

1891

BATAK NATH
v.
PITAMBAR
DAS.

perty purchased by the decree-holder is more in value than the whole sum due on the mortgage, and in proof of this fact they offer to pay up within a month the whole sum due, if the decree-holder gave up the property. * * * I would therefore presume that the decree-holder in fact has got all that he was justly entitled to."

This seems to me to be not only a wrong method of dealing with this execution proceeding, because the question of s. 90 of the Transfer of Property Act never entered into consideration at all, but a very insufficient reason for disposing of an application for a decree under s. 90. The Subordinate Judge's order in our opinion cannot stand, and, in decreeing this appeal and reversing the order of the Subordinate Judge, we direct that he take up the application of the 14th September 1889, and dispose of it according to law. The appellant will have his costs of this appeal.

Appeal decreed.

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April 23.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF JAI LAL.

Criminal Procedure Code, s. 145—Order for interim possession of immovable property—Point of time possession at which is to be looked at in determining which party is entitled to an order under s. 145.

The possession which a Magistrate acting under s. 145 of the Code of Civil Procedure has to find and support, is possession at the time of the Magistrate's proceedings. Hence, where a Magistrate decided a question of possession under s. 145 upon evidence taken six months previously,—*Held* that such order was irregular and unsustainable.

This was a reference made by the Sessions Judge of Farakhabad under the circumstances stated in his order of the 23rd March 1891, which is as follows :—"This is an application for the revision of an order of Mr. C. D. Steel, Joint Magistrate of Farakhabad, purporting to have been passed under the provisions of s. 145, Criminal Procedure Code. From the record of the proceedings it appears that the Joint Magistrate made no inquiry as to the actual

possession of the parties at the time the question came before him, but relied on an order passed by the Collector six months previously. That order, even if it could be relied on in these proceedings, does not clearly determine the question of actual possession by one or other of the contending parties, for the Collector observes:—‘It seems to me that both are in possession, though perhaps not to an equal extent.’ The ruling of the Bombay High Court in—*In the matter of Huchapa and Shiraganjava* (1) is in point.

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In my opinion the order of the Joint Magistrate ought moreover to have been addressed to the person who asserted herself to be the owner of the land and not to her agent.

For the above reasons I report the case to the High Court with the recommendation that the Joint Magistrate's order be set aside, and that if he is still of opinion that a dispute likely to cause a breach of the peace exists, he be directed to decide the case after taking evidence as to actual possession. The Joint Magistrate's explanation is herewith submitted in accordance with the instructions contained in C. L. No. 2 of 1885."

The reference came before Straight, J., who passed the following order:—

STRAIGHT, J.—The Joint Magistrate's explanation does not meet the difficulty. He has decided the question of possession entirely upon the finding of the Officiating Collector of the 6th June 1890, which was no evidence of the issue he had to try, namely, which of the contending parties was in actual possession *at the time of his* (the Joint Magistrate's) *proceedings*. The Joint Magistrate would be well advised to carefully examine the terms of a section before he proceeds to act under it, as his irregularity of action in this matter has necessitated this reference by the learned Judge. I quash his order, but it will be open to the Joint Magistrate to hold a fresh proceeding if the required conditions still exist.

(1) I. I. R. 15 Bom. 152.