

APPELLATE CIVIL.

*Before Mr. Justice Ayling and Mr. Justice Kumaraswami
Sastriyar.*

1916,
November, 27
and
December, 21.

KRISHNAPPA MUDALY (RESPONDENT-PLAINTIFF), APPELLANT,

v.

PERIASWAMY MUDALY (PETITIONER-FOURTH DEFENDANT),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 47, O. XXI, rr. 100 and 101—Exonerated defendant, whether a party to the suit—Suit for redemption—Person claiming adversely to both the mortgagor and the mortgagee—Misjoinder of causes of action and parties—Party exonerated—Delivery of possession in execution—Objection to delivery of property by exonerated defendant—Proceedings whether under section 47 or Order XXI, rule 100 of the Code.

Where a party to a mortgage suit, who sets up a title adverse to both the mortgagor and the mortgagee, has been exonerated from the suit on the ground of misjoinder and his claim has not been adjudicated upon in the suit :

Held, that he does not remain a party to the suit for the purposes of section 47 of the Civil Procedure Code and his claim petition in respect of properties delivered in execution of the decree to the decree-holder falls under Order XXI, rule 100 of the Code.

Ramaswami Sastrulu v. Kameswaramma (1900) I.L.R., 23 Mad., 361 (F.B.) and *Sivasamba Iyer v. Kuppan Samban* (1915) 29 M.L.J., 629, distinguished.

Gadicherla Chinna Seetayya v. Gadicherla Seetayya (1898) I.L.R., 21 Mad., 45 and *Venkatapati Naidu v. Subraya Mudali* (1907) 17 M.L.J., 416, referred to.

Jaggewara Dutt v. Bhuban Mohan Mitra (1906) I.L.R., 33 Calc., 425 and *Musammal Radha Kunwar v. Thakur Reoti Singh* (1916) 20 C.W.N., 1279 (P.C.), followed.

APPEAL against the order of H. D. C. REILLY, the Acting District Judge of South Arcot, in Appeal No. 74 of 1915, preferred against the order of P. VENKATARAMA AYYAR, the District Munsif of Tindivanam, in Execution Petition I, Execution Application No. 1 and Miscellaneous Petition Register No. 15 of 1915 in Original Suit No. 481 of 1914.

The plaintiff sued as the purchaser of the suit properties to redeem a mortgage executed by the sixth defendant in favour of the first defendant. The fourth defendant was joined as a party to the suit, as he claimed an interest in the property ; but as the

* Appeal Against Appellate Order No. 28 of 1916.

interest claimed by him was adverse to both the mortgagor and the mortgagee, he was exonerated with costs from the suit and his claim was not adjudicated upon in the suit. The plaintiff obtained a decree for redemption, and he paid the amount decreed and applied for possession of the property. The amin in execution delivered a portion of the property in the possession of the fourth defendant, who thereupon filed a claim petition under Order XXI, rule 100, of the Code of Civil Procedure. The lower Courts found that the fourth defendant was in possession on her own account and directed that the decree-holder should deliver back possession to the fourth defendant, without adjudicating on the question of title of the fourth defendant. The decree-holder preferred a Civil Miscellaneous Second Appeal to the High Court.

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T. Ethiraja Mudaliyar for the appellant.

S. Venkatarama Ayyar for *V. Viswanatha Sastriyar* for the respondent.

JUDGMENT.—The appellant who claimed title as purchaser of certain items of property sued to redeem a mortgage executed by the sixth defendant in favour of the first defendant. The fourth defendant who is the present respondent was made a party to the suit on the ground that he was claiming an interest in the property. As he claimed an interest adverse to the mortgagor and mortgagee, he was exonerated from the suit. The order recites that the fourth defendant was an unnecessary party to the suit and that he was exonerated with costs “leaving open the issues affecting him.” A decree for redemption was passed in favour of the plaintiff-appellant, and he paid the amount decreed and prayed that possession of the mortgaged property be delivered to him. The amin in execution delivered a portion of the property in the possession of the respondent. The respondent who had been exonerated from the suit and whose claims to the properties was not adjudicated upon filed a petition under Order XXI, rule 100 of the Code of Civil Procedure, objecting to possession being given on the ground that the property belonged to him and was in his possession and enjoyment and that the decree in the suit was collusively obtained by the plaintiff against the sixth defendant who had no title. The decree-holder opposed the application and contended *inter alia* that as the fourth defendant was a party to the suit his

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remedy was under section 47 of the Code and not under Order XXI, rule 100. The District Munsif was of opinion that section 47 did not apply and that he came under Order XXI, rule 100. He ordered the fourth defendant to be restored to possession. On appeal the District Judge was of opinion that section 47 applied but dismissed the appeal on the ground that the provisions of section 47 and Order XXI, rule 100 were not mutually exclusive.

The chief grounds urged in appeal are that the fourth defendant continued to be a party to the suit notwithstanding the fact that he was exonerated, that the lower Appellate Court should have gone into the question of the title of the fourth defendant and should have dismissed his petition if he was unable to show a title superior to that of the plaintiff instead of having confined itself to the main question of possession and dispossession.

