1932.

BENGAL AND NORTH WESTERN RAILWAY COMPANY v. MAHARAJADHIRAJ KAMESHWAR SINGH BAHADUR.

COURTNEY TERRELL, C. J.

suit until the defendants had made it clear that they had no intention of delivering the goods. Had the position been reverse the defendants would not have hesitated to contend that a suit was premature which did not give them a reasonable opportunity of fulfilling the terms of the contract. The defendants by a deliberate process of ignoring the plaintiff's repeated requests for attention to his claim misled him into delaying his suit and it is not open to them now to contend that the suit has been brought too late. In my opinion the attitude of the railway company has throughout been lacking in candour and their defence to this suit even in its most technical aspects has no merit. I would, therefore, dismiss this appeal with costs.

FAZL ALI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

1931.

March, 16.

Before Adami and Fazl Ali, JJ.

BIBI MEHDATUNNISSA BEGAM

v.

SEWAK RAM.*

Execution—mortgage decree laying down order in which mortgaged properties are to be sold—executing court, whether can change the order—High Court, privilege and prerogative of, to vacate erroneous order in the ends of justice when entire record is before the court—order without jurisdiction—whether such order can be validated by consent of parties.

While it is true that an executing court may, in certain exceptional cases where equities demand it, prescribe the order in which the mortgaged properties are to be sold, it has no

* Appeal from Original Order no. 163 of 1928, from an order of Babu Radha Krishna Prasad, Subordinate Judge of Additional Court, Patna, dated the 11th August 1928.

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

such jurisdiction where the mortgage decree has definitely laid down the order in which the mortgaged properties are to be sold.

Rajkeshwar Prasad Narain Singh v. *Mohammad Khalilur Rahman*(1), *Rai Saheb Sarju Lal* v. *Baij Nath Prasad Singh*(2), and *Bhagwan Chandra Das* v. *Rai Saheb Dharam Narayan Das*(3), referred to.

It is the privilege and prerogative of the High Court, once a record is before it and it is found that the order passed is erroneous and so erroneous as manifestly to amount to an injustice, to exercise its power of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require.

Brindaban Chandra Choubey v. *Gour Chandra Roy*(4), followed.

Appeal by one of the judgment-debtors.

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

[An application for review of the judgment was rejected.]

S. M. Mullick (with him *S. Dayal* and *Syed Ali Khan*), for the appellant.

Hasan Imam (with him *W. H. Akbari*, *B. N. Mitter*, *D. N. Das* and *A. H. Fakhruddin*), for the respondents.

FAZL ALI, J.—This is an appeal by one of the judgment-debtors against an order passed by the Additional Subordinate Judge of Patna in the course of an execution proceeding. It appears that in 1917 one Saiyid Badsha Nawab of Patna City borrowed a sum of Rs. 1,25,000 by mortgaging certain immovable properties to the ancestor of the present decree-holder. He died on the 19th March, 1919, leaving two brothers

(1) (1924) 5 Pat. L. T. 223.
(2) (1922) 6 Pat. L. T. 390.
(3) (1924) 6 Pat. L. T. 392.
(4) (1919) 1 Pat. L. T. 467.

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

FAZL ALI, J.

and two sisters as his heirs. A portion of the mortgage debt had been paid off by the deceased mortgagor during his life-time and as the two sisters paid up their one-third share of the remaining mortgage debt, their share in the properties was released by the decree-holder. In 1926 the decree-holder brought a mortgage suit for the realisation of Rs. 63,000 odd which was alleged to be the amount due at the time and he impleaded in this suit the two brothers of the mortgagor who had not paid their share of the debt as defendants 1 and 2 and also certain other persons including the three daughters of defendant no. 1. The necessity of impleading these other persons arose because defendant no. 1 had transferred his share in some of the mortgaged properties in favour of his three daughters (defendants 4 to 6) under an instrument called tamliknama and had also transferred certain other mortgaged properties to defendants nos. 7 to 14 and 17. It may be mentioned here that under this tamliknama defendant no. 4, one of the daughters of defendant no. 1, was directed to pay a sum of Rs. 10,818 odd to the decree-holder and also certain sums of money were left with some of the other transferees so that they might be applied towards the liquidation of the share of defendant no. 1 in the mortgage debt. In the mortgage suit it was held that the mortgage had been split up and, therefore, the two brothers of the deceased were entitled to pay up their share of the mortgage debt separately. Further the Court having fully considered the equities arising in the case directed that the properties be sold in a particular order. The defendant no. 2 whose estate was under the management of the Court of Wards paid up his share of the debt and consequently execution was taken out by the decree-holder against those properties only which were in the possession of defendants 4 to 6 (the three daughters of defendant no. 1) and the other transferees. It appears that defendant no. 4 who is the appellant before us had not appeared in the mortgage suit and in the various petitions which

