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good evidence that the lands belong to it. It is further admitted that the Government revenue has been paid out of church revenues and that in the accounts kept by the defendants (Exhibit V) the lands are described as belonging to the church. The first defendant in his evidence and one of his witnesses admitted that they belonged to the church. The District Judge was under the impression that the plaintiffs were bound to prove some deed of endowment dedicating them to the church or their actual possession of the lands. This is clearly wrong. The fact that the patta is in the name of the first defendant who does not claim it as his own, is no evidence of any title in the villagers. The defendants have no evidence to prove their title and the facts admitted necessarily prove both title and legal possession in the church. The decrees of both Courts must therefore be modified by directing that the plaintiffs be put in possession of the lands claimed in the plaint. The plaintiffs are entitled also to mesne profits from the date of plaint to this date and further mesne profits up to the delivery of possession. The Subordinate Judge will hold an enquiry into the question of the amount of mesne profits and pass a decree for the amount he may find the plaintiffs entitled to. The plaintiffs are entitled to the costs of the memorandum of objections also.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

NARAYANA KUTTI GOUNDAN (FIRST PLAINTIFF), APPELLANT,

v.

PECHIAMMAL *alias* MAHALI AMMAL AND TWO OTHERS (DEFENDANTS NOS. 1 AND 2 AND SECOND PLAINTIFF), RESPONDENTS.*

1911. November 29 and December 29.

Mortgage—Redemption by reversioners after foreclosure decree—Subrogation—Transfer of Property Act (IV of 1882), sec. 91.

While a sale in execution under a mortgage decree was in progress plaintiff (a stranger) paid the decree-amount into court on behalf of some of the reversioners to the property.

Held, that though the mere payment of a mortgage debt by a stranger will not entitle him to the mortgagee's rights by subrogation, yet here under

* Second Appeal No. 1095 of 1910.

section 91, Transfer of Property Act (IV of 1882), the reversioners become equally entitled to a charge over the property and they could validly assign this charge to the plaintiff by way of sub-mortgage.

The English and Indian Law relating to the doctrine of subrogation compared and discussed.

Per SUNDARA AYYAR, J.—

"I am on the whole inclined to hold that a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose. But does it necessarily follow that when a suit is instituted by a mortgagee for sale, the reversioner has not got a sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow? I do not think I am bound to hold that his rights stand on the same footing when he claims of his own accord to redeem and when he tries to save the property for the estate upon the mortgagee attempting to sell it. The right of a person interested in the payment of money which another is bound by law to pay and who therefore pays it, to be re-imbursed by the other is recognised in section 69 of the Indian Contract Act. There is no reason for holding that only those who have an interest in a mortgaged property within the meaning of sections 85 and 91 of the Transfer of Property Act can be held to be interested in the payment of money due on a mortgage created by the last male owner."

SECOND APPEAL against the decree of D. BROADFOOT, the District Judge of Coimbatore, in Appeal No. 153 of 1909, presented against the decree of S. NARAYANASAMY AYYAR, the District Munsif of Udumalpet, in Original suit No. 187 of 1908.

The facts of this case are sufficiently set out in the judgment of SUNDARA AYYAR, J.

K. Srinivasa Ayyangar for appellant.

The Hon'ble The Advocate-General for first respondent.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The facts necessary for the disposal of this Second Appeal may be very briefly stated. One Venkatachella Mudali hypothecated certain land to one Muthu Goundan in 1898 and died in 1904 leaving behind him two widows, the first and second defendants in this suit, and five daughters, defendants Nos. 3 to 7. Muthu Goundan obtained a decree on his mortgage bond against the widows and certain purchasers from them. The property was directed to be sold in execution of the decree and, while the sale was actually going on, Narayana Kutti Goundan, one of the plaintiffs in this suit, paid the amount of the decree into court. Four of the daughters executed a mortgage bond in favour of the two plaintiffs here for the amount which the bond alleges was received from them for discharging the amount required for paying up the decree-amount due to Muthu

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Goundan. The property mortgaged under the instrument was the same as that which had been mortgaged to Muthu Goundan. The plaintiffs' suit is to recover the amount due under their mortgage bond by sale of the mortgaged property and personally from the defendants Nos. 3 to 6, the executants of the bond. The District Munsif was of opinion that the daughters as reversioners having only a *spes successionis* had no such interest in the mortgaged property as would entitle them to redeem Muthu Goundan, and that the plaintiffs obtained no legally enforcible right under the mortgage to them as against the mortgaged property. He therefore refused to pass a decree for the sale of the land, but gave the plaintiffs a personal decree against the defendants Nos. 3 to 6. On appeal the District Judge confirmed the Munsif's decree holding that, though the defendants Nos. 3 to 6 must be held to have some interest in the land and might be entitled to a charge on the land against the first and second defendants, the plaintiffs who lent money to the daughters could not be held to have obtained any valid right under their mortgage. The first plaintiff, Narayana Kutti Goundan, has appealed to this Court from the decree of the District Judge.

