

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr Justice Dunkley.

U AUNG DIN

v.

HALDAR AND ANOTHER.*

1935

Feb. 28.

Execution—Stay of proceedings—Discretion of the Court—Sale in execution—Absence of application to set aside sale—Confirmation of the sale—Imperative duty of the Court—Stay, when to be asked for—Civil Procedure Code (Act V of 1908), O. 21, rr. 29, 89, 90, 91, 92.

Under Order 21, r. 29, of the Civil Procedure Code the Court has a discretion to stay proceedings in execution; but under sub-rule (1) of rule 92 an imperative duty is cast upon the Court to confirm the sale in the absence of an application under rule 89, rule 90 or rule 91, or where such application has been disallowed. An application under any of these rules does not come within the purview of rule 29, and the discretionary power of the Court cannot be exercised in such a way as to over-ride an imperative provision of the law. In consequence an application under rule 29 must be made before the sale of the property takes place.

After the sale of his property, and before its confirmation, the judgment-debtor filed a suit against the decree-holder alleging a certain agreement with regard to the satisfaction of the decree. He applied to the Court for a stay of confirmation of the sale under Order 21, rule 29, of the Civil Procedure Code.

Held, that the application was too late and could only have been made before the sale.

Tim Aung for the appellant.

Talukdar for the respondents.

MYA BU, J.—The first respondent is the decree-holder and the appellant and the second respondent are his judgment-debtors. The first respondent obtained a decree against the appellant and the second respondent which was satisfied except to the extent of about Rs. 20,000. When the first respondent applied for execution of the decree for

* Civil Misc. Appeal No. 108 of 1934 from the order of the District Court of Pyinmana in Civil Execution Case No. 2 of 1933.

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the recovery of the balance in Civil Execution No. 2 of 1933, the respondents objected to the application on the allegation that the decree-holder had entered into an agreement with them to take over certain immovable property belonging to them in full satisfaction of the balance for which execution was sought. The objection did not prevail and certain landed property of the judgment-debtors was attached and brought to sale on the 28th April, 1934, when the decree-holder became the purchaser of the property. The sale was due to be confirmed on the 28th May, 1934. On the 18th May, the application from which this appeal has arisen was filed by the appellant praying for stay of confirmation of the sale on the ground that he had filed a suit with reference to the alleged promise of the decree-holder to take over certain other property in full satisfaction of the balance of the decretal amount, in the same Court. This application was lodged under Order XXI, rule 29, of the Civil Procedure Code. There is no dispute that the suit referred to had been filed about two or three days before the filing of this application, in the District Court of Pynmana. This application, however, was filed at a time when the procedure laid down in Order XXI, rule 92, of the Civil Procedure Code was in operation. According to this rule,

"Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court *shall* make an order confirming the sale and thereupon the sale shall become absolute."

For the purpose of this appeal, the case must be treated as one where there was no application either under rule 89, rule 90 or rule 91, at the time when the confirmation of the sale was pending.

Order XXI, rule 29, is in the following words :

“Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court *may*, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.”

The learned advocate for the appellant contends that an execution proceeding is pending until the sale therein is confirmed and becomes absolute, and therefore an application under this rule can be filed and may be granted even after the sale before the ~~sale~~ is confirmed. If this contention is sound, it is obvious that with reference to the period between the sale in execution and the confirmation of such sale the two rules are in conflict with each other. These two rules can and should be read together for the purpose in hand, and a reasonable construction placed on them. Rule 29 is permissive. Thereunder the Court is given the discretion of staying the execution, whereas rule 92 is imperative by enacting that in the absence of an application under rule 89, rule 90 or rule 91, or where such application has been disallowed, the Court is bound to order confirmation of the sale. When these two rules are read together, as they should be, the result is that the Court may in its discretion stay execution under rule 29 only before the operation of rule 92 takes place *i.e.*, before the sale of the property in question where the execution is by sale of the property attached. In this view of the rules 29 and 92 of Order XXI, the application of the appellant of the 18th May was clearly out of time and, therefore, there is no merit in this appeal.

There is still another point against the appellant. As has been pointed out, the power of the Court

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under rule 29 is purely discretionary, and there being nothing to show that in refusing to stay confirmation of the sale upon an application made in the circumstances of this case any discretion was erroneously or improperly exercised, there is no ground for interference with the order under appeal.

For the above reasons the appeal fails and it is dismissed with costs, advocate's fee three gold mohurs.

DUNKLEY, J.—I agree that this appeal must be dismissed.

The sole point that has been raised in argument on behalf of the appellant is that his application of the 18th May 1934, made under the provisions of rule 29 of Order XXI, to stay the execution proceedings ought to have been allowed.

Rule 29 confers upon the Court a discretion to stay proceedings in execution ; but under sub-rule (1) of rule 92 an imperative duty is cast upon the Court to confirm the sale unless an application of certain kinds is made, of which kinds an application under rule 29 is not one. It is plain that a discretionary power cannot be exercised in such a way as to over-ride an imperative duty, and it follows in consequence that an application under rule 29 must be made before the sale of the property takes place.