1868.
April 28.

Suit No. 1146 *of* 1867.

VITHALDA'S NAROTAMDA'S ....*Plaintiff.*
KARSANDA'S KESHAVDA'S *et al.* ....*Defendants.*

Practice—Suit by second mortgagee to redeem first mortgage—Necessary parties—Administrator General—Act XXIV. of 1867, *Sec.* 17.

In a suit, brought by a second mortgagee against first mortgagees (admittedly overpaid) to compel the first mortgagees to convey to him the mortgaged premises, the heir or legal representative of the deceased mortgagor is, according to the balance of authority, a necessary party.

Cases bearing on the above question collected and considered.

Where it was uncertain who was the heir or legal representative of the deceased mortgagor, and the circumstances attending the execution of the second mortgage were not free from doubt, the cause was allowed to stand over, for the purpose of enabling the plaintiff to apply for an order to the Administrator General (under Sec. 17 of Act XXIV. of 1867) directing him to apply for letters of administration to the estate and effects of the mortgagor; and the plaintiff was allowed (in the event of letters of administration being granted to the Administrator General) to amend his plaint by making the Administrator General a party to represent the deceased mortgagor. The plaintiff was, however, ordered to give security for the probable costs of the Administrator General in the suit.

THIS suit was tried in a Division Court before WESTROPP, J.

On the 17th of January 1852, Jánkibái, widow of Lálchand Velchand, mortgaged to the defendants a piece of ground in Shek Muhammad Street, Bombay, to secure payment of a sum of Rs. 1,801 with interest (compound) at the rate of nine per cent. per annum. The mortgage deed contained the usual covenant to reconvey to Jánkibái, her heirs or assigns. Jánkibái died on the 2nd of August 1853, having by her will (dated the 23rd of July 1853) devised the premises to Nárandás Hargovandás, the son of her deceased son Bhagvándás. Nárandás was described in the will as being then four years old.

After the death of Jánkibái the defendants entered into possession of the premises, and at the time of the suit still continued in possession.

Probate of Jánkibái's will was, in September 1863, granted to Narotamdás Trikamdás. On the 20th of July 1866

Nárandás Hargovandás attained his majority, and on the 26th of March in the following year he mortgaged the premises in question to the plaintiff, to secure the sum of Rs. 1,407, and such further moneys as the plaintiff might advance, with interest at the rate of fourteen annás per cent. per mensem, subject to the mortgage of the defendants. This mortgage contained a covenant on the part of the mortgagor to redeem within two months the defendants' mortgage.

On the 12th of August 1867 Nárandás Hargovandás died. A short time previous to his death he had given instructions to his solicitors to file a suit against the defendants to redeem their mortgage, they having refused to account or reconvey, except on condition of the balance alleged to be due to them being paid.

On the 29th of November 1867, the plaintiff, the second mortgagee, brought the present suit against the defendants, and in their plaint, after alleging that the defendants had been overpaid, prayed—

I. That the defendants might be decreed to execute to the plaintiff a conveyance of the mortgaged premises free from incumbrances;

II. That for this purpose all necessary or proper directions might be given and inquiries made;

III. That the defendants might be decreed to pay the costs of the suit.

The defendants put in a written statement (20th Jan. 1868) in which they (without admitting that the plaintiff was a mortgagee of the premises) admitted that they were mortgagees, and alleged that they had accounted up to the 25th of December 1867 to Narotam Trikamdás, as representative of Nárandás Hargovandás.

They submitted that the suit was defective for want of parties, the mortgagor or his representative not being a party to it, and that the plaintiff could not give a valid receipt.

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They admitted a surplus of Rs. 267-7-6 of rents payable to the mortgagor or his representative, and stated that they were willing to pay that sum to the Administrator General.

The issues framed were—

I. Whether, in the absence of the heir or legal representative of Nárandás Hargovandás as a party to the suit, the plaintiff could obtain any relief therein.

II. Whether Nárandás Hargovandás duly executed the alleged mortgage to the plaintiff.

The plaintiff in his evidence stated that Nárandás Hargovandás, the mortgagor, was about seventeen years of age when he executed the mortgage to the plaintiff, and that he had no other property than that so mortgaged; that the mortgagor had stated to him that he wanted the money to pay some of his creditors, but that he did not mention their names, nor did the witness ask for them; that his father supported the mortgagor when he was alive; that the mortgage-money was paid to the mortgagor about two months before his death, but that nevertheless he (the mortgagor) left no money; that the house was worth Rs. 10,000; that several persons claimed to be heirs of the mortgagor, and that he himself claimed to be so likewise;—but that he had never instituted any inquiries as to who was in fact the heir of Nárandás.

White for the plaintiff.

Mayhew for the defendants.

Cur. adv. vult.

