

1907  
 BANI MUN-  
 CHARAM  
 v.  
 REGINA  
 STANGER.

does not choose to withdraw the suit with the liberty I have given him, his suit will stand dismissed with costs throughout

Mr. Jinnah says that he undertakes to withdraw this suit and file a fresh suit at once.

The order is to be drawn up so as to make the payment of the costs of the suit a condition precedent to the plaintiff's bringing a fresh suit.

The fresh suit to be filed within a month from this date.

Rs. 5,000 to be desposited forthwith with the Prothonotary for the defendant's costs subject to the taxation of the bill.

Attorneys for plaintiffs:—*Messrs Khanderao, Laud & Mehta.*

Attorneys for the defendant:—*Mr. M. B. Chothia.*

B. N. L.

## ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and  
 Mr. Justice Batchelor.*

1908  
 February 14.

JAGGANATH HIRALAL (APPELLANT AND PLAINTIFF) v. TULKA  
 KERA AND OTHERS (RESPONDENT AND DEFENDANTS)\*

*Practice—Interpleader suit—Suit to redeem mortgage against two parties  
 claiming mortgage money—Appropriate Relief.*

When a mortgagor was about to pay off the mortgage amount to an assignee of the mortgage, the mortgagee disputed the assignment and also claimed to be paid the mortgage amount. The mortgagor thereupon filed a suit, impleading both the mortgagee and assignee as defendants. The plaint contained, in substance, a claim for redemption, but it also prayed that the defendants should be required to interplead concerning their claims to the mortgage amount and that the mortgagor should be indemnified in consequence of the loss of the original mortgage-deed. Prior to the hearing the defendants agreed that the assignee was entitled to receive the mortgage amount. The suit was dismissed on the grounds that no interpleader suit could lie as the plaintiff sought an indemnity from one of the defendants which gave him a personal interest in the suit. On appeal,

\* Suit No. 355 of 1907. Appeal No. 1509.

*Held*, that it was erroneous to treat the suit as only one of interpleader. Inasmuch as the plaint also contained in substance a claim for redemption that was the appropriate relief under the circumstances.

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*Vyvyan v. Vyvyan*(1), followed.

THE plaintiff and his brother Purshotam Hiralal were entitled in equal shares to a property situate at Bhatwadi in Bombay. On the 25th March 1895 Purshotam Hiralal mortgaged his undivided share to the plaintiff for Rs. 1,250 at 6 per cent. per annum; and on the 7th September 1895 Purshotam Hiralal mortgaged the same to defendants 1—4, Tulka Kera and Company, for Rs. 5,000 at 12 per cent. per annum subject to the first mortgage. Subsequently Purshotam Hiralal became an insolvent. The plaintiff under his mortgage of the 25th March 1895 advertised Purshotam Hiralal's half share for sale and the sale was fixed for 20th February 1907. Before the sale, however, Messrs. Payne and Company for defendants 1—5 tendered to the plaintiff the sum due on the first mortgage. Defendant No. 5 at that time was the proposed transferee of the second mortgage from Tulka Kera and Company. The plaintiff accepted the proposal suggested by Messrs. Payne and Company and the sale was stopped. Shortly after that the Official Assignee, who was the assignee of the estate and effects of Purshotam Hiralal, put up Purshotam Hiralal's half share in this property for sale and the plaintiff bought it at such sale for Rs. 5,600 subject to the first and second charges, and on the 16th March 1907 the Official Assignee duly executed in favour of the plaintiff a conveyance of the insolvent's undivided share and interest in the said property subject to the said charges.

The first defendant Tulka Kera was the only partner of the firm of Tulka Kera and Company then present in Bombay and as by the indenture of 2nd mortgage it was expressly provided that such partner or partners of the firm of Tulka Kera and Company as might for the time being be present in Bombay, should be entitled to execute a reconveyance in respect of the 2nd mortgage, the plaintiff through his solicitors offered to pay to the 2nd mortgagees and their proposed assignee the amounts

(1) (1861) 4 De G. F. & J. 183.

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of principal, interest, and costs properly due under the 1st and 2nd mortgages, under the belief that the amount of the 1st mortgage had been paid by or on behalf of the 2nd mortgagees and the plaintiff was ready and willing to obtain from the 1st defendant Tulka Kera a reconveyance of the property, the 5th defendant Haji Jakaria Haji Ahmed Patel joining in the same as the proposed transferee of the 2nd mortgage.