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

FAZL ALI, J.

have been filed on her behalf in the execution proceedings, it is stated that she being a pardahnashin lady and no summons having been served on her she could not properly represent her case before the original Court so as to secure a release of her properties by payment of her share of the debt. However that may be, it appears that throughout the execution proceedings she has expressed her willingness to pay her quota of the debt, that is to say, the amount mentioned in the tamliknama as payable by her. The first petition made by her was filed on the 10th December, 1927. By this petition she asked the Court in the first place to order the decree-holder to accept a certain sum of money which according to her was her quota of the debt and release the mortgaged properties which were in her possession. She also asked the Court in the alternative to direct that her properties be sold after the sale of the properties in possession of defendants nos. 3, 5, 14 and 17. This petition was resisted by the decree-holder as well as by some of the judgment-debtors and it is to be noted that the decree-holder in his petition of objection particularly laid stress upon the fact that the order of sale directed by the decree could not be changed by the executing Court. On the 21st April, 1928, the learned Subordinate Judge passed orders on the petition of judgment-debtor no. 4 and directed that on her depositing Rs. 15,500 in Court or paying it to the decree-holder the sale of her properties (which have been described in the execution proceedings as lots nos. 1 to 5) be postponed

> "unless the proceeds of the sale of other lots barring those of judgment-debtors 5 and 6 but including those belonging to judgment-debtors 10 and 11 offer an inadequate sum to satisfy the whole decretal amount."

The effect of this decision was that the order in which the properties had been directed to be sold in the mortgage decree was changed and a sum of Rs. 15,500 was actually paid by the appellant to the decree-holder. On the 28th July, 1928, the appellant filed another application to the learned Subordinate Judge in which

she drew his attention to certain circumstances particularly to the fact that in spite of her having paid the full amount of the mortgage debt proportionate to her share of the liability, her properties were in immediate danger of being sold. It may be mentioned here that according to the valuation of the Court the properties in possession of the appellant are worth only Rs. 8,302-8-0 whereas she had already paid a sum of Rs. 15,500 to the decree-holder. The appellant, therefore, asked in her petition that either the decree-holder be directed to restore Rs. 15,500 which had been paid by her to him or that the sale of her lot might be postponed till all the other mortgaged properties had been sold. This was in effect a petition asking the Subordinate Judge to re-consider his previous order. The learned Subordinate Judge while dealing with this petition characterised the payment of the sum of Rs. 15,500 to the decree-holder as a foolish act on the part of defendant no. 4 and further remarked that the petition had been filed after the appellant had felt the pinch of this foolish act. He also observed—

"At this stage I am of opinion that she cannot ask the Court to revise the order in which the allotments of properties for sale have been arranged."

Now the position which has been created is manifestly a somewhat unfair one and one of great hardship to the appellant. She has paid Rs. 15,500 in cash to the decree-holder to save the properties which according to the valuation of the Court are worth only Rs. 8,302 and odd and yet the decree-holder wants to sell her properties as well as keep the money. It is also conceded that the original decree being a mortgage decree, there was no personal liability on the defendant no. 4 to pay any portion of the decree for the realisation of which the decree-holder was entitled only to sell the mortgaged properties. There is no doubt that the defendant no. 4 has gained very little by payment of Rs. 15,500 because even if the sale of her properties had not been postponed and her properties had been sold straightaway they could not in

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

FAZL ALI, J.

all probability have been sold for more than the amount paid by her to the decree-holder and she could have repurchased the properties herself. The decree-holder, on the other hand, has received a sum of money in cash which he might not perhaps have been able to realise if the properties of the defendant no. 4 had been sold at auction and has also in addition retained the right to sell the properties of defendant no. 4. This position, as the lower Court has observed, has been undoubtedly created by the appellant's own foolish act but unfortunately it was an act to which the Court below also lent countenance by its order, dated the 21st April, 1928, and the question, therefore, is whether the Court is entirely powerless to give relief to a party who has been placed in unfair position not only by reason of her own act but also by reason of an order passed by the Court.

