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into which the lower Court should go. Had the affidavit been filed for the first time here, we should not have allowed the question to be raised; but, as already stated, the affidavit was before the Court below and we think that this matter should be enquired into. The order under appeal is therefore reversed and the lower Court is directed to re-hear the application of Nagappa with reference to the question of fact referred to above and dispose of it. The lower Court will expedite the hearing. We make no order as to costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice K. S. Menon.

1936, February 15.

ARUMUGA BATHAN AND TWO OTHERS (PLAINTIFFS 1, 3 AND 4), APPELLANTS,

v.

SEMBA GOUNDAN (DEAD) AND FIVE OTHERS (SECOND DEFENDANT, SECOND PLAINTIFF, DEFENDANTS 1 AND 3 AND NIL), RESPONDENTS.*

Mortgage—Subrogation—Purchaser of property subject to prior simple and later usufructuary mortgages—Discharge of simple mortgage by—Subrogation to rights of simple mortgagee—Purchaser's right to, as against usufructuary mortgagee—Suit by purchaser to enforce that right—Maintainability of—Transfer of Property Act (IV of 1882), sec. 101 as it stood in 1920—Effect of.

The owner of land, which was subject to a simple mortgage in favour of one person and to two later usufructuary mortgages in favour of another, sold it to the first plaintiff's mother without apparently disclosing the existence of the usufructuary mortgages. By virtue of a lease deed of even date

* Second Appeal No. 535 of 1932.

with the second of the usufructuary mortgages the owner himself remained in possession of the land. The first plaintiff's mother discharged the simple mortgage. Subsequently the usufructuary mortgagee filed a suit upon the lease deed, obtained a decree and in execution entered into possession of the land. Thereupon, the plaintiffs, as heirs of the first plaintiff's mother, filed a suit against the mortgagor, the usufructuary mortgagee and the simple mortgagee claiming to enforce the simple mortgage by sale of the mortgaged property.

Held that the suit was maintainable.

Section 101 of the Transfer of Property Act as it stood in 1920 is not a bar to the suit. The first plaintiff's mother must be deemed to be the assignee in law of the mortgagee whose mortgage she paid off. The principle of the ruling in *Venkatasami Chettiar* v. *Sankaranarayana Chettiar*, (1934) 69 M.L.J. 566, equally applies to a case where the purchase is made privately.

Venkat Reddy v. *Kunjappa Goundan*, (1923) I.L.R. 47 Mad. 551, referred to.

Polayya Dora v. *Anantha Patro*, (1935) I.L.R. 59 Mad. 44, is an answer to the contention that, even if the plaintiffs have any right of subrogation, they can avail themselves of it only in defending a suit, and not as the foundation of a plaint.

APPEAL against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 94 of 1929 (Appeal Suit No. 51 of 1929, District Court) preferred against the decree of the Court of the District Munsif of Sankaridrug at Salem in Original Suit No. 520 of 1928 (Original Suit No. 1071 of 1927, District Munsif's Court, Salem).

B. Sitarama Rao for appellants.

C. S. Venkatachari and *D. Ramaswami Ayyangar* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—The land which forms the subject-matter of this appeal was in 1917 in the possession

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of the first defendant. He mortgaged it in that year by Exhibit B—a simple mortgage deed—to the third defendant. In October 1919, the first defendant mortgaged this property amongst other items to the second defendant's father by two usufructuary mortgage deeds (Exhibits I and II), but by virtue of Exhibit III, a lease deed of the same date as Exhibit II, he himself remained in possession of the land. In March 1920, the first defendant sold the land to the first plaintiff's mother (Exhibit A) without apparently disclosing the existence of the usufructuary mortgages and, in June 1920, the first plaintiff's mother discharged the simple mortgage, Exhibit B. In 1925, the second defendant filed a suit upon the lease deed, Exhibit III, obtained a decree, and in execution entered into possession of the land in 1926. In 1927, the plaintiffs, as heirs of the first plaintiff's mother, filed the present suit, impleading the three defendants, in which they claimed to enforce the mortgage, Exhibit B, by sale of the mortgaged property. The learned District Munsif of Sankaridrug gave the plaintiffs a decree for the amount of the mortgage as claimed, less deduction of interest for the period from March 1920 to April 1926. On appeal the learned Subordinate Judge of Salem dismissed the plaintiffs' suit holding that the first plaintiff's mother, not being a charge-holder, had no right of subrogation, and that the plaintiffs could not bring a suit of this nature when they were themselves the owners of the equity of redemption. The only character they can be said to possess is that of vendees, and not that of mortgagees.

