

## APPELLATE CIVIL.

*Before Mr. Justice Brown.*

MA SAW

v.

MAUNG KYAW GAUNG.\*

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June 24.

*Civil Procedure Code (Act V of 1908), s. 47, O. 21, rr. 90, 92—No suit lies against order made under O. 21, R. 92 of the Code—No suit (if any) lies against auction-purchaser without adding decree-holder to set aside sale on ground of fraud.*

Appellant who was one of the judgment-debtors unsuccessfully applied to have the sale of a piece of paddy land set aside on the ground of fraud. She then filed a suit against the auction-purchaser alone to have the sale set aside.

*Held*, that even if the provisions of section 47 of the Code did not apply as between an auction-purchaser and a judgment-debtor (which was doubtful) the suit could not be set aside against the auction-purchaser alone without being also set aside against the decree-holder.

*Held, also*, that the judgment-debtor having failed in her application under the provisions of Order 21, Rule 90 of the Code, no suit could be maintained by her under the provisions of Rule 92, clause 3.

*P. K. Sanyal v. K. D. Sanyal*, 19 Cal. (P.C.) 683—*referred to*.

Robertson—for Appellant.

Khoo—for Respondent.

BROWN, J.—The appellant, Ma Saw, was one of the judgment-debtors in a decree passed in Civil Regular No. 26 of 1923 of the Subdivisional Court of Tavoy. In execution of that decree a piece of paddy land was attached and sold. Ma Saw applied to the executing Court to have this sale set aside on the ground of fraud and material irregularity in conducting the sale; but her application was dismissed.

Some ten months later she filed the suit out of which this appeal has arisen. In that suit she has not made the original decree-holder a party but has

\* Civil Second Appeal No. 541 of 1926.

named one defendant only, Maung Kyaw Gaung, the auction-purchaser. She asked to have the sale set aside on the grounds of various irregularities and fraud in connection with the sale. The trial Court dismissed the suit on the ground that the matter in issue fell within the scope of section 47 of the Civil Procedure Code and that no separate suit therefore lay. On appeal the District Judge confirmed the decree of the trial Court holding that the suit was not maintainable under the provisions of section 47 read with those of Rule 92 of Order 21 of the Code of Civil Procedure. Ma Saw has now come in second appeal to this Court.

I have been referred to a number of conflicting decisions on the point whether a claim between an auction-purchaser and a judgment-debtor can be adjudicated on by the executing Court under the provisions of section 47 of the Code of Civil Procedure. But I do not think that it is necessary to decide this doubtful point as in any case I do not think that the present suit, as framed, lies. As I have said, the decree-holder has not been joined as a party to the suit; but it seems to me that without the decree-holder being joined as a party, the points at issue cannot be decided as the decree-holder is quite clearly very much interested in the sale of the property; and the sale cannot be set aside as regards the auction-purchaser without also being set aside as regards the decree-holder. For the suit to succeed, it seems to me therefore necessary that the decree-holder also should have been added as a party and in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1), their Lordships of the Privy Council held that a case for setting aside the sale by a judgment-debtor against the decree-

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holder and the auction-purchaser did fall within the scope of section 244 of the old Code of Civil Procedure corresponding with the present section 47. On this ground alone it could be held in the present case that the present suit did not lie. But on another ground also I think it clearly does not lie.

Ma Saw was a judgment-debtor in the earlier case and she made an application under the provisions of Rule 90 of Order 21 to have the sale set aside. Orders were passed against her under the provisions of Rule 92 of that Order and the sale was confirmed. Clause (3) of Rule 92 clearly provides that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

It has been suggested that Ma Saw has come to Court in this case in a different capacity from that in which she came in the execution proceedings. She claimed in her plaint that she was one of the co-owners of the land and as such intended purchasing the land. If what she means is that she merely wanted to exercise the rights of any member of the public to purchase at the auction sale, then it seems to me that her suit must fail as she would have no cause of action, no material interest of hers having been affected; if, on the other hand, her claim is that as a co-owner she had a special right to purchase the whole land then clearly she comes within the scope of Rule 90 of Order 21 under which any person whose interests are affected by the sale may apply. In these circumstances it seems to me to be idle to deny that she did not in her personal capacity make an application under Rule 90 and that the claim she now makes is not also one which she could have made under Rule 90. The facts, which she alleges in her plaint, are that she went to the

place of sale on the date and time appointed, that no one appeared, that finally she left the place and that the sale took place after her departure without any information whatever. This was in substance what she alleged in her application for setting aside the sale before the executing Court. She makes a vague allegation in paragraph 8 of her present plaint that "plaintiff further avers that there was fraud and collusion between the Bailiff and the purchaser as the whole matter was arranged between them so that the purchaser would get the properties cheap." This ground is so vague as really to constitute no cause of action whatsoever.

It has been contended that if the provisions of Rule 92 be rigorously enforced, grave injustice may be done in a case of fraud which is only discovered at a subsequent date. The mere fact that the application of a rule of law may work injustice is not by itself a sufficient reason for not following that rule of law if it is clear and unmistakable. But in the present case there is no allegation that any fraud has been committed which was not capable of discovery in time to make the necessary application under Rule 90. The fraud now alleged if any is fraud in conducting the sale and there is no real allegation of fraud in the present suit beyond the allegation made in the previous execution proceedings. The suit is merely an attempt to have a further adjudication on the point decided in those proceedings.

I am of opinion that the present suit was barred by the provisions of Rule 92 of Order 21.

I dismiss this appeal with costs.

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