The learned Advocate for the respondent vehemently contends that both the Court below as well as this Court are entirely powerless in the matter and lays particular stress on the fact that this is not an appeal against the order of the 21st April, 1928, in pursuance of which the sum of Rs. 15,500 was paid by the appellant to the decree-holder but an appeal against an order of a subsequent date by which the lower Court refused to revise its previous order. The learned Advocate for the respondent also refers to the principle of res judicata and estoppel in this connection and even goes so far as to say that the conduct of the appellant amounts to his entering into a contract with the decree-holder in pursuance of which a sum of Rs. 15,500 was paid to the latter. Now, although I have no doubt that this is neither a case of estoppel nor of res judicata, nor do I understand how the money which was obviously paid to the decree-holder in pursuance of a definite order of the Court, can be said to have been paid under a contract, yet I fully concede that this Court will not and should not interfere on the sole ground of hardship if it is found that the order passed by the lower Court is a legal and proper

order. Here, however, the point which has been argued on behalf of the appellant is that the order of the 21st April, 1928, was wholly without jurisdiction and it was, therefore, incumbent on the lower Court to put matters right and relieve the parties of any hardship that might have arisen in consequence of that order. It has also been pointed out that if the Court has no jurisdiction to pass an order, the order cannot be validated merely because some of the parties have consented to the order. Lastly it is urged that the decree-holder does not suffer in any way if he refunds the amount paid to him and the sale of the mortgaged properties proceeds as if no payment had been made by defendant no. 4. Now, it is well settled that a Court which passes a mortgage decree may also in certain circumstances and having regard to the equities of the case prescribe the order in which the mortgaged properties are to be sold—*see Rajeshwar Prasad Narain Singh* v. *Mohammad Khalilur Rahman*(1). It is also well established that an executing Court cannot go behind the decree which is sought to be executed. The question, therefore, which arises for consideration is whether the learned Subordinate Judge was competent to change the order in which the properties had been directed to be sold in the original mortgage decree, as he actually did, by his order of the 21st April, 1928. It is true that in some cases it has been held that an executing Court may, in certain exceptional cases where equities demand it, prescribe the order in which the mortgaged properties are to be sold. A different view, however, seems to have been taken in *Rai Saheb Sarju Lal* v. *Baij Nath Prasad Singh*(2) where it was observed by Das, J. that the holder of a mortgage decree has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and if any question of equity arises between the decree-holder and the persons to whom the equity

(1) (1924) 5 Pat. L. T. 223.
(2) (1922) 6 Pat. L. T. 390.

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

FAZL ALI, J.

of redemption in the mortgaged properties, or any of them, may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. Nevertheless the same learned Judge again held in *Bhagwan Chandra Das* v. *Rai Saheb Dharam Narayan Das*(1) that the decree-holder is entitled to have all the mortgaged properties mortgaged to him advertised and put for sale, but when they become subject to sale, the Court can decide on just and equitable principles the order in which they should be sold. The learned Subordinate Judge has also cited certain cases in his order of the 21st April, 1928, in which the executing Court was allowed to prescribe the order in which the mortgaged properties were to be sold even though the original Court declined to go into the question. I do not, however, find any authority for the proposition that once the Court passing the mortgage decree had definitely laid down the order in which the mortgaged properties are to be sold, the executing Court can ignore the original decree and proceed to sell the properties in a different order in spite of the objections of decree-holder as well as some of the judgment-debtors. In my opinion, therefore, the order passed by the learned Subordinate Judge on the 21st April, 1928, by which he allowed the sale of the properties of the appellant to be postponed in consideration of her paying Rs. 15,500 to the decree-holder was without jurisdiction and, as I have already stated, this was pointed out by the decree-holder himself in the petition of objection filed by him on the 20th January, 1928. It is, however, urged that that order cannot be touched now because this appeal is not directed against it. I have, however, already stated that the application made by the appellant on 28th July, 1928, was virtually an application asking the Court to reconsider its previous order and in fact in this light the learned Subordinate Judge himself has taken this petition. The question, therefore, is if

(1) (1924) 6 Pat. L. T. 392.

