ORIGINAL CIVIL.

Before McNair J.

NATIONAL INSURANCE CO., LTD.

v.

DHIRENDRA NATH BANERJI.*

1937

June 1, 2.

Interpleader suit—Dismissal of the plaintiff—"At the first hearing," Meaning of—Jurisdiction—Code of Civil Procedure (Act V of 1908), O. XXXV, r. 4.

The words "at the first hearing" or "at the first hearing of the suit" appearing in the different Orders of the Code of Civil Procedure, 1908, do not, in every case, refer to the stage when the issues are framed or the suit is called on for hearing.

In O. XXXV, r. 4 of the Code the words "at the first hearing" refer to the stage when, after the pleadings have all been delivered, the Court considers them in order to understand the contentions of the parties—so that, in a suit of interpleader, after the pleadings are all delivered and even before the suit is called on for hearing or the issues are framed, the Court has jurisdiction, upon plaintiff's application to declare that he is discharged from all liability to the defendants and dismiss him from the suit.

Taran Mandal v. *Raj Chandra Mandal* (1) commented upon.

Abdul Rahman v. *Shib Lal Sahu* (2) relied upon.

APPLICATION by the plaintiff-company in an interpleader suit for a declaration that the plaintiff-company is discharged from all liability to the defendants and for being dismissed from the suit.

The plaintiff-company brought this suit against the defendants Dhirendra Nath Banerji and Prabodh Lal Mukherji in the following circumstances: In October, 1931, the defendant Banerji obtained a loan of Rs. 10,000 from the plaintiff-company and created in its favour a mortgage for that amount by deposit of title-deeds in respect of certain premises, *viz.*, No. 367, Rash Bihari Avenue, Bâliganj, which

* Original Suit No. 272 of 1937.

(1) [1919] A. I. R. (Cal.) 70. (2) (1921) 6 Pat. L. J. 650.

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belonged to him. In July, 1935, the defendant Mukherji, who used to carry on business in the name of S. C. Mukherji & Co., and who had the defendant Banerji as an employee in his said business, paid off, in his said business name, the said loan. Thereupon, each of the defendants claimed the title-deeds from the plaintiff-company for himself.

The defendant Banerji alleged that he obtained the loan—as the plaintiff-company knew at the time—on behalf and solely for the benefit of his employer, the defendant Mukherji, in the latter's said business, although for the purpose of securing repayment of the said loan he deposited his own title-deeds. He further alleged that it was agreed between himself and Mukherji—and this also the plaintiff-company knew—that upon Mukherji repaying the loan to the plaintiff-company the title-deeds would be returned to Banerji by the plaintiff-company.

The defendant Mukherji, on the other hand, alleged that S. C. Mukherji & Co., of which he was the sole propietor, was merely the surety for repayment of the said loan which the defendant Banerji obtained for the latter's own benefit. And S. C. Mukherji & Co. having repaid the said loan, Mukherji submitted, he was entitled to be subrogated to the rights of the creditor in respect of the said title-deeds.

In the Notice of Motion the following were the clauses in terms of which an Order was applied for :—

(1) that the defendants be restrained by injunction from taking any proceedings against the plaintiff-company in relation to the title-deeds mentioned in the grounds hereto,

(2) that the defendants do implead concerning their respective claims to the said title-deeds,

(3) that the plaintiff-company be at liberty to deliver the said title-deeds to the Registrar of this Hon'ble Court to be held by him in safe custody until the final determination of the said suit,

(4) that upon delivery of the said title-deeds to the said Registrar the plaintiff-company be discharged from all liability to either of the defendants in relation thereto,

(5) that the defendants do pay to the plaintiff-company its costs of the suit including the costs of and incidental to the correspondence they had with the defendants or their respective solicitors prior to the institution of this suit and all costs incurred by the plaintiff-company in connection therewith and also costs of and incidental to this application, all such costs to be taxed by the Taxing Officer of this Court on the appropriate scale as between attorney and client,

(6) that pending such taxation and payment of the aforesaid costs the premises No. 367, Rash Bihari Avenue do stand charged with and remain a security for the same and the said title-deeds be not delivered to the defendants or either of them until such costs are paid.

The arguments of counsel appear from the judgment.

N. C. Chatterjee for plaintiff applicant.

H. K. Basu for defendant Prabodh Lal Mukherji.

S. D. Banerjee (for *U. C. Law*) for defendant Dhirendra Nath Banerji, opposing.

McNAIR J. This is an application by the plaintiff in an interpleader suit.

