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# A CRITICAL ANALYSIS OF THE DOCTRINE OF SUBROGATION UNDER THE TRANSFER OF PROPERTY ACT, 1882: ITS ETYMOLOGY, SCOPE, AND LIMITATIONS

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Godwin Goodhead Akpan<sup>1</sup> & Dimple Tilokchandani<sup>2</sup>

## ABSTRACT

The Transfer of Property Act 1882 deals with several types of transactions involving properties between living persons. This particular legislation exclusively makes provision for immovable properties, and a separate legislation governs any other form of property outside its scope. Transfer of immovable properties can take various forms, such as gift, mortgage, charge, lease, etc.

Subrogation is a statutory right which permits one to stand in for the creditor in relation to a person whose debts the encumbrancer has discharged. It has been given credence under the Transfer of Property Act (T.P.A.) 1882, as well as some judicial pronouncements in India.

The present work critically analyses the doctrine of subrogation under the T.P.A., its origin, and the essential ingredients to prove it. The scope of the doctrine of subrogation, its types, and limitations have also been extensively discussed, along with their exceptions.

The last part of the research covers some of the recognised rights available to encumbrancers under the law, as well as the legal remedies available for third parties.

It is therefore concluded that the pace at which the doctrine has been applied is due to the increasing involvement of people in complex agreements and other activities, especially the adoption of mortgages as an effective means of transferring property since time immemorial. Hence, key suggestions have been provided to enhance the scope of applying this doctrine, and also the need for a legislative framework which can reduce the possibility of its abuse.

**Keywords:** Subrogation, Mortgage, Rights of Encumbrancers, limitations & legal remedies.

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<sup>1</sup> BA LLB Student, Marwadi University.

<sup>2</sup> BA LLB Student, Marwadi University.

## **Introduction**

The Transfer of Property Act 1882 deals with several types of transactions involving properties between living persons. This particular legislation exclusively makes provision for immovable properties, and a separate legislation governs any other form of property outside its scope. Transfer of immovable properties can take various forms, such as gift, mortgage, charge, lease, etc.

Mortgage, to be specific, is a standard concept that has been in existence since time immemorial. It is a recognised method of transferring the interest of an immovable property in exchange for a loan, consequent of which it serves as a security or guarantee for recovery in case of any breach. By handling the possession of the property, it inspires more confidence in the lender who treats such as collateral. While this practice persists, it has led to the evolution of other rights in property law, out of which the Doctrine of Subrogation is a derivative.

While 'Subrogation' as a term can be attributed to the French Law, the etymology of the Doctrine of Subrogation can be traced back to the Roman Civil Law Doctrine of '*Cessio actionum*'. It is basically a substitutional principle which allows the redemption of a mortgage by a third party in favour of the mortgagor, provided there is an agreement through a registered deed to that effect. Subrogation is a statutory right which permits one to stand in for the creditor in relation to a person whose debts the encumbrancer has discharged. It has been given credence under the Transfer of Property Act (T.P.A.) 1882, as well as some judicial pronouncements in India.

However, the doctrine of subrogation has been disturbed with several exceptions of law, and its scope is not far-fetched. It can be permitted legally when there is an obligation to pay by the operation of law coupled with an equitable interest, and contractually when there is an express agreement as such. Since it remains a mortgage in disguise, the original mortgagee changes in these instances; hence, the same rights possessed by the former are being transferred to the encumbrancer who holds the legal claim until the debt is paid, subject to the nature of the subrogation. The challenge may arise in terms of the right to subrogate; yet, it has been seen that this authority can be exercised by the co-mortgagor, surety, purchaser of equity of redemption, and puisne mortgagee under prior mortgage.

The present research paper provides a brief understanding of the meaning of the Doctrine of

Subrogation under the T.P.A., and examines the etymology of the Doctrine, the various aspects under its coverage, as well as the extent to which it can be made applicable. It also attempts to expatiate on the limitations and exceptions to the Doctrine, and as well, focus on the rights of the third party vis-à-vis the Encumbrancer, along with the legal remedies that they may have.

Doctrinal methodology has therefore been applied to comprehend the doctrine, with the help of secondary sources of data collection such as textbooks, statutes, case laws, journals, articles, online materials, as well as critical analysis with background logic in the field of Property Law. An analytical approach is further employed to vindicate the key objectives of the work.

