

1880

THE MAT-
TER OF THE
APPEAL OF
SHAMMAD
V.
D. HUSAIN.

an intention. I confess I feel the force of this contention, but I cannot give effect to it in face of the, what appear to me to be, plain directions of s. 622 in its present shape. I would accordingly answer the question put by this reference in the affirmative.

The Division Bench (OLDFIELD, J., and STRAIGHT, J.), on the case again coming before it for disposal, made the following order:—

OLDFIELD, J.—We are of opinion that the Judge has wrongly construed the decree and that it does not allow interest on the principal debt but only on the costs. So far the order of the Judge is modified. The applicant will have his costs of this application.

1880
August 23.

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

DIWAN SINGH AND ANOTHER (PLAINTIFFS) v BHARAT SINGH AND OTHERS (DEFENDANTS).*

Sale in Execution of decree— Suit to set aside order setting aside Sale—Act VIII of 1859 (Civil Procedure Code), ss. 256, 257.

The Court executing a decree having made an order setting aside a sale under Act VIII of 1859 of immoveable property in the execution of the decree, the purchaser at such sale sued the decree-holder and the judgment-debtor to have such order set aside and to have such sale confirmed in his favour. *Held* (OLDFIELD, J., dissenting) that the suit was maintainable, the provisions of s. 257 precluding an appeal from an order setting aside a sale, and not a suit to contest the validity of such an order, and that, the order setting aside the sale in this case being *ultra vires*, the auction-purchaser was entitled to the relief he claimed.

THE plaintiffs in this suit claimed to have the order setting aside a sale of immoveable property in the execution of a decree set aside and to have such sale maintained. The property had been proclaimed for sale on the 20th September, 1877, under an order of the Subordinate Judge of Meerut. On the 14th September, 1877, the judgment-debtors applied to the Subordinate Judge to postpone the sale. On that date the Subordinate Judge made an order on the application directing the postponement of the sale, on condition that the judgment-debtors deposited the fees for issuing fresh notifications of sale, and directing the issue of fresh notifica-

* Appeal under cl. 10, Letters Patent, No. 1 of 1880.

1880

 DIWAN S.
 V.
 BHARAT
 SINGH.

tions of sale fixing the 20th November, 1877, for the sale. On the 19th September, 1877, such application of the judgment-debtors was again laid before the Subordinate Judge, and it was brought to his notice that the deposit required to be made by the judgment-debtors by his previous order on the application had not been made. Upon this, and the judgment-debtors not appearing when called, the Subordinate Judge, on the same day, made an order rejecting the application. The sale accordingly took place on the day originally fixed, the 20th September, 1877, the plaintiffs in this suit becoming the purchasers of the property for Rs. 350. On the 4th October, 1877, the decree-holder objected to the sale on the ground that the order of the Subordinate Judge of the 14th September, 1877, had become publicly known in the village in which the property was situated and in neighbouring villages, and his subsequent order of the 19th September had not become so known, and that in consequence intending purchasers had not attended at the sale; and the property, which was worth Rs. 3,000, had only realized Rs. 350. On the 8th November, 1877, the judgment-debtors preferred similar objections to the sale; and they also objected to it on the ground that the sale had not been properly proclaimed. On the 25th May, 1878, the Subordinate Judge set aside the sale. From evidence taken by him it appeared that the decree-holder's pleader was not present when the order of the 14th September, 1877, was made; that he was told on that day by an official of the Subordinate Judge's Court that the sale had been postponed; and that he did not become aware of the order of the 19th September, 1877, until after the sale had taken place. The order of the Subordinate Judge setting aside the sale was in these terms: "The order postponing the sale was of course conditional, and the condition was not performed by the debtor who had applied for postponement. He has therefore no cause to complain. But it might be said that the decree-holder was prejudiced by the neglect of the debtor. I am satisfied that the order was not passed in the presence of the decree-holder's vakil, and the cause of this omission has been, I think, correctly stated by the decree holder's vakil. That omission has led to a mistake, or to a misrepresentation, and the misrepresentation has, as it appears from the documentary papers produced, produced detriment as much to the decree-holder

