APPELLATE CIVIL—FULL BENCH.

Before Mr. Horace Owen Compton Beasley, Chief Justice, Mr. Justice Anantakrishna Ayyar and Mr. Justice Curgenven.

ABDUL SAC (PETITIONER, SECOND DEFENDANT), APPELLANT,

v.

SUNDARA MUDALIAR AND ANOTHER (RESPONDENTS—PLAINTIFF AND SIXTH DEFENDANT), RESPONDENTS.*

1930, April 24.

Civil Procedure Code (V of 1908), sec. 47, and O. I, r. 10 (2)—Dismissal of a suit on a mortgage against a defendant claiming paramount title—Whether he is a party to the suit within the meaning of sec. 47—Proper order in such case—Right of executing Court to ascertain reason for dismissal.

In a suit to enforce a mortgage, one of the defendants who was in possession pleaded that he did not derive his title from the mortgagor but independently of him, and the Court held that he was not a necessary party and dismissed the suit as against him. The plaintiff who got a decree on the mortgage evicted that defendant in execution, and on application by the evicted defendant, the executing Court put him in possession. Plaintiff preferred an appeal to the District Court.

Held, by the Full Bench—

(1) that the proper order to pass in a case where a Court holds that a defendant had been wrongly impleaded as a party was not to dismiss the suit as against him but to strike out his name from the record as provided by Order I, rule 10 (2), Civil Procedure Code,

(2) that such a defendant was not a 'party to the suit' within the meaning of section 47, Civil Procedure Code, and the appeal to the District Court was therefore incompetent,

and (3) that an executing Court was not confined to the terms of the decree in the suit but was entitled to look into the pleadings and the judgment in the case and find out the real cause of the dismissal of the suit as against that defendant. *Krishnappa* v. *Periaswami*, (1916) I.L.R. 40 Mad. 964 approved.

* Appeal against Appellate Order No. 102 of 1928.

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APPEAL against the order of the District Court of Madura in Appeal Suit No. 208 of 1927 preferred against the order of the Court of the District Munsif of Madura Taluk at Madura, in Miscellaneous Petition No. 280 of 1927, in Original Suit No. 348 of 1917, on the file of the Second Additional Munsif's Court, Madura.

This case coming on for hearing before JACKSON J. his Lordship directed the case to be placed before his Lordship the Chief Justice, observing that as the relevant rulings, viz., *Krishnappa* v. *Periaswami*(1), and *Sethu Konar* v. *Ramaswami Konar*(2), were conflicting, the case might be placed before a Full Bench. His Lordship the Chief Justice accordingly ordered the case to be posted before a Full Bench.

T. L. Venkatarama Ayyar for appellant.—"Dismissal" within the meaning of section 47, Civil Procedure Code, may be (1) on the merits and (2) on the ground of misjoinder. The proper order to pass in the second case is to strike out from the record the name of the defendant who had been improperly made a party. It is only when a suit is dismissed against a defendant on the merits he can be deemed to be a "party" to the suit, and not when the dismissal is on the ground of misjoinder. For, if the paramount title set up by a defendant cannot be enquired into in the suit, it is wrong to enquire in execution proceedings into that title by keeping that defendant on record. The executing Court can see on what grounds a defendant was exonerated or got the suit "dismissed" against him; *Krishnappa* v. *Periaswami*(1), *Sannamma* v. *Radhabhayi*(3), *Linga Aiyar* v. *Lakshumanan Chettiar*(4), *Nallaperumal Pillai* v. *Sakul Hamed Maracayar*(5) and *U. Kala* v. *Ma Hnin U.*(6). In *Ramaswami Sastrulu* v. *Kameswaramma*(7) the dismissal was on the merits. In *Lakshmana Dola Behara* v. *Jujisti Panda*(8) there is no discussion of the question. *Sethu Konar* v. *Ramaswami Konar*(2) is wrong.

(1) (1916) I.L.R. 40 Mad. 964. (2) (1925) I.L.R. 49 Mad. 494.
(3) (1917) I.L.R. 41 Mad. 418 (F.B.).
(4) (1925) 50 M.L.J. 387. (5) (1927) 54 M.L.J. 721.
(6) (1927) I.L.R. 5 Rang. 110. (7) (1900) I.L.R. 23 Mad. 361 (F.B.).
(8) (1928) M.W.N. 601.

