PATNA HIGH COURT

Raja Singh

Vs

Mahendra Singh

Criminal Misc. No. 100 of 1962

(S.C. Misra, K. Sahai and S.P. Singh, JJ.)

25.01.1963

JUDGMENT

Misra, J.

1. The question referred to this Bench for determination is as to whether the High Court can interfere in the exercise of its supervisory jurisdiction, under Article 227 of the Constitution of India, with the finding of the Civil Court recorded when a dispute, which is the subject matter of a proceding under Section 145, Criminal Procedure Code cannot be decided by the Magistrate before whom it is pending, and it is referred to a civil Court for a finding. Section 146 of the Code provides that if the Magistrate in such a case is of the opinion that he is unable to decide as to which of the contesting parties was in such possession of the subject of dispute, he may attach it and draw up a statement of the case and forward the record of the proceedings to a civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject matter of dispute on the date of the order. Subsection (1B) of section 146 provides that at the conclusion of the enquiry the civil Court shall transmit its finding together with the record of the proceedings to the Magistrate by whom the reference was made and the Magistrate shall, on receipt thereof, proceed to dispose of the proceeding under Section 145 in conformity with the decision of the Civil Court. Sub-section (1D) provides that no appeal shall lie from any finding of the Civil Court given on a reference under this section nor shall any review or revision of any such finding be allowed. Sub-section (1E) lays down that an order under this section shall be subject to any subsequent decision of a Court of competent jurisdiction. A decision of a Division Bench of this Court reported in *Chandradip Singh v. R. B. B. Verma*[1], is to the effect that in view of the provisions of sub-section (1D) of S. 146, Criminal Procedure Code the High Court is not competent to interfere with the finding of the Civil Court returned by it on a reference under sub-section (1) of this section, but that it is competent to rectify any palpable error under Article 227 of the Constitution of India.

2. Accordingly, two questions arise in substance for consideration in the present reference. One is, whether Article 227 of the Constitution can be applied and that the finding of the Civil Court in the present context can be interfered with by the High Court. Article 227 of the Constitution provides that every High Court shall have superintendence over all Courts and tribunals

throughout the territory in relation to which it exercises jurisdiction. A Civil Court in the very nature of its constitution is subordinate to the High Court and as such is subject to the supervisory jurisdiction of the High Court as contemplated under this Article. It is unnecessary to refer in detail to the relevant provisions preceding the incorporation of this Article in the Constitution of India. It is enough to state that the jurisdiction to superintend was conferred upon the Supreme Court of the three Presidency towns and the same was also incorporated in Section 9 of the Indian High Courts Act, 1861. When the Government of India Act, 1915, was enacted, Sections 9 and 15 of the Indian High Courts Act, 1861, which together comprised the Superintending jurisdiction of the High Courts, came to be replaced by Section 107 of the Government of India Act, 1915. Under Section 224 of the Government of India Act 1935, the power to superintend conferred upon the High Court under Section 107 was curtailed to a certain extent so far as the judicial part of it was concerned, inasmuch as sub-section (2) of Section 224 provided,

> "Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision". The superintending jurisdiction was both administrative and judicial under the Indian High Courts Act as also Government of India Act, 1915, but under Section 224 of the Government of India Act, 1935, the jurisdiction was narrowed down to administrative superintendence. Under Article 227, however, the Constituent Assembly thought it fit to invest larger power in the High Courts, so that the position in this respect now is the same as it was under Section 107 of the Government of India Act, 1915, and under Section 15 of the Indian High Courts Act, 1861. In general terms, no restriction has been placed upon this power of the High Court which is to be exercised in a suitable case; yet it is well settled that, where an appeal is provided, the Court will not interfere by any peremptory order with the ordinary course of adjudication, save in cases wherein a defeat of law and a grave wrong are manifest and are irremediable by the regular procedure, vide *Shiva Nathaji v. Joma Kashinath*[2], It has also been laid down in the above decision, in so far as it is relevant that the Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretional, and subject to considerations of the importance of particular case.

The principle laid down in the above case is that the Court will sedulously abstain
from making any order or refusing to make it on grounds the appreciation of which is exclusively assigned by law to some other authority, provided the legal competence be exercised in good faith on matters that may reasonably be understood as within its lawful range. Their Lordships of the Supreme Court in the cases of *Hari Vishnu Kamath v. Ahmad Ishaque*[3], *Nagendra Nath Bora v. Commr. of Hills Division and Appeals, Assam*[4], and *Satyanarayan Laxminarayan v. Mallikarjun Bhavanappa*[5], have also considered the scope and defined the limits of discretion to be exercised by the High Court under Articles 226 and 227 of the Constitution. In the following case, they
have also held that if another effective remedy be open to the party then exercise of jurisdiction under Article 227 will not be resorted to: *A. V. Venkateswaran v. Ramchand Sobhraj Wadhwani*[6], Similar is the view expressed by the Bombay High Court in *Sayed Kassam Ibrahim v. M. M.*

