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REVISIONAL CRIMINAL.

Before Das and James, JJ.

MUSSAMMAT LACHMI KUER

v.

GAJADHAR PRASHAD.*

1927.

July, 1.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 146—*disputed land, settlement of, with parties to proceeding, desirability of—order of the magistrate for the management of the attached property, whether open to revision by High Court.*

It is improper to settle a disputed village attached under section 146, Code of Criminal Procedure, 1898, with persons who are parties to the proceedings and who have been found by the Court not to be in actual possession of the land.

The High Court will not lightly interfere with orders that may be passed by the magistrate for the management of properties attached under section 146, but where the order of the magistrate offends against an elementary rule founded on the desire of the court to place the parties to a proceeding on a footing of absolute equality, the order is open to revision.

Per JAMES, J.—" Persons who are excluded from possession by an order under section 146 of the Code of Criminal Procedure ought not to be re-instated while the estate is under attachment."

*Criminal Revision no. 284 of 1927, against an order of M. G. Hallett, Esq., I.C.S., District Magistrate of Gaya, dated the 18th February, 1927.

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

H. L. Nandkeolyar (with him *D. L. Nandkeolyar*), for the petitioner.

Sir Sultan Ahmed, Government Advocate (with him *Hasan Imam* and *T. N. Sahai*), for the opposite party.

DAS, J.—This is an application against the order of the learned District Magistrate of Gaya, dated the 18th February, 1927, by which he has directed that the disputed villages be settled with certain thikedars who are parties to the proceeding before him. Shortly stated the facts are as follows: One Bhagwat Kuer was in possession of the disputed villages as a mukarraridar paying rent to Maharaj Kumar Gopal Saran Narain Singh of Tikari. She died on the 18th September, 1925; and a dispute at once arose between certain persons who may be referred to as the Manjha Babus and the thikedars on the one hand and Mussammat Lachmi Kuer, as to which of the parties was in possession of the disputed villages. The thikedars claimed to be in possession by virtue of settlements made in their favour by Bhagwat Kuer, and most of them attorned to the Manjha Babus, and actively supported their claim in the contest that followed. Proceedings under section 145 were drawn up and to these proceedings the thikedars with whom the learned District Magistrate has now settled the villages were parties. The learned Subdivisional Officer of Gaya tried the cases between the parties and came to the conclusion that the Manjha Babus as well as the thikedars were in possession of the disputed villages, the thikedars, by receipt of rent from the actual cultivators, and the Manjha Babus, by receipt of rent from the thikedars. Mussammat Lachmi Kuer then moved this Court against the order of the learned Subdivisional Officer of Gaya. This Court on the 21st January, 1927, set aside the order of the learned Subdivisional Officer holding that neither party was

in possession of the disputed villages. It passed an order attaching the disputed properties under section 146 of the Code and directing the learned District Magistrate to take the necessary steps under section 146 of the Code of Criminal Procedure and to appoint a receiver to take charge of the estate. When the matter went to the learned District Magistrate, he took the view that

> " the only practicable and the only equitable course is to make a resettlement with the former thikedars who will thereby remain in actual possession of the villages and to appoint a receiver whose duties will be to collect rents from the thikedars to see that they do not neglect the villages or the irrigation work and to see that they do not oppress the tenants ".

As against this order Mussammat Lachmi Kuer has moved this Court and her contention is that it is not a proper exercise of discretion to place the disputed villages in the actual possession of persons who are parties to the proceedings and who are found by the High Court not to have been in possession of the disputed villages.

In my opinion the contention is right and must prevail. In dealing with the question of the possession of the thikedars this Court in its order of the 21st January, 1927, said as follows:

> " It was then contended that the thikedars were in possession and that the thikedars or most of them are willing to pay rent to Hari Surendra and to Raghava Surendra and that accordingly the learned Subdivisional Officer was right in finding in favour of the second party; but the criterion of direct possession as between the first party on the one hand and the thikedars on the other hand is the collection of rent. The title of the thikedars was itself in dispute, their title having been created in their favour by a limited owner; and it is idle to suggest that the acknowledgment of the title of the second party by the thikedars has any value on the question of possession of the second party unless it is established that the title of the thikedars has been recognised by the tenants and that these thikedars are in receipt of rent from the tenants. There is, however, not an iota of evidence in the record to establish that the title of the thikedars was recognised by the raiyats. Indeed the learned Subdivisional Officer has held in distinct terms that the raiyats as a body have gone over to the first party ".

