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AKBAR KHAN
v.
SHEORATAN.

ORDER.—It has been held by this Court (1) that a Civil Court is not precluded by the terms of Regulation VIII of 1822, s. 9, cl. i. from enquiring into and declaring a right on the part of the zamindar to cesses and collections, although not avowed and sanctioned, nor taken into account in fixing the Government jama at the time of settlement, notwithstanding that until so avowed and sanctioned they cannot be collected by the zamindar, and there is nothing in the terms of s. 66 of Act XIX of 1873 to a contrary effect. The plaintiffs claim the right and the cess on old custom, and this question of custom, which has not been distinctly determined, must be tried by the lower appellate Court.

We remand the case for this purpose under s. 354 of Act VIII of 1859, and allow seven days for filing objections to the finding.

The Judge's finding on remand having been in favour of the plaintiffs' right, and confirmatory of the alleged custom, the High Court decreed the appeal in the following judgment:—

We accept the finding of the lower appellate Court, to which no objections have been preferred, and reverse the decree of the lower appellate Court and restore that of the Court of first instance, and decree this appeal with costs.

Appeal allowed.

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March 20.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SUKHAI, (DEFENDANT) v. DARYAI, (PLAINTIFF).*

Act VIII of 1859, ss. 256, 257—Act XXIII of 1861, ss. 11, 35—Auction-sale—Order cancelling sale—Appeal—Suit to set aside.

A Munsif having cancelled an auction-sale of landed property on the sole objection of the judgment-debtor that the property realized a low price, and the Judge having dismissed the auction-purchaser's appeal from the said order on

* Special Appeal, No. 26 of 1877, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 4th November 1876, reversing a decree of Maulvi Wajid Ali, Munsif of Kainganj, dated the 11th July 1876.

(1) H. C. B., N.-W. P., 1870, p. 425.

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the ground that the Munsif had no authority to cancel the sale under the terms of s. 257 of Act VIII of 1859, without some irregularity in conducting or publishing the sale being proved, and that the said order must therefore be taken to have been passed under s. 11, Act XXIII of 1861, which admits of no appeal by the auction-purchaser who was no party to the execution proceedings. Held that such order passed by the Munsif was not a proceeding under s. 11 of Act XXIII of 1861, but an order passed *ultra vires* under s. 257 of Act VIII of 1859, and that a suit would lie for its cancelment, the finality of an order under ss. 256 and 257 of Act VIII of 1859 depending on its compliance with the terms of those sections.

The plaintiff sued for confirmation of an auction-sale and establishment of plaintiff's right of purchase of a third share of a five biswa zamindari property, and for the setting aside of the orders passed on the miscellaneous side by the Munsif and the Judge, by which the said auction-sale was declared cancelled.

The orders on the miscellaneous side referred to were passed on an objection preferred by the judgment-debtor in the Munsif's Court to the effect that the property had been sold for an inadequate price. The Munsif held this to be sufficient cause for cancelling the auction-sale. The auction-purchaser appealed to the Judge who admitted the invalidity of the Munsif's order cancelling the sale, but ruled that, inasmuch as the Munsif's order was passed under s. 11 of Act XXIII of 1861 and not under s. 257 of Act VIII of 1859, under which the Munsif assumed that he was acting, no appeal would lie on the part of an auction-purchaser who was no party to the decree in execution. The Judge accordingly dismissed the appeal on the miscellaneous side, and the auction-purchaser brought the suit. The Munsif of Kaimganj dismissed the suit on the ground that his order on the miscellaneous side was final under s. 257 of Act VIII of 1859, and that under s. 11 of Act XXIII of 1861 no suit would lie for setting aside such orders passed in execution of decree; and further that the auction-purchaser's right only accrues after the sale has been sanctioned and completed, and that, therefore, under s. 32 of Act VIII of 1859, the suit could not be heard, as no right had accrued to the plaintiff. The Subordinate Judge, on appeal by the plaintiff, reversed the Munsif's decision, holding that the Munsif had no power under the terms of ss. 256 and 257 of Act VIII of 1859 to cancel the sale by reason of mere inadequacy of price, and without any irregularity in conducting

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or publishing the sale alleged by the judgment-debtor, who sought to set it aside; that, consequently, as no valid final order had been passed by the Munsif under ss. 256 and 257, his order must be taken to have been passed under s. 11 of Act XXIII of 1861, and that the suit was maintainable. The Subordinate Judge decreed the plaintiff's appeal. The defendant in special appeal to the High Court impugned the appellate Court's decision on the ground that the order passed on the miscellaneous side, setting aside the sale, was final, and that no suit would lie for its cancelment.

