DIGAM Mahato and Others Vs Biraj Mahato and Another

Court: Calcutta High Court

Date of Decision: Sept. 22, 1962

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 100, Order 21 Rule 97, Order 21 Rule 98, Order 21 Rule 99, 115
Constitution of India, 1950 â€" Article 227
Government of India Act, 1915 â€" Section 107
Government of India Act, 1935 â€" Section 224
Penal Code, 1860 (IPC) â€" Section 183, 186, 196, 79, 99

Citation: 67 CWN 887

Hon'ble Judges: D.N. Das Gupta, J

Bench: Single Bench

Advocate: Gourangasundar Chatterjee, for the Appellant;Manan Kumar Ghosh, for the Respondent

Judgement

Niyogi, J.
This Rule was issued on the District Magistrate of Purulia and also on the opposite parties to show cause why the order

complained of should not be set aside. This is an application purported to be u/s 115 of the CPC and Article 227 of the Constitution of India, for

revision of an order by the District Judge of Purulia making a complaint, in accordance with the provision of section 195 (1) (a) of the Criminal

Procedure Code, against the five petitioners u/s 186 of the Indian Penal Code. The facts material for the purpose of the present Rule may shortly

be stated as follows: An application purporting to be u/s 476 of the Criminal Procedure Code was made in the first instance by the present

opposite parties before the Subordinate Judge, Purulia for prosecution of the present petitioners under sections 183, 186.... of the Indian Penal

Code, on the allegations that resistance had been offered by the present petitioners on 30.5.38 when a process server of the Purulia civil court

accompanied by a pleader commissioner appointed by the Court, went to deliver possession of certain lands to the present opposite parties in

execution of a final decree for partition passed in Title Suit No. 63/47 of 1952-53 of the court of the Subordinate Judge, Purulia. The process-

server and the pleader commissioner submitted reports in respect of the said resistance. The Subordinate Judge threw out the petition on the

ground that the application u/s 476 of the Criminal Procedure Code was misconceived and that resistance to delivery of possession having been

admittedly affered by persons who were strangers to the suit in question, an application should instead have been filed under the provisions of

Order 21, rule 97 of the CPC for getting appropriate remedy in this respect. Thereafter the present opposite parties applied before the District

Judge of Purulia to make a complaint u/s 186 of the Indian Penal Code against the present petitioners in accordance with the provisions of section

195(1) (a) of the Criminal Procedure Code, The District Judge after hearing the parties proceeded to make a complaint under the provisions of

section 195(1) (a) of the Criminal Procedure Code, for prosecution of the present five petitioners u/s 186 I.P.C. The complaint was actually

lodged by the Judge-in-charge of Nazarat at the direction of the District Judge.

2. As regards the competence of the District Judge to make a complaint in like circumstances, there can hardly be any doubt. The process-server

as well as the Subordinate Judge both were subordinate to the District Judge within the meaning of section 195(1) (a) of the Criminal Procedure

Code.

3. It has first of all been argued by Mr. Gauranga Sundar Chatterjee, learned Advocate for the petitioners, that the District Judge had not

considered if it was expedient in the interest of justice that such a complaint should be made. No doubt one of the guiding considerations for

making a complaint u/s 195(1) should be paramouncy of public interest and it should be seen that it is not made for the vindication of private

grudge. It should also be considered if there was a reasonable chance of success if the prosecution was started. At the same time the procedure

for enquiry laid down in section 476 Cr. P.C. not being applicable in respect of a complaint made u/s 195 (1) (a), the public servant in question is

ordinarily to be satisfied in the above respect from such materials as are available to him such as, report of the process-server concerned and

affidavit or affidavits, if any. Though the District Judge had not expressly said so, I have no reason to hold that these considerations were not

present in the mind of the District Judge when he proceeded to make the complaint. The contention on the side of the petitioners in this respect

should as such be overruled.

4. Another contention that has been raised by Mr. Chatterjee is that the present opposite parties could ask for reliefs under the provisions of Order

21, rule 97 of the CPC in respect of the alleged obstruction to the delivery of possession set up by the present petitioners and it is urged that they

should have exhausted the remedies available to them under the Civil Procedure Code. There is hardly any merit in this contention, as the question

here really was if the present petitioners had offered resistance to the process-server who was a public servant, in carrying out the order of the

Subordinate Judge to deliver possession of certain lands to the present opposite parties and if a complaint should therefore, be made against them

u/s 186 I.P.C. This has nothing to do with any remedies that may be available to the opposite parties under the CPC in respect of such resistance.

