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civil court is only affected by action of the Collector within the scope of the authority conferred upon him by section 70 of the Civil Procedure Code, and the rules made under that section.

*Appeal dismissed.*

*Before Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.*

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April, 8.

RAJA RAM (PLAINTIFF) v. CHHADAMMI LAL (DEFENDANT).\*

*Civil Procedure Code, section 47—Mortgage—Prior and subsequent incumbrances—Suit by first mortgagee—Second mortgagee made a party and then exempted—Suit for sale by second mortgagee not barred.*

A prior mortgagee brought a suit for sale on his mortgage and impleaded a subsequent mortgagee as defendant. In the course of the suit, however, the counsel for the plaintiff stated that this second mortgage had been paid off, and, in spite of the denial of the puisne mortgagee that this was so, the court acted on that statement and exempted the puisne mortgagee, without trying that issue or the issues raised by him in the suit. A decree for sale was passed in favour of the plaintiff, and it was mentioned in the decree that the puisne mortgagee had been exempted from the suit. The puisne mortgagee thereafter brought a suit for sale on his mortgage.

*Held* that section 47 of the Code of Civil Procedure was not bar to such suit. *Vaddadi Sannamma v. Kodugantē Radhabhayi* (1), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Dr. Kailas Nath Katju, Mr. T. N. Chadha and Mr. L. M. Roy, for the appellant.

Babu Piari Lal Banerji and Munshi Panna Lal, for the respondents.

\* Second Appeal No. 981 of 1923, from a decree of E. T. Thurston, District Judge of Budaun, dated the 16th of March, 1923, reversing a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 30th of November, 1922.

KANHAIYA LAL and ASHWORTH, JJ.:—The question for consideration in this appeal is whether the claim of the plaintiff was barred by section 47 of the Code of Civil Procedure. It appears that certain property was mortgaged by Gokul Chand in favour of Chhadammi Lal, his cousin, on the 20th of May, 1909. Subsequently another mortgage was made by Gokul Chand in favour of Raja Ram, on the 6th of September, 1911.

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On the 18th of August, 1920, Chhadammi Lal filed a suit on his mortgage, making Raja Ram a party. The defence of Raja Ram was that the mortgage deed had been paid up, but before that plea could be tried, the counsel for Chhadammi Lal stated that the mortgage bond held by Raja Ram had been paid up, and that Raja Ram should consequently be exempted from the claim. Raja Ram, however, denied that the money due on his mortgage bond had at any time been paid, but the court, acting on the statement of the counsel for Chhadammi Lal, exempted Raja Ram from the claim, without trying that issue or the issue which Raja Ram had raised in the suit. A decree was eventually passed in favour of Chhadammi Lal for the sale of the mortgaged property, and it was mentioned in the decree that Raja Ram had been exempted from the suit.

The present suit was filed by Raja Ram for the recovery of the money due on his mortgage, and Chhadammi Lal was impleaded as one of the defendants. The allegation of Raja Ram was that the mortgage bond held by Chhadammi Lal had really been paid up, and that the decree obtained by Chhadammi Lal on foot of that mortgage against Gokul Chand and his sons was collusive and fraudulent.

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It appears that during the progress of the execution proceedings arising out of the decree obtained by Chhadammi Lal, an objection was filed by Raja Ram that no execution should be allowed against the property affected by his mortgage, because the decree had exempted him from the claim. Chhadammi Lal opposed that objection, and asked for the notification of the mortgage set up by Raja Ram in the proclamation of sale. The court before which the execution proceeding was pending held that it was not competent to go behind the decree which directed a sale of certain property; and that though complications were likely to arise by reason of the subsequent mortgagee having been exempted from the claim, it had no option but to overrule the objection, and at the same time to notify in the proclamation of sale that Raja Ram was made a party to the suit and was subsequently exempted from it.

The contention is that by reason of the proceedings in the previous suit instituted by Chhadammi Lal, to which Raja Ram was a party, section 47 of the Code of Civil Procedure barred the present claim. There was a further plea raised by Chhadammi Lal that the mortgage bond in suit had been paid up, but the finding of the trial court on that point was that no such payment was established. Raja Ram had in fact asserted that the mortgage held by Chhadammi Lal had been paid up, and the trial court found on that point in his favour. The claim of Raja Ram was accordingly decreed by it, but on appeal the lower appellate court, without going into these matters, dismissed the suit, holding that it was barred by section 47 of the Code of Civil Procedure.

