the lower appellate court's judgment was not explicit on the point, the plaintiff has not contested the appeal as far as that point is concerned, and there is no reason why he should not receive his full costs of the appeal No. 363 of 1930 in which he is the respondent. It is ordered accordingly.

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The plaintiff's appeal (No. 1 of 1931) fails, and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice H. G. Smith.

RAM HET (DEFENDANT-APPELLANT) *v.* POHKAR, (PLAINTIFF-RESPONDENTS.)*

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Subrogation, principle of—Agreement between the borrower and the lender for substitution for the earlier creditor, if necessary—Oral agreement to execute mortgage, how far sufficient to create a mortgage or charge within the meaning of sections 58 *and* 100 *of the Transfer of Property Act (IV of* 1882)*—Transfer of Property Act (IV of* 1882), *section* 92*—Mortgage,—Person advancing money for payment to prior mortgagee—Mortgagor never agreeing by registered instrument for subrogation of such person—Oral agreement, if sufficient.*

The right to benefit under the principle of subrogation depends upon the existence of an agreement between the borrower and the lender by which it is provided that the subsequent lender must be substituted for the earlier creditor and the mere fact that money is borrowed and used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. Where an oral agreement provides that the mortgagor would execute a mortgage in favour of the person paying the money due on a prior mortgage the agreement creates merely a right to

*Second Civil Appeal No. 341 of 1930, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 19th of August, 1930, reversing the decree of Saiyed Akhtar Ahsan, Munsif of Sitapur, dated the 26th of October, 1929.

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obtain a regular deed of mortgage and cannot in itself constitute a mortgage or charge upon the property within the meaning of sections 58 and 100 of the Transfer of Property Act. *Gulzari Lal* v. *Aziz Fatima* (1), relied on. *Narayana Kuttigoundan* v. *Pechiammal alias Mahaliammal* (2), *Hukum Chand Kasliwal* v. *Radha Kishna Moti Lal Chamaria*, (3), *referred* to.

Section 92 of the Transfer of Property Act (as amended by Act XX of 1929) requires that 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 person shall be subrogated. Where no such agreement is alleged or proved the person advancing money for payment to prior mortgagee cannot claim to be subrogated to the rights of the prior mortgagee simply on the basis of an oral agreement.

The case was originally heard by SRIVASTAVA, J., who referred it to a Division Bench for decision. His order of reference is as follows :—

SRIVASTAVA, J. :—The facts material for the purposes of this appeal may be briefly stated as follows :—

Suraj Dai defendant No. 2 executed two mortgages in respect of the same property, one dated the 16th of June, 1919, in favour of Jiwan Ram and another dated the 24th of June, 1919, in favour of Badri, the grandfather of the defendant-appellant, Ram Hait. Decrees for sale were obtained by both the mortgagees. The decree based on the later mortgage, dated the 24th of June, 1919, was passed on the 22nd of March, 1922, whereas the decree based on the earlier mortgage, dated the 16th of June, 1919, was passed some months later on the 16th of October, 1922. The property appears to have been put up for sale first in execution of the decree, dated the 16th of October, 1922, based on the earlier mortgage. The mortgagor Suraj Dai on the 20th of May, 1926, made an applica-

(1) (1919) I.L.R., 41 All., 372 (375). (2) (1911) I.L.R., 36 Mad., 426.
(3) (1929) 7 O.W.N., 289.

tion that she had entered into an agreement with one Pohkar to execute in his favour a mortgage with possession of the property which was under sale, that in anticipation of the said mortgage Pohkar was present in court to make a deposit of Rs. 100 and asking for time to execute the mortgage in favour of Pohkar and to deposit the balance of the decretal amount. A sum of Rs. 100 was actually deposited on the same date. The balance of Rs. 244 was also deposited by Pohkar on the 19th of June, 1926 and thus the entire decretal amount of the first mortgage was paid off. It is admitted that on the 19th of June, 1926, Suraj Dai executed a pro-note in favour of Pohkar for Rs. 400 which included the two sums deposited by Pohkar and that about two years later on the 11th of June, 1928, she executed a mortgage deed in his favour for a sum of Rs. 1,000 which included a sum of Rs. 588 due on the pro-note just mentioned. The defendant-appellant purchased the property on the 24th of June, 1929 in execution of the decree based on the second mortgage in favour of his grandfather.

