

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1917,
October, 31
and
November, 2.

S. SITARAMASWAMI (PETITIONER-ASSIGNEE FROM THE
DEFENDANT), APPELLANT IN BOTH THE APPEALS,

v.

D. LAKSHMI NARASIMHA AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 146, and O. XXII, r. 10—Suit originally filed in a District Munsif's Court—Plaint returned and filed in a Subordinate Judge's Court—Suit property mortgaged to another during pendency of suit in the former Court—Decree for plaintiff by Subordinate Court—Petition to District Court by mortgagee for permission to appeal, if competent—Appeal by mortgagee against decree of Subordinate Judge's Court, whether maintainable.

A plaint filed in a District Munsif's Court was, on objection taken by the defendant to the valuation of the suit, ordered to be returned and was presented in the Subordinate Judge's Court. While the suit was pending in the District Munsif's Court, the suit property was mortgaged by the defendant to the appellant. On the suit being decreed by the Subordinate Judge in favour of the plaintiff, the defendant did not prefer an appeal; the appellant, as the mortgagee of the suit property pending suit, alleging collusion between the plaintiff and the defendant, filed an application in the District Court under Order XXII, rule 10, for an order allowing him to prefer an appeal, and also preferred an appeal against the decree. The District Judge dismissed both the petition and the appeal as incompetent. The appellant preferred to the High Court a Civil Miscellaneous Appeal and a Second Appeal against the decisions respectively:

Held, that Order XXII, rule 10, only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule;

Subba Pillai v. Rungasami (1917) M.W.N., 306, and *The Collector of Muzaffernagar v. Husaini Begam* (1896) I.L.R., 18 All., 86, followed.

Held also, that, under section 146 of the Civil Procedure Code, it was competent to the mortgagee to prefer an appeal to the District Court against the decree of the Subordinate Judge, and that the District Judge was bound to dispose of the appeal on the merits, notwithstanding the dismissal of the petition under Order XXII, rule 10.

* Second Appeal No. 1153 of 1916 and Civil Miscellaneous Appeal No. 74 of 1916.

Where a plaint is returned for presentation to the proper Court any devolution of interest during the pendency of proceedings in the first Court must be taken to be a devolution of interest during the pendency of the suit in the second Court.

Seshagiri Row v. Vapa Velayudam Pillai (1913) I.L.R., 36 Mad., 492, distinguished.

SECOND APPEAL against the decree of K. SRINIVASA RAO, the District Judge of Ganjām at Berhampur, in Appeal No. 200 of 1915, preferred against the decree of T. JIVAJI RAO, the Temporary Subordinate Judge of Ganjām at Berhampur, in Original Suit No. 25 of 1914.

Appeal against the order of K. SRINIVASA RAO, the District Judge of Ganjām, in Appeal No. 200 of 1915.

The material facts appear from the judgment.

K. V. L. Narasimham for the appellant.

C. Srinivasan for *S. Varadachariar* for the first respondent.

The Judgment of the Court was delivered by

SESHAGIRI AYYAR, J.—Plaintiff, the mother, sued her son, the defendant, for a declaration that the property in suit was her stridhanam. The suit was first filed in the District Munsif's Court and on objection being taken to valuation, it was returned for presentation to the Court of the Subordinate Judge and was tried in that Court. When the suit was in the Munsif's Court, the defendant executed a mortgage in favour of the present appellant. The suit was decided by the Subordinate Judge in favour of the plaintiff. It is alleged that while the son was taking steps to file an appeal he colluded with his mother and gave up the idea of preferring an appeal. Thereupon the present appellants filed an application to the District Court under Order XXII, rule 10, for an order that he be allowed to prefer an appeal, as the right to the property in suit devolved on him pending the suit. At the same time, he filed memorandum of appeal against the decree of the Subordinate Judge. On the application the District Judge held that Order XXII, rule 10, was not applicable and dismissed it. On the appeal he held that his order on the application concluded the right of the appellant. Against these two decisions a Civil Miscellaneous Appeal and a Second Appeal have respectively been preferred. As regards the dismissal of the application we agree with the conclusion of the District Judge though not with the reasons given by him. He has