Chudasama[7], and the Calcutta High Court in *Haripada Dutt v. Ananta Mandal*[8], The principle laid down by the Supreme Court in the above decisions is that the scope of the power of interference by the High Court under Article 227 is co-extensive with the exercise of its power under its writ jurisdiction under Article 226 of the Constitution, and the power of interference may extend to quashing an impugned order on the ground apparent on the face of the record; but under Article 227 the power of interference is limited to seeing that the tribunal functions within the limits of its authority. One of the questions mooted in the case of Nagendra Nath Bora, AIR 1958 SC 398 was whether an interlocutory order passed by the High Court could be interfered with by the Supreme Court in an appeal against that order, and it was laid down that although, ordinarily, such an order could not be interfered with, yet the Supreme Court would interfere with such an order when the features of the case warrant such interference. Mr. B. C. De has referred in particular to the deci-sion in the case of Satyanarayan Laxminarayan, AIR 1960 SC 137 wherein it has been laid down that however wide may be the powers of the High Court under Article 227-and it is definitely wider than the power under Section 115 of the Code of Civil Procedure it is well established that the High Court cannot in the exercise of its powers under that section, assume powers to correct every mistake of law. Where there is no question of assumption of excessive jurisdiction or refusal to exercise jurisdiction or any irregularity or illegality in the procedure or any breach of any rule of natural justice but, if anything, it is merely an erroneous decision which error, not being apparent on the face of the record, it cannot be corrected by the High Court in revision under Section 115 oil the Code of Civil Procedure or under Article 227 of the Constitution. The conclusion seems to be that the High Court, as a rule, will not interfere in the exercise of its superintending jurisdiction with the order of a subordinate Court merely on questions of facts or only because there is failure to consider certain affidavits filed by the parties, if the High Court is satisfied that the Subordinate Court has fairly considered the evidence on record, even if every item of evidence has not been gone into.

3. Mr. B. C. De has urged that if an alternative effective remedy is open, the High Court will not exercise its jurisdiction under Article 227 of the Constitution. It is true, no doubt, that the Supreme Court in the case of A. V. Venkateswaran, AIR 1961 SC 1506 and the High Court of Bombay in the case of Syed Kassam Ibrahim. AIR 1956 Bombay 545 and the Calcutta High Court in the case of Haripada Dutta, AIR 1952 Calcutta 526 have laid down that where an alternative remedy is open, the High Court will, as a rule, not interfere either under Article 226 or 227. That, in fact, is a well known consideration in determining whether the High Court should give relief by way of issuing 4 writ or in its power of superintendence, although the aforesaid decision of the Supreme Court makes it clear that it is not an inflexible rule and it is a matter of discretion for the High Court to be exercised on a consideration of a variety of individual facts. In the present case, Mr. B. C. De has referred to sub-section (1E) of S. 146, Code of Criminal Procedure, which lays down that an order under this
section shall be subject to any subsequent decision of a Court of competent jurisdiction. It is true, no doubt, that an order under this section can be reopened by way of regular suit for declaration of title, but that, in itself, will be hardly a ground for the refusal by the High Court to exercise its jurisdiction under Article 227 in a suitable case. If that view were taken, even a judgment containing a flagrant violation of legal principles, or principles of natural justice, would also be upheld, which is putting the matter in the extreme form, and I am not inclined to agree with Mr. B. C. De in so far as his contention is based on sub-section (1E) of S. 146.

4. Another relevant question, however, for consideration in determining whether the High Court

will exercise its jurisdiction under Article 227 of the Constitution, in the matter of a finding by the Civil Court, is as to whether the exercise of such jurisdiction will not be superfluous, inconvenient and cumbersome. The view appears to be as expressed in some of the decisions, to which reference has been made by the learned counsel, that sub-section (1D) bars out any appeal, review or revision of such a finding and as such the only remedy open to a party must be the procedure provided under Article 227 of the Constitution. It is, no doubt, true that sub-section (1D) in terms refers to this matter specifically, but the point for consideration is whether it amounts to prohibiting an appeal, review or revision of such a finding recorded by the Civil Court or it goes beyond it and puts such a finding beyond the power of the High Court as well to consider when the matter comes up before it under Sections 435 and 439, Code of Criminal Procedure when such finding has been received by the Magistrate and an order has been passed by him in conformity with the decision of the Civil Court. It is, no doubt, true that an opinion has been expressed in some of the decisions that sub-section (1D) gives finality to the finding of the Civil Court and that it cannot be interfered with either under Sections 435 and 439 or under Article 227 of the Constitution. That was the view expressed by Bhargava, J. of the Allahabad High Court in *Chokhey Lal Moti Ram v. Babulal Behari Lal*[9], and some other decisions, vide *Muthu Sethurayar v. Lourduswami Odayar*[10], *Ramnarain Singh v. Mahatha Niranjan Lal*[11], *Shreedhar Thakur v. Kesho Sao*[12], *Ram Narayan Goswami v. Biswanath Goswami*[13], to the effect that the High Court is now incompetent to interfere in the exercise of its revisional jurisdiction with the finding of the Civil Court as accepted by the Magistrate in any circumstances, howsoever illegal, improper or otherwise incorrect it may be. But the question for decision is whether this Court will follow the opinion expressed by the learned Judges in these cases. It is true, no doubt, that against a finding of the Civil Court, no appeal review or revision will life order the Code of Civil Procedure inasmuch as the Civil Court, while adjudicating the reference made by the Magistrate, does not act as a Civil Court independently but only records a finding as a tribunal which in itself will not be operative unless it is adopted by the Magistrate, although the latter is bound to act in conformity with it. It is only when such a finding becomes a part of the order of the Magistrate and is integrated into it that it becomes operative and binding upon the parties. The reference to prohibition of appeal, review or revision of the finding of the Civil Court is based on the principle that it is not a final order and not binding upon by any party being only an intermediate stage in the proceeding, and as such no appeal, review or revision will lie against it, mainly, under the Code of Civil
Procedure and even under the Code of Criminal Procedure, for the obvious reason that it is the opinion expressed about certain matters referred to the Civil Court by the Magistrate. To infer from this, however that the Legislature also prohibited the consideration or the propriety or otherwise of the finding by the High Court, when it has been adopted by the Magistrate and an order passed on it, against which an application in revision has been filed by the party aggrieved, will amount to laying down that the Legislature by prohibiting an appeal, review or revision under sub-section (1D) has also by implication included under it Sections 435 and 439 of the Code of Criminal Procedure. Those two sections confer power upon the High Court to consider any order passed by the Court subordinate to it to call for the records and rectify any illegality or impropriety in the order which in some cases may also cover a case of rectifying a defective finding of fact, if it is so grave or , serious as to merit interference by the High Court, In my opinion, however, sub-section (1D) cannot be read in that form. If the Legislature intended to curtail the power of the High Court in regard to an order passed under Section 146, Criminal Procedure Code there should have been side by side an amendment of Sections 435 and 439. The same not having been done, sub-section (1D) must be given a narrow interpretation so as to