It is clear from the facts of the case that the plaintiffs lent moneys to the four daughters on the security of such interest as they would obtain in the land by redeeming Muthu Goundan's mortgage. If the daughters obtained a valid charge on the land against the widows, the defendants Nos. 1 and 2, by redeeming the mortgage, there is no reason for holding that they could not create the mortgage in question in the plaintiffs' favour charging their right.

The plaintiffs then would stand in the position of the sub-mortgagees with respect to the defendants Nos. 1 and 2 and would be entitled to sue both their mortgagors, the daughters, and the defendants Nos. 1 and 2 to enforce their mortgage by the sale of the first and second defendants' right in the land. It was not suggested in the courts below that the plaintiffs lent the money merely on the personal security of the executants of the mortgage-deed. The question for decision in this Second Appeal therefore is whether the daughters who executed it obtained any charge over the land by discharging the amount due to Muthu Goundan. It is contended for the appellant, *firstly*, that they

would stand in the shoes of Muthu Goundan by subrogation merely by discharging his debt, and *secondly*, that they were persons entitled to redeem Muthu Goundan's mortgage under section 91 of the Transfer of Property Act and by redeeming him became entitled to his right as against the first and second defendants. The first of these two arguments was put on a broader ground than the second, it being contended that, whether a reversioner under the Hindu Law is a person entitled to redeem under section 91 of the Transfer of Property Act or not, the right of subrogation was wider, and that the daughters having discharged a burden on Venkatachellam's estate in the hands of first and second defendants, the land in their possession became liable for the amount paid by them. In support of this argument, the judgment of WARRINGTON, J. in *Butler* v. *Rice*(1), was relied on. In that case, one Mrs. Rice was the owner of a house in Bristol and of property in Cardiff, which were together subject to a charge in favour of a bank to secure £450 and interest, and the title-deeds of both the properties were deposited with the bank. Mr. Rice asked the plaintiff Butler to lend him £450 for the purpose of paying off the mortgage. Mr. Butler agreed to lend the amount upon a legal mortgage for £300 of the Bristol house and a guarantee of £150 by Mr. and Mrs. Rice's solicitor, who was to hold the title-deeds for him in the meantime. The money was paid and deeds of the Bristol property which were recovered from the bank passed into the custody of the solicitor. Mrs. Rice did not know of the transaction and subsequently refused to execute a mortgage in favour of the plaintiff. Butler instituted an action against Mr. and Mrs. Rice and the solicitor for a declaration that he was entitled to a charge on the Bristol property for £450 and interest. WARRINGTON, J. took the question for determination to be whether in the circumstances of the case, Mrs. Rice was entitled to hold the Bristol property discharged from the debt of £450 not one penny of which, said the learned Judge, she had paid off herself, or whether the person who paid was entitled to treat the bank's charge as still on foot in his favour. The learned Judge observes, "In the first place I find from the facts I have stated that it was not the intention of the plaintiff, nor indeed is it possible to suppose that any sensible

(1) (1910) 2 Ch. 277, at p. 282.

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man would have such an intention, to discharge the property from the debt. There are only two questions which have to be dealt with in order to arrive at the further conclusion that in equity the debt is still kept alive. The *first* is this: is it material that the owner of the property, the mortgagor, has not requested the person who paid the money to make the payment? and *secondly*, is the plaintiff's right affected by the further intention that, when the transaction was fully carried out, his position should be secured by a legal mortgage for £300 and a guarantee of £150? On the first question it should be observed that this is not a case in which a person seeks to create a charge in his own favour. Here there was an existing charge, and the only question is whether it had been paid or kept alive. On such a question as that it appears to me that the concurrence of the mortgagor is immaterial. Her position is not affected. The only alteration in her position is that instead of owing the money to A she will in future owe it to B." Again he says, "then does the fact that the plaintiff intended, if the transaction was carried out, to have a legal mortgage on the Manor Road property only and a guarantee for the remaining £150 prevent the application of the doctrine? Plainly not. His meaning was that he should have a further security; but that is no evidence that he intended in the meantime to give up such security as a transfer of the deeds to him would give him. The evidence which he gives, which I find to be true, as to what he said at the second interview supports this, namely, that the deeds were to be taken by the solicitor and held by him for the plaintiff. Such security as that gave would be superseded by the better security to be given afterwards." It may be noted that it was not contended that her husband had any right to act on behalf of Mrs. Rice or that the solicitor was entitled to enter into any agreement on her behalf. In these circumstances, it appears to me that the judgment of the learned Judge went very far and is not supported by any previous decision of the English Courts. The learned Judge appears to hold that, though the plaintiff had no previous interest in the property to sustain his action in paying off a previous mortgage and claiming a charge for the amount paid by him, he was entitled to stand in the shoes of the bank whose charge he discharged. He observes that as there was *an existing charge* in favour of the bank the concurrence