### Research Gap

Although Section 92 of the Transfer of Property Act recognises the concept of subrogation, its application has evolved from its primary legal foundation. However, some of the judicial interpretations indicate how the doctrine has been used exceptionally and inconsistently due to misconceptions regarding its origin, application and scope. Moreso, the equitable nature of subrogation has deteriorated due to restrictions on the rights acquired by the subrogee, particularly in situations where a third party redeems the mortgage, and therefore requires scholarly efforts to fill the gap and restore consistency in this legal doctrine.<sup>3</sup>

It has been further seen that mortgagors have misused the theory without due regard to the legal consequences and the equal rights that these third parties obtain upon subrogation. This has resulted in cases of fraud, misuse of law and obstacles in recovering and enforcing property rights.<sup>4</sup> Moreover, the limitations and exceptions within the theory of subrogation are also ignored. Although these concerns are of the utmost importance, the prevailing literature currently in print deals mostly with case law descriptions and judicial expositions, to the near exclusion of critical commentaries regarding the misconduct inherent in the doctrine, and the absence of effective legislative redress.<sup>5</sup> In examining the extent, limitations, exemptions, and judicial trends relating to the doctrine of subrogation, this research seeks to fill the gap and accentuate the imperative to raise awareness to ensure equitable and consistent application.

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<sup>3</sup> Kushi Malviya, *Doctrine of Subrogation, Definition, Types and Elements*, LAWCTOPUS (2024).

<sup>4</sup> David G. Carlson, *Fraudulent Transfers: Void and Voidable*, CARDOZO (2021).

<sup>5</sup> ERIC A. DOLDEN, DAN C. RICHARDSON, PRACTICAL AND SUBSTANTIVE ASPECTS OF SUBROGATION, 89 – 92 (DOLDEN WALLACE FOLICK LLP, 2015).

## An Analytical Study of the Doctrine of Subrogation under the T.P.A.

The doctrine of subrogation is an extension of the common law doctrine of equity and principles of natural justice, whereby the party enjoined is not privy to the contract. It is based on the belief, expectation, and legal requirement that a person, paying money, which another is bound to pay by law, is qualified to be reimbursed by the other whose shoes he steps into. In dealing with the broad theme encompassing Mortgage and Charge under Property Law, A. P. Singh and Ashish Kumar dealt with the Doctrine of Subrogation. According to them, subrogation is an important doctrine of mortgage which allows a person to step into the shoes of the mortgagee after performing their obligations.<sup>6</sup>

It is a settled position of law that ‘he who seeks equity must do equity’; even so, the contract law also emphasises the need for reimbursement of equitable charges under section 69.<sup>7</sup> Section 5 of the Mercantile Law Amendment Act 1856 (England)<sup>8</sup> provided for the indemnification by the principal debtor for the advances made and loss (if any) sustained by the surety. Unless the owner or co-owner redeems the mortgaged property from the subrogee, he remains the mortgagee.

In the detailed work of Mulla,<sup>9</sup> the scope of the section related to Subrogation has been laid down with reference to the precedent established by the Court of Law. According to him, subrogation means substituting the person redeeming for the encumbrancer who has been paid off. The illustration given in the said provision of law has triggered the author to go as far as discussing the rule of intention that is implied in the Act, the redemption by *Benamidar*, as well as the exception to the rule against subrogation of the Mortgagor. Other people, like Rakshandha,<sup>10</sup> have defined subrogation as a legal doctrine in which one person takes away the rights of a creditor against his or her debtor. The importance of the doctrine from the perspective of insurance, contract law, and its application to temporary injunctions also gains relevance.<sup>11</sup>

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<sup>6</sup> A. P. SINGH, ASHISH KUMAR SRIVASTAVA, PROPERTY LAWS, 283 – 286 (LexisNexis 2015).

<sup>7</sup> The Indian Contract Act, 1872.

<sup>8</sup> Mercantile Law Amendment Act 1856

<sup>9</sup> SIR DINSHAW FARDUNJI MULLA, THE TRANSFER OF PROPERTY ACT, 700 – 720 (LexisNexis, 12th Ed. 2015).

<sup>10</sup> Rakshandha Darak, *Doctrine of Subrogation: Meaning, Case Laws and Provisions*, LAWBHOOMI (2020).

<sup>11</sup> *Ibid.*

By understanding, subrogation in its very nature is the process whereby a person who pays the debts of another succeeds to the right of the creditor who is paid off. Unlike the subrogation that exists in insurance and other related disciplines, the focus of subrogation here is limited to that of mortgage as recognised under the Transfer of Property Act (The Act).<sup>12</sup> The essence of subrogation remains the fact that the individual paying off the charge becomes the assignee by virtue of equity. This is a legal fiction that allows him to step into the shoes of the prior encumbrancer in full to avoid unjust enrichment and not partially, as the latter is not permitted by law.