Messrs. Payne and Company also informed the plaintiff's solicitors that the original indenture of 2nd mortgage had been mislaid or was missing and the plaintiff's solicitors therefore proposed that the 2nd mortgagees should execute a deed of indemnity in favour of the plaintiff in respect of the missing deeds.

At about this time the 2nd, 3rd and 4th defendants through their attorneys informed the plaintiff's attorneys that they did not agree to the proposed transfer of the 2nd mortgage to the 5th defendant and demanded from the plaintiff payment of the amount due on the 2nd mortgage and threatened to file a suit against him in default. The first defendant Tulka Kera in April 1907 through the attorneys of the 2nd, 3rd and 4th defendants also wrote to the plaintiff's attorneys alleging that he had not instructed his former attorneys Messrs. Payne and Company to act for him in the matter of the reconveyance and alleging that the arrangement for a transfer of the 2nd mortgage to the 5th defendant had fallen through and that he was not aware that Messrs. Payne and Company had paid the amount of the first mortgage, and demanding payment of the 2nd mortgage and threatening to file a suit against the plaintiff in default of payment. Messrs. Payne and Company on behalf of the 5th defendant had also written to the plaintiff's attorneys alleging that the agreement for transfer of the 2nd mortgage was subsisting and binding and warning the plaintiff against paying the amount of the 2nd mortgage to the 2nd mortgagees.

The plaintiff thereupon filed this suit alleging that he had always been ready and willing to pay to the party or parties who might be declared properly to be entitled to the same, the respective amounts of the principal and interest due in respect

of the 1st and 2nd mortgages and the mortgagees' costs thereof and submitted that upon such payment he was entitled to redeem the undivided moiety of Purshotam Hiralal and that he was entitled to have a proper reconveyance executed in his favour in respect thereof by the party or parties who may be declared to be entitled to be indemnified by the defendants or some of them in respect of the alleged loss of the original indenture of 2nd mortgage, but in consequence of the rival claims made to the said money on behalf of the 1st defendant on the one hand and the 2nd, 3rd, 4th defendants and the 5th defendant on the other hand, he was unable to pay the same to the said defendants or any of them until their claims *inter se* to the same should be decided by the Court.

The plaintiff brought into Court the sum of Rs. 12,442-11-0 and alleged that he had always been willing and still was willing to pay the costs of and incidental to the reconveyance of the said property when ascertained. He alleged that he had no interest in the sum of Rs. 12,422-11-0 otherwise than as a stake holder, but rival claims had been made thereto by the defendants as before stated.

Under the aforesaid circumstances and in the events that have happened the plaintiff prayed as follows :—

(a) That the defendants may be restrained by the order and injunction of this Honourable Court from taking any proceedings against the plaintiff, in respect of the amounts due on the said 1st and 2nd mortgages.

(b) That the said defendants may be required to interplead together concerning their claims to the 1st and 2nd mortgages.

(c) That all necessary and proper directions may be given and orders passed for the payment to the defendant or defendants entitled thereto of the sum brought into Court as aforesaid.

(d) That upon payment of the amounts due on the said 1st and 2nd mortgages and the costs of and incidental to the reconveyance thereof when ascertained to such of the defendants as may be declared entitled to receive the same, the plaintiff and the undivided moiety of the said Purshotam Hiralal in the property described in Schedule A hereto which has been purchased by the plaintiff may be discharged from all liability in respect of the said 1st and 2nd mortgages to any of the defendants herein.

(e) That upon payment of the moneys justly due to them or any of them the defendants or some of them may be directed to execute in favour of the

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1908 plaintiff a proper deed or deeds of reconveyance and a deed of indemnity  
 JAGGANATH (the latter at the costs of the party executing the same); such deed or  
 v. deeds if necessary to be settled by this Honourable Court.  
 TULKA KERA. (f) That the defendants or some of them may be ordered to pay the  
 plaintiff's costs of this suit.  
 (g) That the plaintiff may have such further or other relief as the  
 nature of his case may require

Before the suit came on for hearing defendants 1—4 relinquished their claim to be paid the amount due on the 2nd mortgage and admitted the 5th defendant's right to receive it.

The 5th defendant submitted that having regard to the pendency of a suit in which the rights of the 5th defendant and the other defendants could and would be properly decided the plaintiff was not justified in filing the suit of interpleader. He further alleged that the amount brought into court by the plaintiff was not sufficient to satisfy his claim in respect of the 1st and 2nd mortgages respectively.

Russell, J., dismissed the suit with costs on the ground that no interpleader suit could lie (1) because the plaintiff sought an indemnity from one of the defendants in respect of the loss of the mortgage-deed and (2) a decree in an interpleader suit could not be passed unless there were two active claimants in respect of the property.

