

1927

U Po THIN
AND FOUR

v.

N. N.
BURJORJEE
AND TWO.RUTLEDGE,
C.J., AND
BROWN, J.

capacity has not clearly borne in mind the provisions of section 110 of the Government of India Act, but, while this Court could not issue an order in the nature of a *mandamus* to the Governor, there is, in our opinion, nothing to prevent it issuing such an order to persons, though eminent, holding a public office (see *Alcock Ashdown & Co. v. Chief Revenue Authority of Bombay*) (1).

For the reasons given we consider that the appeal fails and must be dismissed, with costs ten gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Brown.

S.N.V.R.S. SUBRAMANIAN CHETTYAR

v.

N.L.M. CHETTYAR FIRM AND TWO.*

1927

June 6.

Civil Procedure Code (Act V of 1908), O. 21, r. 90—Whether an auction-purchaser is a person whose interests are affected by the sale.

Held, that an auction-purchaser is a person who is entitled to make an application under Rule 90 of Order 21 of the Code of Civil Procedure, to set aside a sale on the ground that he was misled by the sale-proclamation and consequently a suit by him will not lie.

Birj Mohun Thakur and another v. Rai Umanath Chowdhry and others, 20 Cal. 8; *Ravinandan Prasad v. Jagannath Sahu*, 47 All. 479—referred to.

Banerji—for Appellant.

Patker—for 1st Respondent.

BROWN, J.—The 1st respondent to this appeal obtained a mortgage decree against the 3rd respondent and in execution of that decree a certain

(1) (1923) 47 Bom. 742.

* Civil Second Appeal No. 497 of 1926.

piece of land was put up for sale and purchased by the appellant.

The appellant has brought a suit to set aside the sale on the ground that he had been misled by the sale proclamation and by the explanation of the Bailiff at the time of the sale to believe that the land was being sold free from incumbrances ; whereas he subsequently found that the land was subject to a prior mortgage to another party. The suit was contested on various grounds and has been dismissed by the trial Court and the lower Appellate Court.

The plaintiff has come to this Court in second appeal. Various points arise in connection with the case but the only point that has at present been argued before me is as to the maintainability of the suit.

It is contended on behalf of the respondents that the appellant's remedy was to make an application under the provisions of Rule 90 of Order 21 of the Code of Civil Procedure and that, as that remedy was available to him, he is precluded by the provisions of Rule 92 from bringing this suit. It is admitted that if the appellant was entitled to apply under the provisions of Rule 90 then his suit must fail ; and the point for determination therefore is whether an auction-purchaser is one of the persons who can apply to the Court to set aside the sale under the provisions of Rule 90. Under the Code of 1882 the auction-purchaser was not so entitled. That was definitely decided by their Lordships of the Privy Council in the case of *Birj Mohun Thakur and another v. Rai Umanath Chowdhry and others* (1). The section of the old Code corresponding Rule 90 was section 311 and under that section the only possible category into which an auction-purchaser could have come was a "person whose property had

1927

S.N.V.R.S.
SUBRA-
MANIAN
CHETTYAR
v.
N.L.N.
CHETTYAR
FIRM
AND TWO.

BROWN, J.

(1) (1892) 20 Cal. 8.

1927

S.N.V.R.S.
SUBRA-
MANIAN
CHETTYAR
v.
N.L.N.
CHETTYAR
FIRM
AND TWO.
BROWN, J.

been sold"; but by the Code of 1908, section 311 was amended and now amongst the persons entitled to make an application under Rule 90 is any person "whose interests are affected by the sale." The question to be decided now is therefore whether an auction-purchaser is a person whose interests are affected by the sale.

I have been referred on behalf on the respondents to the case of *Khetro Mohon Datta v. Sheikh Dilwar* (1). It was there held that it was not open to a party who purchased at an auction sale to impugn the validity of his own purchase when he found that he had bought a property which was not worth as much as he expected at the time of his purchase. But this is not an authorised report and the judgment contains no discussion as to the meaning of the present Rule 90.

No authorized report has been cited before me in favour of the construction which the appellant wishes to put on this rule. The High Court of Allahabad has held definitely that the expression "any person whose interests are affected by the sale" includes an auction-purchaser in the case of *Ravinandan Prasad v. Jagarnath Sahu* (2). There are a number of cases dealing with the point prior to 1908 but as pointed out by Walsh, J., in *Ravinandan Prasad's* case these decisions have no bearing on the interpretation of the very different words of the present Rule 90 of the Code. The learned Judge remarks "I find myself compelled to hold as a matter of law that a person who is the highest bidder, whose bid is accepted, who is compelled by law to pay a deposit, and unless something intervenes, is compelled by law to complete his purchase, is a person "whose interests are affected by the sale." It is impossible to use a wider term than "a person's interests." In the ordinary use of the word in the English language it is a term

(1) Patna Law Journal, Vol. III, p. 516.

(2) (1925) 47 All. 479.

converging every sort of interest recognised by law, such as, in the case of an auction-purchaser, liability to pay the money, liability to complete and take a transfer of the property, and from his own point of view the necessity of finding the necessary funds, and also the necessity of carrying through to fruition the provisional contract into which he has entered. If the expression were "interests in the property," it would of course be confined to an interest in the property sold, antecedent to the sale. If the word were merely "interest" without the plural and without the words "in the property," it might be possible to hold that the word "interest" was confined to interest in the thing itself at the time of the sale. But that is not the expression, and to my mind the actual expression in the rule is free from ambiguity or difficulty of any kind and ought to be construed as meaning what it says." This appears to me to be an entirely convincing exposition of the law. The fact that in Rule 91 an action-purchaser is specifically mentioned might be a matter for consideration if there were any ambiguity in the wording of Rule 90 by itself. But to my mind there is no such ambiguity and it is impossible to say that an action-purchaser is not a person whose interests are affected by the sale.

I do not think that any reference to certain other authorities which have been cited and which bear more or less indirectly on the point for consideration is necessary. The reasoning in *Ravinandan Prasad's* case appear to me to be incontrovertible. I am therefore of opinion that an auction-purchaser is a person who is entitled to make an application under Rule 90 of Order 21 of the Code of Civil Procedure. It follows that the present suit did not lie and has been rightly dismissed.

I therefore dismiss this appeal with costs.

1927

S.N.V.R.S.
SUBRA-
MANIAN
CHETTYARv.
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BROWN, J.