The plaintiff-company on October 14, 1931, lent to D. N. Banerji a sum of Rs. 10,000 and Banerji deposited with it in Calcutta certain documents of title relating to a property at Bâliganj. The plaintiff-company alleged that Banerji was a partner in S. C. Mukherji & Co. This Banerji denies, and he states that he was in the employ of Prabodh Lal Mukherji who was the sole proprietor of the firm of S. C. Mukherji & Co., and that he obtained the loan on behalf of his employer. The loan was admittedly repaid by the firm, and Mukherji alleges that he stood surety for its repayment and is now entitled to be subrogated to the rights of the creditor. The loan was repaid in July, 1935, and in August, 1935, Banerji and Mukherji both claimed the title-deeds. In the correspondence, they have set out their claims, and the grounds on which those claims are based. On August 23, 1935, the attorneys for the plaintiff-company wrote to the defendants that the loan had been paid off and the mortgage redeemed by Mukherji & Co., that both Banerji and Mukherji

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claimed the title-deeds, and that the company was willing to make them over to whichever party could establish his title. The letter concludes:—

> The matter is one which ought to be settled between you, and unless some agreement is arrived at, our clients will have no other alternative than to file an interpleader suit and deposit the title-deeds in Court for delivery to the claimant who will be declared rightfully entitled thereto.

The suit was eventually filed on February 18, 1937.

This application is opposed by both the defendants.

The procedure which should be followed in interpleader suits is laid down in s. 88 of the Civil Procedure Code and O. XXXV of the first schedule to it. S. 88 is as follows:—

> Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself.

O. XXXV, r. 1, provides that in every interpleader suit the plaint shall state—

> (*a*) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;
>
> (*b*) the claims made by the defendants severally; and
>
> (*c*) that there is no collusion between the plaintiff and any of the defendants.

Those statements have all been made in the plaint. The defendant Banerji in his affidavit on this application makes a bare allegation, without any supporting facts, that the plaintiff-company is "very friendly with the other defendant" and that they have "in collusion and in conspiracy with each "other been trying to harass" him. It is noteworthy that although there was a definite statement in the plaint that there was no collusion, that statement has not been denied or even pleaded to by Banerji

in his written statement, and no issue as to collusion could be raised on the pleadings. The plea of collusion has, however, been pressed by learned counsel on behalf of Banerji in this application, in order to support his claim that the plaintiff-company should not be dismissed from the suit, and should pay the costs of this application.

It is alleged that the application is misconceived, and that allegation is based on two grounds. It is contended, first, that it is unnecessary, and that it will have the effect of increasing the costs. Reference is made to the case of *Crawford* v. *Fisher* (1) in support of the contention that the plaintiff in an interpleader suit must bear the costs of any proceedings which he may take in the suit that are productive of needless expense.

For the plaintiff-company, it has been pointed out that not only is this application not productive of extra costs, but that it will, in all probability, save costs, for if matters were allowed to proceed to a hearing, briefs would have to be delivered and hearing fees would be incurred, and there would be costs of the various interlocutory proceedings preliminary to the hearing of a defended suit. The plaintiff-company contends that it is in the interests of all parties, and, in my opinion, that contention is correct, that it should be released from the proceedings at the earliest possible opportunity.

It is next urged that this is not the proper time within the limits laid down by the Code for a matter of this nature to be decided, and considerable argument has been adduced to the Court with regard to the meaning of the words "first hearing" which are to be found in O. XXXV, r. 4, *viz.* :—

> At the first hearing the Court may declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; .....

(1) (1842) 1 Hare 436; 66 E. R. 1103.

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The contention on behalf of the defendant, as I understand it, is that the Court is only empowered to act as provided, at the "first hearing", and that the words "at the first hearing" do not mean at the time when an application of this nature is made. Reference has been made to O. XV which is headed "Disposal of the Suit at the First Hearing" and reliance has been placed on a judgment of Greaves J. in the case of *Taran Mandal* v. *Raj Chandra Mandal* (1). In that case the learned Judge was dealing with the words "first hearing" in O. XIII, r. 1, which relates to the documentary evidence to be produced at the first hearing, and he held that the words "first hearing of the suit" in that Order meant the date when for the first time the case is "called on "for hearing and really gone into," and not the date when the case was fixed for hearing but was not gone into at all. Now, the report is not very clear, and it is obvious that the learned Judge did not take time to express his judgment in carefully chosen words, but, in any event, he was dealing with the meaning of the words "first hearing of the suit" in O. XIII, r. 1, and, in the circumstances of that case, with the greatest respect, I do not see how he could have come to any other decision. The words "first hearing" are used frequently in various orders, notably in O. VIII, r. 1, which provides that the defendant may at or before the "first hearing" present a written statement of his defence, and in Chitaley and Annaji Rao's Code of Civil Procedure (2nd. ed.) at p. 1388, I find the following comment :—

> The " first hearing " of a suit does not mean the day on which the *witnesses are examined* or the trial taken up. It means the day on which the Court goes into the pleadings in order to understand the contentions of the parties. In suits in which issues have to be framed, the day on which such issues are framed is the first hearng of the suit, inasmuch as on that day the Court looks into the pleadings with a view to understand the contentions of the parties.

This is made clear by the provisions of O. X, r. 1, under which "At the first hearing of the suit the "Court shall ascertain from each party or his

(1) [1919] A. I. R. (Cal.) 70.

"pleader whether he admits or denies such "allegations of facts as are made in the plaint or "written statement (if any) of the opposite party."

