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 SON, J.

On the question of law I prefer not to express a final opinion as to whether failure on the part of the Sub-Inspector to comply with section 165 (1) of the Code of Criminal Procedure would give room for a finding that the search was "without due care and attention." But I am satisfied that failure on his part to comply with section 165(5) would afford no ground for such a finding.

Order modified.

APPELLATE CIVIL.

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 March, 20,
 27.
 April, 11,
 20.

Before Macpherson and Dharle, JJ.

BINDESHWARI NARAIN SINGH*.

v.

RAJA KIRTYANAND SINGH BAHADUR.

Code of Civil Procedure, 1908 (Act V of 1908), section 73 and Order XXI, rule 72(2)—court, whether has power to enforce an order for rateable distribution by summary process in execution—appeal, whether lies from an order refusing to execute an order for rateable distribution—amount bid by the decree-holder in an execution sale, whether forms "assets held by the court"—section 73—order for set-off in favour of decree-holder, whether is subject to the provisions for rateable distribution—Order XXI, rule 72(2).

A court has power to enforce an order for rateable distribution by summary process in execution.

The amount bid by a decree-holder at an execution sale forms "assets held by the court" within the meaning of section 73, Code of Civil Procedure, 1908, until the confirmation of the sale and an order for a set-off under Order XXI, rule 72(2), of the Code in favour of the decree-holder is subject to the provisions for rateable distribution contained in section 73.

* Appeal from Original Order no. 140 of 1929, from an order of Akhauri Nityanand Singh, Subordinate Judge of Monghyr, dated the 22nd March, 1929.

An appeal lies from an order refusing to execute an order for a rateable distribution.

Madden v. Chappani(1), followed.

Mussammat Hurmoozi Begum v. Musammat Ayesha(2), distinguished.

Appeal by the decree-holder.

The facts of the case material to this report are stated in the judgment of Dhavle, J.

R. K. L. Nandkeolyar, for the appellant.

S. Dayal and *D. L. Nandkeolyar*, for the respondents.

DHAVLE, J.—This is an appeal from an order of the Subordinate Judge of the 2nd court, Monghyr, holding that the appellant was not entitled to execute as against the respondents a certain order for rateable distribution. It appears that the appellant obtained a money decree against Kumar Kalikanand and others, which he put into execution in Execution Case no. 494 of 1923 before the Subordinate Judge, 1st Court, Monghyr. The respondents also had a rent decree against the same judgment-debtors, which was put in execution in Rent Execution Case no. 113 of 1923 before the Subordinate Judge of the 2nd Court, Monghyr. In this rent execution the respondents on the 19th May, 1924, purchased several properties of the judgment-debtors after leave taken from the court to bid at the auction sale. They were also, as appears from the ordersheet, permitted to deposit the poundage fee, and upon their doing so, a set off was allowed to them in respect of the purchase money, and the case was adjourned to the 19th June, 1924, for confirmation of sale. On the 13th June, 1924, the appellant who, as I have already said, had in the previous year started an execution case in connection with his money decree in the 1st court, applied to the Subordinate Judge of the 2nd court for rateable distribution.

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(2) (1920) 5 Pat. L. J. 415.

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Owing to certain reasons into which it is not necessary to enter at present this application of the appellant was only disposed of on the 31st March, 1926, the order of the Subordinate Judge being passed on the ordersheet of rent execution case no. 113 of 1923 and being in these terms :

" The application for rateable distribution is allowed. The sale certificate will not be issued unless the sum payable to the other creditor is paid. Execution case dismissed on part satisfaction. Sale confirmed."

An account was subsequently prepared showing that the appellant was to get Rs. 10,220-6-0 out of the sale proceeds, the rest going to the respondents as their share in the rateable distribution. When the appellant applied for execution of this order, the respondents contended that he was not entitled to realise the money in execution. This contention was accepted by the Subordinate Judge on the ground that as the order of rateable distribution did not contain anything directing realization by execution and as it had become final, the executing court had no power to execute the order as a decree. The learned Subordinate Judge observed that his predecessor in 1926

" instead of directing that the amount be deposited in court or that the present judgment-debtors (namely, the respondents in this Court) do pay the amount directly to the decree-holder of Case no. 494 of 1923 or instead of directing that the decree-holders would be entitled to realize the said amount by execution chose to lay down a condition that a sale certificate will not be issued unless the sum payable to the other creditor is paid "

a condition which failed to bring any satisfaction to the appellant because the properties were subsequently sold in execution of a prior mortgage decree obtained by another party, making it perfectly useless for the respondents to apply for and obtain a sale certificate. He distinguished *Bijoy Kumar Addya v. Rama Nath Barman*⁽¹⁾ as a case where the order for a refund was passed by the High Court on a rule issued against the order refusing the grant of rateable distribution.

