

ANALYSIS OF RULE OF MARSHALLING AND CONTRIBUTION

Dear Friends,

As you are aware that in many cases of mortgage , the mortgagor having more than one property , mortgages same property with two or more mortgagees. If mortgagor sale any property subject to mortgage , then it is his duty to satisfy the debt first from sale proceeds of properties.

The Rule/Doctrine of Marshalling and Contribution is applicable in this case lets discuss the same;

Marshalling means, when several properties are subject to a mortgage and one of them is sold, free from encumbrance, the mortgagee is required to satisfy his debt from the other party subject to the mortgage.

Marshalling means arranging things, systematize, or regulate things which mean the things arranged in a proper manner or order. In the Transfer of Property Act, section 56, 81 and 82 deals with the doctrine of marshalling and contribution. According to section 56 of the transfer of property act, the marshalling applies on seller and buyer. Section 56, the rule of marshalling by the subsequent purchaser only deals with the sale not mortgage. Section 56 incorporates the rule of marshalling by a purchaser. And for a mortgage, section 81 is the rule of marshalling in which the subsequent mortgagee has the right to claim to marshal. The right of marshalling securities is not absolute.

SECTION 56 IN THE TRANSFER OF PROPERTY ACT, 1882

Marshalling by subsequent purchaser.—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 mortgaged-debt satisfied out of the property or properties not sold to him, so far as the same will extend, 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.

Marshalling is the right of subsequent mortgagees whereas contribution is with respect to mortgagors. Marshalling is if a creditor has multiple funds to realize his

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debt, he must first pursue the multiple funds instead of prejudicing the creditor who is secured only by one fund. Whereas in contribution all the co-mortgagors who have taken a debt by mortgaging their properties have to make contributions towards debt proportionately according to their respective shares.

RULE OF MARSHALLING

Marshalling means “to arrange” and the Rule is first introduced in Transfer of Property Act, 1882 under Section 56. Section 56 may be explained in the following manner:

- 1. There must be an owner of two or more properties,*
- 2. He must mortgage two or more of his properties to any person,*
- 3. Thereafter, he must sell one or more of these properties to any person other than the one he mortgages the properties to. The sale must include at least one property that has been mortgaged by the owner,*
- 4. The buyer of such properties is entitled to have the owner satisfy the mortgage-debt out of the property or the properties not sold him before he purchases the property. This can be subject to a contract stating the contrary,*
- 5. The rule of marshalling should not be so exercised so as to prejudice the rights of the mortgagee, any persons claiming under the mortgagee, or any person who has acquired an interest with consideration in any of the properties.*

In short, the Rule of Marshalling provides the buyer, in the above case, the right to demand from the owner that the property be free from any and all encumbrances before the buyer purchases the property.

SECTION 81 IN THE TRANSFER OF PROPERTY ACT, 1882

Marshalling, securities.—If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

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SECTION 82 IN THE TRANSFER OF PROPERTY ACT, 1882

Contribution to mortgage-debt.—Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid. Nothing in this section applies to a property liable under section 81 to the claim of the 2[subsequent] mortgagee.

SECTION 81 also adopts the Rule of Marshalling but in cases of Mortgages. Section 81 may be understood in the following manner:

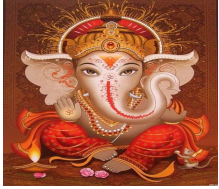
1. *There must be an owner of two or more properties. He must mortgage two or more of these properties to any person,*
2. *He must then mortgage one or more of these properties to another person,*
3. *The subsequent mortgagee is entitled to have the mortgage-debt of the prior mortgagee satisfied out of the properties not sold to him. This can be subject to a contract stating the contrary too,*

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4. Similar to Section 56, the rule of marshalling here too should not be so exercised so as to prejudice the rights of the mortgagee or any person who has acquired an interest with consideration in any of the properties.

Marshalling, in this context, may be explained by an illustration. If the mortgagor mortgages three of his properties X, Y and Z to A and then mortgages X to B, B is entitled to have the mortgagor satisfy his debt from the sale proceeds of the properties Y and Z and only if the said sale proceeds fall short, can property X be sold.

EXMAPLE: A mortgages his properties X, Y and Z in favour of B for a loan of Rs. 50,000/-. A later sells property X to C for a consideration of Rs. 50,000/-. A does not repay the loan to B and B causes the property to be sold with the help of the court. Here C can claim that the B should recover his debt first from Y & Z property and the property X should not pass to B as the subject matter of sale, if his debt is satisfied out of the two other properties Y & Z, even the property X was also the security kept with the mortgagee.

RULE OF CONTRIBUTION

The Rule of Contribution relates to the collective contribution towards a mortgage debt by mortgagors. It gives one mortgagor the right to have the other's property contribute to the discharge of the mortgage debt. When a creditor has a single claim against several debtors, he can realize the debt from any one of them, but as per the rule of contribution he can claim contribution to the debt by the other debtors, so that the burden might fall on all equally. The rule is encapsulated under Section 82 of TOPA and may be divided as per the following:

1. Mortgaged Property Belonging to two or more persons

This is based on the following essentials:

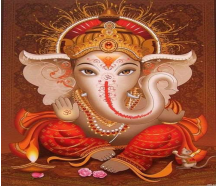
- i) A mortgaged property must belong to two or more persons based on a common loan;
- ii) Each mortgagor, in absence to a contrary contract, is liable to contribute as per his share of the mortgage.

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For example, X, Y and Z mortgaged their properties to D mortgaging a common debt. Now if D can recover the entire debt from the properties mortgaged by X, X is entitled to demand Y and Z to contribute their portion of the debt out of their mortgaged properties.