of the mortgagor is immaterial. The learned Judge no doubt refers to the agreement between Butler and Mr. Rice and the solicitor that the deeds were to be taken by the solicitor and held by him for Butler, but it is difficult to see that this would have any bearing on the question if Mr. Rice and the solicitor had no right to act for Mrs. Rice. The decision seems almost to go the length of holding that even a volunteer who pays off an existing mortgage would be entitled to a charge on the mortgaged property for the amount he paid. The decision is not based on any agreement between Butler and the debtor that the former should have the rights of the latter. The learned Judge says that the judgment in *Patten* v. *Bond*(1) and the decision in particular of ROMER, J. in *Chetwynd* v. *Allen*(2) are consistent with the view expressed by him, "for in the case before him, as in this, the material payment was made without the knowledge and without any communication with the person who was the real owner of the mortgaged property, and, notwithstanding that, ROMER, J. held that the charge was still on foot." In *Patten* v. *Bond*(1) the money was lent at the request of trustees for the purpose of preserving the trust estate. In such cases, a right of subrogation is undoubtedly recognised in the English Law. In *Chetwynd* v. *Allen*(2) the person who claimed the right of subrogation paid the money at the request of the trustee for the owner of the property who was the trustee's wife, in order to discharge a mortgage executed on her property with her consent. He was therefore entitled to bind her interest by an agreement which he entered into for discharging that mortgage. The case is therefore not similar to *Butler* v. *Rice*(3). On the other hand, the decision in *In re Wrexham, Mold and Connah's Quay Railway Company*(4), appears to be against the view maintained by WARRINGTON, J. There, a railway company, which had issued debenture stock and whose power of borrowing was exhausted, borrowed money from their bankers to pay a half-year's interest on the stock, the bankers paying the interest warrants of the stock-holders when presented to them. Soon after this a judgment-creditor of the company presented a petition under the Railway Companies Act, 1867, and a Receiver was appointed under the petition. The Receiver

(1) (1889) 60 L.T., 583. (2) (1899) 1 Ch., 353. (3) (1910) 2 Ch., 277.
(4) [(1898) 2 Ch., 663 and (1899) 1 Ch., 440 at p. 448.]

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had in his hands sufficient money to pay the next half-year's interest due to some of the stock-holders. The bank claimed priority in respect of their advances over all interest payable in respect of the debenture stock; this claim was negatived by ROMER, J. and by the Court of Appeal. RUBY, L.J. observes, "The claim . . . is rested on a supposed subrogation and right to stand in the place of, and with the right to the securities and priorities of, the creditors who have been paid off, and this is the only claim with which I propose to deal. I do not think that any right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers has ever been allowed, or can be justified in principle." LINDLEY, M. R. and VAUGHAN WILLIAMS, L.J. took the same view. It may be observed that the bank's rights against the company as a simple creditor apart from any question of priority was not denied as the money though borrowed by the company in excess of their powers was used for discharging claims lawfully binding on the bank.

The principle governing the right of subrogation in cases where it is claimed by a person, who without any previous interest in the property discharges a mortgage on it, is expressed in Jones on Mortgages (section 874) thus: "Under the equitable principle of subrogation, one who pays a mortgage debt under an agreement for an assignment or for a new mortgage, for his own protection or for the benefit of another, acquires a right to the security held by the other." The learned author quotes a passage from a recent Georgia case [*Wilkins* v. *Gibson*(1)] which may be cited here. "It has been said that subrogation was a 'benevolent' doctrine and equity would apply it in any case in which justice required it; and under sanction of this elastic expression cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be, and we therefore hold, that a subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor he would be bound to pay or where he had some interest to protect, or where he advanced the money *under an agreement, express or implied, made either with the debtor or creditor*, that he would be subrogated to the rights and remedies of the creditor." The rule is stated in similar terms by Sheldon in his

(1) 113 Ga. 31.

book on Subrogation. It has been said that "whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor, he is entitled to such substitution. But the doctrine generally adopted, and that of these very cases when limited to the point actually decided, is that a conventional subrogation can result only from a direct agreement, express or implied, made with either the creditor or debtor, and it is not sufficient that a person paying the debt of another should have merely an understanding on his part that he is to be subrogated to the rights of the creditor, though, if the agreement have been made, a formal assignment will not be necessary." The English cases do not carry the principle further.