- 1880

AN SINGH
v.
HARAT
SINGH.

as to the debtor. In this view, I think the sale must be set aside, but the debtor must pay interest at twelve per cent. on the amount fetched at the sale to this date, as also costs to the purchaser, who is quite innocent of the debtor's deception." On appeal by the auction-purchasers, the appellate Court in the first instance made an order confirming the sale, but subsequently, on review of judgment, made an order affirming the order of the 25th May, 1878, setting aside the sale. The present suit was instituted by the auction-purchasers against the decree-holder and the judgment-debtors in March, 1879, in the Court of the Munsif of Meerut. They claimed to have the order of the 25th May, 1878, set aside and the sale of the 20th September, 1877, confirmed, on the ground that that order was contrary to the provisions of Act VIII of 1859. The defendants set up as a defence to the suit that it was not maintainable, as the order of the 25th May, 1878, was final under s. 257, Act VIII of 1859, and that the sale, having taken place after it had been postponed, without the issue of fresh notifications, was illegal and had properly been set aside. The Court of first instance disallowed the first ground of defence, holding that the suit was maintainable; but allowed the second, and dismissed the suit. On appeal by the plaintiffs the lower appellate Court held that the order of the 25th May, 1878, setting aside the sale was final, under the provisions of s. 257 of Act VIII of 1859, and the suit was not maintainable. It was not contended before the lower appellate Court that that order was made *ultra vires*.

The plaintiff appealed to the High Court, contending that, "inasmuch as that order was passed *ultra vires* under s. 257 of Act VIII of 1859, a suit would lie for its cancelment; that the Judge was wrong in holding that the order was final, and no suit would lie to set it aside; and that the finality of an order under ss. 256 and 257 of Act VIII of 1859 depended on a compliance with the terms of those sections, and not otherwise." The Judges of the Division Bench before which the appeal came for hearing PEARSON, J., and OLDFIELD, J.,) differed in opinion on the point whether the suit was maintainable, the judgments of those Judges being as follows:—

PEARSON, J.—The sale appears to have been made under the authority of the order directing it to be held on the 20th Septem-

ber, 1877. I do not find that any order was passed for postponement. The order passed on the judgment-debtor's application of the 14th *idem* merely intimated that, on certain conditions, an order for postponement of sale would be passed; but, those conditions not being fulfilled, an order rejecting the application for the postponement of the sale was passed on the 19th *idem*. I conclude, therefore, that the sale held on the 20th *idem* was lawfully held.

1880

 DIWAN S
 v.
 BHARA
 SINGH

No irregularity in publishing or conducting the sale is pretended to have occurred; and no ground for setting aside the sale under ss. 256 and 257, Act VIII of 1859, existed. The first ground of appeal, *viz.*, that the order setting aside the sale was passed *ultra vires*, should, in my opinion, be allowed.

The words "shall be final" in s. 257 I take to preclude a regular or special appeal and not a suit, which is precluded in cases in which an order is legally passed under the section by the concluding terms of the section.

I would reverse the decree of the lower Courts and decree the appeal with all costs, and declare the plaintiff entitled to what he claims.

OLDFIELD, J.—The sale appears to have been set aside by the Subordinate Judge acting within his jurisdiction, under ss 256 and 257, Act VIII of 1859, and the auction-purchaser cannot bring a suit to set aside the Subordinate Judge's order and have the sale confirmed in his favour, that order for setting aside the sale being final. The appeal is dismissed with costs.