confine it only to the finding of the Civil Court as such and not to extend it to the position which results when such a finding has been adopted by the Magistrate and order passed upon its basis. It is true, no doubt, that the opinion expressed in some of the decisions is that this will amount to doing indirectly what could not be done directly. In my opinion, however, it will be an unsound application of the aforesaid principle in the present context. The legislature appears never to have intended barring out interference under Sections 435 and 439. What it really intended to do was that the finding of the Civil Court which, in the absence of sub-section (1D), might be liable to construction that this being a finding of the Civil Court, it might be subject to the provisions of the Code of Civil Procedure, cannot be interfered with. That contingency has been ruled out by sub-section (1D) so that the matter would now be governed by the Code of Criminal Procedure. It is true, no doubt, that even under the Code of Criminal Procedure, the finding of the Civil Court as such cannot be interfered with, because, in the first place, Code of Criminal Procedure applies to the order of a Criminal Court and a finding of the Civil Court as such cannot be subject to revision under the Code of Criminal Procedure. Moreover, it is an interlocutory order and to allow it to be made subject matter of a revisional jurisdiction would be extremely inconvenient. If that were so, it may well be that the High Court will interfere with it at one stage under Article 227 or under sections 435 and 439, and the same finding accepted by the Magistrate may come up for examination by the High Court, if, for instance, the jurisdiction of the Magistrate to pass the order strictly in terms of sections 145 and 146 of the Code of Criminal Procedure, such as the existence of the apprehension of a breach of the peace due to a dispute, may be questioned. Thus, there will be one proceeding under Article 227 of the Constitution and yet another proceeding under sections 435 and 439 of the Code of Criminal Procedure for another purpose. In my opinion, therefore, such a procedure will be definitely inconvenient and cumbersome. If, on the contrary, the view adopted is that at one stage the finding of the Civil Court is acted upon by the Magistrate, and an order in conformity therewith is passed, it becomes an order by a Magistrate and it will be subject to the provisions of sections 435 and 439 of the Code of Criminal Procedure, the position is rationalised. This was the opinion expressed by Mr. Justice Ramaswami of the Madras High Court in the case of *Rengammal v. Rama Subbarayalu Reddiar*[14], That was a case in which two applications in revision were filed by the petitioner; one against the finding of the Civil court and another against the order passed by the Magistrate acting upon that finding. The High Court dismissed both the applications; the one against the Magistrate not on the ground of jurisdiction but on the ground that no point was made out for interference under Section 439, and the other one was dismissed on the ground that no revision application against the finding of the Civil Court as such was maintainable in terms of sub-section (1D) of section 146, But the learned Judge made the following observation :-

> "(7) This restriction is but proper because the findings get merged in the decision of the magistrate and all the grounds that can be urged against the finding can be urged against the finalized decision and if there is no such restriction there will be multiplicity of proceedings and possible conflicting revisional orders reducing the whole thing to an absurdity. This wise restriction has been conceived in the best public interests and involves no invasion of the fundamental right or diminution of the paternal and supervisory jurisdiction of this Court".

The decision seems to be in line with the opinion I have expressed above and, to my mind, that is the correct view to be followed in regard to the interpretation of the various sub-sections of

Section 146 Criminal Procedure Code I may refer in this connection to a rule of legal construction of a statute when there are provisions therein which may appear in some matters to be inconsistent with each other. It is settled that in such a case the principle of harmonious construction is to be followed and only when that is altogether precluded, on account of the plain terms of the relevant provision the question arises which is to prevail by implication. This is known as exposition ex visceribus actus. What Lord Tenterden observed in *Bywater v. Brandling*[15], as quoted by Craies on Statute Law (5th edition, page 94), is pertinent and runs thus : -

> "In construing Acts of Parliament we are to look not only at the language of the preamble or of any particular clause, but at the language of the whole Act. And if we find in the preamble or in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from , the more large and extensive expressions used in other arts the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause". Coming now to the facts of the case, the disputed lands are 8 bighas 4 kathas, being plot Nos. 585 (4 bighas 10 kathas from the east) and 592 (14 Kathas from the south) of khata No. 81 and plot No. 471 (3 bighas from the south) of Khata No. 97 of village Mohanpur. According to the case of the petitioners, who were second party, a part of this land was given to Ramdeni Singh and his two brothers from whose heirs the first party purported to have purchased the
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> disputed land. The mortgage, however was redeemed and, after redemption,
> the petitioners took over possession. They continued to be in possession thereafter. The case of the first party was that each party was in possession in his own right for a long time. In support of their respective cases, both parties adduced documentary evidence and affidavits sworn by the witnesses produced by them. A pleader Commissioner was appointed to submit his report. The documents filed by them included rent receipts, canal parchas and bill papers of sugarcane. Apart from the above documents, the first party also filed sale deeds and affidavits sworn by four persons. The learned Magistrate of Sasaram who held the enquiry found himself unable to decide the dispute on account of its complicated nature and referred the matter to the Additional Subordinate Judge of Sasaram for a finding. The latter, on a consideration of the evidence led by the parties, recorded a finding in favour of the first party and forwarded it to the Magistrate who accepted it and passed orders in favour of the first party. The second party accordingly has come up in revision against that order.

