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C. E. DOOPLY AND FOUR OTHERS v. M. E. MOOLLA AND THREE OTHERS.

RUTLEDGE, C.J., AND BROWN, J.

with schools apparently for the education of Randerias, they seem to be persons interested in the matters in issue. There is no suggestion in the order appealed from that the appellants were not interested in the subject-matter of the suit and in fact the learned Judge's willingness to join them as plaintiffs, if they obtained the consent of the Government Advocate, rather negatives the idea that they were not so interested.

In these circumstances, the appeal is allowed and the order appealed from set aside and it is directed that the appellants be joined as defendants. Costs three gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Heald, and Mr. Justice Cunliffe.

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Feb. 28.

MA KIN
v.
MA BWIN.*

Lis pendens—*Administration suit—Avoidance of sale by administrator—Limitation Act (IX of* 1908), *Article* 91.

Held, that a suit in which one of two co-heirs sues the other heir, who is administrator of the estate for his share of the estate and asks for the profits of the estate, in which a preliminary decree was given declaring that the plaintiff was entitled to a half share of the estate and directing that the usual accounts and enquiries be taken and made, in which a commissioner was appointed to take these accounts and enquiries and in which a final decree was given for the half share in the estate as found by the commissioner is in fact an administration suit, whether or not it is such a suit in form, and the doctrine of *lis pendens* does not apply to such suits.

Held, that a suit to have a sale made by an administrator set aside under section 90 of the old Probate and Administration Act (section 307 of the new Succession Act) is governed by Article 91 of the Limitation Act.

Burjendra Mohan Sarma v. *Manorama Dasi*, 49 Cal. 911; *Lee Lim Ma Hock* v. *Ma Saw Mah Hone*, 2 Rau. 4; *The Eastern Mortgage and Agency Co.* v. *Rabati Kumar Ray*, 3 C.W.N. 260—*referred to.*

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* Civil First Appeals Nos. 218 and 219 of 1925.

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MA KIN
v.
MA BWIN

J. R. Chowdhury—for Appellant.
Rahman—for Respondent.

HEALD, J.—In Suit No. 26 of 1918 of the District Court of Myaungmya, which was instituted by an application for leave to sue as a pauper on the 13th of September 1917 and was finally decided on the 7th of August 1922 Ma Bwin, the present respondent who was one of Shwe Aung's two widows, sued Ma Me O, who was the other widow and was administratrix of Shwe Aung's estate to recover her half share of that estate and she obtained a decree for her half share.

In Suit No. 51 of 1924 of the District Court of Pyapôn, which is one of the two suits now under appeal, Ma Bwin sued the present appellant Ma Kin to recover possession of half of holding of paddy land which formed part of the estate, on allegations that she had been put into possession of that half of the land in execution of the decree in the suit mentioned above and that the appellant had forcibly ousted her.

Appellant pleaded that she was not bound by the decree in Suit No. 26, and that she had bought the whole holding, of which the land claimed by Ma Bwin formed half, from Ma Me O, administratrix of the estate, with the permission of the Administration Court.

In Suit No. 57 of 1924 of the District Court of Pyapôn, which is the other suit now under appeal the appellant Ma Kin sued for a declaration of her title in respect of the other half of the same holding which the respondent Ma Bwin had attached in execution of the decree which she had obtained against Ma Me O in Suit No. 26. She said that she had bought the land from Ma Me O as administratrix with the permission of the Court.

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Ma Bwin admitted the conveyance by Ma Me O but said that it was invalid.

The two suits were heard together, the matter in dispute in them being Ma Kin's title to the holding which was conveyed to her by Ma Me O.

It appears that in March 1915 Ma Me O applied to the Court, which had granted Letters of Administration to her, for permission to sell the holding which is now in dispute but that, although the Court gave her such permission, she did not avail herself of it. Instead in May 1917 she again applied to the Court, this time for permission to mortgage the land, and she obtained permission to mortgage it. She mortgaged it at once to a Chetty for Rs. 1,000 with interest at Rs. 2 per cent. per mensem. This was before the institution of Ma Bwin's Suit No. 26. On the 7th of June 1919 she sold it, without further permission from the Court, to the appellant Ma Kin.

Two questions arise in the cases, (1) whether the sale by Ma Me O to Ma Kin is void as having been made *pentente lite*, and (2) whether Ma Bwin is entitled to avoid the sale as having been made without the permission of the Administration Court.