The plaintiff Pohkar instituted the suit which has given rise to this appeal for a declaration that he is entitled to priority in respect of Rs. 588 which represents the amount paid by him in respect of the mortgage, dated the 16th of June, 1919, by right of subrogation. The suit was dismissed by the trial court but that decision was reversed by the court of appeal.

The contention urged on behalf of the defendant-appellant is that Pohkar when he made the payment was a mere volunteer and had no interest in the mortgaged property. It is also alleged that there is no evidence of any agreement that by making the payment he would acquire the rights of the prior mortgagee Jiwan Ram. For these reasons it is argued that Pohkar is not entitled to any priority and cannot claim the rights of the prior mortgagee by subrogation. Reliance has been placed upon the decisions in

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Narayana Kutti Goundan v. *Pechiammal alias Mahali Ammal* (1); *A. V. A. Audinatha Ayyengar* v. *S. S. Bharathi* (2); *Umrai Lal* v. *Rukmin Kuar* (3) and *Veeraraghava Iyer* v. *K. Lakshmana Iyer* (4) in support of the appellants contention. The learned counsel for the plaintiff-respondent on the other hand has placed reliance upon the decisions in *Dwarka* v. *Ali Mohammad Khan* (5); *Ram Charan Lonia* v. *Bhagwan Das Maheshri* (6); *Nasiruddin* v. *Ahmad Husain* (7), *Jagatdhar Narain Prasad* v. *A.M. Brown* (8) and *Cunliffe Brooks & Co.* v. *The Blackburn and District Benefit Building Society* (9), *cited in Mata Din* v. *Iftikhar Husain* (10) and contended that as the money paid by Pohkar has paid off the mortgage in favour of Jiwan Ram and as the said payment was made in anticipation of a proposed mortgage, the plaintiff is in equity entitled to be subrogated to the rights possessed by Jiwan Ram. I think that the case is a fit one for being decided by a Bench of two Judges.

I accordingly certify it to be a fit case under section 14(2) of the Oudh Courts Act, for being heard by a division Bench.

Mr. *Radha Krishna*, for the appellant.

Messrs. *Hyder Husain* and *R. B. Lal*, for the respondents.

RAZA and SMITH, JJ. :—This appeal has been referred to a Bench of this Court for decision under section 14(2) of the Oudh Courts Act.

The following facts are no longer in controversy :—

Musammat Suraj Dei (defendant No. 2) executed two mortgages in respect of the same property in favour of Jewan Ram and Badri on different dates. The mortgage in favour of Jewan Ram was executed

(1) (1911) I.L.R., 36 Mad., 426(432).
(2) (1929) A.I.R., Mad., 890.
(3) (1916) 14 A.L.J., 953.
(4) 24 M.L.J., 312.
(5) (1930) 7 O.W.N., 610.
(6) (1926) L.R., 53 I.A., 142.
(7) (1926) 3 O.W.N., 731 P.C.
(8) (1906) I.L.R., 33 Calc., 1133.
(9) (1884) L.R., 9 A.C., 857.
(10) (1929) 6 O.W.N., 393.

on the 16th of June, 1919, and that in favour of Badri on the 24th of June, 1919. Badri (since deceased) was the grandfather of Ram Het (defendant No. 1). Both the mortgagees obtained decrees for sale of the property on the basis of their mortgages. The decree based on the mortgage of the 24th of June, 1919, was passed on the 22nd of March, 1922, whereas the decree based on the mortgage of the 16th of June, 1919, was passed on the 16th of October, 1922. It appears that the property was put up for sale first in execution of the decree of the 16th of October, 1922, based on the earlier mortgage of the 16th of June, 1919. On the 20th of May, 1926, Musammat Suraj Dai (mortgagor) made an application stating that she had entered into an agreement with Pohkar (plaintiff) to execute in his favour a mortgage with possession of the property which was under sale and that Pohkar was present in court to make a deposit of Rs. 100. She prayed for time to execute the mortgage in favour of Pohkar and to deposit the balance of the decretal amount. It appears that this application was not granted and sale of the property was not stayed by the Court. However, Rs. 100 were actually deposited by Pohkar on the 20th of May, 1926, and the balance of Rs. 244 was also deposited by him subsequently on the 19th of June, 1926. Jewan Ram himself purchased the property in execution of his decree at the auction sale. As the decretal amount had been deposited in court, the sale which had taken place in favour of Jewan Ram was set aside by order of the Court. Musammat Suraj Dei instead of executing a mortgage in favour of Pohkar executed a pronote in his favour for Rs. 400 on the 19th of June, 1926. This sum of Rs. 400 included the two sums which had been deposited by Pohkar in court in satisfaction of Jewan Ram's decree. However, she executed a mortgage in favour of Pohkar about two years later, on the 11th of June, 1928, for Rs. 1,000, which included the sum

