of Redemption—There were certain doubts regarding the purchaser of equity of redemption that whether he can be subrogated or not. Equity of redemption is regarded as a property of the mortgagor which he can sell or assign. The purchaser of such equity becomes the owner of the property. The question now arises whether he can be treated as the mortgagor in a mortgage transaction? If such a purchaser steps in place of the mortgagor then he will have no right of subrogation under section 92 of Transfer of Property Act. To remove this difficulty the Indian courts have introduced the principle of intention. Often it was decided by the courts that in such cases the intention of the purchaser of equity of redemption is simply to keep the mortgage alive. The Privy council in Mallireddy Ayyareddy V. Gopi Krishnayya[16] stated that

“...It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to a mortgage, may if he pays off an earlier charge treat himself as buying it and stand in the same position as his vendor. This rule would not apply if the owner benefit of the property had covenanted to pay the later mortgage-debt, but in this case there was no such personal covenant.”

In case[17] ‘A’ gave a first mortgage to ‘B’, a second mortgage to ‘C’ and again a third mortgage to ‘B’. Out of the considerations received from the third mortgage, ‘B’ retained Rupees 499 for the discharge of the first mortgage and Rupees 790 for paying off ‘C’s mortgage which he had agreed. But ‘B’ did not pay off ‘C’s mortgagee and ‘C’ sued on his mortgage. ‘B’ was held not entitled to use the first mortgage as a shield.

2.2. Conventional Subrogation

Whenever the payment is made by a stranger to a creditor in the expectation of being substituted in the place of creditor, he is entitled to such substitution.[18] But the doctrine generally adopted is that a Conventional Subrogation can result only from a direct agreement to that effect made with either the creditor or the debtor, and that it is not sufficient that a
person paying the debt of another should do so merely with the understanding on his part that he is to be subrogated to the rights of the creditor,[19] though if the agreement has been made, a formal assignment is not necessary[20] and the agreement may be shown by subsequent acts which indicate a prior agreement. No claim by subrogation, whether conventional or by operation of law, to the securities held or the remedies enjoyed by a creditor for the collection of his demand, can be enforced, until the whole demand of the creditor has been satisfied.[21] Until then there can be no interference with the creditor’s rights or securities which might, even by a bare possibility, prejudice or in any way or embarrass him in the collection of the residue of his demand.[22] Subject to these limitations, any agreement, whether made by the debtor or the creditor, for the substitution of the person advancing the money for the payment of a debt to the securities, remedies, or priorities of the creditor, will, to the extent of the agreement, be enforced in equity.[23]

Conventional subrogation upon payment of a debt, and remedy for the payment itself, cannot co-exist.

3. CONCLUSIONS

Doctrine of Subrogation is a doctrine taking on more than a single thought with perhaps the most common type being an equitable remedy used to prevent unjust enrichment. For example, where the goods were sent from place ‘A’ to place ‘B’ and the goods forwarding note contained a clause that jurisdiction for deciding disputes between the parties would be at place ‘D’ and power of attorney was granted at that place in favour of the insurer, it was held that the suit for damages filed at a place ‘D’ by insurer and consignee was maintainable.[24]

The insurer has no better rights than the insured and can only trail actions against a person who could have been pursued by the insured.

Subrogation also permits a person who releases the debt of another person to be subrogated to any security for that debt. That is, the person who discharges the debt may step into the shoes of the person originally permitted to security for that debt and have the benefit of any such security.

However the provisions of Section 92 of Transfer of Property Act shall not be construed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full. And also does not have the effect of a substitute becoming a mortgagee.

Supreme Court in India held that the rights of subrogation vest only by operation of law rather than the creation of express agreement.

In fact Supreme Court of India stated that subrogation was assignment of the rights by the insured and, therefore the insurer was not a “consume” within the meaning of the Consumer Protection Act, 1986 and, therefore not entitled to maintain a complaint.

REFERENCES

[1] W. W. BUCKLAND, EQUITY IN ROMAN LAW 47-54 (1911) [hereinafter cited as BUCKLAND].
[2] Id
[3] Id. at 47-8
[4] Id

http://www.iaeme.com/IJMET/index.asp 947  editor@iaeme.com
[9] Id. at 284.
[12] Id
[16] (1924) 47 Mad 190: 51 IA 140: AIR 1924 PC 36.
[18] Tradesmen’s Building Association V. Thompson, 32. N.J. Eq. 133: Coe V New Jersey Midland R.R Co; 27 N.J. Eq 110
[20] Neely V. Jones, 16 W.Va. 625
[23] Grant, in re, U.S. Dist. Court,