The explanation appended to section 47 of the Code provides that for the purpose of that section a

plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed shall be deemed to be parties to the suit. The intention obviously is that for the purpose of *deciding questions arising between the parties to the suit* in which the decree was passed, or their representatives, and *relating to the execution, discharge and satisfaction* of the decree, a person who has been exempted from the claim will be deemed to be as much a party to the suit as a person against whom the decree has been passed. In other words any question relating to the execution, satisfaction or discharge of the decree, arising between persons who were parties to the suit, whether exempted or otherwise, must be decided in the execution proceeding arising out of the decree passed in the suit to which he was such a party. The question must, however, relate to the execution of that decree and must not seek to challenge its validity, for no court executing a decree can go behind it; and if a person seeks to challenge the validity of the decree, the only remedy open to such a person is, if the matter has not already been finally determined in the suit, to get it adjudicated by a separate suit, or in such other manner as may be open to him according to law.

The present plaintiff seeks by means of this suit to challenge the propriety of the decree which was passed in the case in favour of Chhadammi Lal against Gokul Chand and his sons. He was a party to the suit. He had pleaded that the mortgage then in suit was no longer subsisting and had been already discharged. That plea was not inquired into, and, on the oral application of Chhadammi Lal, the present plaintiff was then exempted from the claim. That matter, therefore, can now be determined in the present suit. That decree cannot operate as *res*

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*judicata* against the present plaintiff, because the matter had not been decided, and no question relating to the validity or otherwise of that decree can be entertained at the instance of a party to the suit or decree, in a proceeding taken by the decree-holder to enforce that decree. As pointed out in *Vaddadi Sannamma v. Koduganti Radhabhayi* (1), where a person has been properly impleaded as one of the defendants in a suit, but the suit is dismissed against him on account of the election by the plaintiff to abandon his case so far as it affects that defendant, such a person is a defendant against whom the suit has been dismissed for the purpose of the determination of any question relating to the execution, satisfaction or discharge of that decree. The question now raised is, however, not a question relating to the execution, satisfaction or discharge of the decree. It is a question which goes to the root of the decree itself and challenges its validity, and that question cannot be determined except by a separate suit.

The lower appellate court has referred to the decision in *Data Din v. Nanku* (2), but that was a case in which a suit was brought against a Hindu father and his son for the recovery of money due on a mortgage, and for some reason or another a simple money decree was passed against the father alone, and the son was exempted. An attempt was subsequently made to attach and sell the share of the son in the joint family property, and it was held by this Court that the liability of the share of the son for the payment of that decree on the ground of his pious obligation could be inquired into under section 47 of the Code of Civil Procedure. The position of a son, who is under a pious obligation to pay the debts due by his father, however, stands on a widely different footing

(1) (1917) I.L.R., 41 Mad., 418. (2) (1918) 16 A. L. J., 752.

from that of a subsequent mortgagee, who has to be impleaded to give him an opportunity to redeem, and who is competent to raise any objection to a decree being passed against the property of which he is the subsequent mortgagee. There is no obligation on him to pay the prior mortgage, if he questions its validity or denies that it is subsisting; and that matter must be determined either in the suit brought by the prior mortgagee for the enforcement of the mortgage, if he is made a party to it, or in a separate suit if he has been exempted from the claim, leaving the matter undetermined. Reference has also been made to the decision in *Parbhu Dayal v. Anandi Din* (1), but there too the decree was a personal decree, in execution of which some property was attached which was held under a usufructuary mortgage, and the question was rightly held to be one relating to the execution, discharge or satisfaction of the decree. That is not the case here. Section 47, therefore, has no application. The other points raised in the appeal have not been determined by the lower appellate court.

The appeal is therefore allowed, and the case is remanded to the lower appellate court with a direction to re-admit the appeal under its original number and to dispose of it after determining the other points raised therein in the manner provided by law. The costs here and hitherto shall abide the result.

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(1) (1919) 17 A. L. J., 832.