

## FULL BENCH (CIVIL),

*Before U Thein Maung, Chief Justice, U Tun Byu and U San Maung, JJ.*

CHAN EU GHAI (DECREE-HOLDER)

*v.*

LIM HOCK SENG (*a*) CHIN HUAT  
(JUDGMENT-DEBTOR).\*

H.C.  
1948  

---

---

Nov. 29.

*Transfer of Property (Restriction) Act, 1947—Ss. 2 (a) and 3—Sale—Transfer of Property Act, s. 54—Sale in execution—If a transfer "made by any person"—General Clauses Act, s. 2 (44).*

*Held:* Under s. 2 (d) of the Transfer of Property (Restriction) Act, 1947, the word "sale" must have the meaning assigned to it in the Transfer of Property Act, *viz.*, a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Sale in execution of a decree is within the mischief of s. 3, Transfer of Property (Restriction) Act, 1947. The non-reference to s. 2 (d) in s. 54, Transfer of Property Act, makes no difference.

Sale is effected when the offer of the highest bidder is accepted by the officer conducting the sale. Under Rule 271, Original Side Rules, the Registrar merely confirms the sale, and grants the certificate "specifying the property sold and the name of the person, who at the time of the sale is declared to be the purchaser." The Sale Certificate is evidence of the transfer. As the sale is by an officer, and an officer is a person as defined in s. 2 (44), General Clauses Act, he cannot sell immoveable property to a foreigner and such sale will be void under s. 5.

*Mohamed Yacoub v. P.L.R.M. Firm and others*, (1931) I.L.R. 9 Ran. 608; *Basir Ali v. Hafiz Nasir Ali*, (1916) I.L.R. 43 Cal. 124, referred to.

*Per U TUN BYU, J.*—Under Rules 258 and 260 of the Original Side Rules the highest bid at the auction sale is not placed before the Presiding Judge for acceptance. The provisions of Order 21, Code of Civil Procedure making acceptance by a Judge before the contract for sale can be confirmed does not apply to sales in the High Court.

*Mohamed Yacoub v. P.L.R.M. Firm and others*, 9 Ran. 608; *Maung Ohn Tin v. P.R.M.P.S.R.M. Chettyar Firm and others*, I.L.R. 7 Ran. 425, referred to.

The Court sale on the Original Side must be considered to be a sale by the Bailiff. The purpose of the Transfer of Property (Restriction) Act, 1947, is to prevent any immoveable property being transferred to a foreigner and a sale by the Bailiff comes within the mischief of s. 3.

---

\* Civil Execution No. 23 of 1947 of High Court, Rangoon.

*Wan Hock* for the decree-holder.

*Ba Sein* (Government Advocate) *amicus curiæ*.

U THEIN MAUNG, C.J.—The question that has been referred to us is :

H.C.  
1948

CHAN EU  
GHAI

v.  
LIM HOCK  
SENG (a)  
CHIN HUAT.

“Can a foreigner within the meaning of section 2, clause (a), of the Transfer of Property (Restriction) Act, 1947, purchase immovable property within the meaning of clause (b) of the said section at a sale in execution of a decree of a Court?”

Now section 3 of the Transfer of Property (Restriction) Act, 1947, provides :

“Notwithstanding anything contained in any other law for the time being in force, no transfer of any immovable property or lease of immovable property for any term exceeding one year, shall be made by any person in favour of a foreigner or any person on his behalf, by way of sale, gift, mortgage or otherwise.”

Under section 2 (d) of the Act, the word “sale” must have the meaning assigned to it in the Transfer of Property Act ; and “sale” according to the Transfer of Property Act is “a transfer of ownership in exchange for a price paid or promised or part paid and part promised.” So a sale, even though it be in execution of a decree, is a sale within the mischief of section 3 of the Transfer of Property (Restriction) Act, 1947. The mere fact that section 54 of the Transfer of Property Act does not under section 2 (d) thereof, apply to any transfer in execution of a decree does not make any difference. Apart from the provision that “lease”, “sale”, “gift” and “mortgage” shall have the same meaning as has been assigned to them in the Transfer of Property Act, the Transfer of Property (Restriction) Act has been enacted separately from and independently of the said Act. As a matter of fact the preamble thereof reads “whereas it is expedient to restrict the

H.C.  
1948

CHAN EU  
GHAI

v.