Babu Barodha Prasad for appellant.

Munshis Sukh Ram and Kashi Prasad for respondent.

JUDGMENT.—If this matter rested solely on the plea in special appeal, there would be no difficulty in disposing of the case. For if the first Court's order in execution of decree setting aside the sale was final, there could have been no appeal to the Judge, and any order made by him might have been cancelled under s. 35 of Act XXIII of 1861. But here the order made by the Munsif setting aside the sale was not one that could be legally made under s. 257 of Act VIII of 1859, since no material irregularity in publishing or conducting the sale and consequent substantial injury to the objector, by reason of the irregularity, were established. The Munsif's order, therefore, setting aside the sale, because the sale price was inadequate, no material irregularity being proven, was in excess of the power granted to him by the section. But it was certainly not an order made, as the District Judge assumed in miscellaneous appeal, under s. 11 of Act XXIII of 1861, because there was no question arising between the parties to the suit which the Munsif was called upon to dispose of when he made his order. If it had been such a question, there could have been no separate suit. But here the auction-purchaser having fulfilled all the conditions of the sale, calls for confirmation, which is refused on no legal ground by the Court executing the decree. He had bought the property, and all that was wanting was a confirmation of his title. If no application of a legal character was made to set aside the sale, the Court executing the decree, to use the words of the section, *shall* confirm the sale. As in this case no objection permissible by s. 256 had been made, the Court executing the

decree was absolutely bound to confirm the sale, and as it did not do so, but acted in excess of its jurisdiction in refusing to do so, and in cancelling it, it appears that the suit will lie. We are justified in this opinion by a decision of a Division Bench of this Court in special appeal No. 1437 of 1876, decided on the 13th March of the present year (1). We therefore affirm the judgment of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

RAMANAND, JUDGMENT-DEBTOR, (APPELLANT) v. THE BANK OF BENGAL, DECREE-HOLDER, (RESPONDENT).*

Act VIII of 1859, s. 273—Act XX of 1866, s. 52—Act VIII of 1871, ss. 53, 54, 55—Appeal—Execution—Procedure—Repeal.

No appeal lies against orders passed in execution of decrees under Act XX of 1866, the procedure under that Act having been expressly saved by Act VIII of 1871, which repealed Act XX of 1866.

The judgment-debtor appellant filed the above miscellaneous appeal from an order of the Subordinate Judge of Cawnpore under

* Miscellaneous Regular Appeal, No. 75 of 1876, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th November 1876.

(1) In this case the plaintiff sued to establish his right as auction-purchaser to, and to obtain possession of, the property sold by auction, by setting aside the orders passed on the miscellaneous side by the first and appellate courts which cancelled the said auction-sale. The plaintiff added a claim to obtain mesne profits from date of sale to date of possession.

The lower Courts having on insufficient grounds assumed fraud in the auction-sale by reason of inadequacy of price and other irrelevant circumstances, and having held that the orders passed on the miscellaneous side under ss. 256 and 257 of Act VIII of 1859 precluded a fresh suit to establish the auction-purchaser's right to the property, sale of which was annulled, the High Court (Pearson and Turner, J.J.) remanded the case for trial on the merits in a judgment of which the following extract is the material portion:—

“The order passed by the Munsif on the 10th March 1875, setting aside the

sale, and that passed by the Judge on the appeal from it on the 5th June 1875, did not, it would seem, proceed on the ground of any material irregularity in publishing or conducting the sale, and cannot, therefore, in reference to the provisions of s. 257 of Act VIII of 1859 bar the present suit, which the plaintiff is entitled to have tried on the merits. He cannot indeed obtain in this suit all the relief he asks for; but if he should succeed in showing that the sale made to him was a valid one which should have been confirmed, he would be entitled to a decree annulling the order above-mentioned, and declaring his right to obtain from the Munsif an order confirming the sale, a certificate of the nature described in s. 259, and delivery of the property which was the subject of the sale in the manner provided by s. 263 or s. 264 of Act VIII of 1859.”

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