We are of opinion that the case falls under Order XXI, rule 100 of the Code of Civil Procedure, and that the lower Courts were right in refusing to decide in execution proceedings questions which had advisedly not been adjudicated upon in the suit.

When a party to a mortgage suit is exonerated on the ground that he sets up a title adverse to both the mortgagor and mortgagee, the ground of exoneration is that he ought never to have been made a party, the suit being bad for multifariousness as the plaintiff is joining causes of action which ought not to be joined and the joinder of which will be embarrassing. In *Jaggewara Dutt v. Bhurban Mohan Mitra*(1) it was held that such a suit was against the provisions of sections 44 and 45 of the old Code of Civil Procedure (Order II, rules 4 and 5 of the present Code) and was bad for multifariousness and in *Musammatt Radha Kunwar v. Thakur Beoti Singh*(2) their Lordships of the Privy Council were of opinion that the joinder in a mortgage suit of parties who set up adverse claims was irregular and would only lead to confusion.

The exoneration in the present case having been on the ground of misjoinder we are of opinion that the party whose claim was not adjudicated upon does not remain a party to the suit for the purpose of section 47 of the Code of Civil Procedure.

(1) (1906) I.L.R., 33 Cal., 425. (2) (1916) 20 C.W.N., 1279 (P.C.).

Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purpose of section 47 in spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such dismissal or exoneration. To hold that in cases of misjoinder (and consequent refusal of the Court to adjudicate upon the particular matters in contest) the party whose claim was not adjudicated upon and who was exonerated remains a party to the suit would lead to the anomaly that the Court would be bound in execution proceedings to decide the very questions which it refused to determine in the suit.

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No authority has been cited for the broad proposition that a party, once on the record remains a party notwithstanding exoneration so as to entitle the Court to determine in execution matters which it refused to adjudicate upon in the suit. Most of the authorities cited were under section 244 of the old Code of Civil Procedure, and do not throw much light on the explanation to section 47 which was added by the Code of 1908 and there is a conflict of authority so far as the Madras High Court is concerned as to the effect of exoneration. None of the cases cited deal with the case of the striking out of a claim on the ground of misjoinder. *Ramaswami Sastrulu v. Kameswaramma*(1) and *Sivasamba Iyer v. Kuppan Samban*(2) decide that a party who is exonerated and against whom a suit is dismissed comes within section 244 of the old Code of Civil Procedure, and section 47 of the new Code, but they do not appear to be cases of exoneration by reason of misjoinder of causes of action. In *Ramaswami Sastrulu v. Kameswaramma*(1) the observation of the Judges when referring to *Gadicherla Chinna Seetayya v. Gadicherla Seetayya*(3) indicate that where the name of a party who has been exonerated is actually removed from the record, the result would have been different. In *Abdul Kasim v. Thambusami Pillai*(4) OLDFIELD AND KRISHNAN, JJ., were of opinion that the removal of the name of a party from the suit such as appears to have taken place in *Gadicherla Chinna Seetayya v. Gadicherla*

(1) (1900) I.L.R., 23 Mad., 361 (F.B.) at p. 367. (2) (1915) 29 M.L.J., 629.
(3) (1898) I.L.R., 21 Mad., 45.

(4) Civil Revision Petition No. 768 of 1915 and Appeal Against Appellate Order No. 88 of 1915.

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Seetayya(1) would take the case out of section 47 of the Code. As pointed out in *Venkatapati Naidu v. Subraya Mudali*(2) the mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party. The appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
and Mr. Justice Kumaraswami Sastriyar.*

1916,
September, 21
and
October, 12
and
1917,
April, 17,
18 and 20.

V. PERUMAL PILLAI (SIXTH DEFENDANT), APPELLANT,

v.

R. M. M. R. M. RAMAN CHETTIAR (SECOND PLAINTIFF),
RESPONDENT.*

Mortgage—Suit for sale of one item exonerating other items mortgaged—Right of mortgagee to exonerate—Contribution, duty of, whether, lost by exoneration—Transfer of Property Act (IV of 1882), ss. 60 and 82.

A mortgagee seeking to realize the amount due to him brought a suit for sale of one only of the items mortgaged impleading therein the mortgagor and the person who purchased the equity of redemption in the one item in execution of a money decree. The mortgagee exonerated from liability the other items mortgaged :

Held by the FULL BENCH, that, a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property.

Ponnusami Mudaliar v. Srinivasa Naickan (1908) I.L.R., 31 Mad., 333, and *Surjiram Marwari v. Barhamdeo Parsad* (1905) 1 C.L.J., 337, dissented from.

Semble : — A release of certain items by the mortgagee has not the effect of releasing those items from liability for contribution under section 82 of the Transfer of Property Act.

Jugal Kishore Sahu v. Kedar Nath (1912) I.L.R., 34 All., 606, referred to.

SECOND APPEAL against the decree of T. SRINIVASA AYYANGAR, the Subordinate Judge of Tuticorin, in Appeal No. 71 of 1913,

(1) (1898) I.L.R., 21 Mad., 45.

(2) (1907) 17 M.L.J., 416.

* Second Appeal No. 1693 of 1914.