5. It has been alleged that as the pleader commissioner and the process-server were about to proceed with their task in giving delivery of

possession to the opposite parties, resistance was offered by the present petitioners who came there armed with dangerous weapons like tabla,

kurhal and lathi and threatened the pleader commissioner and the process-server with dire consequences if they proceeded with their work. Both

the process-server and the pleader-commissioner who was appointed by the Civil Court, were public servants and according to the allegations,

threats of violence were used by the present petitioners in such a way as to prevent them from carrying out their duties as enjoined by the

Subordinate Judge. As observed by a Bench of this Court in (1) Rajshahi Banking and Trading Corporation Ltd, v. Surendra Nath Mitra, AIR

(29) 1942 Cal., 435:

It was the Judge''s duty to protect that peon when he was carrying out the order of the Court. Both the Subdinate Judge and the peon are public

servants within the meaning of S. 21 Penal Code, and on the face of the application it would appear that there was a matter to be enquired into as

to whether the defendant had committed an offence within the meaning of S. 186, Penal Code. Clearly, the peon was subordinate to the

Subordinate Judge whilst he was carrying out the Judge''s order. In my view, the Judge made excuses for not taking steps to protect the peon.

Unless peons are protected they cannot carry out their duties and the administration of justice may become a farce. In my opinion on the facts

before us the Subordinate Judge ought to have made complaint in respect of the occurrence so that the matter could have been examined by the

proper criminal court to see whether an offence under S. 186, Penal Code, had been committed or not.

6. It has next been argued before us by Mr. Chatterjee that the Subordinate Judge having in the first instance refused to make a complaint, the

District Judge was not competent to make such a complaint under the provisions of section 195 (1) (a). I, however, see no reason to hold that a

refusal to make a complaint by the Subordinate Judge should be treated as final. As the administrative head, the District Judge would still be

competent to make a complaint in suitable circumstances under the provisions of section 195(1) (a). The view that I take in this matter finds

support from a Bench decision of this Court in (2) Ramesh Chandra Poddar v. Hari Mohan Poddar, reported in 42 C.W.N. 531. It was held

there that, the complaint by the District Judge was an administrative order which the District Judge was competent to make u/s 195(1) (a) Cr. P.C.

and the exercise of his such powers should not be affected by the fact that Subordinate Judge had refused to make such a complaint.

7. There is no real conflict in this respect between the decision in (2) (Ramesh Chandra Poddar v. Hari Mohan Poddar, reported in 42 C.W.N.

531), and the decision in Madhu Sudhan Chatterjee v. Haridas Gope, reed in (3) 44 C.W.N. 1011, which has been relied on by Mr. Chatterjee.

That case was of a different nature. It was held there that when the public servant concerned had withdrawn the proceedings, they could not be

revived by the District Judge at the instance of the person who was not a public servant.

8. The argument that the administrative order of the District Judge making the complaint had the effect of interfering with the judicial order of the

Subordinate Judge, is also really of no substance. A (misc) judicial proceeding was started in respect of the petition filed by the present opposite

parties but, no evidence was recorded and an order to the following effect was passed by the Subordinate Judge in the record of T. Ex. Case No.

4 of 1957.

20.12.58. Parties file haziras. Heard lawyers. The application u/s 476 Cr. P.C. is considered in the light of the argument advanced. No oral

evidence adduced. On a careful consideration of the matter I am satisfied that the application is misconceived. The proper remedy would have

been an application under Or. 21, R. 97 C.P.C., specially when resistance to delivery of possession was admittedly caused by third parties. In any

case, when a plea of bonafide claim of right is available prima facie to the O.P.s., I am not prepared to make a complaint in the matter suggested in

the application which is hereby rejected without costs to the other side."" Even if it be conceded for the sake of argument that the first part of the

order was in the nature of a judicial order, the last portion of the order where he expressed his opinion that he was not prepared to make a

complaint in the manner suggested, could only have been made u/s 195 (1) (a) Cr. P.C. Therefore, the order of the Subordinate Judge refusing to

make a complaint, should be interpreted to be an administrative order made by him as a public servant. I would in this connection refer to (4) AIR

1950 S.C., 244, where it has been observed that the same proceeding might be administrative at one stage and quasi-judicial at another.

The question involved in this Rule is the propriety of the administrative order made by the District Judge and Mr. Manan Kumar Ghose, learned

Advocate for the opposite parties, has contended that this application is misconceived and no revisional petition lies against the order of the District

Judge in this respect. Mr. Ghosh has, in this connection, also relied on the above case of (2) Ramesh Chandra Poddar v. Hari Mohan Poddar,

reported in 42 C.W.N. 531, in support of his contention that the impugned order of the District Judge is an administrative order against which no

application in revision lies. In the said case Jack, J. expressed the view that ""this is really an administrative order and we are not inclined to interfere

with the decision of the Judge in revision. Patterson. J. also observed: "".....should like to add that the question involved is one which can only

properly be raised by a Rule to show cause why the order of the Magistrate taking cognizance of the complaint filed by the Judge should not be set

aside for want of jurisdiction. The Rule in the present case was not directed against that order; but against the order of the District Judge, and for

that reason too I regard the application as being misconceived.