5. Learned Counsel for the petitioners has not raised any clear question of law, but has raised the point that the finding of the learned Additional Subordinate Judge suffers from non-consideration of certain important documents filed by the petitioners and also errors of record. He has also ignored completely the affidavits filed on behalf of the parties which also would vitiate his finding in terms of a number of decisions of this court.

6. In support of his first contention, he has placed before us a short history of the various transactions relating to the disputed property, Khata Nos. 81 and 97 measure 61 bighas and bighas respectively. Out of this area, 23 bighas were not given in mortgage, and the mortgage which was executed in 1895 in favour of Ramdeni Singh related only to 40 bighas. A rent suit was instituted by the landlord in 1895. The mortgagees were compelled to pay the entire arrears of rent and they became statutory mortgagees of the entire khatas 81 and 97 under section 171 of the Bengal Tenancy Act. They got themselves recorded as raiyat in respect of the entire khata. In 1918, a suit was instituted by Raja Rai and Ramlochan Rai for redemption and for a declaration that a further rent sale of the two holdings in 1905 during the subsistence of the mortgage interests was a fraudulent rent sale and the properties which were purchased by the first party did not lose their character as mortgage interest. The suit was thus framed as a composite suit one prayer of which was for redemption and the other was for declaration. The prayer for redemption was, however, withdrawn but that for declaration was pressed and the suit was dismissed. The mortgagors contemplated to prefer an appeal against that decision but, in the meantime, the parties came to an amicable settlement and on the 9th May, 1920, the terms of the compromise were drawn up by which the petitioners got back their 23 bighas and the mortgagees remained in possession of the remaining area as such. This continued up to 1951 when a part of the land was redeemed by a registered document. Another suit was instituted again for redemption of the remaining area. The suit was decreed. On appeal taken from that decision, however, the judgment of the trial Court was reversed.

Then a second appeal was preferred. This also was compromised. A third suit, however, still remained pending. According to the petitioners, the disputed plots formed part of the 23 bighas of land which was not given in mortgage but in respect of which a statutory mortgage sprang up which, however, again, was terminated by compromise dated the 9th of May, 1920. Thakur Singh, grandson of Ramdeni. the original mortgagee, sold 2 bighas 2 kathas out of the land comprised in plot No. 592, and 12 kathas and 1 bighas 10 kathas out of plot No. 471 comprised in khata No. 97, to Gopi Singh and Harinandan Singh, first party, on the 18th of February, 1950. Gopi and Harinandan applied to the Canal Department for mutation of their names in respect of this area of 2 bighas 12 khathas, but their application was rejected. The disputed plots, as I have mentioned above, are plot Nos. 471, 585 and 592, measuring 8 bighas. On the 3rd of February, 1960, Baikunth, one of the grandsons of Ramdeni, executed a sale deed in favour of Mahendra Singh nephew of Deoki Singh, opposite party No. 1, relating to 18 kathas 10 dhurs out of plot No. 585 of khata No. 81. On the same date, Baikunth executed another sale deed in favour of Singhasan Singh, opposite party No. 11. On the same date, Bindeshwari Singh, another grandson of Ramdeni, executed a sale deed in favour of opposite party Nos. 1, 11 and 13, namely, Singheshwar Singh, Mahendra Singh and Collector Singh, out of plot Nos. 585 and 471; 5 bighas 10 kathas out of plot No. 585 and one bigha put of plot No. 471. On the same date, Baikunth executed a sale deed in favour of Collector Singh comprising 10 kathas out of plot No. 585. In 1959, Baikunth Singh, had executed a sale deed in favour of Singheshwar Singh, opposite party No. 11, conveying 15 kathas out of plot No. 585, khata No. 81. Mr. Kailash Roy appearing for the petitioners urged that all these sale deeds which, apparently, lend strong support to the case of the opposite party should have been completely discarded inasmuch as once it was held that under the compromise dated the 9th of May, 1920, 23 bighas of land were put back in possession of the mortgagors represented by the petitioners and, further that the disputed lands are comprised in those khatas, any subsequent sale deed by the family of the mortgagees relating

to the same property is wholly ineffectual for the purpose of passing title to the vendees or for affecting the possession of the mortgagors. The learned Additional Subordinate Judge has lost sight of this aspect of the case. The deed of compromise (Saraite safainama), however, is an unregistered document and Mr. Kailash Roy has contended that it has been referred to in some other documents later on. Mr. Kailash Roy has drawn our attention to the following documents which, according to him, have not been considered at all :

(1) The report of the pleader commissioner who found the disputed plots amalgamated with the admitted plots of the petitioners. The report was submitted on the 26th of July, 1960.
(2) Report of the Canal S. D. O. dated the 18th of January, 1954. That also showed that plot No. 584 and plot No. 585 were amalgamated at least in 1954, if not earlier.
(3) Survey Register of Cane Cooperative Society to show that from 1940-41 to 1953 Raja Singh, petitioner, grew sugarcane over these plots.
(4) The application of the first party in 1952-53 for mutation of their names in the canal papers in regard to plot No. 585, which was rejected.
(5) The application by Gopi Singh to have his name mutated in regard to plot Nos. 471 and 592, also rejected.
(6) The application of opposite party No. 4 made before the Canal S. D. O. on the 15th September, 1950. That also was rejected.
(7) The Khatian showed that plot No. 471 is part of khata No. 97 and the receipts which are filed in respect of khata No. 81 cannot relate to the land under khata No. 97.