In India the scope of the rule appears to me to be narrower still. A mere agreement either with the creditor holding a mortgage or with the debtor owing it cannot give a person lending money to discharge the mortgage a lien over the property—*see* section 54 of the Transfer of Property Act. An agreement with the creditor or the debtor may entitle him to sue him for the execution of a mortgage-deed, or a deed of assignment of the mortgage as the case may be; but mortgages for a sum of Rs. 100 and upwards can be created only by registered instruments and a mere agreement to mortgage is insufficient to create a lien. In England and in America, it may be that the principles of equity would enable the courts to treat an agreement for a mortgage as giving the lender an equitable interest in the property agreed to be mortgaged. But equitable interests are not recognised in this country as distinct from legal interests, though many principles of law are borrowed from the principles of English Equity Jurisprudence. In this country, equitable mortgages by deposit of title-deeds are recognised only in a special class of cases referred to in section 59 of the Transfer of Property Act when the mortgages are made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. In *Gurdeo Singh* v. *Chandrikah Singh*(1) the rule of subrogation is stated and it seems to be assumed that a payment made under agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security would be sufficient to entitle the lender to the benefit of subrogation. In *Jagatdhar Narain Prasad* v.

(1) (1907) 5 C.L.J., 611 at pp. 631 and 632.

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A.M. Brown(1) it was held that an agreement to give a mortgage would be enough to create a charge by way of subrogation, though the decision of the case itself does not seem to have required the enunciation of the principle. It appears to me that the important distinction between the English and Indian Law pointed out above was overlooked in these cases. No doubt a person having an agreement may sue for the specific performance of the agreement to execute or assign a mortgage, and in suits for the execution of a mortgage-deed, the courts have sometimes passed not only a decree for specific performance but for sale also following on the execution of the conveyance. But this does not justify the view that the agreement itself can be treated as creating a charge. In the American Cyclopedia of Law and Procedure, volume XXVII, the true principle applicable in England and America is stated by *H. C. Black*, the author of the article on "Mortgages." He says, "an agreement by which a stranger undertakes to advance the redemption money and pay it for the mortgagor's benefit, to hold the premises as security for his reimbursement, and to release or re-convey to the mortgagor on being repaid, is valid and enforcible; it is not within the statute of frauds and may be made the basis for a decree for specific performance." The principle is also recognised in *Khushal* v. *Punamchand*(2), where the transaction took place in the town of Bombay and the lender who paid off the prior mortgage could therefore claim an equitable mortgage. There are two kinds of cases which must be distinguished from the class under notice. No conveyance of course would be required in cases where a person who having a previous interest in the property pays off a prior mortgage or where the owner of the equity of redemption paying off a mortgage claims priority over a subsequent incumbrancer. So also in cases where one claiming under a void or voidable conveyance or *bonâ fide* believing himself to have a title to the property discharges an encumbrance on it and claims a charge as against the owner. The principle contended for by the appellant that the mere payment of a mortgage debt by a stranger would entitle him to the mortgagee's rights by subrogation has always been negatived in India.

(1) (1906) I.L.R., 33 Calc., 1133. (2) (1898) I.L.R., 22 Bom., 164.

See : *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* and *Soodisht Lall*(1). It is impossible to argue that it is open to any meddler to claim a lien by discharging a mortgage with which he has no concern. I must therefore overrule the contention that the plaintiff can claim to be subrogated to the rights either of the daughters or of Muthu Goundan by the mere fact that he discharged the mortgage of the latter.

