APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Doyle.

1928

April 1.

A. K. MOOPAN.

v.

A. KARUPANA.*

Civil Procedure Code (Act V of 1908), O. 8, rr. 9 and 10—Party's failure to file written statement—Pronouncement of judgment without evidence.

Held, that where a party fails to present his written statement on the date fixed by the Court for such purpose, the Court cannot pronounce judgment against him forthwith. Plaintiff must prove his case by evidence. O. 8, r. 10, of the Civil Procedure Code allows a Court to pronounce judgment against a party only when that party fails to produce a written statement demanded under O. 8, r. 9. In the latter case the Court has meterials on which it could form a judgment.

Hay for the appellant.

Sastri for the respondent.

DAS and DOYLE, JJ.—In Civil Suit No 34 of 1927 of the District Court of Hanthawaddy, Karuppanna Maistry sued Kilavan Moopan, the plaint being filed on the 4th of August, 1927. On the 29th of August, 1927, summons was unserved, but an individual, who stated that he was the brother of Kilavan Moopan, appeared and said that his brother was in India, giving his address. Summons was issued to that address, returnable on the 24th of October, 1927. On the 24th of October, 1927, Kilavan Moopan appeared in person and asked for time to file a written statement. The learned Additional District Judge granted him two days to file a written statement. As Kilavan Moopan was unrepresented by an advocate, this period was *primâ facie* somewhat short. On the 26th of October, 1927, as no written statement had been filed, the learned Additional District Judge noted in the diary that, under Order VIII, rule 10,

* Civil First Appeal No. 315 of 1927 against the judgment of the District Court of Hanthawaddy in Civil Regular No. 34 of 1927.

of the Code of Civil Procedure, he would proceed to pronounce judgment forthwith, and thereupon, without examining any witnesses, gave a decree in favour of the plaintiff-respondent, basing his decree apparently on the pleadings of the plaintiff-respondent, although the plaintiff-respondent had not entered the box.

Kilavan Moopan in appeal, which is supported by affidavits, urges that he did not file a written statement on the day in question because, in the meantime, it had been agreed to refer the matter to arbitration. His advocate further points out that the learned Additional District Judge was utterly wrong in his procedure in passing a decree under Order VIII, rule 10, of the Civil Procedure Code.

It is not disputed by the learned advocate for the plaintiff-respondent that, where the Court is about to pass an *ex parte* decree, formal evidence at least must be given before judgment can be passed. It cannot be seriously argued that, where a defendant appears, presumably for the purpose of contesting a suit, although he may fail to put in a written statement, the plaintiff should be treated more favourably as regards proof than where the defendant does not appear at all.

It is true that Order VIII, rule 10, of the Code of Civil Procedure, states that "where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit." But we are of opinion that the permission given to the Court to pronounce the judgment refers to a written statement which has been demanded by the Court under Order VIII, rule 9, of the Code of Civil Procedure, after the Court has proceeded to hearing; and where, therefore, there are materials before the Court on which it could form a judgment. The learned

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Additional District Judge was, therefore, not justified in passing a decree in favour of the plaintiff-respondent without at least hearing formal evidence.

[Their Lordships held that appellant was led to understand that there would be a settlement of the case by arbitration and that in any case the time allowed to him to file his written statement was too short, and so remanded the case.]

APPELLATE CIVIL.

Before Mr. Justice Brown.

1928

April 2.

MAUNG NAUNG
v.
MAUNG BA GYI AND ONE.*

Purchaser at Court auction—Remedy if judgment-debtor has no saleable interest—No warranty of title—Purchaser's right and remedy restricted to statutory enactment—Civil Procedure Code (Act V of 1908), O 21, rr. 91, 92, 93—Remedy by way of suit, when allowed.

Held, that an auction-purchaser at a Court sale may apply under O. 21, r. 91, of the Civil Procedure Code, within 30 days from the date of sale, to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold, and if the sale is set aside under rule 92, the purchaser is entitled to an order for refund of his money under rule 93. There is no warranty of title, express or implied, either by the decree-holder or by the Court in case of execution sales ; so the purchaser's remedy is restricted to that prescribed by the statute that creates his right. He cannot file a suit against the decree-holder for the return of his money, unless the question is outside the scope of these rules.

Soolayman v. *S. S. A. O. Chetty Firm*, 10 L.B.R. 76—*followed.*

Rishikesh Laha v. *Manik Molla*, 53 Cal. 758—*distinguished.*

Bhattacharyya for the applicant.

BROWN, J.—The petitioner, Maung Naung, bought certain properties at a Court sale in execution of a decree in the year 1922. One Maung Kyi then started

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* Civil Revision No. 76 of 1928 against the order of the District Court of Meiktila in Civil Appeal No. 101 of 1927.