APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Baguley.

MAUNG MIN SIN

v.

MAUNG MAUNG AND OTHERS.*

1931

May 4.

Civil Procedure Code (Act V of 1908), Order 21, Rule 90 (b)—Decree-holder's application to set aside sale—Deposit of purchase money by auction-purchaser, to be treated as deposit by decree-holder.

Where the decree-holder applies to set aside a sale under Order 21, Rule 90, of the Civil Procedure Code, the terms of proviso (*b*) of that Rule (as amended by the Rule Committee of this Court) are substantially complied with, if the Court treats the deposit of the purchase money by the auction-purchaser, which stands to the credit of the decree-holder, as a deposit by the decree-holder who has made the application.

Roy for the appellant.

No appearance for the respondents.

PAGE, C.J.—In this case in an application under Order 21, Rule 90, of the Civil Procedure Code the decree-holder has raised an objection to a sale in execution of the decree on several grounds. The learned District Judge has held that Order 21, Rule 90, proviso (*a*) does not apply to the present application, but inasmuch as the decree-holder did not himself make the deposit prescribed under proviso (*b*) the learned Judge was of opinion that he had no jurisdiction to entertain the application. On behalf of the decree-holder it is contended that the terms of proviso (*b*) are substantially complied with in a case where the decree-holder applies to set aside a sale under Order 21, Rule 90, if the Court treats the deposit of the purchase money by the auction-purchaser, which stands to the credit of the decree-holder, as a deposit by the decree-holder who has made the application. I am of opinion that the

* Civil Miscellaneous Appeal No. 13 of 1931 from the order of the District Court of Pyinmana in Civil Execution Case No. 19 of 1930.

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contention raised on behalf of the appellant is correct, and that the learned District Judge in the circumstances ought not to have refused to entertain the application.

The appeal is allowed, the order from which the appeal is brought is set aside, and the learned District Judge must hear and determine the application according to law.

BAGULEY, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Carr.

MAUNG AUNG MYINT
v.
MAUNG THA HMAT AND ANOTHER.*

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Dec. 23.

Civil Procedure Code (Act V of 1908), O. 21, r. 58, 62, 63—Claim on attached property—Attaching creditor's denial of claim—Court's duty to investigate—Notice of claim in sale proclamation without inquiry—Attaching creditor's remedy

When a person claims that he has a mortgage or charge on a property that has been attached in execution of a decree, and the attaching creditor disputes the claim, then under O. 21, r. 58 of the Civil Procedure Code, the Court is bound to investigate the claim and should satisfy itself as indicated by Rule 62 that there is a valid mortgage or charge before allowing any mention of such charge to be made in the sale proclamation. In such a case the Court ought not to direct without inquiry that the claim be mentioned in the sale proclamation. If the Court nevertheless does so, the attaching creditor can regard the order as passed against him under Rule 63 and has therefore the right to file a declaratory suit under that rule.

Venkatram for the appellant.

Ray for the respondents.

CARR, J.—In Suit No. 52 of 1927 of the Subdivisional Court of Myanaung, the present plaintiff-appellant Aung Myint sued Maung San Ya and a

* Special Civil Second Appeal No. 294 of 1930 from the judgment of the District Court of Henzada in Civil Appeal No. 26 of 1930.

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number of others for possession of certain land and for mesne profits. This suit was dismissed in the Subdivisional Court, but he obtained a decree from the District Court on appeal on the 25th of August 1928. The defendant filed a second appeal to this Court, but that was dismissed on the 18th of December 1928. The actual decretal amount and costs made the defendants liable to pay very nearly Rs. 1,000. Maung Aung Myint took out execution of this decree in Civil Execution No. 63 of 1928 of the same Court, instituted on the 30th October 1928. The house and site now in dispute, which belonged to Maung San Ya, were actually attached on the 19th March 1929. In the meantime on the 7th January 1929, that is to say, within three weeks of the disposal of his appeal in this Court, Maung San Ya executed a registered deed mortgaging the house and site together with a number of cattle to the defendant-respondent Maung Tha Hmat, who is his brother-in-law, for the sum of Rs. 3,500. On the 30th of May 1929 Maung Tha Hmat made an application in the execution proceedings that the sale should be subject to his mortgage. Notice was issued to the decree-holder and on the 13th of June he appeared and denied this mortgage. The Subdivisional Judge then directed that the sale proclamation should issue and that Tha Hmat's claim to this mortgage should be mentioned in it together with the fact that the decree-holder contested the mortgage.

But on the 29th of May, Tha Hmat filed suit No. 18 of 1929 of the same Court on his mortgage, against the widow and son of San Ya who, by that time, was dead. He did not join as a defendant the attaching decree-holder Maung Aung Myint although under Order 34, rule 1, of the Code of Civil Procedure read with section 91 (*f*) of the Transfer

of Property Act, which at that time was in force, the decree-holder was a necessary party to the suit. On the 13th of June Maung San Ya's representatives confessed judgment and a mortgage decree was passed in favour of Tha Hmat.