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of Rs. 588 due on the pronote mentioned above. Ram Het (defendant-appellant) purchased the property on the 24th of June, 1929, in execution of the decree which had been passed in favour of his grandfather Badri on the basis of the second mortgage mentioned above, that is, the mortgage of the 24th of June, 1919. Pohkar (plaintiff) instituted the suit which has given rise to this appeal for a declaration that he is entitled to priority in respect of Rs. 588 (at least) which represents the amount paid by him in respect of the mortgage of the 16th of June, 1919, by right of subrogation.

The suit was dismissed by the trial court but that decision was reversed by the court of first appeal. The appellant before us is Ram Het.

It is contended on behalf of the defendant-appellant that Pohkar was a mere volunteer when he made the payment in question and had no interest in the mortgaged property. It is also contended that there is no evidence of any agreement that by making the payment in question he would acquire the rights of the prior mortgagee Jewan Ram. It is therefore argued that Pohkar is not entitled to any priority and cannot claim the rights of the prior mortgagee by subrogation.

It is contended on behalf of the plaintiff-respondent (Pohkar) that as the money paid by him has satisfied the mortgage in favour of Jewan Ram, and as the said payment was made in anticipation of a proposed mortgage, he (plaintiff) is entitled to be subrogated to the rights of Jewan Ram, the prior mortgagee.

It is noticeable that it is neither alleged nor shown on behalf of Pohkar, the plaintiff in this case, that there existed an agreement between him and Musammat Suraj Dei by which it was provided

that he would be substituted for the earlier creditors (Jewan Ram and Badri).

In disposing of this appeal, we have to see if Pohkar is entitled to claim the right of subrogation against Ram Het, the heir and legal representative of Badri deceased.

When a person is allowed by law to stand in place of a mortgagee he is said to be subrogated or substituted in place of the latter. "The right of one creditor to stand in the place of another comes under the technical head of subrogation, a term which has descended to us from the Roman Law and which means nothing more than substitution. In the English Law, however, the word is not unfrequently used in a narrower sense, namely, substitution by operation of law . . . No person can safely lend money to a mortgagor to pay off a charge on the property without taking an assignment of the security. If he does not take this precaution, it is very likely he will be told that the loan was made simply with the object of clearing off the incumbrance so as to let in an intermediate mortgage as a first charge on the estate—a view which must take the lender by surprise, though it may be a perfectly legal deduction from acknowledged legal principles, ... A claim to subrogation can be sustained only when there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagee, and, though such an agreement may be presumed when the money is expressly advanced for the purpose of paying off an incumbrance, there can be very little doubt that the mere fact that the money borrowed by the debtor is used to pay off a prior mortgage does not entitle the lender to the benefit of the discharged security. The real question in all such cases is whether the payment made by the stranger was a mere loan to the debtor on his personal security or whether it was made

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under an agreement that he should be substituted for the creditor. The law does not usually thrust benefits on people for which they do not themselves stipulate and we find that in the Roman Law and the system based on it, subrogation is permitted only when there is an agreement to that effect with the borrower''. (See Ghose's Law of Mortgage, volume I, pages 352, 360 and 364, 5th edition).

In the case before us the plaintiff has not set up any such agreement as already observed. It is not his case that any such agreement was entered into between him and Musammat Suraj Dei. Pohkar had no interest in or charge upon the property or the right to redeem the property at the time he advanced money to Musammat Suraj Dei or deposited money in court on her behalf to satisfy the decree which Jewan Ram had obtained in respect of the property on the basis of his prior mortgage of the 16th of June, 1919.

As pointed out in the case of *Narayan Kutti Goundan* v. *Pechiammal alias Mahali Ammal* (1), ''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 Mortgage (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* (2) 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

(1) (1911) I.L.R., 36 Mad., 426 (432—434).
(2) 113 G.A., 31.