Learned Counsel has also contended that the opposite party has not filed any canal parchas from the period 1950 onwards, whereas the petitioners have filed them. He has also contended that out of the affidavits filed on behalf of the opposite party, which the learned Subordinate Judge has not considered, the affidavits of Ramadhar Singh and Bijoy Bahadur Singh are of no value, as they are partisan witnesses and they are bound down along with the members of the opposite party in the proceeding under Section 107, Code of Criminal Procedure. As for the affidavits on behalf of the petitioners, there is one by a police constable who was deputed to the village for the personal safety of the petitioners who apprehended breach of the peace from the side of the opposite party.

7. Mr. B. C. De for the opposite party has contended that there are two Bajidawas which do not mention the names of the petitioners as having any interest in the disputed land; but it is incorrect. The finding of the learned Additional Subordinate Judge is that these Bajidawas, dated the 28th July, 1959, and 6th January, 1960, were executed after the executants parted with their interest in the disputed land. The Mohadanama also does not show the plot number. The field bujharat has been in favour of the first party. In my opinion, the documents in favour of the parties are of a very conflicting character. The affidavits filed on their behalf also, in the circumstances, cannot improve the position. As a result it cannot be held that the finding of the learned Additional Subordinate Judge is necessarily vitiated. It may be that there are certain errors in the finding and the consideration of the evidence is not as full and clear as it should be. For that reason, we gave liberty to the learned Counsel for the parties to place before us an analysis of the very large number of documents filed by them in support of their respective cases.

In view of the fact that the documents are of a conflicting nature, and of considerable weight for either party, I find myself unable to interfere with the findings of the learned Additional Subordinate Judge as was laid down by Rankin, C. J. in *Fakirchand Mondal v. Madar Mondal*[16], It may be mentioned that the learned Counsel for the opposite party placed considerable reliance on the field bujharat which was prepared only a few months before the initiation of the proceedings under section 144, Civil Procedure Code The Legislature has amended sections 145 and 146 of the Code of Criminal Procedure for the sake of speedy disposal of these proceedings and to send the case back to the Court below, in the circumstances of this case, for a decision now, would mean further delay.

8. In the result, the application is dismissed and the rule is discharged. If the petitioners are aggrieved by the order, it will be open to them to resort to the Civil
Court by a regular suit for declaration of title and recovery of possession.
Sahai J.

9. I agree that there is no merit in this application, and it should be dismissed. I find it necessary, however, to express my views on some of the points which arise for determination in this case.

10. The points which this Bench has to consider may be formulated as follows :

> 1. Does sub-section (1D) of Section 146 of the Code of Criminal Procedure, which is to the effect that no appeal, review or revision shall lie against a finding of the Civil Court on a reference under the section, apply only so long as the Magistrate has not disposed of the proceeding under Section 145 in conformity with the decision of the Civil Court?
> 2. Can the High Court interfere with the finding of the Civil Court at any stage in exercise of its power of superintendence under Article 227 of the Constitution?

11. As to the first question, my learned Brother Misra, J. has expressed the view that the provisions of sub-section (1D) of Section 146 bar an appeal, review or revision under the Code of Civil Procedure and even under the Code of Criminal Procedure, only so long as the Magistrate does not pass his order in conformity with the decision of the Civil Court. I have considered the matter from several aspects; but, with respect, I find myself quite unable to agree with this view.

12. It is necessary, first, to consider the position of the Civil Court while hearing a reference under Section 146 and the nature of the proceeding before it. It is not possible, in my opinion, to equate the position of the Civil Court with an amicus curiae. The meaning of the expression 'amicus curiae' as given in Webster's New International Dictionary, is :

> "a friend of Court; hence, in practice, a bystander or party who suggests or states some matter of law for the Court's assistance".

A note appended under this is to this effect:

> "An amicus curiae is heard only by the leave and for the assistance of the Court, and upon

> a case already before it. He has no control over the suit, and no right to institute any proceedings therein".

It is thus manifest that an amicus curiae has no legal position or right. He merely assists the Court by pointing out the law or evidence at the request of the Court, which is free to accept or reject his opinion. Under Section 146 of the Code of Criminal Procedure, the Civil Court has a definite statutory position. Possibly, the legislature has provided for reference to the Civil Court on the basis that the presiding officer of the Civil Court, who devotes himself exclusively to judicial work, has more experience in judicial matters than a Magistrate, who has multifarious kinds of duties, including judicial work and administrative work. Furthermore, it is not open to the Magistrate either to accept or to reject the finding of the Civil Court. He is bound to pass orders in conformity with the decision of the Civil Court.

13. The nature of the proceeding before the Civil Court continues to be criminal, and does not become civil. As stated by Ahmad, J. in *Bodh Narain Prasad v. Deo Narain Singh*[17],

> "......the proceeding even on reference made to the Civil Court on the point of possession retains its old moorings and does not change its character from a criminal proceeding to a civil proceeding and is as such all along kept in the seisin of the criminal Court for its final conclusion".

With respect, I agree with this observation as well as the rea
sons given therefor.

