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We have no hesitation in holding that the learned District Judge did have jurisdiction to entertain the appeal.

[The judgment then discussed the merits of the case and concluded as follows.]

In the result we modify the decree of the court below to the extent mentioned above. In other respects we dismiss the appeal. Costs of this appeal to be borne in proportion to success and failure.

REVISIONAL CRIMINAL

Before Mr. Justice Mulla

EMPEROR *v.* HAZARI AND OTHERS*

1938

October, 21

Naik Girls' Protection Act (Local Act II of 1929), section 4—Order by District Magistrate under the section—Executive order—No inquiry prescribed—Not judicial order of a criminal court—No revision lies—Criminal Procedure Code, section 439—Jurisdiction.

No revision lies from an order passed by a District Magistrate under section 4 of the Naik Girls' Protection Act, Local Act II of 1929.

Such an order is an executive order passed by an officer of the Government specially designated to carry out the provisions of that Act; it is not a sentence or punishment for an offence within the meaning of the Indian Penal Code and the Criminal Procedure Code and is not a judicial order passed by an inferior criminal court constituted under the Criminal Procedure Code, and therefore the revisional powers of the High Court under section 439 of the Criminal Procedure Code can not be invoked for setting aside that order.

In order to carry out the provisions of the Act the District Magistrate is invested with certain powers; but there is nothing in the Act to suggest that in exercising those powers he is required to act as a judicial officer presiding over a criminal court who is bound to observe any rules of procedure such as those which govern an inquiry, trial or other proceeding under the Criminal Procedure Code. In fact he is not required by any provision of the Act to hold any inquiry before passing an order which he is authorised to pass.

Messrs. *B. B. Chandra*, *B. S. Darbari* and *G. S. Pathak*,
for the applicants.

The Government Advocate (*Dr. M. Wali-ullah*), for
the Crown.

MULLA, J.:—This is an application by three girls of
the Naik community invoking the revisional powers of
this Court under section 439 of the Criminal Procedure
Code against an order passed by the Additional District
Magistrate of Naini Tal under section 4 of the Naik
Girls' Protection Act (II of 1929). It appears that one
of the applicants, Lalta by name, is not affected by the
order in question, and the application has consequently
been pressed on behalf of the other two, named Hazari
and Chanda. An application in revision was also made
to the learned Sessions Judge of Kumaun, but he
rejected it on the ground that the order sought to be
set aside was not a judicial order by an inferior criminal
court within the meaning of section 435 of the Criminal
Procedure Code and was consequently not liable to
interference in revision. The correctness of this propo-
sition is challenged by the applicants, who have conse-
quently come up to this Court for relief.

The circumstances in which the order in question
was passed may briefly be stated in order to appreciate
the points raised by the applicants. On the 25th
January, 1938, one Thakur Lakhan Singh, who is an
Honorary Rescue Officer for Naik girls, made a report
to the Additional District Magistrate of Naini Tal in
respect of five girls, including the three applicants,
alleging that they were all minors, being less than 18
years of age, and were living in immoral surroundings
and being trained to the profession of prostitution.
Upon that report the Additional District Magistrate
issued notices to the guardians of the girls under section
3 of the Naik Girls' Protection Act asking them to show
cause why they should not be ordered to send the girls
to some settlement as provided for by section 4 of the

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Act. The guardians filed objections to the proposed order, challenging the allegation that the girls were living in immoral surroundings and were being trained to the profession of prostitution. On the date fixed for the hearing of the matter the Additional District Magistrate examined the Rescue Officer and the girls and made brief notes of their statements, which were not made on oath. This proceeding took place in the presence of the objectors' counsel, but it appears from the record that they were not allowed to cross-examine the Rescue Officer. Some arguments were, however, heard and the Additional District Magistrate passed an order in which he held that he was satisfied that the girls were all minors and all of them, except one, were being trained as prostitutes. By the same order he directed the four girls to get themselves examined by the lady doctor of the Haldwani Dispensary within a week. The applicants Hazari and Chanda were accordingly examined by the Medical Officer in charge of the Civil Dispensary at Haldwani in the presence of the lady doctor. In his report of that examination the doctor expressed the opinion that they did not appear to be virgins. This examination took place on the 16th February, 1938, and two days later, apparently without examining the doctor and letting the objectors have an opportunity of cross-examining him or producing any evidence to rebut his opinion, which was by no means definite, the Additional District Magistrate proceeded to pass an order under section 4 of the Naik Girls' Protection Act directing three of the girls, including the applicants Hazari and Chanda, to be sent to a settlement at Haldwani to be detained there until they attained majority. It is against this order that the application in revision is directed.