In second appeal, the plaintiffs claim that they should be given a decree for the full amount of the mortgage as it stood on the date of their plaint. The appeal is resisted by the second defendant, the usufructuary mortgagee, who contends that the suit is not maintainable. Whether the suit is maintainable or not is the main point for decision.

The first, and extreme, position taken up by the second defendant is that the plaintiffs are vendees, and vendees only, and acquire no rights whatever in virtue of their discharge of Exhibit B. In support of this argument, we have been referred to three decisions in which a vendee who had discharged a mortgage claimed after the discharge to sue as mortgagee and it was held that he could not do so. In the first of these, *Arumugasundara Maharajah Pillay* v. *Narasimha Iyer*(1), a mortgagee purchased the equity of redemption in the mortgaged property and some years later purported to sell the equity of redemption alone and reserve the mortgagee's rights in himself. When he sued on this mortgage right it was held that on the date when he purchased the equity of redemption his mortgage was extinguished. In *Bhawani Kuwar* v. *Mathura Prasad Singh*(2), a decision of the Privy Council, the respondent, a mortgagee, purchased certain villages in execution of his mortgage decree which were subsequently sold for arrears of revenue. He claimed to be paid the mortgage money, but it was held that the mortgage was extinguished on the date of the purchase. The

(1) (1915) 29 M.L.J. 583. (2) (1912) I.L.R. 40 Cal. 89 (P.C.).

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last case is *Daso Polai* v. *Narayana Patro*(1) where a mortgagee purchased the equity of redemption in the mortgaged property and in the next year filed a claim petition on the strength of his sale deed. The petition was dismissed and the order of dismissal became final. The purchaser then sued on the footing of his mortgage. Here too it was held that the mortgage was extinguished on the date of his purchase.

It was easy, however, for Mr. Sitarama Rao for the appellants to point out that these three decisions are, for our present purpose, wholly irrelevant. In none of them was there any question of the existence of a subsequent mortgagee, and therefore the situation with which we have now to deal, and the question of the right of subrogation which involves the existence of two mortgages, the earlier of which has been discharged, could not possibly arise. And this distinction is made quite clear in the judgment of the Privy Council in *Bhawani Kuwar* v. *Mathura Prasad Singh*(2) at page 103.

Another argument on behalf of the respondent that, even if the plaintiffs have any right of subrogation, they can avail themselves of it only in defending a suit, and not as the foundation of a plaint, does not require much discussion as it has been answered only recently by a Bench of this Court in *Polayya Dora* v. *Anantha Patro*(3). It is there pointed out that, though there are *obiter dicta* to be found here and there in support of the argument, it has never been made the basis of any decision, and it is accordingly repelled by

(1) (1933) I.L.R. 57 Mad. 195.
(2) (1912) I.L.R. 40 Cal. 89 (P.C.). (3) (1935) I.L.R. 59 Mad. 44.

the learned Judges. Nor is this the only case in which a suit has been permitted to be filed upon a discharged mortgage. [See *Mulla Vittil Seethi* v. *Achuthan Nair*(1), *Suthi Kutti* v. *Achutan Nair*(2), *Rama Rao* v. *Mandachalugai*(3), *Venkat Reddy* v. *Kunjappa Goundan*(4), *Venkatasami Chettiar* v. *Sankaranarayana Chettiar*(5) and *Mangtulal Bagaria* v. *Upendra Mohan Pal Chaudhuri*(6).]