S. T. Srinivasa Gopala Chari for respondents.—The actual wording of section 47 must be given effect to. The executing Court is neither bound nor entitled to enquire into the reasons for dismissal or exoneration, so long as the particular party's name is not taken off the file. An executing Court cannot go behind the decree and look into the judgment unless the decree is ambiguous; see *Abdul Kasim* v. *Thambusami Pillai*(1), *Venkatasamy* v. *Chitambaram*(2), printed as a footnote at page 420 of *Sannamma* v. *Radhabhayi*(3), *Kuthala Mudali* v. *Venkata Reddi*(4), *Ramaswami Sastrulu* v. *Kameswaramma*(5), and *Lakshmana Dola Behara* v. *Jujisti Panda*(6). Such a person claiming a paramount title may be a party; *Doraiswami Ayyangar* v. *Varadarajulu Nayudu*(7).

JUDGMENT.

BEASLEY C.J.—This case has been referred to us by our brother JACKSON J., because the question for decision by us has been the subject of conflicting decisions in *Krishnappa* v. *Periaswami*(8) and *Sethu Konar* v. *Ramaswami Konar*(9). BEASLEY C.J.

The question before us arises out of proceedings in execution. The second defendant in Original Suit No. 348 of 1917 on the file of the Second Additional District Munsif's Court of Madura is the appellant here. The facts of the case may be briefly stated as follows:—One Kaliappa Pillai was the original owner of the properties, the subject-matter of the suit. He left a widow and an adopted son Ramaswami Pillai. In 1889 the latter released the suit properties in favour of his adoptive mother. She sold the property in 1894 and between that date and 1909 there were different purchasers. In 1909 the appellant became the purchaser of the property and created a usufructuary mortgage in 1910 in favour of the sixth defendant. In 1906 Ramaswami

(1) (1916) 5 L.W. 701. (2) (1917) 23 M.L.T. 206.
(3) (1917) I.L.R. 41 Mad. 418 (F.B.). (4) A.I.R. (1927) Mad. 253.
(5) (1900) I.L.R. 23 Mad. 361 (F.B.). (6) (1928) M.W.N. 601.
(7) (1927) 53 M.L.J. 647. (8) (1916) I.L.R. 40 Mad. 964.
(9) (1925) I.L.R. 49 Mad. 494.

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Pillai executed a mortgage of some of the properties which mortgage was assigned to the present first respondent. In 1917 the first respondent filed a suit to enforce the mortgage and bring the properties to sale. Ramaswami's son was the first defendant, and defendants 2 to 5 were impleaded in that suit and also the sixth defendant, the usufructuary mortgagee. In that suit the first defendant was *ex parte*. The second defendant claimed a title paramount by purchase and pleaded that he was not a necessary party to the suit. The District Munsif dismissed the suit as against defendants 2 to 6 but gave a decree against the first defendant. In his judgment he states as follows :—

"Second defendant claims an independent title. He has endorsed on the plaint that he does not derive his title from the mortgagor but quite independently of him. Therefore he is not a necessary party to the suit. The suit must be therefore dismissed with costs against defendants 2 to 6. Plaintiffs will get a decree against the other defendants in the suit."

In the decree also the suit was dismissed as against defendants 2 to 6. An execution petition was then presented by the plaintiff to bring the property to sale. No notice was given to the other defendants. He dispossessed the sixth defendant who was then in possession of the property. The appellant then presented an application to put the sixth defendant in possession of the property. The first respondent disputed the appellant's title on the merits and put him to proof of all the sales and purchases. The District Munsif held that the plaintiff (first respondent) was not entitled to evict the defendants. In his order the District Munsif stated—

"The plaintiff is not entitled in execution of this decree to evict the sixth defendant or defendants 2 to 5."

The first respondent appealed to the District Judge at Madura who held that the questions of title as between the first respondent and defendants 2 to 6

should have been investigated and that, since the Defendants 2 to 6 were parties to the suit, the first respondent was barred by section 47, Civil Procedure Code, from instituting a separate suit, but that the application under section 47 of the Civil Procedure Code could have been treated as a suit if the learned District Munsif considered it sufficiently complicated. The appellant's contention here is that the question of his title and the sixth defendant's title was not a matter which could be gone into in the execution proceedings.