WESTROPP, J. (after stating the pleadings and facts as above given), proceeded:—In *Palk* v. *Clinton* (a), Sir William *Grant*, M.R., said: "The question here is, whether you can proceed without the mortgagor. I always understood that, before you can agitate the question of redemption as between two mortgagees, the mortgagor shall be a party. In *Fell* v. *Brown* (b), that is laid down as Lord *Thurlow's* understanding of the practice; which was very

(a) 12 Vesey 58, 59. (b) 2 Bro. C. C. 276.

inconvenient in that instance, the heir being out of the jurisdiction: yet in his absence Lord Thurlow would not decree redemption against the first mortgagee; saying the natural decree is that the second mortgagee shall redeem the first mortgagee; and that the mortgagor shall redeem him or stand foreclosed; and he never knew a decree that was not so perfected; that is the expression. This appears to be a rule of long standing; for in Lord Nottingham's manuscripts I see a case, *Woodcock* v. *Mayne,* in which it was held, that a second incumbrancer could not file a bill to redeem prior incumbrancers without the mortgagor—the very same doctrine in express terms."

In *Fell* v. *Brown,* Lord *Thurlow,* L.C., ordered the cause to stand over in order that the heir should be made a party. The same course was adopted in *Farmer* v. *Curtis* (c), which was a suit by a second mortgagee against the first mortgagee to redeem and foreclose the equity of redemption. The mortgagor there was dead, and the plaintiff alleged, in his bill, that after diligent inquiry he was unable to discover where the heir of the mortgagor resided, or whether he was living. Mr. *Turner* (afterwards Lord Justice Turner), *arguendo,* there said: "Now it has been said that the first mortgagee may keep the estate; but does not that argument apply to the second mortgagee also? He, too, may keep the estate, and get it, without there being anything due to him. For in the absence of the mortgagor the Court does not decide whether anything is due to the second mortgagee or not."

The heir of the mortgagor, Nárandás Hargovandás, is the party whose interest it is the very object of this suit to affect; and he, therefore, should be before the Court. He is not what is denominated in Equity a passive party. If the Court were to comply with the prayer of this plaint, the heir would be put to his suit or action to recover possession from the plaintiff if his mortgage be impeachable; the legal estate would, by the conveyance of the defendants, if they were compelled by the Court to execute it, become vested in

(c) 2 Simon 466.

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the plaintiff. In Ireland, where, as here, a sale, and not merely a foreclosure, is usually decreed in mortgage causes, the heir of the mortgagor is esteemed an indispensable party, as well in foreclosure as in redemption suits: Burroughs and Gregson's Ir. Eq. Pleader 32. "All persons having a right to redeem should be parties to the suit, either as plaintiffs or defendants:" *Ibid.* 127. In *Gopey Mohun Thakore* v. *Sebun Gower* (East's Notes No. 64, 2 Morley's Dig. 105), which was a case between Hindús, it was not denied that there must be some party to represent the mortgagor. There, he had died without any son, but leaving a widow and two daughters. The widow was deemed sufficiently to represent the estate of the mortgagor.

In *Ramsbottom* v. *Wallis* (*d*), Sir C. *Pepys*, M.R., says that the cases "are quite conclusive, that there cannot be an adverse redemption between the first and second mortgagees, without bringing the mortgagor before the court. The second mortgagee has a right to do this; he has a right to put in operation his security: he has a right to work out the means of payment; but, there being a prior incumbrancer before himself, he cannot do that against the mortgagor without putting that prior incumbrancer out of the way, the only means of doing which is by redeeming. He is only permitted, therefore, to redeem the mortgage for the purpose of working out his security. It is very true that Lord Eldon gave to a second incumbrancer against the first a remedy undoubtedly beyond what prior cases would authorise; he put a receiver upon the estate, in the absence of the mortgagor, adversely against the first incumbrancer. It is not easy to see how that could be done, except for the purpose of ultimately working out the security, and be the means of securing it in the mean time. There have been instances where the assistance of the court has been offered to the parties, though in the absence of the mortgagor; but then the first and second mortgagees concurred, and the first mortgagee was willing to be redeemed; but it is, in fact, only doing that which the parties might do for them-

(*d*) Coote on Mortgages, Appx. 576, 3rd Ed.

selves." The case before Lord Eldon, to which the Master of the Rolls there alluded, was *Tanfield* v. *Irvine* (e): the first incumbrancer was not in possession; the second incumbrancer, an annuitant, obtained a receiver over the lands, the grantor of the annuity being abroad, and not a party to the suit; the bill being filed against the trustees of the legal estate, and the first incumbrancer. The order appointing a receiver directed him to keep down the interest on the incumbrances (generally) affecting the estate.

The defendants, I gather from their learned counsel, only ask for safety, and are not to be considered as opposing the plaintiff's suit further than is necessary for their own protection. As overpaid mortgagees, they have become mere trustees for the mortgagor, and may be held liable to pay interest on all balances in their hands from the time they were paid in full: *Quarrel* v. *Beckford* (f), *Smith* v. *Pilkington* (g). They declined to convey to the plaintiff, because they considered that, as between them and the heir of the mortgagor, they would still be regarded in Equity as accountable as mortgagees in possession, unless the conveyance were made with the assent of the heir; and I am not prepared to say they were wrong.