14. In my judgment, the only interpretation which can be put upon sub-section (1D) is that the finding of the Civil Court cannot be challenged in that Court or in a superior Court at any stage. The first line of reasoning which leads me to this conclusion is very simple. Sub-section (1B) provides for the Civil Court to conclude the inquiry and transmit its finding to the Magistrate and for the Magistrate to dispose of the proceeding under section 145 in conformity with the decision of the Civil Court. The Magistrate's function, therefore, is only to declare the possession of that party whose possession has been found by the Civil Court. Even after he has given such a declaration, the finding of the Civil Court remains the finding of that Court, and does not become the finding of the Magistrate. The Magistrate does pass the final order; but he cannot give any finding of his own, vide AIR 1959 Calcutta 366. There is thus no question of the finding of the Civil Court merging into the "finding" of the Magistrate.

15. Sub-section (1D) speaks of the finding of the Civil Court, and, if the legislature had meant that that finding would become subject to appeal review or revision after the Magistrate passes his order, there could be no difficulty in adding, at the end of the sub-section, the words 'until the Magistrate passes his final order'. Addition of those words was necessary also because an earlier sub-section, i.e. (1B), has provided for the passing of the final order by the Magistrate. In the absence of those words, it is not possible for me to hold that the finding remains sacrosanct so long as the Magistrate does not pass his final order but becomes subject to revision by the High Court like any other order of an inferior Criminal Court as soon as he passes such order.

16. The question can be considered from another point of view. I have already observed that the

proceeding before the Civil Court retains its nature as a criminal proceeding. No appeal, review or revision under the Code of Civil Procedure could therefore, be entertained against the finding of the Civil Court, even if sub-section (1D) had not existed. No appeal against that finding could lie even under the Code of Criminal Procedure because Section 404 of that Code lays down that no appeal would lie from any judgment or order of a Criminal Court except as provided by the Code or
any other law for the time being in force. No section of the Code nor any other law provides for an appeal against the finding of the Civil Court on a reference under Section 146. There is no provision in the Code, giving power to a Criminal Court to review its own judgment. Unless the power of review was specifically given to the Civil Court, therefore, it could not review its finding on a reference of the kind in question. A revision could also not lie under Sections 435 and 439 because Section 435 speaks of the record in a proceeding before an inferior Criminal Court being called for and examined, and Section 439 speaks of orders which may be passed in a proceeding, the record of which has been called for by the High Court itself or has been reported for orders. At the stage when the Civil Court arrives at its finding and before the Magistrate passes his final order, the record is not before an inferior Criminal Court. Hence, powers under Sections 435 and 439 cannot be exercised. Even if it is assumed, however, that a criminal revision lies because the proceeding can be said to be one before an inferior Criminal Court on the ground that the Magistrate retains seisin over it even while the reference is pending before the Civil Court all that was necessary to provide for under sub-section (1D) was to bar a criminal revision against the finding of the Civil Court. Instead of doing that, the legislature has used very strong language by saying that no appeal, review or revision would lie. If the only purpose was to bar a criminal revision against the finding of the Civil Court until the Magistrate passed his final order, it would mean that the legislature unnecessarily used very emphatic language to achieve very little.

17. It is said that, if the legislature intended by enacting sub-section (1D) to curtail the High Court's power of revision, there should have been a corresponding amendment of Sections 435 and 439. I am unable to agree. There is, in my opinion, not the slightest doubt that a revision lies against the final order of the Magistrate because there is no prohibition in Section 146 against a petition for revision being entertained from the Magistrate's order. All that sub-section (1D) means is that the finding of the Civil Court will not be liable to be challenged before that Court or a superior Court. In view of the amendment introduced in sections 145 and 146 by Act 26 of 1955, there are three different stages in a proceeding under Section 145. At the first stage, the Magistrate draws up a proceeding under that section when he is satisfied that a dispute likely to cause a broach of the peace exists concerning any land or water or its boundaries. He then proceeds under Section 145, and, if he can find possession with either party as required by sub-section (4) of that section, he declares that party to be in possession. It is only if he is of opinion that none of the parties is in possession or if he is unable to decide as to which party is in possession that he can make a reference to the Civil Court. The first stage is over when the reference is made. The second stage is the inquiry before the Civil Court ending with a finding arrived at by that Court relating to possession. The third stage starts when the finding goes to the Magistrate. He has then to pass final order in conformity with the finding. The High Court's power to examine the proceedings before the Magistrate in the first and the third stages cannot be doubted. All that sub-section (1D) says is that the finding of the Civil Court will not be liable to be challenged. It is thus open to the High Court to interfere if the Magistrate's order is not in conformity with the Civil Court's finding or if there is some illegality in drawing up the

proceeding or in making the reference. The restriction against interference with the Civil Court's finding is a special provision, and it is a well-established principle that a special provision controls a general provision. It was not, therefore, necessary to amend Sections 435 and 439 of the Code.

18. I may mention another point. The Parliament amended Sections 145 and 146 by Act 26 of 1955 with the purpose of expediting disposal of a proceeding under Section 145. It is for this reason that parties' right to examine witnesses has been taken away, and they have now to file affidavits instead in a proceeding under Section 145. Besides, the legislature has expressed its hope in sub-section (4) of Section 145 that the Magistrate would as far as practicable, conclude the inquiry within a period of two months. Under Section 146, as it stood previously, the Magistrate had to attach the disputed property in case he was unable to find which of the parties was in possession. That has been done away with. In view of the amendments, the matter has to be referred to the Civil Court, and the proceeding under Section 145 has to be terminated in accordance with the finding of the Civil Court which has to conclude the inquiry, as far as practicable, within a period of three months. Sub-section (1E) of Section 146 provides that the order passed under Section 146 would be subject to a subsequent decision of a Court of competent jurisdiction. In view of that provision, the finding of the Civil Court on a reference is not conclusive for all time. That being so, I do not think that there is any hardship to any party if the provisions of sub-section (1D) are construed to mean that the finding of the Civil Court cannot be challenged in criminal revision at any stage.