The question is whether defendants 2 to 6 in the suit are, under the provisions of section 47 of the Civil Procedure Code, defendants against whom a suit has been dismissed and therefore parties to the suit. The contention of the appellant is that, as the defendants were held not to have been properly impleaded in the suit and the suit on that ground was dismissed as against them, they are not defendants against whom a suit has been dismissed as is provided in section 47 of the Civil Procedure Code and that there is a distinction between the dismissal of a suit on its merits and a dismissal through misjoinder of parties. Two views upon this matter have been taken. There is the broad view of the section taken in *Krishnappa* v. *Periaswami*(1), and the narrow view of it in *Sethu Konar* v. *Ramaswami Konar*(2). Before proceeding to deal with the cases upon this point, reference must be made to Order I, rule 10 (2), Schedule 1 of the Civil Procedure Code, which provides that the Court may at any stage of the proceedings order the name of any party improperly joined to be struck out. The District Munsif having found that defendants 2 to 6 had been improperly impleaded in the suit should have ordered their names to be struck out instead of dismissing the suit as

(1) (1916) I.L.R. 40 Mad. 964. (2) (1925) I.L.R. 49 Mad. 494.

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against them. The broad view of section 47 of the Civil Procedure Code is that it is proper for the Court in execution proceedings to consider not only the decree itself but the judgment and the pleadings and see whether upon the facts of the case the parties, although the suit was dismissed as against them, really remained parties to the suit. The narrow view of the section is that it is not appropriate to the executing Court to consider anything else but the fact that the suit was dismissed as against the defendants, no matter what the reasons were for such dismissal. That, of course, is placing the strictest and narrowest construction on section 47. In *Krishnappa* v. *Periaswami*(1), AYLING and KUMARASWAMI SASTRI JJ. held that 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, he does not remain a party to the suit for the purposes of section 47 of the Civil Procedure Code. The order of the Judge in the trial Court was an order exonerating the defendant with costs as he was an unnecessary party to the suit. It was argued in the appeal that, notwithstanding this exoneration, he still continued to be a party to the suit, and that the lower Appellate Court should have gone into the question of his title. On page 966 in the judgment of the High Court it is stated—

"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. 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

(1) (1916) I.L.R. 40 Mad. 964.

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."

And again at page 968—

"As pointed out in *Venkatapathi Naidu* v. *Subroya Mudali*(1), 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."

This case was referred to in *Sannamma* v. *Radhabhayi*(2), a decision of a Full Bench, which held that, where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is "a defendant against whom a suit has been dismissed" within section 47, Civil Procedure Code. On page 424 Sir JOHN WALLIS C.J. states—

"The case which came before the Court in *Krishnappa* v. *Periaswami*(3), of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other causes of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of section 47, goes far to defeat the prohibition of joinder, and such a construction of section 47 should therefore be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power, which it now has under Order I, rule 10 (2), of ordering at any stage of the

(1) (1907) 17 M.L.J. 416. (2) (1917) I.L.R. 41 Mad. 418 (F.B.).
(3) (1916) I.L.R. 40 Mad. 964.

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proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma*(1), have the effect of taking him out of the operation of section 47 which ought not to apply to him seeing that he has no real concern with the suit."

Although Sir JOHN WALLIS does not definitely decide the point, it is obvious that he approved of the spirit of *Krishnappa* v. *Periaswami*(2), and he certainly has given very strong reasons for holding that the Bench in that case took the correct view.

I will now turn to *Sethu Konar* v. *Ramaswami Konar*(3), where a Bench of this Court took the opposite view to that taken in 40 Mad. 964. That was a suit for sale on a mortgage and a person claimed the property by a title paramount to that of the mortgagor and he was joined as a defendant. But the final decree merely stated that he was exonerated without removing his name from the record and it was held that he should be considered as continuing to be a party to the suit. The reason for deciding this case in that way was that the Bench considered that the ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party but will depend entirely upon whether his name has been struck off from or retained on the record. This of course is applying section 47 in its strictest sense. Another case on this point is *Linga Aiyar* v. *Lakshumanan Chettiar*(4), a decision of ODGERS and VISWANATHA SASTRI JJ. The second defendant in that suit had his name by consent struck off by the District Munsif, but his name was retained in the cause-title in the decree which was finally drawn up, and it was held that, in spite of his name being struck off, he was a party to the suit within

(1) (1900) I.L.R. 23 Mad 361 (F.B.).
(2) (1916) I.L.R. 40 Mad. 964.
(3) (1925) I.L.R. 49 Mad. 494.
(4) (1925) 50 M.L.J. 387.