Reference has already been made to the words "first hearing" in O. XIII, r. 1. An Appellate Bench of this Court in *Talewar Singh* v. *Bhagwan Das* (1) held that certain documents had been wrongly excluded by the trial Court on the ground that they had not been filed in time within the provisions of ss. 138 and 139 of the Civil Procedure Code of 1882 which correspond with the provisions of O. XIII, r. 1 and O. XIII, r. 2 of the present Code. In the course of their judgment the learned Judges say—

"At the first hearing therefore when the issues were framed, it was not obligatory on the plaintiffs to produce them" (their documents) "unless they were called upon to do so."

It is argued that this is a decision that the words "first hearing" must always refer to the time when issues are framed. Such a construction would place far too narrow an interpretation on the words used which must be read with their context and in reference to the particular provisions of the Code under consideration. This decision in *Talewar Singh* v. *Bhagwan Das* (1) does not appear to have been brought to the notice of Greaves J. when he gave his decision in 1919.

The meaning of these words in O. XIII, r. 1 was also considered in Madras in the case of *Chidambaram Chettiar* v. *Parvathi Achi* (2) which purported to follow the decision of this Court in *Talewar Singh* v. *Bhagwan Das* (1) and it was held that the "first hearing" in O. XIII, r. 1 means the date on which issues are framed. The Court referred to the decision of Greaves J. and the learned Judge pointed out that it is very difficult to say from the nature of the expression used, whether it refers to the framing of the issues or to the examination of witnesses.

(1) (1907) 12 C. W. N. 312, 315. (2) [1926] A. I. R. (Mad.) 347.

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The words "first hearing" are also used in O. XIV, r. 1(*5*) which provides that at the "first hearing" the Court shall, after reading the plaint and the written statements, if any, proceed to frame the issues, and sub-r. (*6*) provides that nothing in this rule requires the Court to frame and record issues where the defendant at the "first hearing" makes no defence.

The matter is dealt with very clearly and at some length by Jwala Prasad A. C. J., and Das J., in the case of *Abdul Rahman* v. *Shib Lal Sahu* (1) where the learned A. C. J. says :—

> Much has been argued at the bar as to the real meaning and scope of the word " hearing " used in the different provisions of the Civil Procedure Code but a careful examination of the rules on the subject will leave no manner of doubt that this is purely a question of academic interest. The word " hearing " has not been defined in the Code but it is obvious that it is used in the different rules with a view to state the different purposes for which a date for hearing of the suit is fixed.

The learned Judge then deals with the particular rules which were relevant at the enquiry before him and continues :—

> Various steps have to be taken by the parties in a suit in order that it may be ready for final hearing : which means the examination of witnesses, the tendering of documents, and the hearing of arguments. At the intermediate stage, in order to enable or compel the parties to take necessary steps in the prosecution of the case, the Court may fix dates for some particular action to be taken. These dates are dates for the hearing of that particular matter which is specified in the order of the Court.

I have no doubt after looking carefully into the various orders and rules to which I have been referred that the expression "first hearing" may have a different meaning in one Order to what it has in another. The learned authors of Chitaley and Annanji Rao's Code of Civil Procedure, in the paragraph to which I have already referred, sum up in a few words, the substance of the decisions: The 'first hearing' means the day on which the Court goes into the pleadings in order to understand the contentions of the parties. If that be the true meaning of the words "first hearing" in O. XXXV, r. 4, I have no doubt that the Court has power, at such a stage as this, and on an application of

(1) (1921) 6 Pat. L. J. 650, 655-656.

this nature, to give the petitioner the relief which he claims. It is obviously undesirable that a person, who claims no right in the property at stake, but which is the subject matter of conflicting claims by two defendants, should be retained on the record and forced to join in the various interlocutory proceedings, which may be necessary, pending the final disposal of the rights of the parties. Orders of this kind have been made in the past by myself and by other Judges of this Court on similar applications but the power of the Court to make such orders has never, so far as I am aware, been seriously challenged before. I hold that this application is in order and that a plaintiff in an interpleader suit is entitled to apply to the Court, so soon as the pleadings have been completed, for an order that those persons who have adverse claims to the property in dispute should continue their contest without having the plaintiff retained on the record. It appears to me that it will save costs not only for the plaintiff but also for the defendants themselves. I am satisfied further that in the interests of justice and of the parties concerned that such an order can be made under the inherent powers of the Court. The plaintiff-company has brought itself within the provisions of s. 88 and O. XXXV of the Code of Civil Procedure and it claims no interest in the subject matter of this suit. It has stated that there is no collusion and that statement is not denied in the written statements. In the circumstances, there will be an order in terms of paragraphs 1 to 6 of the notice of motion.

Application allowed.

Attorneys for plaintiff applicant: *Kar, Mehta & Co.*

Attorney for defendant Prabodh Lal Mukherji: *J. C. Basu.*

Attorney for defendant Dhirendra Nath Banerji: *Sudhir Chandra Ray Chaudhuri.*

P. K. D.