19. In my opinion, the High Court continues to have power to interfere with the finding of the Civil Court in exercise of its power of superintendence under Article 227 of the Constitution, if a case is made out for exercise of that power. I do not think that it will be inconvenient or cumbersome for any party to seek his remedy against an order passed by the Magistrate under Section 145 on the basis of the Civil Court's finding. He can file his petition under Sections 435 and 439 as well as Article 227 of the Constitution. The High Court will then interfere under Article 227 with the finding of the Civil Court only if a case for interference under that Article is made out; but it will exercise its ordinary power of revision under Sections 435 and 439 in so far as the proceedings before the Magistrate are concerned. I do not apprehend any difficulty if this procedure is followed.

20. Views similar to those which I have expressed above on the interpretation of sub-section (1D) have been taken by Somasundaram, J. in AIR 1959 Madras in. In that case, the petition for revision was filed against the final order of the Magistrate. The learned Judge observed that no appeal, review or revision could lie against the finding of the Civil Court. He further observed that the High Court could not go into the correctness of the finding of the Civil Court because that would amount to doing indirectly what was prohibited directly. This reasoning also supports the conclusion which I have reached. In AIR 1960 Madras 169, Ramaswami, J. has relied upon the decision in Muthu Sethurayar's case, AIR 1959 Madras 111, on the point that no revision lies against the finding of the Civil Court, but has made certain observations which indicate that the restriction applies only so long as the finding of the Civil Court does not "get merged in the decision of the Magistrate". With great respect, I am unable to accept the observation as correct. As I have already said, the Magistrate does not arrive at any finding, and there is no question of merger of findings. All that happens is that the Magistrate declares one party or the other to be in possession in accordance with the finding of the Civil Court, which continues to retain its

separate identity.

21. I may also refer to a Bench decision of this Court in 1962 BLJR 267: (AIR 1962 Patna 468) in which I delivered the judgment of the Bench. The conclusions which I have reached in that decision are in accord with the conclusion which I have reached in this case.

22. Though the finding of the Civil Court is, under sub-section (1D), not subject to appeal, review or revision, the constitutional power of superintendence given to the High Court under Article 227 cannot be held to have been taken away. I may refer only to AIR 1952 Calcutta 526 in this connection. Under Section 9(1) of the West Bengal Bargadars Act, it was provided that no award or order of a Board or of an Appellate Officer shall be questioned in any Court. The High Court was included under the definition of 'Court'. Their Lordships observed that those provisions could not prevail against the Constitution, and that the High Court could, in suitable cases, pass a necessary order in exercise of its power under Article 227.

23. It has been argued that the High Court ought not to pass an order in exercise of its power under Article 227, if a suitable alternative remedy is available. I agree with my learned Brother Misra, J. that there is no inflexible rule that the High Court cannot issue a writ or pass an order in exercise of its power under Article 227 simply because an alternative remedy is available. I also agree that the High Court has discretion to entertain a petition for issue of a writ or order notwithstanding the existence of such an alternative remedy in suitable cases. In the present case, I have held that, in a criminal revision arising out of a final order of the Magistrate, the High Court cannot examine the correctness of the Civil Court's finding. This remedy is, therefore, not open to the aggrieved party. The only other remedy is provided in sub-section (1E) of section 146. In pursuance of that remedy, an aggrieved party has to institute a suit. In my opinion, the High Court cannot refuse to interfere in exercise of its power under Article 227, if a case is made out for exercise of such power, only on the ground that, by means of a lengthy remedy of a suit, the aggrieved party can get his redress. I wish only to add that, as a rule, the High Court will decline to interfere under Article 227 before the Magistrate passes his final order on the ground that it will be inconvenient and duplication of work to entertain one petition before and one petition after the Magistrate passes his final order in conformity with the finding of the Civil Court.

24. The limits of exercise of powers under Article 227 are well settled. In AIR 1960 SC 137, their Lordships have observed about the power under Article 227 as follows :

> "However wide it (the power) may be than the provisions of Section 115 of the Code of Civil Procedure , it is well established that the High Court cannot in exercise of its power under that section assume appellate powers to correct every mistake of law. Here there is no question of assumption of excessive jurisdiction or refusal to exercise jurisdiction or any irregularity or illegality in the procedure or any breach of any rule of natural justice. If anything it may merely be an erroneous decision which, the error not being apparent on the face of the record, cannot be corrected by the High Court in revision under Section 115 of the Code of Civil Procedure or under Article 227".

25. For the reasons given above, I would answer the first question which I have formulated by saying that the bar applies at all stages and the second question by saying that the High Court can and would interfere with the Civil Court's finding in appropriate cases under Article 227 after the Magistrate passes his final order in accordance with that finding. We could, therefore, interfere with the finding of the learned Munsif in this case, if a case for exercise of our power under Article 227 of the Constitution had been made out. My learned Brother Misra, J. has discussed the merits, and it is perfectly clear that no such case has been made out. Hence, I agree with the order proposed.