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relied on *Seshagiri Rao v. Vapa Velayudam Pillai*(1) for the proposition that the suit in the Munsif's Court was not continued in the Court of the Subordinate Judge. We reserve our opinion on the exact point decided in *Seshagiri Rao v. Vapa Velayudam Pillai*(1). That decision is authority only for the proposition that for purposes of limitation, the suit in the Court of the Subordinate Judge was different from that which was first filed in the Munsif's Court. As at present advised we are inclined to think that when a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court. But the order of the District Judge can be supported on the ground that when the appellant applied to the District Judge, there was no suit pending. Order XXII, rule 10 only governs applications made to continue a suit. Consequently the application presented after the termination of the suit was not within the rule. The recent decision of this Court in *Subba Pillai v. Rungasami*(2), takes that view which is also supported by *The Collector of Muzaffernagar v. Husaini Begam*(3). We agree with the view taken in these decisions. Following them we hold that the District Judge was right in rejecting the application and we dismiss the Civil Miscellaneous Appeal with costs.

The District Judge is clearly wrong in holding that the appeal failed by reason of his rejection of the application. Apparently his attention was not drawn to the provisions of section 146 of the new Code of Civil Procedure. It is rather anomalous that if the person claiming under a party applied to continue the suit while it was pending, the Court had a discretion to permit him to do so or to refuse his application while the effect of section 146 is to grant such a person an undeniable right to prefer the appeal which his assignor could have preferred. But the language of the section is clear and we are not at liberty to go behind its plain terms. The proceeding contemplated by the section would include an appeal and the expression *claiming under* is wide enough to cover cases of devolution, etc., mentioned in Order XXII, rule 10. We

(1) (1913) I.L.R., 36 Mad., 482.

(2) (1917) M.W.N., 306.

(3) (1896) I.L.R., 18 All., 86.

therefore hold that the appellant was entitled to prefer the appeal to the District Judge. That appeal must now be heard on the merits. We reverse the decree of the District Judge and remand the appeal to him for disposal. Costs of the Second Appeal will abide the result.

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v.
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—
SESHAGIRI
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K.B.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

MUTHAMMAL (PLAINTIFF), APPELLANT,

v.

RAZU PILLAI AND FIVE OTHERS (DEFENDANTS), RESPONDENTS.*

1917,
February,
19 and 22,
March, 29,
and
November, 14.

*Mortgage—Suit and decree by prior mortgagee without impleading puisne mortgagee
—Purchase of mortgage property by prior mortgagee in execution—Receipt of
rents and profits thereafter—Mode of accounting between the two mortgagees.*

A mortgage decree obtained by a prior mortgagee without impleading a puisne mortgagee does not affect the latter and the amount therefore payable by the latter in discharge of the prior mortgage is not the amount of the decree but that which is due on the footing of the prior mortgage as if no suit had been brought; and if the prior mortgagee buys the mortgage property in execution of his decree and gets possession of the same, the rents and profits received by him cannot be set off as equivalent to the interest due for the period of possession but must be accounted for and deducted from the amount payable by the puisne mortgagee.

Umes Chunder Sircar v. Zahur Fatima (1891) I.L.R., 18 Cal., 164 (P.C.) and *Ganga Pershad Sahu v. The Land Mortgage Bank of India* (1894) I.L.R., 21 Cal., 368 (P.C.), applied. *Syed Ibrahim Sahib v. Armugathayee* (1915) I.L.R., 38 Mad., 18, considered.

APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 54 of 1914 (Original Suit No. 108 of 1912 on the file of the Subordinate Judge of Madura).

The facts are given in the first paragraph of the judgment of the High Court.

M. D. Deradoss, T. V. Gopalaswami Mudaliyar and A. Ganesa Ayyar for the appellant.

K. Bhashyam Ayyangar, S. Aravamudu Ayyangar and A. Krishnaswami Ayyar for the respondent.