The next question for consideration is whether the daughters were entitled to redeem Muthu Goundan under section 91 of the Transfer of Property Act and could by doing so claim a charge which they could transfer to the plaintiffs. Section 91 provides that any person having any interest in or a charge upon the mortgaged property and any person having any interest in or charge upon the right to redeem the property may institute a suit for redemption. Section 85 lays down that all persons having an interest in the property comprised in the mortgage must be joined as parties to any suit under this chapter relating to such mortgage. The word "interest" must be taken to be used in the same sense in both the sections. Can it be held that a reversioner under the "Hindu Law" is a person having an interest within the meaning of these sections? I cannot hold that in a suit by the mortgagee for sale or foreclosure, such a reversioner is a necessary party. Indeed, it is doubtful whether he can be held to be a proper party at all. It follows that a reversioner cannot be held to be entitled to institute a suit under section 91. In *Ram Chandar* v. *Kallu*(2), STANLEY, C.J., and BANERJI, J. held that the reversionary heirs of the deceased husband of a Hindu widow in possession of his property as such could not maintain a suit for redemption. Although the holder of a mere easement and a remainder man have been held entitled to redeem in England [*see* Seton on "Judgments and Orders," sixth edition, page 1935, and *Pearce* v. *Morris*,(3)], I am on the whole inclined to hold that a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose. But does it necessarily follow that when a suit is instituted by a mortgagee for sale, the reversioner has not got a sufficient interest in the property to entitle

(1) (1875) 2 I.A., 131. (2) (1908) I.L.R., 30 All., 497.
(3) (1869) L.R., 5 Ch., 227.

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him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow? I do not think I am bound to hold that his rights stand on the same footing when he claims of his own accord to redeem and when he tries to save the property for the estate upon the mortgagee attempting to sell it. The right of a person interested in the payment of money which another is bound by law to pay and who therefore pays it to be re-imbursed by the other is recognised in section 69 of the Indian Contract Act. There is no reason for holding that only those who have an interest in a mortgaged property within the meaning of sections 85 and 91 of the Transfer of Property Act can be held to be interested in the payment of the money due on a mortgage created by the last male owner. It has been held by the courts in India that a reversioner is entitled to resist a claim for probate of a will alleged to have been made by the last male owner by reason of his interest in the estate. See *Brindaban Chandra Shaha* v. *Sureswar Shaha Paramanick*(1) and *Puttanna* v. *Ramakrishna Sastri*(2). As observed by MOOKERJEE, J. in the former case: "Although a reversioner under the Hindu Law has no present interest in the property left by deceased, yet it is manifest that he is substantially interested in the protection or devolution of the estate. It is well-settled that a reversioner can sue to restrain waste. . . . The reversioner can, if he makes out a proper case, obtain an order for the appointment of a Receiver. . . . He can maintain a suit for declaration that an adoption by the female heir in possession is invalid. . . . He can also sue for a declaration that an alienation by the female heir in possession will not be operative beyond her life-time. This has now been placed beyond the possibility of dispute by the provisions of section 42 of the Specific Relief Act, illustrations (*e*) & (*f*) to which section show that such declaratory suits may be maintained. Besides it is manifest . . . that such a declaratory suit is maintainable by a remote reversioner, who would take an absolute interest in the absence of the immediate reversionary heir who has only qualified rights in the estate; and also, when the nearest reversioner has precluded himself

(1) (1909) 10 C.L.J., 263 at p. 269. (2) (1907) I.L.R., 30 Mad., 135.

from maintaining a declaratory action by his conduct or by omission to sue within the statutory period, a remote reversioner is entitled to maintain the suit." In *Sambasiva Aiyar* v. *Seetalakshmi Ammal*(1), it has been held by this Court that a reversioner paying arrears of Government revenue in order to save the estate from sale is entitled to recover the same from the widow in possession. I am of opinion that the daughters had sufficient interest in the land to entitle them to discharge Muthu Goundan's debt when the property was brought to sale and that by doing so they obtained a charge over the land which they were entitled to assign or charge in favour of the plaintiff. I must therefore hold that the plaintiff obtained a valid charge for the amount paid by him to discharge Muthu Goundan's mortgage. The widows cannot contend that they have been put to any disadvantage by the redemption of Muthu Goundan's mortgage by the daughters The amount due to the plaintiff was disputed by the first defendant in her written statement. The case does not appear to have been tried on the merits. We therefore reverse the decrees of the Courts below and remand the suit to the Court of first instance for disposal on the merits. The costs up to date will abide the result.

SPENCER, J.—I agree with my learned brother in thinking that the defendants Nos. 3 to 7 as reversioners were persons interested within the meaning of section 69 of the Indian Contract Act in the payment of money which the widows, the defendants Nos. 1 and 2, were bound to pay to Muthu Goundan. By discharging the debt for which the property of the defendants Nos. 1 and 2 was on the point of being sold, I think that they were equitably entitled to have a charge on the property. This being so, I am further of opinion that the assignment or sub-mortgage by the defendants Nos. 3 to 7 to the plaintiff of their lien by the deed of July 3rd, 1909, was in law a valid transaction. The result will be as above stated.

(1) Civil Revision Petitions Nos. 343 and 344 of 1908.