LIM HOCK  
SENG (a)  
CHIN HUAT.

U THEIN  
MAUNG, C.J.

transfer of immoveable property to foreigners” and section 3 commences with the phrase “ notwithstanding anything contained in any other law for the time being in force.”

The only other question for consideration is whether a sale in execution of a decree is a transfer “ made by any person.”

A Court executing a decree merely orders that the property be sold and the sale thereof is conducted by the Bailiff, Deputy Bailiff or some other officer under Order XXI, Rule 65 of the Code of Civil Procedure or, in the case of the High Court, under Rule 268 of the Original Side Rules.

The sale itself is effected when the offer of the highest bidder is accepted by the officer conducting the sale. [See *Mohamed Yacoob v. P.L.R.M. Firm and others* (1).]

Under Order XXI, Rule 92 of the Code of Civil Procedure the Court and, under Rule 271 of the Original Side Rules, the Registrar merely confirm the sale and under Order XXI, Rule 94 thereof the Court merely grants “ a certificate specifying the property sold and the name of the person who *at the time of the sale* is declared to be the purchaser.” (See also the form of the Certificate of Sale of land at page 285 of the Burma Code, Volume VII.) Besides, as has been pointed out in *Basir Ali v. Hafiz Nasir Ali* (2) “ the sale certificate does not transfer the title ; it is evidence of the transfer.”

Under these circumstances it is clear that the sale in execution of a decree is by the Bailiff, Deputy Bailiff or some other officer ; such officer is a “ person ” as defined in section 2 (44) of the General Clauses Act ; he is bound by section 3 of the Transfer of Property (Restriction) Act, 1947, not to sell any immoveable

(1) (1931) I.L.R. 9 Ran. 608.

(2) (1916) I.L.R. 43 Cal. 124.

property to a foreigner ; and a sale by him of any such property to a foreigner will be void under section 5 thereof.

So our answer to the question under reference is in the negative.

U TUN BYU, J.—I respectfully agree with the conclusion which the learned Chief Justice arrived at in the judgment delivered by him, of which I have had an opportunity of reading it. I would however like to say a few words. The answer to the question under consideration will depend on the construction which is to be placed on the provisions of section 3 of the Transfer of Property (Restriction) Act, 1947, the relevant portion of which reads :

“ 3. Notwithstanding anything contained in any other law for the time being in force, no transfer of any immoveable property or lease of immoveable property for any term exceeding one year, shall be made by any person in favour of a foreigner or any person on his behalf, by way of sale, gift, mortgage or otherwise.”

It has been contended on behalf of the decree-holder that in a Court sale, the sale should be considered to have been made by the Court itself and not by the Bailiff or any other officer, who actually conducted the sale, and that the provisions of section 3 of the Transfer of Property (Restriction) Act, 1947, will not apply to such a sale in that the Court cannot be considered to be a person within the meaning of section 3. In order to ascertain whether a sale, which is made in pursuance of a final mortgage decree, comes within the provisions of section 3 of the Transfer of Property (Restriction) Act, 1947, it will be necessary in each case to examine the provisions of law and the circumstances under which the sale was made. Under Rule 268 of the High Court

H.C.  
1948

CHAN EU  
GHAI

v  
LIM HOCK  
SENG (a)  
CHIN HUAT.

U THEIN  
MAUNG, C.J.

N.C.  
1948

CHAN EU  
GHAI  
v.  
LIM HOCK  
SENG (a)  
CHIN HUAT.  
—  
U TUN BYU,  
J.

