

1924

April 7.

APPELLATE CIVIL.

Before Mr. Justice Young, and Mr. Justice Heald.

SAYA BYA AND ONE

v.

MAUNG KYAW SHUN.*

Practice—Counter-claim, whether admissible—Civil Procedure Code (V of 1908) silent—Specific performance, an equitable and discretionary relief.

Held, that though the Civil Procedure Code does not provide for counter-claims, there is nothing to prevent a Judge treating the counter-claim as plaint in a cross suit and hearing the two together, if the counter-claim is properly stamped.

Clark—for the Appellants.

Barnabas—for the Respondents.

YOUNG and HEALD, JJ.—In this suit the plaintiffs seek to recover possession of two plots of lands, relying on their title. The defendants plead that they were put in possession of the same in exchange for the cancellation of a debt of Rs. 1,850 and for the payment of a further sum of Rs. 50 that it was an outright sale, and that it would be inequitable to eject them. They say that the plaintiff promised to give them a registered deed whenever they wanted it, but put them off from time.

They accordingly counter-claimed for specific performance of the alleged agreement. The trial Court dismissed the plaintiffs' suit and allowed the defendant's counter-claim.

The appellate Court modified the decree and allowed the plaintiff to recover possession on payment of Rs. 1,900.

The defendants appeal.

* Special Civil Second Appeal No. 41 of 1923 against the decree of the Divisional Court of Myaungmya in Civil Appeal No. 10 of 1922.

The respondents urged that the counter-claim was a form of suit unknown to the Code of Civil Procedure and would not lie.

This is strictly speaking correct, but there is nothing to prevent a Judge treating the counter-claim as the plaint in a cross suit and hearing the two together if he is so disposed and if the counter-claim is properly stamped. The learned trial Judge did so exercise his option, and heard the two suits together and there is nothing to prevent him from adopting this course.

With regard to the appeal, it appeared that the appellants who seek to have their counter-claim allowed and a decree passed for the specific performance of the alleged contract to sell the land outright, had themselves put in evidence extracts from Register No. 1, in which the transaction was described as a temporary and not an outright sale and did not call the Revenue Surveyor to explain how such an entry came to be made.

This alone would prevent us from granting the appellants the equitable and discretionary relief of specific performance of an alleged contract of outright sale.

We confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

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v.

MAUNG
KYAW SHUN.YOUNG,
AND
HEALD,
JJ.