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

FAZL ALI, J.

the learned Subordinate Judge refuses to vacate an order which is entirely without jurisdiction and his order is appealable, whether the appellate Court cannot vacate that order. I do not think that even giving full weight to the technical arguments advanced on behalf of the respondent it can be held that the appellate Court is not competent to do so. Mr. Shiveshwar Dayal appearing on behalf of the appellant drew our attention to the decision of this Court in *Brindaban Chandra Choubey* v. *Gour Chandra Ray*(1) where it was pointed out that it is the privilege and prerogative of the High Court once a record is before it and it is found that the order passed is erroneous and so erroneous as manifestly to amount to an injustice, to exercise its power of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require. I do not think, however, that the present case need be placed on such a high ground, because apart from the powers of superintendence which this Court undoubtedly possesses and which it will not be slow to exercise in a proper case, I think it is open to this Court to give adequate relief to the appellant in this appeal. There is no doubt that the order of the learned Subordinate Judge passed on the 21st April, 1928, in pursuance of which the sum of Rs. 15,500 was deposited was without jurisdiction and the parties should be relegated to the former position as far as possible. In the present case all the properties excepting the properties belonging to the appellant and the judgment-debtors nos. 5 and 6 have been already sold and none of the parties affected by the sale objected to these sales excepting the appellant. The petition of the appellant was thrown out by the Court below on the ground that he was not competent to maintain an application under Order XXI, rule 90, and the appellant preferred an appeal against the order to this Court. Her appeal has been allowed and the case has been sent back to the Court below with

(1) (1919) 1 Pat. L. T. 467.

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

a direction that it is to be heard and disposed of on its merits. The appellant, however, undertakes not to press that matter before the learned Subordinate Judge if this appeal is allowed and adequate relief is granted to her.

FAZL ALI, J.

In these circumstances all that we need do is to place the appellant and the decree-holder respondent in the same position in which they were before the order of the 21st April, 1928, was passed. As the respondents nos. 5 and 6 and the other judgment-debtors took no steps within the time prescribed by law to have the sale of other properties set aside, the sale of those properties need not be disturbed. Thus I think that it will meet the ends of justice if we order and provide that the respondent decree-holder will be competent to sell the properties of the judgment-debtor no. 4 forthwith if he repays the amount of Rs. 15,500 to the appellant or deposits it to her credit in the Court below within three months from to-day. In case this money is not deposited the respondent decree-holder will still be entitled to sell the properties of the remaining judgment-debtors other than the appellant but not the property of the appellant. We have in passing this order taken into consideration the fact that as the mortgaged property in possession of the appellant (lots 1 to 5) has been valued by the Court below at Rs. 8,302-odd, the decree-holder respondents will not be in any way prejudiced if they elect not to sell these properties and keep the money, a course to which the appellant does not have any objection. The respondents nos. 5 and 6 also who are the only other parties interested in this appeal will not be prejudiced at all, because in any event their properties will be sold last of all as provided in the decree.

The order of the lower Court is, therefore, set aside and the appeal allowed on the terms already indicated. If the respondent decree-holder proposes to sell the properties of judgment-debtors nos. 5 and

1931.

BIBI MEHDATUN-NISSA BEGAM v. SEWAK RAM.

6 only they will sell them for the balance of the decretal amount due after giving credit for the sum of Rs. 15,500 paid to them by defendant no. 4. If, however, they return the money to the appellant within the time prescribed, the decretal amount will increase to that extent. Having regard to the circumstances of the case there will be no order as to costs.

ADAMI, J.—I agree.

FAZL ALI, J.

Appeal allowed.

CRIMINAL REFERENCE.

Before Macpherson and James, JJ.

NANDKESHWAR PRASAD SAHI

1932.

August, 30.

v.

SITA SARAN SAHI.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 145 *and* 146—*dispute concerning land, one party claiming joint possession while the other claiming exclusive possession —sections, whether applicable.*

A dispute between two parties one of whom claims joint possession while the other claims exclusive possession over the disputed land and contests the opposite party's right is within the contemplation of section 145 (and, therefore, of section 146), Code of Criminal Procedure, 1898.

Sham Lal Mahto v. *Rajendra Lal*(1), not followed.

Tarujan Bibi v. *Asamuddi Bepari*(2) and *Krista Alhadini Dasi* v. *Radha Syam Panday*(3), distinguished.

The only condition for a proceeding under section 145, terminating in a finding under sub-section (4) and an order under sub-section (6) or an order under section 146, is that

* Criminal Reference no. 42 of 1932, made by J. G. Shearer, Esq., I.C.S., Sessions Judge, Muzaffarpur, in his letter no. 1014, dated the 30th June/2nd July, 1932.

(1) (1920) 1 Pat. L. T. 594.
(2) (1900) 4 Cal. W. N. 426.
(3) (1902) 7 Cal. W. N. 118.