9. It has, however, been argued by Mr. Chatterjee that in (3) Madhu Sudhan Chatterjee v. Haridas Gope, 44 C WN 1011 , another Division

Bench of this Court revised the order of the District Judge made in an appeal u/s 476B Cr. P.C. making a complaint u/s 195(1) (a), while

conceding that section 476 did not apply to the case.

10. The two rulings are therefore, apparently in conflict on this point. I, however, respectfully agree with the view expressed in (2) 42 C.W.N. 531

that an administrative order of this nature can not be subject of revision u/s 115 of the Code of Civil Procedure.

11. Mr. Chatterjee however, has contended that the power of superintendence under Article 227 of the Constitution of India is wide enough to

enable the High Court to interfere even with the administrative orders in appropriate cases. The question is not free from difficulty. Article 227 is in

these terms: --

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

12. In (5) Bimala Prosad Roy v. State of West Bengal, reported in 55 C.W.N. 87, this Court expressed the opinion that Article 227 of the

Constitution of India gave this court a right in appropriate cases to interfere judicially with orders of courts and tribunals made amenable to its

jurisdiction by that Article. In that particular case, however, the orders sought to be interfered with were made before the Constitution came into

force and so it was held that the court could not interfere in the said case under the provisions of Article 227 of the Constitution.

13. Similar view was also expressed in (6) Waryam Singh and another v. Amarnath and another, reported in (1954) S.C.A. 334. But their

lordships were careful to observe that this power of superintendence was to be exercised most sparingly and only in appropriate cases in order to

keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This view was further amplified by the

Supreme Court in (7) Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, . Therein it was held that this power of superintendence under

Article 227 of the Constitution was both judicial and administrative. At page 243 the following observations in this connection were made by the

Supreme Court: --

... the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a court

which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a

right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to re-hear the case on the evidence

14. Mr. Manan Kumar Ghose has next urged that such order made by the District Judge in his administrative capacity cannot be said to be an

order made by a tribunal or by a court within the meaning of Article 227 of the Constitution of India and therefore the provisions of Article 227 will

not apply here. It is, however, not necessary for us to express any definite opinion in this respect, as in my opinion, for reasons stated, this

application is liable to be rejected.

15. I would therefore, discharge the Rule.

Amaresh Roy, J.

16. I had the advantage of perusing the judgment which my learned brother has just now delivered. But I am unable to agree with my Lord''s

conclusions, and I shall presently state my reasons.

17. This Rule was issued upon an application purported to have been made u/s 115 Cr. P.C. and Art. 227 of the Constitution of India by five

persons against whom a complaint u/s 195(1) (a) Cr P.C. has been directed by the District Judge of Purulia for prosecuting them for alleged

offences u/s 186 I.P.C. The facts that led to that order being made by the learned District Judge are these: In a Partition Suit in the court of the

Subordinate Judge, Purulia there was a decree for partition. Two persons named Biraj Mahato and Manbodh Mahato who were parties to that

Partition Suit started Execution Case No. 4 of 1957 in the Court of the Subordinate Judge, Purulia for delivery of possession of the lands allotted

to them in the Final Partition decree. It is alleged that when a Pleader Commissioner appointed by the subordinate Judge in that suit and a process-

server of that court was giving delivery of possession on 30th May, 1958, the present petitioners came there armed with various weapons and

obstructed the pleader commissioner and the process-server under threat of assault from delivering possession in respect of plots of land including

plots Nos. 144 and 154 of Mouza Khayerband. The process-server made a report to that effect to the learned Subordinate Judge and also the

pleader commissioner made similar allegations naming specifically the five persons who are said to be the obstructers. An application was made to

the court of the Subordinate Judge by the present opposite parties Biraj Mahato and Manbodh Mahato praying that a complaint should be made

u/s 476 Cr. P.C. for prosecution of the persons named as obstructers for offences under sections 183 and 196 of the Indian Penal Code. That

application was registered in the court of the learned Subordinate Judge as Misc. Case No. 134 of 1958 and notice of the said application was

given to the present petitioners directing them to show cause. They showed cause by denying the allegations and raising the contention that they

were in possession of the lands of Khata No. 2 and they denied title and possession of the applicants over those lands. At the hearing of that Misc.