The argument on behalf of the applicants is that the Naik Girls' Protection Act being a penal statute, any inquiry or other proceeding held under it must be

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governed by the provisions of the Criminal Procedure Code, which were entirely ignored in the present case by the Additional District Magistrate of Naini Tal, who followed a procedure of his own which is utterly inconsistent with all notions of the manner in which an inquiry resulting in a penal order should be conducted. It is contended that the order passed by the Additional District Magistrate amounts to the imposition of a severe penalty on the applicants and their guardians, who were not given any opportunity of defending themselves and showing that there was no justification for any action being taken under section 4 of the Naik Girls' Protection Act. Great stress was laid on the obvious irregularities in the procedure adopted by the Additional District Magistrate, if judged by the requirements of the Criminal Procedure Code and the Indian Evidence Act, and it was strenuously argued that the whole proceeding being entirely contrary to law this Court had full power to quash it in revision and to set aside the order in which it culminated.

The learned Government Advocate has contended, on the other hand, that this Court has no power to interfere with the order in question because it is an executive order passed by an officer of the Government specially designated to carry out the provisions of the Naik Girls' Protection Act and not a judicial order passed by an inferior criminal court constituted under the Code of Criminal Procedure. A number of cases have been cited to show that the District Magistrate is invested with certain powers under various special enactments, and any order passed by him in the exercise of those powers which is not a sentence or punishment for an offence within the meaning of the Indian Penal Code and the Criminal Procedure Code cannot be deemed to be a judicial order by an inferior criminal court to which the revisional powers of the High Court can extend.

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Upon a careful consideration of the relevant provisions and the scheme and purpose of the Naik Girls' Protection Act, I think the objection taken by the learned Government Advocate is well founded and must prevail. From the preamble of the Act it is clear that it was enacted only to terminate a particular custom prevailing in the Naik caste in the United Provinces whereby minor girls are trained for prostitution. In order to carry out its provisions the District Magistrate is invested with certain powers; but there is nothing in the Act to suggest that in exercising those powers he is required to act as a judicial officer presiding over a criminal court, who is bound to observe any rules of procedure such as those which govern an inquiry, trial or other proceeding under the Criminal Procedure Code. In fact he is not required by any provision of the Act to hold any inquiry before passing an order which he is authorised to pass. Section 2 of the Act authorises him to require from time to time by general or special order any member or members of the Naik caste to furnish him with such information as may be prescribed for the purposes of the Act. Section 3 similarly invests him with the power of directing from time to time, by order in writing, any person or persons having under his or their guardianship or control a minor girl or girls of the Naik caste within the local limits of his jurisdiction to take such steps as he may by the said order specify, to restrict or otherwise regulate the movements of such minor girl or girls or to remove her or them to the Kumaun Division in order to prevent her or their being trained to the profession of prostitution or living in immoral surroundings. The powers given by these sections are absolutely untrammelled by the need of any inquiry or other proceeding before an order is passed. Now section 4 of the Act, under which the order in question has been passed, runs as follows: "If the District Magistrate is of opinion that there is danger

that a minor girl of the Naik caste within the local limits of his jurisdiction may be sold, let for hire, trained or otherwise disposed of with the intent that she shall be employed for the purpose of prostitution or for any unlawful and immoral purpose, he may order that she shall be sent to a settlement and there detained for such period as may be prescribed, or that she shall be placed under the guardianship of any person of the same faith who is willing and in the opinion of the District Magistrate fit to have charge of her, and may take such steps as may in his opinion be necessary for the enforcement of such order." It is very significant that in this section everything is left to the opinion of the District Magistrate and there is absolutely no suggestion that for the purpose of forming his opinion it will be necessary for him to make any inquiry or to have any specified materials before him. Nor is there any general provision in the Act making it incumbent on him to hold any inquiry or other proceeding in the nature of any inquiry before forming his opinion and basing an order thereon. I think it is clear from all these provisions that the Act has given certain powers to the District Magistrate, not in his capacity as the presiding officer of the court of the District Magistrate constituted under the Code of Criminal Procedure, but in that of an officer specially appointed by the Government to carry out the provisions of the Act. It was open to the Government to appoint any one of its officers other than a Magistrate to carry out the provisions of the Act, and if the Government had done so, it could not be reasonably argued that an order passed by such an officer was an order passed by an inferior criminal court which could be set aside by the High Court in the exercise of its revisional powers under section 439 of the Criminal Procedure Code. The fact that the Government chose the District Magistrate for that purpose cannot affect the legal position. It is well