(1) (1917) 43 Ind. Cas. 715.

The first question that arises in this appeal, though it was not argued in the beginning, is whether an appeal at all lies in the case. The learned Government Pleader who appears for the respondents has cited *Musammât Hurmoozi Begum v. Musammât Ayesha*(¹) and other decisions from almost every other High Court in the country in support of the proposition that there is no appeal against an order passed under section 73 of the Code of Civil Procedure. This contention is met on behalf of the appellant by pointing out that the appeal is really directed not against an order refusing rateable distribution but against an order refusing to execute an order for a rateable distribution. The terms of the order have been set out already, and it is clear that the appellant's contention is right; as will be seen below, *Madden v. Chappani*(²) is an authority in favour of the appellant's contention that as against the respondents he is entitled to enforce the order for a rateable distribution by summary execution.

It has been urged on behalf of the appellant that the amount bid by the respondents at the execution sale formed "assets held by the court" within the meaning of section 73 of the Code of Civil Procedure until the confirmation of the sale and that the order for a set-off in favour of the respondents was subject to the provisions for rateable distribution contained in that section. Both these propositions are supported by the decision in *Madden v. Chappani*(²), and the second is also now supported by express provision, namely, the words "subject to the provisions of section 73" in sub-rule (2) of Order XXI, rule 72 of the Code of 1908. The case cited is also an authority for the further contention that the court has power to enforce an order for rateable distribution by summary process in execution.

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(2) (1887) I. L. R. 11 Mad. 356.

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The learned Advocate for the respondents has sought to meet these contentions by urging that the amount bid by them represents what the properties were worth to them, and that they were entitled to the option of a re-sale as an alternative to a refund of the amount found due to the appellant according to a rateable distribution of the purchase money. It is, however, clearly too late now to claim this option, the order for a rateable distribution being really non-appealable and in any case having become final by lapse of time. The learned Advocate has also urged that the order for a rateable distribution (which has been quoted above in extenso) should be read as a whole, and that so read, it only means that the respondents are to derive no benefit from the sale unless they pay the appellant his share. Stress has been laid on the fact that there was in fact no order for a refund, and it is urged that the executing court cannot go behind the terms of the order in question. It seems to me, however, that once it is held that the purchase money which was allowed to be set off continued to be "assets held by the court" until the order for a rateable distribution, no express order directing a refund by the respondents was at all necessary, for the order of rateable distribution was by its very nature capable of being enforced by summary process in execution. The set-off was statutorily subject to the provisions of section 73, and the order for a rateable distribution was a necessary consequence of two undisputed facts, viz., (1) the court holding assets, and (2) the appellant having applied for the execution of his money decree against the same judgment-debtor as the appellant had done and not having obtained satisfaction thereof, before the receipt of such assets as a consequence of the execution sale held at the instance of the respondents. It may or may not have been open to the court to direct that no sale certificate would be issued to the respondents unless the sum payable to the appellant was paid, but the court had no power to deprive the appellant of his ordinary remedy of realization by

summary process in execution, and I can see nothing in the terms of the order of the 31st March, 1926, from which it can be gathered that the court purported or even intended to do so. In *Bijoy Kumar Addya v. Rama Nath Burman*⁽¹⁾, referred to by the learned Subordinate Judge also, it was pointed out that "a refund of this sort might be enforced by process in execution."

I would, therefore, give effect to the contentions of the appellant and decree this appeal with costs.

MACPHERSON, J.—I agree. As usual with orders of Babu N. N. Chakravarti, Subordinate Judge, the order of 31st March, 1926, is difficult to interpret. Apparently by the second sentence he merely meant to put pressure upon the Banaili Raj to pay the present appellant without compelling him to resort to his ordinary remedy of execution of the order already made for rateable distribution. It is just conceivable, though not probable, that he contemplated that the Raj should pay nothing if it decided not to take out a sale certificate at all. That may indeed have been in the minds of the representatives of the Raj, with their greater knowledge of the position, when they accepted or possibly even suggested or pressed for an order in such terms, but one prefers to hold that it was not the intention of the Judge or the contemporaneous interpretation of the appellant.

Appeal decreed.

APPELLATE CIVIL.

Before Dhavle and Macpherson, JJ.

CHITRAREKHA DAI

v.

BABU BANSMAN RAI.*

Succession Act, 1925 (Act XXXIX of 1925), section 384—Order granting succession certificate on condition of furnishing security—order, whether appealable.

* Appeal from Original Order no. 248 of 1929, from an order of Rai Bahadur Radha Kanta Ghosh, District Judge of Purnea, dated the 12th June, 1929.

(1) (1917) 48 Ind. Cas. 715.

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