The Privy Council has lucidly explained it in *Kampta Singh v. Chaturbhuji*. The Privy Council held that if a person owns one property subject, with the property of other persons, to a common mortgage, and has paid off the mortgage debt, he is entitled to call upon the owners of the other property to bear their proper proportion of the burden.

2. When One Property is Mortgaged First and then again mortgaged with another Property

When the mortgagor has two properties (A & B) and he mortgage one property (A) to secure one debt (lets' say loan from X Bank) and then mortgages both (A & B) to secure another debt(from Bank Y). Then Debt from Bank X will be paid out of sale proceeds of property A, therein , the absence of a contract to the contrary , each property is liable to contribute ratably to the later debt from Bank Y after deducting the amount of Debt from Bank X from the sale proceeds of property A.

If outstanding value of debt from bank X exceeds the sale proceeds or value of property A, then whole value of debt from bank Y will be paid from value of property B and nothing to be contributed from value of property A.

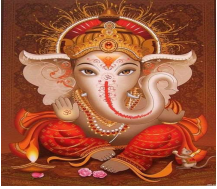
Bohra Thakur Das Vs. Collector of Aligarh (1906) 28 ALL 593- in this case the mortgagor mortgaged the village of Kachaura to Nand Kishore and another by a Simple Mortgage in 1868. Again he mortgaged eleven biswa share of Kachaurain and eight biswa share of another village Agrana to the same Nand Kishore 1870. In 1873 the plaintiffs purchased the equity of redemption of Agrana. The first mortgagees obtained a decree on their mortgage and purchased 11 biswa share of Kachaura in execution. The plaintiffs sued to redeem the second mortgage and contended that 11 biswa share of kachaura had been purchased by the mortgagee, they were liable to pay a proportionate share of debt for redemption.

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The Hon'ble Allahabad High Court – “ The answer to this question depends on the circumstances under which the purchase was made. Supposing A and B are mortgagors of certain properties ,which they have jointly mortgaged to C. Now if C , the mortgagee himself , purchases the equity of redemption from A , it is clear that he cannot permit to throw upon B's share the whole burden of his mortgage. In such a case B's share can only be saddled with the proportionate amount of the mortgaged debt. But if as in this case C's purchase was at a sale in execution of a decree obtained on bought Kachaura property at open sale and not subject to any charge and he must be presumed to have paid the value for it. The case than stands thus – the whole of the Kachaura Property has been swallowed up by the first mortgage and consequently the burden of second mortgage falls entirely on Agrana property. The owner of latter property has under circumstances no right of contribution against the owner of the Kachaura Property.

The appeal filed with the Privy Council against judgement of Allahabad High Court. The Privy Council observed that – “ As Kachaura was sold and purchased by Nand Kishore in execution and part satisfaction of a decree obtained on a prior mortgage of 1868, the courts in India properly overruled the appllelants contention which has not been pressed before this Board.”

In Sesha Iyer Vs. Krishna Iyenger (1901)ILR 24 Mad 96(107,108)- two properties X & Y were mortgaged to R and X & Z properties were mortgaged to P. R executed his decree for sale on the first mortgage by the sale of X. P then sued to enforce his mortgage. X had already been sold by the prior mortgagee , the whole burden of P's mortgage fell on Z. P sought to realise his money by sale of Z but he also claimed contribution against Y , which has been sold to another person D. However his claim was not admitted.

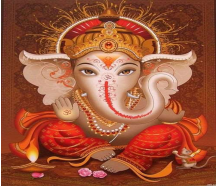
The Court said that – “ the plaintiffs who certainly cannot be in a better position that they would be if they had simply bought the part of mortgaged property subsequently sold under R's decree, had their opportunity , and they might by paying of the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property. They would then have stood in a position analogous to that of one of several mortgagors who has redeemed the whole property and claims to take advantage of Section 95 of the Act. But the plaintiffs did nothing and, therefore , no right to contribution arose and the other property stood free from any lien.”

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PLEASE NOTE THAT : *The reason why marshalling supersedes contribution is because the last mortgagee is given an opportunity to make the mortgagor discharge the mortgage debt from other mortgaged properties first before he realizes the mortgage debt from the properties mortgaged to the person who holds the right of marshalling. However, if after exercising the right of marshalling, the amount realized from the other properties is insufficient, the last mortgagee must then contribute as his is the only mortgage debt left to be realized.*

SECTION 92 IN THE TRANSFER OF PROPERTY ACT, 1882

Subrogation.—Any of the persons referred to in section 91 (other than 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 so subrogated. Nothing in this section shall be deemed 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.

SECTION 95 OF TRANSFER OF PROPERTY ACT 1882 : "RIGHT OF REDEEMING CO-MORTGAGOR TO EXPENSES"

Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

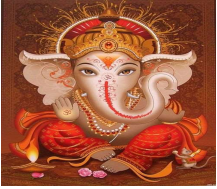
CONCLUSION: *It is important to point out here that Marshalling is applicable in situation where debt can be satisfied out of other properties. But if it cannot be satisfied with the help of the other properties, then marshalling will not be permissible.*

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Marshalling cannot arise unless there is a common debtor and more than one property is kept as a security for the repayment of loan.

- 1. The owner of two or more properties mortgages them to one person;*
- 2. He then sells one or more properties to another person;*
- 3. 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 will extend;*
- 4. But not so as to prejudice the rights from mortgagee or persons claiming under him; or*
- 5. of any other person who has for consideration acquired an interest in any of the properties.*

From above it is clear that the Doctrine of Marshalling and Contribution is important in transaction of mortgage. Marshalling is the right of subsequent mortgagee and contribution to debt and in other words, it is the right of the co-mortgagors of several shares in one property. This is referred to as the scheme of ratable distribution. The nature of doctrine of contribution is based on the principles of equity.

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