Against this decision the plaintiff appealed.

*Weldon* (with *Robertson*) for the appellant

The Court said we should have filed a suit for redemption but see *Vyayan v. Vyayan*<sup>(1)</sup>. Suit No. 337 is filed against Tulka Kera personally and not against the firm; he is not sued as a partner.

*Tavar* with *Jinnah* for respondent No. 1.

The plaintiff had full knowledge of Suit No. 337 of 1907 which was filed on the 17th April 1907 and in which the rights of the 5th defendant and the 1st defendant would have been decided. In spite of this however, the plaintiff filed an interpleader suit two days afterwards that is on 19th April 1907. If

(1) (1861) 4 De G. F. & J. 183.

the plaintiff wanted to pay off the amounts of the 1st and 2nd mortgagees and if there was any dispute as to who should receive the amount of the 2nd mortgage the proper remedy was to file a redemption suit. In his plaint the plaintiff claims personal relief and the law is that in an interpleader suit the plaintiff should not claim personal relief and that he should have no interest in the thing claimed otherwise than as a shareholder. Turning to the prayers of the plaint it will be seen that in prayers "D" and "E" he claims personal relief. In *Bignold v. Audland*<sup>(1)</sup> it was decided that if the plaintiff is interested in the subject matter the suit shall be dismissed.

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There is also an English case *Mitchell v. Hayne*<sup>(2)</sup> in which it has been held that where a plaintiff represents not merely that he has a lien with respect to which two other persons have adverse rights but that there is a further question to be litigated adversely between himself and one of them, that is not a case of interpleader.

*Chamier* for respondent No. 5.

JENKINS, C. J. :—This is an appeal by the plaintiff from a decree dismissing his suit with costs on the ground that it is an interpleader suit, and so not maintainable.

In my opinion the learned Judge has been misled by the terms in which the suit evidently was described before him, for to treat it as only a suit of interpleader is to disregard paragraphs (d), (e) and (g) of the prayer to the plaint. Those paragraphs contain in substance a claim for redemption, and that in the circumstances is the appropriate remedy (cf. *Vyvyan v. Vyvyan*<sup>(3)</sup>). The dismissal of this suit might possibly result in the loss to the plaintiff of his right to redeem and that no one could have intended.

The decree of the first Court must therefore be set aside. It is now conceded that the first four defendants have no such right as was claimed by them, and it is agreed that the principal and interest payable to the 5th defendant up to the institution of the suit is Rs. 2,480-3-0 on the first mortgage and

(1) (1840) 11 Sim. 23.

(2) (1824) 2 Sim. & St. 63.

(3) (1861) 4 De G. F. & J. 183.

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Rs. 10,000 on the second mortgage with interest at 6 per cent. on Rs. 1,250 from the 20th February 1907. The only dispute is as to when interest should cease to run. I think in the special circumstances of this case that it did not cease on payment of the amount into Court, but on the other hand I hold it should not run beyond the 7th of October 1907, the date of the decree under appeal, and it was the 5th defendant who raised the issue that this suit was not maintainable, and thus delayed payment of the mortgage money.

There must, therefore, be a decree declaring what on this basis is the amount due, the figure to be settled by the Court if the parties cannot agree, and further declaring that the 5th defendant alone is entitled to receive the same, and then there will be the usual decree for redemption save that by consent the time for payment will be one month, and there must be a direction that the defendants do give at the expense of the defendants 1 to 4 a good and effectual indemnity, in respect of the loss of the title-deed to indemnify the plaintiff, his heirs and assigns his and their estate and effects and the mortgaged property from and against all loss, costs, charges, damages and expenses and other consequences, which the plaintiff his heirs or assigns of the mortgage property shall or may incur, sustain or become liable to for or by reason of or on account or in respect of the loss.

The plaintiff must pay the 5th defendant's costs of the suit, but not of the appeal as it was the issue raised by the 5th defendant that occasioned the necessity of this appeal. It was the unjustifiable position taken up by the first four defendants that necessitated the suit and therefore they must bear the plaintiff's costs of it including the costs he has to pay the 5th defendant.

It was the issue raised by the 5th defendant that procured the dismissal of the suit and so brought about this appeal, therefore half of the plaintiff's costs of this appeal must be borne by the 5th defendant and the other half will be borne by the other defendants.

Attorneys for the plaintiff—*Messrs. Little & Co.*

Attorneys for defendants—*Messrs. Mulla & Mulla and Messrs. Payne & Co.*