To claim the liberty under the doctrine of subrogation, it has to be proven that;

1. The person claiming the right must have an interest or charge upon the property mortgaged entitling him to redeem the mortgage.
2. The person must redeem the mortgage.
3. The person must have advanced money to the 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.<sup>13</sup>

### **Etymology of the Doctrine of Subrogation**

The doctrine of subrogation is an equitable doctrine that was derived from Roman Law. In those days, it was considered that a creditor who lent money to a debtor for paying off mortgage money on the condition that he would be substituted was entitled to claim the benefit of security that had been discharged with the aid of money lent by the creditor. In 1910, this doctrine was applied by the Indian Court in *Bissessar Prasad v. Lal Sarnam Singh*.<sup>14</sup>

The doctrine of Subrogation came to be enshrined under section 92 of the Transfer of Property Act<sup>15</sup> based on the old doctrine of equity in 1929. While the first part of section 92<sup>16</sup> creates right of subrogation in favour of a certain category of people who redeem a mortgage, the third paragraph encompasses contractual subrogation. When there is advancement of money for

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<sup>12</sup> The Transfer of Property Act, 1882.

<sup>13</sup> Khushi Malviya, *Doctrine of Subrogation: Definition, Types and Elements*, LAWCTOPUS (2024).

<sup>14</sup> (1910) 6 Cal LJ 134.

<sup>15</sup> *Supra* note 7.

<sup>16</sup> *Ibid*.

discharging the mortgage, the encumbrancer will be entitled to the right of subrogation and will be bestowed with a subsisting interest over the property.<sup>17</sup>

Earlier, the doctrine of subrogation was achieved by a harmonious reading of sections 74 and 75 of the Transfer of Property Act before the amendment that was done in 1929. The said amendment brought several changes, among which included the introduction of this doctrine under section 92 of the Act. The aforesaid sections 74 and 75 dealt with “redeeming up and foreclosing down” of rights, which were found in Order XXXIV Rule 11 of the Code of Civil Procedure.<sup>18</sup> This position of law achieved changes since the said rules were found to be more of substantive law than the procedural consideration as the law stood before, thus, the enforcement of the amendment.<sup>19</sup>

### **Scope of the Doctrine of Subrogation**

The Doctrine of Subrogation under the Transfer of Property Act<sup>20</sup> is only applicable to the case of a mortgage. In this case, the value of the property will remain the same; if there is depreciated currency, the amount that can be demanded will only be up to the value of that currency at the time the payment was made. Supposing some joint debtors pay up and discharge the mortgage, they will replace the mortgagee, yet their rights will be limited to the extent required for their individual equitable protection.

The scope of co-mortgagor under section 92 of the Transfer of Property Act is very narrow, as he is considered to be in a fiduciary relationship and can only claim the price which he has actually paid, with incidental expenses. As a co-mortgagor, the rule demands only reimbursement of the actual amount. When discharging it, it has to be considered whether secured or unsecured debts are involved to maintain a balance of equity.<sup>21</sup>

When there is a default in payment of the mortgage amount, the subrogee can exercise the powers under section 69 of the Act<sup>22</sup> to sell out the property at auction. To invoke this, there must have been an agreement of subrogation available in the registered mortgage deed. If there

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<sup>17</sup> DR AMAR PAL SINGH, DR ASHISH KUMAR SRIVASTAVE, PROPERTY LAWS (LexisNexis, 2<sup>nd</sup> Ed 2023)

<sup>18</sup> The Code of Civil Procedure, 1908.

<sup>19</sup> DARASHAW VAKIL, DR H. R. JHINGTA, COMMENTARIES ON THE TRANSFER OF PROPERTY ACT (LexisNexis, 5<sup>th</sup> Ed. 2017).

<sup>20</sup> *Supra* note 7.

<sup>21</sup> Digambar Das v. Harendra Narayan Pandey, (1910) 14 C. W. N. 6171.

<sup>22</sup> *Ibid.*

are discrepancies in the declaration of title, the defendant, in most cases, can contest the same by filing for an injunction or a fresh suit to that effect.

Dr Poonam took a step further to point out the essential ingredients available under the relevant provision of law. She explained the types of subrogations, parties that can, as well as those who cannot subrogate. Furthermore, Poonam covered partial subrogation and its effects, along with the aspect of exclusion by covenant.<sup>23</sup> M. V. Chandramathi<sup>24</sup> expatiated on the two types of the doctrine of subrogation and preferred an illustrative conclusion to the whole focus of his work. Thus, it can be seen that, while section 92 deals with the instance of a person having an interest that is in persistence, section 92(iii) covers the situation whereby the previous position of the law, the right of subrogation, was invoked on the doctrine of conventional subrogation. A mortgage is indivisible, and there cannot be a partial redemption of a mortgage.<sup>25</sup> If a person redeems the entire mortgage, the rights of the mortgagee will automatically stand subrogated; however, if it is the case that only partial payment has been made, then there can only be the existence of equity of redemption.