Then on the 1st of July Tha Hmat applied for sale subject to his mortgage decree and after notice to the decree-holder on the 5th of August the Judge directed that this decree should be mentioned in the sale proclamation.

On the 17th of August the decree-holder applied that the sale might be stayed pending decision of the present suit which he instituted on the same day and the sale was stayed accordingly. The suit is for a declaration that the mortgage and the decree passed on it are fraudulent and void and that the house and site are free from incumbrances. No objection was raised in the Subdivisional Court to the maintainability of this suit, and the Subdivisional Judge, on the facts, found that the mortgage was in fact fraudulent and collusive and therefore void, and gave the plaintiff a declaration as prayed. On appeal to the District Court it was contended that the suit was not maintainable and the District Judge held that this was so and allowed the appeal and dismissed the suit. The plaintiff now appeals.

The District Judge in his judgment said :—"It cannot be disputed that the suit was not one brought under Order 21, rule 63, of the Civil Procedure Code. The suit could therefore have been brought only under section 42 of the Specific Relief Act." He then proceeded to discuss the question and held, relying on the decision in *K.R.M.A. Firm* v. *Maung Po Thein* (1) that the plaintiff had no right of suit

(1) (1926) I.L.R. 4 Ran. 22.

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under section 42 of the Specific Relief Act. This decision is attacked in this appeal on the authority of *Ma Sein* v. *P.L.S.K. Firm* (1). That decision would certainly justify the finding that the present suit is maintainable under section 42 of the Specific Relief Act; but it seems to me that there is a conflict between this decision and the case first mentioned and I have considerable doubts of the correctness of the ruling in *Ma Sein*'s case. I am inclined to think that a creditor who, under section 53 of the Transfer of Property Act, is entitled to avoid a transfer, should properly sue under section 39 of the Specific Relief Act for the actual cancellation of the deed in question. However, I do not propose to go further into this question, for in my opinion this suit is maintainable under the provisions of Order 21, rule 63 of the Code. This claim is not expressly put forward in the memorandum of appeal, but it has been fully discussed at the hearing and the respondent has had an opportunity of meeting it.

It is true, of course, that the suit was not expressly filed as one under Order 21, rule 63, nor was it filed as one under section 42 of the Specific Relief Act. That, however, makes no difference. It is not necessary in filing a suit to set out the provision of law under which the suit will lie, except perhaps in some special cases, and what we have to consider is whether the present suit is maintainable under any provision of the law. Turning to Rule 58 of Order 21 of the Civil Procedure Code, we find that provision is made for investigating claims to attached property and objections to the attachment. Rules 59, 60 and 61 are not relevant for our present purposes; but rule 62 is of importance. That rule says :—

(1) (1929) I.L.R. 7 Ran. 477.

"Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so subject to such mortgage or charge." This rule seems to me clearly to show that a claim that the attached property is subject to a mortgage is such a claim as is contemplated in rule 58. It follows, therefore, that we must take Maung Tha Hmat's application for sale of the property subject to his mortgage and to his decree as a claim made under rule 58, and when the Subdivisional Judge directed that the existence of the mortgage and of the decree should be mentioned in the sale proclamation he was in fact passing an order against the decree-holder such as is contemplated in rule 63, and I am very clearly of opinion that therefore the decree-holder has under that rule a right to institute a suit for a bare declaration.

I think it is desirable to make some comment on the Subdivisional Judge's order directing that the fact of the mortgage and the fact of the decree-holder's denial of it should be mentioned in the sale proclamation. In my view, under the provisions in the Code already referred to, when a claimant under rule 58 makes his claim on the ground that he has a mortgage or charge on the property, the Court is bound to investigate this claim, and should satisfy itself as indicated by rule 62 that there is a valid mortgage or charge before allowing any mention of such charge to be made in the sale proclamation. It seems to me obvious that an enquiry of this kind is necessary in the interests of all parties concerned. If the sale proclamation mentions a mortgage which in fact does not exist, obviously the interests both of the judgment-debtor and the decree-holder are

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likely to suffer at the sale, for the property is not likely to realise its full value as unencumbered. I note that in Mulla's Civil Procedure Code, in the notes to rule 62 under the head "Subject to Mortgage," the learned author says: "The Code clearly makes a distinction between the case in which the property is expressly sold subject to a mortgage and a case in which notice of mortgage is given in the proclamation of sale. The former is provided for by the present rule and the latter by rule 66 below." With all respect for the learned author, I am unable to agree that the Code makes any such distinction. Rule 66 (2*c*) requires that the proclamation shall specify as fairly and accurately as possible "any incumbrance to which the property is liable." I direct special attention to the use of the words "is liable". There is nothing whatever in the rule to suggest that the proclamation should specify any encumbrance to which the property *is merely alleged to be liable*. Having regard to all these provisions my view is, as I have already said, that the Court should investigate all claims to the possession of a mortgage or charge or other encumbrance over the attached property before allowing mention of such encumbrance in the sale proclamation.

For the reasons already given I am of opinion that the present suit will lie under Order 21, rule 63.

[On the evidence his Lordship held that the mortgage was in fact fraudulent and collusive and therefore void, and so allowed the appeal.]