

Krishnappa Mudali Vs. Periasami Mudali

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Court : Chennai

Decided On : Dec-21-1916

Reported in : (1917)32MLJ532

Appellant : Krishnappa Mudali

Respondent : Periasami Mudali

Judgement :

1. The appellant who claimed title as purchaser of certain items of property sued to redeem a mortgage executed by the 6th defendant in favour of the 1st defendant. The 4th 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 4th 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 were not adjudicated upon filed a petition under Order XXI, Rule 101 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 6th defendant who had no title. The decree holder

opposed the application and contended inter alia that as the 4th defendant was a party to the suit his remedy was under Section 47 of the Code and not under Order XXI Rule 101. The District Munsif was of opinion that Section 47 did not apply and that he came under Order XXI, rule 100. He ordered the 4th 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.

2. The chief grounds urged in appeal are that the 4th 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 4th 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.

3. 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.

4. 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. Bhuban Mohun Mitra* I.L.R. (1906) C. 425 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 *Mussammat Radha Kunwar v. Thakur Reoti Singh* (1916) 31 M.L.J. 571 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.

5. 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 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.

6. 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* I.L.R. (1900) M 361 and *Sivasamba Iyer v. Kuppan Samban* (1915) 29 M.L.J. 629, decided 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. Kameswarammu* I.L.R. (1900) M. 361, the observation of the judges at page 367 when referring to *Gadicherla Chinna Seetayya v. Gadicherla Seetayya* I.L.R. (1897) M. 45 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 C.R.P. No. 768 of 1915 and appeal against Order No. 88 of 1915, *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 Seetayya* I.L.R. (1897) M. 45 would take the case out of Section 47 of the Code. As pointed out in *Venkatapathi Naidu v. Subbayya Mudali* (1917) 17 M.L.J. 416 the mere fact that the name of the exonerated party is not formally removed from the records pursuant to the order exonerating him would not affect

the question as to whether he remains a party.

7. The appeal fails and is dismissed with costs.

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