S. P. Singh, J.

26. I have had the advantage of perusing the judgments of my esteemed brethren Misra, J. and Sahai, J. and I agree that Criminal Miscellaneous No. 100 of 1962 should be dismissed.

27. I would, however, add a few words of my own. The important question for consideration is whether the High Court can interfere with the finding of the Civil Court under Sections 435 and 439 of the Code of Criminal Procedure after the finding is adopted by the Magistrate and the final order is passed.

28. Sub-section (1) of Section 146 Criminal Procedure Code provides for a reference to a Civil Court for a decision of the question whether any or which of the parties was in possession, if the Magistrate is of the opinion that none of the parties was then in such possession or is unable to decide as to which of them was then in such possession of the subject of dispute.

29. Sub-section (1A) lays down how the Civil Court shall dispose of the reference and decide the question of possession. Sub-section (1B) is important. It directs the Civil Court to conclude the inquiry within three months of the appearance of the parties before it and transmit its finding to the Magistrate and the Magistrate shall dispose of the proceeding in conformity with the decision of the Civil Court. Sub-section (1C) provides for costs of the reference. Then follows the controversial provision incorporated in sub-section (1D). It provides that no appeal from nor any review or revision of any such finding of the Civil Court shall lie. It will be observed that this provision does not impose any bar to any review or revision of the order of the Magistrate passed under sub-section (1B). It only provides that the finding of the Civil Court (and not the order of the Magistrate) shall not be questioned in review or revision.

30. Another noteworthy thing is that no alteration has been made in Sections 435 and 439 with the result that the powers of the High Court under these sections remains unaffected. There is, therefore, no reason to bar a revision from the order of the Magistrate passed under sub-section (1B). It will also be observed that if the Magistrate himself decides the question of possession without reference to the Civil Court and passes order under Section 145, Criminal Procedure Code, declaring the possession of one or the other party, it is beyond controversy that that order is open to revision. There appears to be no foundation for distinction between an order passed by a Magistrate under sub-section (4) of Section 145 and sub-section (1B) of Section 146 of the Code of Criminal Procedure. It is recognized that a revision may lie even against the order of the Magistrate under sub-section (1B) of S. 146, Criminal Procedure Code but it is said that the revision in such a case must be limited in scope but there would appear no ground for such a differentiation. To say that powers under Sections 435 and 439 can be exercised without

limitation in respect of an order passed under sub-section (4) of Section 145 and for a limited purpose under sub-section (1B) of Section 146 is to introduce substantial qualification in Sections 435 and, 439, which the Legislature in its wisdom did not think it proper to do.

31. It is argued that it would be anomalous to question the finding of the Civil Court after it is integrated in the order of the Magistrate when appeals from and review or revision of such an order is completely barred. This argument sounds plausible but lacks substance. Taking S. 146, Criminal Procedure Code as a whole, the intention of the Legislature appears to be to bar revision, review or appeal at different stages of the same proceeding. It is manifest that the Legislature has not expressly barred a revision or review of the order of the Magistrate under sub-section (1B). To permit revision against the finding of the Civil Court at one stage and also against the order of the Magistrate at another stage would have frustrated the very object of the amendment, namely, to shorten the duration of the proceeding under Section 145, Criminal Procedure Code This is so because one function is assigned to the civil Court and the other to the Magistrate. Therefore, in my opinion, when a revision is preferred against the order of the Magistrate under sub-section (1B), not only the operative order of the Magistrate but the entire proceeding including the findings of the civil Court are before the Court and, therefore the High Court can, in appropriate cases, interfere with the findings of the civil Court, if they are in flagrant violation of the well recognized principles of law. Such a construction not only harmonises the different provisions of Sections 145 and 146, but also dispenses with the limitations sought to be imposed upon the powers of the High Court under Sections 435 and 439. Once we proceed to lay down the qualification, it would be difficult to draw a line where to stop. It is true that this Court will not ordinarily interfere with a considered finding of the civil Court. At the same tune, it is difficult to prescribe the exact principles which may guide the High Court in disposing of the matters in all such cases.

32. As regards application of Article 227 of the Constitution of India, it is altogether a different question. The powers of the High Court, cannot be taken away or abridged by a Legislative enactment; and, as such, sub-section (1D) of Section 146 has not and cannot have that effect. The High Court, however, as a rule, will not interfere with the finding of the Civil Court merely on the ground of non-consideration of some evidence or some irregularity found to have been committed by the Civil Court. It is only in exceptional cases of flagrant violation of legal principles and that also after the Magistrate has passed final orders in conformity with such finding that the High Court will interfere. Otherwise, such an interference at an earlier stage will lead to duplication and prolongation of the proceedings which the Legislature has intended to avoid.

33. For these reasons, I agree with the views expressed by my esteemed brother Misra, J.

Answers accordingly.

Cases Referred.

[1] 1962 BLJR 105 : (1962 (2) Cri LJ 577)
[2] ILR 7 Bom 341 (FB)
[3] AIR 1955 SC 233
[4] AIR 1958 SC 398

[5] AIR 1960 SC 137
[6] AIR 1961 SC 1506
[7] AIR 1956 Bom 545
[8] AIR 1952 Cal 526
[9] AIR 1960 All 599
[10] AIR 1959 Mad 111
[11] AIR 1958 Pat 85
[12] 1962 BLJR 267: (AIR 1962 Pat 468)
[13] AIR 1959 Cal 366
[14] AIR 1960 Mad 169
[15] (1828) 7 B and C 643, 660
[16] 35 Cal WN 374 : (AIR 1931 Cal 619)
[17] AIR 1958 Pat 308