

CIVIL REVISION.

· Before Mr. Justice Mosely.

K.N.R.M. NARAYANAN CHETTYAR

v.

MA SAW HLA AND OTHERS.*

1940

May 27.

Declaratory suit by claimant to attached property—Temporary injunction to stay sale—No power to stay sale—Right, title and interest of judgment-debtor only sold in execution—Claimant's rights unimpaired by sale—Exercise of inherent powers of Court to stay sale unnecessary—Specific Relief Act, s. 42—Civil Procedure Code, s. 151 ; O. 21, r. 63 ; O. 39, r. 1.

A claimant who has filed a declaratory suit with regard to property which has been attached in execution proceedings, to which he is not a party, cannot obtain a temporary injunction staying the sale. Since the amendment of O. 39, r. 1 of the Civil Procedure Code by the High Court a Court has no power to stay the sale at the instance of a third party. The sale of the property attached in the execution proceedings cannot impair his interest in the property, for only the right, title and interest of the judgment-debtor are conveyed to the purchaser and if the claimant succeeds in his suit, his own interests cannot be deemed to be disposed of by the sale. The inherent powers of the Court cannot be invoked either, for it is not necessary in the ends of justice, or to prevent abuse of the process of the Court to stay execution when the claimant's rights are not affected by the sale.

K. C. Ghose v. Moyee Dasee, (1863) Marshall's Reports, 478; *Mohamed Hajee Valli v. Vednath Singh*, A.I.R. (1938) Ran. 21, followed.

P. K. Basu for the applicant.

No appearance for the respondents.

MOSELY, J.—This is an application for revision of an order of the Subdivisional Court, Bassein. It has been heard *ex parte*.

The applicant K.N.R.M. Narayanan Chettyar obtained a decree against L.A. Kasi Chettyar and two others (respondents 2, 3 and 4 here who have not entered any appearance), as legal representatives of one Somasundram Chettyar, and took out execution in

* Civil Revision No. 14 of 1940 from the order of the Subdivisional Court of Bassein in Civil Execution No. 57 of 1938.

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which some property was sold. The first respondent Ma Saw Hla made an application for removal of the attachment but later withdrew it. After that she filed a suit against the K.N.R.M. Firm for a declaration that she was the sole legal representative of Somasundram Chettyar, who was a Buddhist, she being his daughter, that the decree which had been obtained and obtained *ex parte* against L.A. Kasi Chettyar and two had been obtained by fraud and collusion and was inoperative against Somasundram's estate and against her, and that in any case she is not bound by it. Ma Saw Hla did not sue for an injunction to restrain the sale of the rest of Somasundram's property in execution of the decree obtained by K.N.R.M. Narayanan Chettyar, but she applied to the Court to stay execution. Both suits having been filed in the Subdivisional Court the learned Judge held that Ma Saw Hla was not bound to sue for an injunction, but that it would put her to inconvenience in recovering the properties if they were sold, as that would drive her to enforce her claims by fresh suits and might result in injury to the purchasers at the sales. He also mentioned a case as cited in Chitaley's Civil Procedure Code where stay of execution was granted on the ground that the *ex parte* decree was obtained by fraud. That case is *P. W. Fitzholmes v. Waryam Singh* (1), and it was held there that, although no suit between the parties was pending within the meaning of Order 21, rule 29, yet, as the defendant in the previous suit was about to file a suit for a declaration that the decree had been obtained by fraud, stay of execution might be ordered in other proceedings under the inherent powers of the Court. In that case, however, stay was ordered in favour of a party to the previous proceedings, whereas Ma Saw Hla here was.

(1) 75 L.C. 419.

not such a party. The trial Court here too purported to order stay of execution under its inherent powers under section 151.

It was laid down as early as 1863 by the Calcutta High Court in the case of *Khiluck Chunder Ghose v. Prosunno Moyee Dasse* (1) that "The Court will not interfere to stay execution upon the application of a person, not a party to the suit, who claims immovable property liable to be taken under the decree", that is to say, if Ma Saw Hla had applied in the previous execution proceedings execution would not have been stayed. It was pointed out that the remedy was by an application under the section to which the corresponding provision now would be Order 21, rules 98 and 99.

The matter is really concluded by the case of *Mohamed Hajee Valli Mohamed v. Vednath Singh and others* (2), (First Appeal No. 175 of 1936 of this Court). It was said there that Order 39, rule 1, has now been amended and the words "wrongfully sold in execution of a decree" have been deleted.

"The result of the amendment *prima facie*," (it is said) "is that the Court in which a suit under Order 21, rule 63, is pending does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit. The reason for the present rule is not far to seek. The claimant in a proceeding under Order 21, rule 58, who files a suit under Order 21, rule 63, is not the judgment-debtor against whom execution is taken, and the sale of the property attached in the execution cannot impair his right, title or interest in the property, for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit succeeds then the interests which are declared in his favour are to be deemed not to have been disposed of by the sale."

If no temporary injunction can be given it is clear that execution cannot be stayed, for that would amount

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(1) Marshall's Reports, 478.

(2) A.I.R. (1938) Ran. 21.

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to exactly the same thing. As was said in the above case, section 151 cannot be invoked, for it is not necessary in the ends of justice, or to prevent the abuse of the process of the Court, to stay execution when the right title and interest cannot be affected by the sale.

It makes no difference that the plaintiff's suit is one for a declaration under the Specific Relief Act and not one under Order 21, rule 63. For these reasons this application in revision will be successful and the order of the trial Court passed without jurisdiction staying the sale will be set aside with costs, advocate's fee two gold mohurs.