### Types of Subrogation

1. **Legal Subrogation:** This is based on the equity principle of reimbursement, the first paragraph of section 92 of the Transfer of Property Act<sup>26</sup> deals with legal subrogation. Here, a person needs to show that he had a pre-existing interest or charge over the property, that he has redeemed the interest or charge in full, and that he paid the amount from his own pocket for the protection of his interest. Legal subrogation is reached only by redemption; this distinguishes it from the other type of subrogation, which is the obligation to pay. This means that it can be claimed by a person who has an interest in the mortgage property and not by a person who does not have an obligation to pay.<sup>27</sup>
2. **Conventional Subrogation:** The third paragraph of section 92 covers the aspect of conventional subrogation. Under this type of subrogation, there is always an agreement entered into with the party paying the debt that he would be subrogated to the rights

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<sup>23</sup> DR POONAM PRADHAN SAXENA, PROPERTY LAW, 438 – 444 (LexisNexis, 2nd Ed. 2016).

<sup>24</sup> M. V. Chandramathi, *One Thought on "The Doctrine of Subrogation under the Transfer of Property Act"*, 942 – 946, INTERNATIONAL JOURNAL OF MECHANICAL ENGINEERING AND TECHNOLOGY (2017).

<sup>25</sup> Markar Akath Kondarakayil Mamu v. Punjapatath Kuttu, (1182) ILR 6 Mad 61.

<sup>26</sup> *Supra* note 8.

<sup>27</sup> D. Silviya Dixina, *A Critical Analysis on the Doctrine of Subrogation under Transfer of Property Act*, PEN ACCLAIMS (2018).

and remedies of the original creditor. Here, the amount paid cannot exceed the amount made in the express agreement; it is in this position that the legal principle of equity is pressed into service to make the person a creditor.<sup>28</sup>

Moreso, conventional subrogation is not limited as compared to the legal; it can be claimed by anyone who, by registered deed with the mortgagor, redeems a prior mortgage. In other words, it can be said to be contractual.

### **Limitations to the Doctrine of Subrogation**

One of the shortcomings of the doctrine of subrogation is that the surety cannot take upon himself the title of the property since such an instrument will no longer exist when there is discharge. Thus, there cannot be any kind of assignment that is legally permissible. In addition, it can also be seen that the assignee of a trust cannot speculate in purchase against the fund in his hands.

Moreover, under the Transfer of Property Act,<sup>29</sup> the doctrine of subrogation is limited to those who are interested in having the mortgage redeemed. A third party can claim up to what is necessary for the security itself.<sup>30</sup> It is a settled position of law that the purchaser of property during the subsistence of a mortgage would only acquire a right of equity of redemption. To contest the claim for the equity right of subrogation, a person must be in the position of a surety of the debt, have made payment under an agreement with the debtor or creditor to hold or receive assignment of the debt as security.

### **Exceptions to the Doctrine of Subrogation**

Although it is considered under this doctrine that every person stepping into the shoes or substituting a person in a mortgage will be vested with certain interests in the form of subrogation, there are certain exceptions to the acceptance of such a theory in holism. A stranger who voluntarily obtains a deed of release from the mortgagee by paying off the mortgagee's debt neither acquires a right of the subrogee nor that of the mortgagee. Unless a deed of release is executed by a mortgagee on satisfaction of the mortgage's debt, he can only

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<sup>28</sup> Shruti Majumdar, *The Doctrine of Subrogation Under the Transfer of Property Act*, Bn'W JOURNAL (2022).

<sup>29</sup> *Supra* note 7.

<sup>30</sup> *Kesavanchan v. Velu*, (1996) 7 SCC 720.

claim the said amount in equity and not acquire the right of subrogation.<sup>31</sup>

Another exception to the doctrine of subrogation can be seen from the position of no-claim in certain instances. A person is not entitled to the right of subrogation if there was nothing assigned to him at the time of transfer, and there has been no mistaken belief as to the actual existence of a subsisting interest in the vendor, and the payment is made in expectation of a future title.<sup>32</sup>

It is also pertinent to mention that the doctrine of subrogation does not apply to a mortgagor in any circumstance. This means that a mortgagor cannot in any way be engaged in subrogation.

Furthermore, certain categories of people are not entitled to claim subrogation. This includes the payment by the mortgagor and not the puisne mortgagee, a person lending money which covered the whole mortgaged property, including the share of one who was not a party to the subsequent mortgage.<sup>33</sup> It is also not applicable where the mortgage money is applied in discharge of a prior mortgage.

