

time should not disentitle a claimant to relief to which he has otherwise shown his title.

Of this, the recent case of *Rockefoucauld v. Bostead*(1) is a good illustration. The same principle has been acted upon by the Bombay High Court with reference to mandatory injunctions (*Jannadas Shankarial v. Atmaram Harjivan*(2)). Examining the present case in the light of these observations, we find no adequate ground for holding that there was waiver or such conduct or neglect as would justify us in refusing the plaintiffs the declaration they are otherwise found to be entitled to, nor should it be overlooked that in this case the party through whom the defendants' claim entered into the transaction with his eyes open and at his own risk, as he was aware of the arrangement by which his mortgagor's power was limited. He could, therefore, claim no indulgence.

For these reasons must reverse the decree of the District Judge and restore that of the Subordinate Judge. The appellants' costs in this and the Lower Appellate Court must be paid by respondents Nos. 1 to 21.

ATHIRARATH
NANU
MENON
v.
ERATHANIKAT
KOMU
NAYAR.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

GADICHERLA CHINA SEETAYYA (PLAINTIFF), PETITIONER,

1897.
October 15.

v.

GADICHERLA SEETAYYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 244 (c)—Party to the suit.

A defendant who had been exonerated from a suit is not a party within the meaning of Civil Procedure Code, section 244 (c), and a suit by the plaintiff for contribution for his share of the costs of execution is not barred under that section.

PETITION under Presidency Small Cause Courts Act, section 25, praying the High Court to revise the decree of N. Saminadha Ayyar, Subordinate Judge of Kistna, in Small Cause Suit No. 753 of 1895.

(1) L.R., 1897, 1 Ch. D., 196.

(2) 1.L.R., 2 Bom., 133.

* Civil Revision Petition No. 339 of 1896.

GADICHERLA
CHINA
SEETAYYA
v.
GADICHERLA
SEETAYYA.

The Subordinate Judge said: "Claim for Rs. 311-15-5 alleged to be due by the defendant in contribution for his one-sixth share of the costs of execution incurred by plaintiff in Original Suit No. 3 of 1867 on the file of the late Principal, Sadar Amin's Court of Rajabmundry.

"The defendant contends among others that no separate suit lies, as the matter in question falls within clause (e) of section 244 of the Civil Procedure Code.

"My finding is in the negative. This defendant was admittedly a party to the suit in which the decree was passed, and the question whether this defendant should pay to the decree-holder a portion of the execution costs is one relating to the execution of the decree. Consequently, clause (e) of section 244 does apply, and no separate suit can be brought. The decree-holder wanted to get the whole costs from the first defendant, who undertook to put the decree-holder in possession of his one-sixth share, but failed to do so. The District Judge of Godavari ordered the first defendant to pay the same, but on appeal the Madras High Court held that the first defendant should be liable only to his one-sixth share of the costs. But it does not follow therefrom that a separate suit lies for the remainder of costs."

In result he dismissed the suit with costs.

Plaintiff preferred this petition.

Sriyanga Chariar for petitioner.

Eliraju Mudaliar for respondent.

JUDGMENT.—We think the Subordinate Judge was wrong in holding that the defendant who had been exonerated from the suit was a party within the meaning of section 244 (e) of the Civil Procedure Code, and, therefore, that the plaintiff could not bring a separate suit against him, but was bound to proceed in execution (see *Mukarrab Husain v. Hurmatunnissa*(1)).

The fact that the plaintiff's claim arises out of expenses incurred in the course of executing the decree makes no difference. We express no opinion as to the merits of the plaintiff's claim. We, therefore, reverse the decision of the Subordinate Judge and direct him to restore the suit to his file and dispose of it according to law.

The respondent must pay the appellant's costs.