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known that the District Magistrate has been invested with special powers under various enactments, and in several cases decided by this Court it has been held that when the District Magistrate exercises such powers he does not function as a criminal court, and any order passed by him in the exercise of such powers cannot be interfered with or disturbed by this Court in the exercise of its revisional powers under section 439 of the Criminal Procedure Code. Reference may be made in this connection to the following cases: *Madusudan Lal v. King-Emperor* (1), *Municipal Board, Benares v. Ram Sahai Gupta* (2), *In the matter of the petition of Damma* (3) and *Sandal Singh v. District Magistrate of Dehra Dun* (4). A similar view has been taken by the Calcutta High Court in the cases of *Hasan Ali Bepari v. Emperor* (5) and *Krishen Doyal Jalan v. Corporation of Calcutta* (6). The Patna High Court also has endorsed the same view in the case of *Bideshi Mian v. Emperor* (7). The order sought to be set aside in the present case was not a sentence or punishment for an offence within the meaning of the Indian Penal Code and the Criminal Procedure Code. No inquiry or other proceeding is prescribed by section 4 of the Naik Girls' Protection Act under which the order in question was passed, and even if an inquiry were held, none of the various procedures prescribed in the Code of Criminal Procedure could have been applicable in terms to such an inquiry. I am therefore of the opinion that the order in question was passed by the Additional District Magistrate of Naini Tal in the exercise of the special powers conferred upon the District Magistrate by section 4 of the Naik Girls' Protection Act, and in doing so he did not function as an inferior criminal court, so that the revisional powers of this Court under

(1) [1930] A.L.J. 216.

(2) A.I.R. 1933 All. 281.

(3) (1907) I.L.R. 29 All. 563.

(4) (1933) I.L.R. 56 All. 409.

(5) (1919) I.L.R. 47 Cal. 843.

(6) A.I.R. 1927 Cal. 509.

(7) A.I.R. 1932 Pat. 155.

section 439 of the Criminal Procedure Code cannot be invoked for setting aside that order.

The result, therefore, is that the application in revision does not lie and is consequently dismissed.

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APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Verma

PIAREY LAL AND OTHERS (PLAINTIFFS) v. DINA NATH
AND OTHERS (DEFENDANTS)*

1938
October,
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Transfer of Property Act (IV of 1882), section 92, paragraph 1—Subrogation—Equity—Right by subrogation to enforce a mortgage can not be claimed in equity, apart from the section—Auction purchaser of equity of redemption paying off decree on prior mortgage—No right to bring a second suit for sale, as against puisne mortgagee, on the prior mortgage—Transfer of Property Act, section 59A—“Mortgagor” includes auction purchaser of equity of redemption—Covenant running with the land—Undertaking by puisne mortgagee to pay off prior mortgage—Whether auction purchaser of mortgagor’s rights can sue the puisne mortgagee for breach of the contract—Transfer of Property Act, section 65.

Cases of subrogation fall under two heads: (1) Where payment by a defendant of a mortgage or of the decree on a mortgage is allowed to be set up by way of a shield as an equitable defence; and (2) Where a person paying off a mortgage is allowed to bring a suit to enforce that mortgage. The second class of claim can not be made in equity but can lie only under the terms of section 92 of the Transfer of Property Act.

The language of section 92, paragraph 1, appears to contemplate a suit for sale against a mortgagor. The rights that could be acquired under that section and paragraph would be for sale as against the mortgagor, and as against other mortgagees would presumably merely be rights of priority. Where the plaintiff, having acquired the mortgagor’s equity of redemption at an auction sale, and having paid off a prior mortgage, brings a suit for sale on that mortgage, impleading as defendants the puisne mortgagee and the original mortgagor

*Second Appeal No 553 of 1935, from a decree of Jagan Nath Singh, Additional Civil Judge of Muttra, dated the 13th of August, 1934, modifying a decree of Ram Nath Sharma, Additional Munsif of Muttra, dated the 5th of April, 1933.