### **Rights available to Encumbrancers**

Subrogation is a new section that was added in the amending Act 20 of 1929. The right of co-mortgagor has been recognised since the outset; the original sections were in sections 74 and 75, which gave the right to redeem in express terms on the second or subsequent mortgagees. Subrogation has been permitted by law, not only for its beneficial purpose but also to achieve the ends of justice and the expectations of those who are involved.<sup>34</sup> Before expatiating the rights below, it has to be borne in mind that these rights can be claimed only by those who are entitled to be subrogated; these include any person having an interest in or charge on the mortgaged property, any surety, and any creditor of the mortgagor.

After redeeming a mortgage, one is implied to have the right subsisting in oneself, and the benefit of the same lasts until the value is paid off. These include that;

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<sup>31</sup> Aditya Thakur, Shreya Pal, *Doctrine of Subrogation under the Transfer of Property Act – An Analysis*, SSRN (2023).

<sup>32</sup> Govinda Padayachia v. Lokanatha Aiyar, (1921) 40 Mad LJ 114.

<sup>33</sup> Chellamcherla v. Mummareddi, (1911) 21 Mad LJ 180.

<sup>34</sup> (1952) 2 SCC 373; 1952 SCC Online 107.

The encumbrancer is entitled to all the benefits of all the securities which the creditor owned for the clearing of the debt.<sup>35</sup> He can ask for his loss to be indemnified; however, the co-mortgagors cannot be obliged to give more than their share. This does not mean that the scope to claim indemnity is without limit; it can be in a situation where there is payment in depreciated money or when there is a purchase of security at a discount, there is no right to get beyond the same from the principal.

In this context, the principle of equity will be considered in the light of the right available to the co-mortgagor. In the case where the co-mortgagor contributes to redeem the mortgage belonging to him and others, he has the right to call upon the rest to contribute towards the excess which he paid over his shares. At this point, he will have two rights: first, stepping into the shoes of the mortgagee satisfied by him, and second, the right to recover contribution up to the amount of the excess that he contributed.

### **Legal Remedies available for Third Parties**

1. The right to be subrogated.<sup>36</sup> The person who has redeemed the property is entitled to the same rights as the mortgagee and, in case of default, may enforce redemption, sale, or foreclosure of the property.
2. Declaration of title.<sup>37</sup> After redemption of property interest, the mortgagee is entitled to the declaration of property interest; the same is applicable to a person who attains the complete substitutional right.
3. Based on the equity principle, a co-mortgagor can claim the excess of his contribution from other mortgagors.
4. Section 69 of the Transfer of Property Act allows for the sale of mortgaged property upon the fulfilment of certain conditions, and this can be availed even while invoking the rights under the doctrine of subrogation.

### **Conclusion and Suggestions**

The doctrine of subrogation is one of the most utilized provisions under the Transfer of

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<sup>35</sup> Rakshandha Darak, *Doctrine of Subrogation: Meaning, Case Laws and Provisions*, LAWBHOO MI (2020).

<sup>36</sup> Chullikana Shambatta and others v. Cherakoodlu Narayana Bhatta and Others, (1951) 1 MLJ 596.

<sup>37</sup> Chandra and Another v. K. Mathiazhagan and Another, (2019) MAD 8961.

Property Act. Its momentum has been gained with the increasing involvement of people in complex agreements and other activities, especially the adoption of mortgages as an effective means of transferring property since time immemorial.

A critical study of the said doctrine has been made to unveil its deep-rooted origin with the principle of equity. Having examined it from the point of its origin, the various types and essential elements embodying the doctrine have been given due credence.

Furthermore, an introspection of the scope of applicability of the doctrine, its limitations and a few exceptions has been very well discussed. In addition to that, an advanced study has been made with the help of case laws and other legal materials to comprehend some of the rights available to encumbrancers as well as the legal remedies that parties can be able to claim under the doctrine of subrogation.

Nonetheless, it is suggested that the doctrine should not be limited to mortgages under the Transfer of Property Act; it should extend to other kinds of transfers as well, as mentioned in the work. Also, there should be the recognition of strangers under this doctrine; this is because their exclusion can lead to injustice, as mortgagors may tend to exploit them by incurring debts with the knowledge that they will not be put on equal footing as a subrogee.

Lastly, there should be a laid down provision of law enumerating the various rights under this doctrine beyond which a person cannot claim and also the elaboration of legal remedies that are available to any aggrieved parties by way of legislation or an amendment to avoid complexity or future misuse.

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