the meaning of section 47 and the explanation thereto, but it was stated that striking out is the proper procedure to be employed in the case of misjoinder, that in any other case the proper course is dismissal, and that striking off of the name is not appropriate to the case of a party against whom the plaintiff does not wish to proceed further. In that case there was no question of a misjoinder of parties as the defendant was properly impleaded in the suit. Another case directly in point is *U. Kala* v. *Ma Hnin U.*(1), and there 40 Mad. 964 and 41 Mad. 418 were followed; and it was held that, where a suit is dismissed against a person on the ground that he was wrongly joined as a party having no real concern with the suit, such a person does not remain a party to the suit for the purpose of section 47 of the Civil Procedure Code and that a more appropriate way, in case of misjoinder, is to strike out the name of the party under Order I, rule 10 (2) of the Code so as to take him out of the operation of section 47. The contrary view was taken in *Abdul Kasim* v. *Thambusami Pillai*(2). There a defendant was exonerated by the decree in the suit with the result that the suit was dismissed as against him, but his name was not actually removed from the record and it was held that he did not cease to be a party to the suit on that account. That was a decision of a Bench consisting of OLDFIELD and KRISHNAN JJ. This case was referred to in 40 Mad. 964. No reason for the exoneration of the defendant is given either in the statement of the facts of the case or in the judgment which is a very short one. In *Venkatasawmi* v. *Chitambaram*(3), it was held that a defendant whose name appears in the decree without having been struck off previously from the record is a party within the

(1) (1927) I.L.R. 5 Rang. 110. (2) (1916) 5 L.W. 701.
(3) (1917) 23 M.L.T. 206.

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provisions of section 47 of the Civil Procedure Code. There the fourth defendant set up a title adverse to both the mortgagor and the mortgagee and was held not to be a necessary party and ordered to be struck out of the suit. The order was—

"Fourth defendant is not a necessary party and is exonerated with costs."

The Bench consisting of SADASIVA AYYAR and PHILLIPS JJ. thought that section 47 was perfectly plain in its terms. In *Ramaswami Sastrulu* v. *Kameswaramma*(1), it was held that a party defendant exonerated from the suit, the suit being dismissed against him, is a party to the suit. This case also was referred to in 40 Mad. 964 but was held distinguishable because it did not appear to be a case of exoneration of a party by reason of misjoinder of causes of action.

Mr. Srinivasa Gopala Chari, in the course of his argument on behalf of the respondents, contended that the construction placed upon section 47 of the Civil Procedure Code in 40 Mad. 964 ought not to be placed upon it, because of the inconvenience it would cause to the litigant public and those who have to advise them, and because it would put an unreasonable burden upon the executing Court if that Court had to consider not only the decree but the judgment and the pleadings in the suit instead of merely taking the decree itself. I can see no force in this latter contention as it is the duty of a Court not only to refer to the decree but also to the judgment and the pleadings. In the case before us no inconvenience could have been occasioned by this procedure because the judgment of the District Munsif upon this point is contained in a very few lines. He further contended that there can be no distinction between the case of a defendant against whom the

(1) (1900) I.L.R. 23 Mad. 381 (F.B.).

plaintiff abandons his claim and the suit is accordingly dismissed as against him and a person who has the suit dismissed against him on account of misjoinder. In my view, the two cases are quite different. In the former case, he may be a proper party to the suit, but yet the plaintiff either does not wish to take a decree against him or feels that he is unable to prove his claim and he is not a person to whom Order I, rule 10 (2) applies. In the latter case, on the other hand, he is a person who ought never to have been made a party to the suit at all, and not having been properly impleaded, the plain duty of the Court is to strike his name out. If the respondent's contention is correct, then it means that, although the appellant ought not to have been made a party to the suit and the District Munsif held that he had been improperly impleaded and instead of striking his name out adopted the wrong procedure in dismissing the suit as against him, he is to be placed in a worse position than a party in respect of whom the Court does adopt the correct procedure. It seems to me to be a contradiction to say that a person who is held at the trial of the suit not to be a proper party to the suit remains still a party to the suit. I am clearly of the opinion that *Krishnappa* v. *Periaswami*(1), was correctly decided and the appeal to the lower Appellate Court was incompetent. The appeal must accordingly be allowed with costs.

I cannot leave this case without pointing out that it is the duty of the trial Judge to strike out the name of a party improperly impleaded. It is quite wrong procedure to dismiss the suit as against him.

ANANTAKRISHNA AYYAR J.—I agree.

CURGENVEN J.—I agree.

N.R.

(1) (1916) I.L.R. 40 Mad. 964.