The next argument against the maintainability of the suit is that by the terms of section 101 of the Transfer of Property Act, as that section stood in 1920, the first plaintiff's mother, not being at any time a mortgagee or charge-holder in respect of this land, could acquire no right of subrogation. This is no doubt so, but the question here is whether the first plaintiff's mother cannot be deemed to be the assignee in law of the mortgagee whose mortgage she paid off. In *Venkat Reddy* v. *Kunjappa Goundan*(4) and *Venkatasami Chettiar* v. *Sankarandrayana Chettiar*(5) which followed it, the plaintiffs who were permitted to file suits were not the mortgagees themselves, but purchasers of the mortgaged property at sales held in execution of the mortgage decrees, and these purchasers were deemed to be assignees of the mortgagee decree-holders. In *Venkat Reddy* v. *Kunjappa Goundan*(4), no doubt, there was no question of a subsequent mortgage, but in *Venkatasami Chettiar* v. *Sankaranarayana Chettiar*(5) the contest was directly between the purchaser at the sale held in execution of the first mortgage and the purchaser at the sale held in execution of the subsequent

(1) (1911) 21 M.L.J. 213 (F.B.).
(2) (1911) 21 M.L.J. 475.
(3) (1918) 35 M.L.J. 467.
(4) (1923) I.L.R. 47 Mad. 551.
(5) (1934) 69 M.L.J. 566.
(6) (1929) I.L.R. 57 Cal. 82.

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mortgage. In this latter case, therefore, it can be said that the plaintiff, though he discharged the first mortgage by his Court-auction purchase, and was never himself a party to it, was permitted to avail himself of a right of subrogation and sue upon it. In our present case, there have been no mortgage decrees and therefore no purchaser through the agency of the Court, but we can see no legal principle which prevents us from extending the same right of suit to a purchaser by private treaty. Whether the purchase is made through Court or privately the principle is the same. The purchaser discharges what he thinks is the only mortgage and then discovers that a later mortgage interest still subsists. If in the case of a Court-auction purchase the purchaser is in these circumstances permitted to sue upon the mortgage which he has discharged, we do not see why the private purchaser should be placed in any inferior position. We therefore hold that the language of section 101 of the Transfer of Property Act is not a bar to the present suit.

Finally it was argued for the respondent that this suit cannot be maintained because the plaintiffs are themselves the owners of the equity of redemption. We see no force in this argument which was not supported by any authority in circumstances in which there is also a second mortgagee to be considered. Order XXXIV, rule 1, Civil Procedure Code, does not lay it down that in a suit on a mortgage the owner of the equity of redemption must always fill the role of defendant. It is enough if all the interests in the property are represented in the suit, as they undoubtedly are here. Nor can we see any practical

difficulties at all in conducting a suit like the present one, in granting a decree, and in executing it.

We are therefore of opinion that all objections to the maintainability of this suit have failed.

This appeal will therefore be allowed to the extent of setting aside the decree of the lower appellate Court which should restore the appeal to its file and dispose of it and the memorandum of cross-objections on the remaining issues. The sixth respondent must pay the appellants' costs in second appeal. Otherwise costs to abide the event. Court-fee to be refunded to the appellants.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

BANAKAR BASAPPA *alias* DODDA BASAPPA AND ANOTHER (PETITIONERS), APPELLANTS,

1935, December 17.

v.

HANSAJI GULABCHAND FIRM (RESPONDENTS), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), sec. 75 (3)—Order made by District Court in appeal—Meaning of—Appeal—*Ex parte *order of District Court in—Order of that Court refusing to set aside—Order in appeal, if—Appeal from—Competency of.*

An order of a District Court refusing to set aside an *ex parte* order in appeal is not itself an order in appeal within the meaning of section 75 (3) of the Provincial Insolvency Act. An appeal from such an order is therefore competent.

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* Appeal Against Order No. 321 of 1934 and Civil Revision Petition No. 1106 of 1934.