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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 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 right of the creditor though if the agreement has 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 be narrower still. A mere agreement either with the creditor holding a mortgage or with the debtor owning 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 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 a registered instrument and a mere agreement to mortgage is insufficient to create a lien. In England and in America it may

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be that the principle 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 recognized in this country as distinct from legal interests though many principles of law are borrowed from the principles of English jurisprudence . . . 'In *Jagat Dhar Narain Prasad* v. *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 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 the 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.

The mere fact that money is borrowed and used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit depends upon the existence of an agreement between the borrower and the lender by which it is provided that the subsequent lender must be substituted for the earlier creditor. (See *Gulzari Lal* v. *Aziz Fatima* (2).

As pointed out by their Lordships of the Privy Council in the case of *Hukum Chand Kasliwal* v. *Radha Krishan Moti Lal Chamaria* (3)," an agreement between *A* and *B* providing that the executant *A* should

(1) (1906) I.L.R., 33 Calc., 1133. (2) (1919) I.L.R., 41 All., 372 (375).
(3) (1929) 7 O.W.N., 289.

give a regular mortgage of his immovable property for money advanced by *B* cannot constitute a mortgage or charge upon such property within the meaning of sections 58 and 100 Transfer of Property Act. The said agreement merely creates a right in *B* to obtain another mortgage, viz., a regular deed of mortgage of the said immovable property to be executed by *A*".

The agreement on which Pohkar, the plaintiff in this case, may rely was simply an agreement by which it was provided that Musammat Suraj Dei would execute a mortgage in his favour in respect of the property to be executed by Musammat Suraj Dei. The respondent's learned Counsel contends that Pohkar by making the payment in question had an interest to acquire a charge by suing for specific performance of the agreement. In our opinion this contention is not well founded. The alleged agreement did not constitute a mortgage or charge upon the property. By making the payment, in question simply, Pohkar did not and could not acquire an interest in or charge upon the property or upon the right to redeem the property. He acquired no title to the property by making the payment in question. It must be remembered that in order that the right of subrogation should accrue in favour of a person with defective title it is necessary that the person making the payment should have an ostensible title at least. Pohkar had no such title even, at the time he made the payment in question. He had no interest to protect at the time he agreed to advance money to Musammat Suraj Dei. It cannot be denied that Pohkar can claim no right of subrogation under section 92 of the Transfer of Property Act (as amended by Act XX of 1929). That section is in the following terms:—

"Any of the persons referred to in section 91 other than the mortgagor and any co-mortgagor

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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 person 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 91 is in the following terms:—

"Besides the mortgagor any of the following persons may redeem or institute a suit for redemption of the mortgaged property namely:—

(*a*) Any person (other than the mortgagee of the interest sought to be redeemed) who has an interest in or charge upon the property mortgaged.

(*b*) Any surety for the payment of the mortgage debt or any part thereof or (*c*) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property".

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In the case before us, Musammat Suraj Dei never agreed by a registered instrument that Pohkar shall be subrogated to the rights of Jewan Ram. No such agreement is alleged or proved in this case. It is noticeable that no mention of such an agreement was made in the application (exhibit 2) which Musammat Suraj Dei made on the 20th of May, 1926, asking for time to be allowed to her in order to execute a mortgage deed in favour of Pohkar. No mention of such an agreement was made also in the mortgage (exhibit 1) which she executed in favour of Pohkar on the 11th of June, 1928. Nothing was said in the plaintiff's mortgage about the prior mortgage or about the satisfaction of the decree which had been passed on the basis of that mortgage.

If this case is to be decided under the Transfer of Property Act, as it existed before it was amended by Act XX of 1929, even then Pohkar could claim no right to be subrogated to the rights of the prior mortgagee (Jewan Ram). (See sections 74, 91 and 101 of the Old Act).

Some other authorities were also referred to during the course of arguments, but we do not think it necessary to refer to them as they do not appear to be in point.

The result is that we allow the appeal and setting aside the decree of the learned Subordinate Judge, dated the 19th of August, 1930, restore that of the Munsif, dated the 26th of October, 1929. The appellant, Ram Het, will get his costs from the respondent, Pohkar, in all the three courts.

Appeal allowed.