

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice
Madhavan Nayar.

1925,
September 7.

SETHU KONAR (2ND DEFENDANT), APPELLANT,

v.

RAMASWAMI KONAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 47—Mortgage—Decree for sale—Person claiming mortgage property on a title paramount to that of the mortgagor, impleaded as a defendant—Exoneration in the final decree—His name, not struck off from record—Sale in execution—Claim to property by exonerated defendant—Petition, whether under sec. 47, Civil Procedure Code—Appeal from order on petition, whether competent.

Where, in a suit for sale on a mortgage, a person, who claimed the property by a title paramount to that of the mortgagor, was joined as a defendant, but the final decree merely stated that he was exonerated without removing his name from the record, he should be considered as continuing to be a party to the suit, and a petition, filed by him claiming the hypothecated property sold in execution of the decree and purchased by the decree-holder, falls under section 47 of the Civil Procedure Code, and an appeal from an order passed on the petition is competent.

The ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record.

Venkatasawmy v. Chitambaram, (1918) 23 M.L.T., 206, followed.

APPEAL against the order of K. S. RAMASWAMI SASTRI, Subordinate Judge of Negapatam, in A.S. No. 117 of 1923 preferred against the order of S. VARADA ACHARIYAR,

* Appeal against Appellate Order No. 43 of 1924.

District Munsif of Tiruturaippundi in E.A. No. 230 of 1922 in O.S. No. 320 of 1918.

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The material facts appear from the judgment.

B. Ganapathi Ayyar and *N. Panchapagesa Ayyar* for appellant.

K. S. Jayarama Ayyar for respondent.

JUDGMENT.

SPENCER, J.—O.S. No. 320 of 1918 was a suit brought by the first respondent upon a mortgage. The suit was decreed and the plaintiff purchased some of the suit property in Court auction. Second defendant in the suit thereupon filed an application to set aside delivery of the items purchased on the ground that he had a paramount title which prevailed over the title of the mortgagor in consequence of more than 16 years' possession after the property had been surrendered to him by the owner. The District Munsif found in favour of the petitioner and directed release of the property. On appeal to the Subordinate Judge by the decreeholder purchaser, the District Munsif's order was set aside and the petition was dismissed. It is now contended that no appeal lay to the Subordinate Judge, on the ground that the appellant, though made a party to the suit, was exonerated as he set up a title paramount to that of the mortgagor, and consequently the decreeholders' remedy, if any, against the District Munsif's judgment was to bring a suit to set aside the order. The Subordinate Judge held that he could dispose of the appeal against the order under section 47 as a claim petition was preferred by a party to the suit and he thought that the latest decision in *Venkatasawmy v. Chitambaram*(1), was in favour of this view. Reliance is now placed upon *Krishnappa v. Periaswamy*(2). The

(1) (1918) 23 M.L.T., 206.

(2) (1917) I.L.R., 40 Mad., 964.

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learned Judges who decided that case were inclined to the view that if a party was exonerated from a suit on the ground of mis-joinder he would not remain a party to the suit for the purpose of section 47 and that it was immaterial whether his name was actually removed from the record in pursuance of the order exonerating him. In *Venkatasawmy v. Uhitambaram*(1), SADASIVA AYYAR and PHILLIPS, JJ., took the view that the plain words of the Code were intended to give legal effect to the decision of the Full Bench in *Ramaswami Sastrulu v. Kameswaramma*(2), and to overrule the previous decisions which had decided that a defendant whose name appears in the decree without being struck off was not a party to the suit, if he had been exonerated by the decree passed in the suit. In *Sannamma v. Radhabayi*(3), this case is quoted in the footnote and ABDUR RAHIM, J., who was one of the referring Judges, expressed a doubt as to the correctness of *Krishnappa v. Periaswamy*(4), and thought it required to be overruled as it did not give sufficient effect to the plain language of the section. The decision of the Full Bench did not actually overrule I.L.R., 40 Mad., 964, as it was not necessary to do so in order to answer the questions referred to the Full Bench. The opinion of the Full Bench was that if a person had been properly impleaded as a defendant in a suit and if the plaintiff abandoned his claim against him and the suit was dismissed as against him, such a person would still be "a defendant against whom a suit has been dismissed" within the explanation to section 47 of the Civil Procedure Code. In *Krishnappa v. Periaswamy*(4), the previous decision in *Venkatapathi Naidu v. Subraya Mudali*(5), was quoted with approval. This is a

(1) (1918) 23 M.L.J., 206.

(2) (1900) I.L.R., 23 Mad., 361 (F.B.).

(3) (1918) I.L.R., 41 Mad., 418 (F.B.) (4) (1917) I.L.R., 40 Mad., 964.

(5) (1908) 17 M.L.J., 416.

judgment of a single Judge given before the amendment of the Code. With due respect I am unable to follow the learned Judge when he says that a party against whom a claim has been abandoned is clearly not a party to the suit. The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him, as was the case in *Venkatataswamy v. Chitambaram*(1). In my opinion the ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. In *Krishnappa v. Periaswamy*(2), the learned Judges were evidently impressed with the anomaly that might arise out of the Court having to decide in execution proceedings questions which it had refused to determine in the suit. That might be the consequence of exonerating a person who had a title superior to that of the principal defendant; but the obvious remedy would be for the Court to adopt the procedure provided in section 47 of treating the petition in execution as a suit and trying it in the regular manner, if it had not already taken the simpler course of removing the party from the record under Order I, rule 10 (2) at an earlier stage. As the appellant in the present case was a party to the suit and the final decree merely states that he is exonerated without removing his name from the record, I think that his remedy lay only by a petition under section 47, which was the course he adopted, and as the Subordinate Judge has decided against his claim on a question of fact, no second appeal will lie. The appeal is dismissed with costs of the respondent. We direct each party to bear his own costs in the Courts below.

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(1) (1918) 23 M.L.T., 206.

(2) (1917) 1 L.B., 40 Mad., 964.

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MADHAVAN NAYAR, J.—I agree. In *Ramaswami Sastrulu v. Kameswaramma*(1), it was decided that the defendant, in whose favour a suit is dismissed he being exonerated from the suit, must be regarded as a party to the suit within the meaning of section 244 of the old Code. The explanation to section 47 of the present Code, viz.—

“For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit,” gives effect to this decision; an appeal, therefore, clearly lies in the present case. The question raised before us was, no doubt, left open in the Full Bench decision in *Sannamma v. Radhabayi*(2). But it appears to me that the opinion of the learned Chief Justice is to the effect that, in cases of this description, unless a party’s name has been struck out and removed from the records, he would remain “a party to the suit.” That has not been done in this case and, therefore, though the second defendant (appellant) has been exonerated in the judgment, in my opinion, he must still be regarded as a party to the suit within the meaning of section 47, Civil Procedure Code.

As the other question raised is one of fact, I agree that this Civil Miscellaneous Second Appeal should be dismissed with costs.

K.R.

(1) (1900) I.L.R., 23 Mad., 361 (F.B.). (2) (1918) I.L.R., 41 Mad., 418 (F.B.).