The plaintiffs appealed to the Full Bench from the judgment of Oldfield, J., under cl. 10 of the Letters Patent.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the respondents.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—I am clearly of opinion that the suit in this case lies, and that in fact it is the only remedy against such an

1880

MAN SINGH
 v.
 BHARAT
 SINGH.

order as is complained of. The terms of s. 257 of Act VIII of 1859, to my mind, necessarily lead to this conclusion and are of themselves quite sufficient to determine the question. The objection to the sale was allowed, and the order to set it aside was, therefore, as provided by s. 257, final. But the very next sentence of the section shows plainly to my mind what is meant by this word "final," for it is there provided that, "if the objection be disallowed, the order confirming the sale shall be open to appeal," the order on which appeal shall be final, and in that case the party against whom the order is given shall be precluded from bringing a suit. Such are the provisions of this section, where the objection to the sale is disallowed. Where, however, the objection to the sale is allowed, as in the present case, the section provides that the order shall be final; and it is perfectly clear to me that that means "shall not be open to appeal," and that there may be a remedy by a new suit in such a case. In short, the section appears to me clearly to provide for two different remedies applicable to the two kinds of orders provided for. The first relates to the case where the objection is allowed and the order thereon final; in that case there is no appeal, but a suit will lie. The second kind of order is where the objection is disallowed, in which case the order may be appealed against, but a fresh suit is excluded. I therefore entirely agree with Mr. Justice Pearson and in the order he proposes, and I would therefore allow this appeal and reverse the order of the Division Bench with all costs.

PEARSON, J.—I adhere to the opinion expressed in my judgment of the 16th March last and have nothing to add thereto.

STRAIGHT, J.—It seems to me that this suit can properly be maintained and that the plaintiffs are entitled to succeed. No doubt the Subordinate Judge's order professed to be passed under ss. 256 and 257 of Act VIII of 1859, and it was not open to appeal; but I fail to find any prohibition in s. 257 of Act VIII of 1859 to the bringing of a suit by a party aggrieved by an order setting aside a sale, where such order has, as in the present case, been passed "*ultra vires*" and directly in contravention of the provisions of s. 256. The case of *Sukhai v. Daryai* (1) appears to me to be in

point and is an authority I see no reason to dissent from. I therefore agree with Mr. Justice Pearson that the appeal should be decreed with costs, and that the plaintiffs should have given them the relief they ask.

1889

 DIWAN SINGH
 v.
 BHARAT
 SINGH.

OLDFIELD, J.—This is a suit brought by an auction-purchaser of property sold in execution of a decree on the 20th September, 1877, to have the sale maintained in his favour by cancelling the order of the Subordinate Judge who set aside the sale. The question is whether the suit is maintainable with reference to the provisions of s. 257, Act VIII. 1859. It appears that the sale had been notified to take place on the 20th September, 1877, but prior to that date the judgment-debtor applied to have the sale postponed for two months, and the Subordinate Judge passed the following order:—"The sale be postponed on the condition that the *taiabána* fees for issue of fresh notifications are paid, and an abstract proceeding be sent to the officer conducting the sale for postponement." The judgment-debtor did not deposit the fees, and an officer of the Court reported the fact to the Subordinate Judge on the 19th September, the day before that fixed for the sale, and that in consequence the order for postponement of the sale had not been issued, and the Subordinate Judge on this report ordered that the judgment-debtor's petition for postponement be rejected and the sale should take place; the sale was held the next day, 20th September, and the defendant purchased the property put up for sale. Both decree-holder and judgment-debtors then put in objections to the sale. The decree-holder complained that the Court had ordered the postponement of the sale, and its order had gained publicity in the village and neighbourhood, and consequently the decree-holder and all the neighbouring zamindárs did not come to make purchase, and the property worth Rs. 3,000 had in consequence been sold for Rs. 350, and bought by a mukhtár and petition-writer of the Court; and he contended that a fresh notification ought to have been issued, and the order for postponement ought not to have been made in his absence without notice to him, and he asked to have the sale set aside on the above grounds. The judgment-debtors, besides urging similar objections, urged also that the sale-notifications had not been stuck up on the property or served. The Subordinate Judge held

1880

AN SINGH
v.
HARAT
SINGH.

that the judgment-debtors had no real cause of complaint, as the order for postponement of the sale was conditional on their depositing fees, which they failed to do; but that the decree-holder's objection was valid, as the order was made in his absence, and had caused misapprehension, and the result had been to prejudice both him and the judgment-debtor; and he set aside the sale.