On the first of these questions the lower Court found that the doctrine of *lis pendens* applied. The learned Judge distinguished the case of the *A. L. A. R. Chetty Firm* v. *Maung Thwe*, cited, in the case of *Lee Lim Ma Hock* v. *Ma Saw Mah Hone* (1), on the ground that suit No. 26 was not an administration suit. I do not accept this view. A suit in which one of two co-heirs sues the other heir who is administrator of the estate for her share of the estate and asks for the profits of the estate, in which a preliminary decree was given declaring that the plaintiff was entitled to a half share of the estate and direction that the

(1) (1924) 2 Ran. 4.

usual accounts and enquiries be taken and made, in which a commissioner was appointed to take those accounts and enquiries, and in which a final decree was given for the half share in the estate as found by the commissioner is in fact an administration suit, whether or not it is such a suit in form, and on the rulings in the cases cited and the authorities mentioned therein I have not doubt that the doctrine of *lis pendens* did not apply, and that the sale by Ma Me O to Ma Kin was a vaild sale.

It was nevertheless voidable under section 90 of the (old) Probate and Administration Act at the instance of any person other than the administratrix who was interested in the property and Ma Bwin was undoubtedly interested in the property. The only question which arises is therefore whether or not Ma Bwin is still entitled to avoid the sale. That question involves the question which article of the First Schedule to the Limitation Act applies to the avoidance of such sales. On this question there seems to be a remarkable scarcity of authority. We have been referred to the case of *The Eastern and Mortgage Agency Company* v. *Rebati Kumar Ray*(1) but that case merely lays down that a person who is entitled to avoid a transaction ought not to be allowed to do so in such a manner as to recover property which would otherwise be lost to him and at the same time to keep the money or other advantages which he has obtained under it.

This view we may note was accepted in the case of *Burjendra Mohan Sarma* v. *Manorama Dasi* (2), where it was said "when the person affected by such a transaction seeks to avoid its consequence, he is in the position of a person who seeks equity and must do equity. Thus not only can he not ignore the transaction,

(1) (1898) 3 C.W.N. 260. (2) (1922) 49 Cal. 911.

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but he must offer to reimburse the prior transferee." I have no doubt that this principle applies to such cases as the present. But we have not been referred to any case in which the period of limitation within which such a transaction must be avoided has been laid down. It seems clear that the conveyance is good until it is avoided, and that until it has been avoided Ma Bwin can have no title to the property and therefore would not be able either to recover from Ma Kin the half which she claims to have acquired by reason of the execution or to attach the other half as belonging to Ma Me O, whether as administratrix or as the other heir to the estate.

It is therefore necessary for us to decide whether or not Ma Bwin is still entitled to avoid the conveyance.

It seems to me that in terms Article 91 of the First Schedule of the Limitation Act applies to such a case. I have not been able to find any case in which that article has actually been applied to such a case, but on the other hand I have not found any other article which has been so applied or any case in which it has been held that Article 91 does not apply to a case of this nature. It has been said that Article 91 applies to suits of the kind mentioned in section 39 of the Specific Relief Act and a suit to set aside a voidable conveyance would undoubtedly lie under that section. Pollock and Mulla in their Commentary on that section say that the period of limitation is three years as provided by Article 91 of the Limitation Act but the cases which they cite as authority for this proposition are none of them cases similar to the present case.

In these circumstances it seems to be necessary for us to decide for ourselves which article is applicable and in view of the fact that no provision seems to be made for a suit to cancel or set aside such a conveyance, other than that contained in Article 91, I am

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constrained to hold that that article applies, and that the conveyance can only be avoided within three years from the time when the facts entitling Ma Bwin to avoid it became known to her.

The question of limitation was not put in issue in the lower Court and I would therefore frame the following issue and would refer it to the lower Court for trial. When did the facts entitling Ma Bwin to avoid conveyance of the 7th of June 1919 first become known to her ?"

The District Court will proceed to try that issue and will return the evidence to this Court together with its finding thereon and the reasons therefor.

CUNLIFFE, J—I agree.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

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Mar 8.

M. E. MOOLLA & SONS, LTD., AND ONE
v.
THE CORPORATION OF RANGOON.*

City of Rangoon Municipal Act (Burma Act VI of 1922), sections 3 (iv), 80, 86—Machinery and plant to be included in assessing building—Machinery fixed by tenant—Liability of owner for assessment.

Held, that the Corporation has the right to take into consideration the machinery and plant in any building in assessing the building, and also to hold the owner of the building responsible for the tax, although the machinery and plant may have been fixed up by his tenant.

The Chetty Firm of R.M.P.V.M. and one v. *The Corporation of Rangoon*, (1926) 4 Ran. 178 ; *Maung Po Yee and Brothers* v. *The Corporation of Rangoon*, (1927) 5 Ran. 161—*followed.*

Young—for Appellants.

N. M. Cowasjee—for Respondents.

* Civil Miscellaneous Appeals Nos. 116 and 117 of 1926.