I am not at all disposed to outstep the authorities in such a case as the present, by permitting the plaintiff's mortgage to be established, or the plaintiff himself to enter into possession, in the absence of some person representing the estate of the deceased mortgagor. Looking to the tender age of that mortgagor when he is alleged to have executed the mortgage to the plaintiff, to the fact that the plaintiff's father was in the nature of a guardian of the mortgagor, and to what the plaintiff has said as to the necessity for that mortgage, and his admitted apathy in inquiring into that necessity, and looking also to the high rate of interest stipulated for by the plaintiff, I am very clearly of opinion that this is not a case for departing from precedent. But as I do not think that the property of the deceased mortgagor

(e) 2 Russ. 149.
(f) Seton on Decrees, 3rd Ed., 469. (g) 1 D. F. & J. 120.

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is at present in a safe or satisfactory condition, and as there exists here an officer with such powers as those of the Administrator General, I think that I can, consistently with the precedents, the interests of the parties to this suit, and the safety of the estate, make an order which will ensure the due representation of the mortgagor's interest. That is, to allow this cause to stand over for two months, for the purpose of enabling the plaintiff to apply for an order to the Administrator General, under Sec. 17 of Act XXIV. of 1867, directing him to apply for letters of administration of the estate and effects of Nárandás Hargovandás, the deceased mortgagor, the plaintiffs undertaking to give good security, to the extent of Rs. 2,000, before the Prothonotary, to indemnify the Administrator General against any costs of this suit: such indemnity to be without prejudice to the right of the Administrator General to receive his costs, or any part thereof, out of the estate, should the Court think fit to order the same; and, in the event of such letters of administration being granted to the Administrator General, the plaintiff to be at liberty to amend the plaint, and all other proceedings in this suit, by making the Administrator General a party to the same. This order to be without prejudice to the right of the Administrator General to demand in this suit that the defendants should account, as mortgagees in possession, for all moneys which have come into their hands in that character, and that they should pay into court any balance found due from them; and also that, in the like event of the said letters of administration being granted as aforesaid, the defendants should pay into court forthwith, to the credit of this cause, the surplus, Rs. 267-7-6, admitted in their written statement, and any moneys subsequently received by them, after making all just allowances; and the Administrator General to be permitted to receive the rents and profits of the said mortgaged premises, from the time of the granting of such letters of administration. Costs of the present parties to this suit reserved, except the costs of the day, which the plaintiff is to pay to the defendants.

If the plaintiff be unwilling to accept the above order, he may have liberty to withdraw from this suit, under Sec. 97

of the Civil Procedure Code, with permission to bring such other suit as he may be advised; he forthwith paying to the defendants their costs of the present suit.

Attorneys for the plaintiff: *Macfarlane and Green.*

Attorneys for the defendants: *C. E. & F. Stanger Leathes.*

Note. The plaintiff subsequently elected to take the former order.—ED.

Aug. 6.

Appeal No. 137.

BANK OF HINDUSTA'N, CHINA, AND JAPAN (LIMITED)......................................*Appellants.*

PREMCHAND RA'ICHAND *et al.* ....*Respondents.*

Appeal No. 138.

AHMEDBHA'I HABI'BHA'I.....................*Appellant.*

PREMCHAND RA'ICHAND *et al.* ....*Respondents.*

The Companies Act, 1862 (25 & 26 *Vict., c.* 89, *s.* 87)—*Leave of the Court of Chancery—Stay of Proceedings—Comity of Courts—Sale—Execution Sale—Purchase-money—Civ. Proc. Code, Secs.* 246 *and* 258 *—Hindú Law—Gift of Land—Receipt of Rent.*

A suit may be brought in the Courts in India against a company that is being wound up under "The Companies Act, 1862," without the leave of the Court of Chancery being first obtained.

Semble—The High Court will, in the exercise of its general power, stay the proceedings in a suit against such a company where the circumstances are such as to render it proper to do so.

In a suit, under the latter portion of Sec. 246 of the Civil Procedure Code, brought by the owner against the purchaser of property, which has wrongfully been attached and sold in execution of a decree, the execution creditor is properly made a party, the object being to restore all parties to the position which they occupied previously to such attachment and sale.

When a sale is set aside by reason of the execution debtor having no interest in the property sold, the purchaser of such property is entitled to receive back his purchase-money, as on a consideration that has failed.

To make a gift of land complete under the Hindú Law, there must be either possession or receipt of rent by the donee. The receipt of rent may be by an agent, and, if the transaction is *boná fide*, it is immaterial that such agent has before the gift received the rent for the donor.

THESE were two separate appeals from a decree of Arnould, J., made on the 20th of March 1868, in Original Suit No. 383 of 1867.