Now by the provisions of s. 257, Act VIII of 1859, an order for setting aside a sale passed on an objection made under s. 256, Act VIII of 1859, on the ground of material irregularity in publishing or conducting a sale, is final, and will preclude a suit on the part of the auction-purchaser for having the sale maintained in his favor.

On this point I may refer to cases,—*Kooldeb Singh v. Juggurnath Singh* (1); *Mobkoonissa v. Dewan Ali* (2); *Sookoomar Singh v. Kashee Singh* (3); and *Kooldeep Narain Singh v. Lukheen Singh* (4). In the last case Peacock, C. J., remarks:—"If the objection be allowed the order made to set aside the sale is final; that, as I understand it, means final for all purposes." It is only when a Court has set aside a sale otherwise than in the exercise of its jurisdiction under s. 257, Act VIII of 1859, that a suit has been allowed. Now in the case before us it appears to me indisputable that the Subordinate Judge, when he passed his order for setting aside the sale, was acting under the provisions of ss. 256 and 257, Act VIII of 1859. The objections made to the sale were clearly on the ground of irregularity in publishing the sale, and were so treated by the Subordinate Judge, whose order was made under s. 257, and who was thus acting in the exercise of his jurisdiction when he made the order to set aside the sale; and indeed, as the Judge has observed, it was not even contended in this suit that the Subordinate Judge's order was *ultra vires*; and I may here observe that the Judge has drawn a correct distinction between this case and that of *Sukhai v. Daryai* (5), where the Court, in setting aside the sale, does not appear to have been proceeding under the provisions of s. 257. In the case before us, the only objection which can be advanced against

(1) 2 W. R., Misc., 19.

(2) 4 W. R., 22.

(3) 13 W. R., 250.

(4) 9 W. R., 218.

(5) I. L. R., 1 All. 374.

the Subordinate Judge's order is that there had been no material irregularity of the nature mentioned in s. 256, inasmuch as the order given for postponement of the sale had never in fact taken effect, and therefore the Subordinate Judge ought to have disallowed the objections taken to the sale. Possibly that may be the case, but the error of the Subordinate Judge was one of judgment; he may have given an improper order on the merits of the objections, but his order was not given without jurisdiction, being clearly made under s. 257, Act VIII of 1859, being an order which he was competent to make under that section. The objections to sale were made under s. 256; the Subordinate Judge was bound to dispose of them under s. 257; and he did so dispose of them; and when thus acting the merits of his order cannot be made the subject of inquiry in a regular suit. The object of the law was expressly to prevent questions of this kind being re-opened on their merits, and I think the law would be defeated if the plaintiff were permitted to bring this suit. It appears to me that the plaintiff has no right other than to recover his purchase-money with interest under s. 258, Act VIII of 1859, and he has really no particular ground of complaint. He could again bid for the property at its re-sale, whereas on the other hand the maintenance of the sale under the circumstances would be a hardship and loss to the parties to the decree, if as is not improbable the property sold for a song in consequence of the impression having got abroad that the sale had been postponed. As Peacock, C. J., remarked in the case of *Kooldeep Narain Singh v. Lukheen Singh* (1) already referred to the setting aside the sale "would cause no great hardship: for, if the objection were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale: but he could not be greatly injured; for when a sale is set aside, the purchaser is entitled by s. 258 to receive back his purchase-money, with or without interest."

I must hold that this suit is not maintainable and has been rightly dismissed, and I would dismiss this appeal with costs.

Appeal allowed.

1880

DIWAN SII
v.
BHARA'
SINGH.