The position then is this: the thikedars are parties to the proceedings under section 145 of the Code of Criminal Procedure. They claimed that they were

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in direct possession of the disputed villages by receipt of rent from the tenants and that their possession should not be disturbed. That position was found to be untenable in this Court. The question then arises whether the learned District Magistrate should settle the disputed villages with persons who are parties to the proceedings under section 145 of the Code and whose contention was found untenable in this Court. It is a well-settled rule that as a matter of principle a person ought not to be appointed a receiver who has shown a partiality for one of the parties and that a party to the action should not be appointed unless by consent or unless there are special circumstances justifying his appointment in preference to others. The rule is not a technical one, but is founded on the desire of the Courts to see that the parties are placed on a footing of absolute equality. Now a receiver is an officer of the Court and has to act under the direction of the Court, and it is far less mischievous to appoint a party to a proceeding as a receiver than to place him exactly in the position which he would have occupied if an adverse order had not been passed against him. As a matter of principle, therefore, I think the order of the learned District Magistrate is open to grave objection.

We have been asked to consider whether in practice the order of the learned District Magistrate is likely to produce any harmful result. This I decline to consider, for the reason that if exceptions are allowed to be engrafted on a general principle of this nature then the time must come when the very wholesome rule upon which the practice rests will be swept away. I think that the order of the learned District Magistrate must be set aside.

It was contended before us by the learned Government Advocate that the order passed by the learned District Magistrate in this matter is not revisable by this Court and a case was cited to us which was decided, not under the new Code, but under the old Code. The new Code provides that orders under

section 146 are subject to revision by the High Court; but it was contended that the order passed in this matter by the learned District Magistrate was not an order under section 146 of the Code but was an administrative order, with which this Court will not interfere. I entirely accept the view that this Court, in the exercise of its revisional jurisdiction, should not lightly interfere with orders that may be passed by the District Magistrate for the management of the attached properties under section 146 of the Code. But the question is not one of want of jurisdiction, but of the proper exercise of discretion by this Court. As I take the view that the order of the learned District Magistrate offends against an elementary rule founded on the desire of the Courts to place the parties to a proceeding on a footing of absolute equality, I must set aside the order, and remand the case to the learned District Magistrate to enable him to take proper steps in accordance with law.

JAMES, J.—I agree that persons who are excluded from possession by an order under section 146 of the Criminal Procedure Code ought not to be reinstated while the estate is under attachment. The learned District Magistrate justified his order for resettling the estate with the thikedars on equitable and practical grounds. In his reference to equitable considerations he is apparently referring to the dual nature of the zarpeshgi leases, but no equities can arise in favour of mortgagees in possession whose claim to that title is derived from mortgagors who being themselves out of possession, and having endeavoured unsuccessfully to obtain possession, by force, are now definitely excluded from possession by the order of attachment. The only ground on which resettlement with these thikedars could have been justified would have been that of unavoidable necessity. A case has been made out for the justification on this ground of the order by which the thikedars were restored to possession for the remainder of the Fasli year 1334; but lapse of

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time has rendered it unnecessary to go into that question, since the date fixed by the learned District Magistrate for payment of the last kist of 1334 has already passed. I am not satisfied that after the end of 1334 it would be difficult to manage the estate otherwise than through these thikedars; and I do not think that the order for resettlement for 1335 and subsequent years has been justified by proof of necessity. I therefore concur in the decision of my learned brother. After the end of 1334 no resettlement should be made with any of these thikedars or with anybody who may be a near relation or a benamdiar of any of them.

Order set aside

Case remanded.

APPELLATE CIVIL.

Before Kulwant Sahay and Ross, JJ.

IHSAN HASAN KHAN

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July, 1.

v.

PANNA LAL.*

Muhammadan law—marriage with an idolatress or fire-worshipper, whether void or invalid—offspring, whether legitimate—acknowledgment when marriage uncertain, effect of.

Under the Muhammadan law a Muhammadan male may contract a valid marriage with a Muhammadan or Kitabia, i.e., a Christian or Jewess but not with an idolatress or fire-worshipper. If, however, he does marry an idolatress or a fire-worshipper, the marriage is not void (*batil*) but merely invalid (*fasid*) and the offspring of such marriage will be legitimate issue of their father.

When the marriage is uncertain, but it has not been disproved, an acknowledgment by the father has the effect of proving the legitimacy of the offspring.

*Appeal from Original Decree no. 45 of 1924, from a decision of Pandit Ram Chandra Chaudhari, Additional Subordinate Judge of Monghyr, dated the 27th August, 1923.