Rules and Orders it is a Bailiff who conducts the sale, and there is nothing in the High Court Rules and Orders to indicate that such a sale will have to be confirmed by the Court itself before it becomes effective. The observation of Page C.J. in the case of *Mohamed Yacoob v. P.L.R.M. Firm and others* (1), with respect, sets out correctly the law that is applicable in Burma, and which is as follows :

“I am of opinion that the ruling of Mr. Justice Chari in *Afauzuddin v. Howell* that when property is ‘knocked down’ to the highest bidder there is a conditional offer to purchase the property by the bidder, which he is at liberty to withdraw unless and until his bid is accepted by the Court, was wrongly decided, and must be regarded as overruled. Of course, if there is a rule of practice in the Court that the officer conducting the sale shall not be entitled to accept a bid or conclude the sale, and that such officer is given authority merely to record the bids, and forward the bid sheet to the Court in order that the Court may accept or reject the bids or any of them, it follows that no sale takes place until the Court has accepted the bid. Such a practice appears to obtain in Bihar and Orissa, but there is no such practice in Burma.”

The observation made in the case of *Maung Ohn Tin v. P.R.M.P.S.R.M. Chettyar firm and others* (2) is also apposite for the purpose of this reference, and which is :

“Under Rule 258 of the Rules of this Court published at page 126 of the High Court Rules and Orders sales of immoveable property in execution of a decree for money are to be conducted by the Bailiff under the direct supervision of a Registrar. There is no provision in the Rules which requires a Judge to accept a bid. Under Rule 259 if the highest bid be equal to or higher than the reserved price (if any), the Bailiff shall make an entry in the sale-book to the following effect :

‘I declare.....to have been the highest bidder for the purchase of the property above set forth (or of lot No.       ) for the sum of Rs .....’

(1) (1931) I.L.R. 9 Ran. 608.

(2) I.L.R. 7 Ran. 425.

And under Rule 260 an application for an order confirming a sale of immoveable property is not necessary. If no application to set aside the sale is made within the period allowed therefor a Registrar may pass an order confirming the sale. It is quite clear therefore that the rules of procedure on the Original Side of this Court do not contemplate the highest bid at an auction sale being placed before the presiding Judge for acceptance, nor does it seem to us that the provisions of Order XXI of the Code of Civil Procedure require a bid to be accepted by a Judge before the contract of sale can be held to be complete."

H.C.  
1948  
CHAN EU  
GHAI  
v.  
LIM HOCK  
SENG (a)  
CHIN HUAT.  
U TUN BYU,  
J.

Thus a contract of sale in a case like the present case can be considered to be a sale made by the Bailiff in the absence of any specific rule of law, which in effect provides that the sale shall not be considered to be effective until it is accepted by the Court.

The sale certificate issued by the Court does not really purport to transfer the title in the immoveable property which had been sold, and in the case of *Basir Ali v. Hafiz Nasir Ali* (1), it was observed as follows:

"But a sale certificate merely records an already accomplished fact, and states what has been sold. In execution sales there is no warranty by the Court that the title is good. The quantity and nature of the right and interest existing in the debtor at the time of attachment and advertisement of sale, alone pass by the sale. In mortgage suits, the right, title and interest both of the mortgagor and the mortgagee pass. In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity and title of the thing sold, just as much as if he were purchasing the same under private contract. I do not see what the difference is. The sale certificate does not transfer the title. It is evidence of the transfer."

The purport of the Transfer of Property (Restriction) Act, 1947, is to prevent any immoveable property being transferred to a foreigner, with power to exempt

---

(1) (1916) I.L.R. 43 Cal. 124 at p. 129.

H.C.  
1948  
—  
CHAN EU  
GHAI  
v.  
LIM HOCK  
SENG (a)  
CHIN HUAT.  
—  
U TUN BYU,  
J.

any transfer in suitable cases, which the President might think proper, from the operation of that Act ; and a sale by the Bailiff in a case like the present case will have to be considered to come within the mischief of section 3 of the Transfer of Property (Restriction) Act, 1947 ; and thus the answer to the question under consideration is in the negative.

U SAN MAUNG, J.—I agree.