Case no oral evidence was adduced but arguments were advanced by both parties. The learned Subordinate Judge by his order No. 52 dated the

20th of December, 1958 held that the prosecution u/s 476 Cr. P.C. was misconceived and that the proper remedy would have been an application

under Order 21, Rule 97 C.P.C. specially when resistance to delivery of possession was admittedly caused by third parties and bonafide claim of

right was prima facie available to them. The learned Subordinate Judge refused to make the complaint prayed for and rejected the application.

18. Thereafter on 9th of January, 1959, the present opposite parties made an application before the learned District Judge of Purulia purporting to

be u/s 195(1) (a) Cr. P.C. for filing a complaint. It was stated in that petition that the learned Subordinate Judge of Purulia was moved to take

action u/s 195(1) (a) Cr. P.C. but he refused to take such action and accordingly the said application was being made before the learned District

Judge as administrative head of the Nazarat. It may be mentioned that the said statement was patently incorrect as no application had been made

to the Subordinate Judge u/s 195(1) (a) Cr. P.C. He was moved as a Court u/s 476 Cr. P.C.

19. The application made to the District Judge was registered under the order of the District Judge as Misc. Case No. 1 of 1958 in the Court of

the District Judge of Purulia who also directed notices to issue to the present petitioners for showing cause. Requisites for service of notice etc.

were directed to be filed within three days by order of the learned District Judge dated the 9th of January, 1959. The records of that Misc. Case

shows that at the first instance opposite parties Nos. 1 to 3 and 8 to 10 appeared through lawyer, and the learned District Judge directed issue of

notices by registered post on non-appearing opposite parties. The case was adjourned from time to time. Then by order dated the 6th August,

1959 the learned District Judge called for the original records and summons on witnesses were issued. There were further adjournments on the

ground that the court was engaged in Sessions Trials and Land Acquisition Reference Cases and ultimately the case appears to have been heard in

the Court of the learned District Judge on 17th of September, 1960.

20. Before the learned District Judge a point was taken that an application having been made before the learned Subordinate Judge who was the

court concerned and that application having been rejected by the Judicial Order of the learned Subordinate Judge, without perusing the remedy

against that order an original application u/s 195(1) (a) Cr. P.C. to the court of the District Judge was not maintainable.

21. The learned District Judge by his order dated the 17th of September, 1959 rightly pointed out that section 476 of the Code of Criminal

Procedure had no application but he was in error in thinking that the learned Subordinate Judge, had held anything different. Because, the learned

Subordinate Judge also said in his order, as I have stated already, that the application u/s 476 Cr. P.C. before him was misconceived. The learned

District Judge, however, held that the matter being u/s 195(1) (a) Cr. P.C. a complaint could lawfully be made either by the process-server

concerned or by the presiding officer of the court whose writ the process-server was entrusted to execute or by the Judge-in-charge of the

Nazarat or by the District Judge as functionaries to whom the process-server is administratively subordinate and he held that the matter having

come to his notice on the basis of an application, he was-

At least administratively required, irrespective of that application, to act on the report of the process-server, who must be deemed to be public

servant subordinate to the District Judge for purpose of clause (a) sub-section (1) of section 195.

22. With regard to the learned subordinate Judge''s observation that the proper remedy should have been under Order 21, Rule 97 C.P.C. the

learned District Judge says in his order that that view cannot be supported. He expressed his view in these words: --

It appears, however, that the warrant issued by the court definitely directed the process-server to give delivery of possession in respect of the

lands mentioned therein with the help of the pleader commissioner. It was an order issued by a competent court [and passed in a judicial

proceeding in accordance with law. The warrant could not be lawfully resisted, since u/s 99 of the Indian Penal Code, the right of private defence

of property is not available against an act which does not reasonably cause the apprehension of death or of grievious hurt, if done, or attempted to

be done by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by

law. No plea of bonafide claim of right preferred to in the order of the learned Subordinate Judge can come into operation here. The opposite

parties remedy was only under Or. 21, r. 100 C.P.C.

23. On that view the learned District Judge directed to make a complaint u/s 195(1) (a) of the Code of Criminal Procedure against the five persons

who are petitioners in this court for being prosecuted u/s 186 of the Indian Penal Code.

24. It appears that thereafter by order dated the 25th October, 1960 the learned District Judge directed a copy of his order to be forwarded to

the Judge-in-charge of Nazarat requesting him to lodge a complaint in terms of the above order in his administrative capacity. In pursuance of that

order of the District Judge Shri A.N. Banerjee, Judge-in-charge of Nazarat has forwarded a complaint to the court of the Sub-divisional Officer,

Purulia, in which the complainant is the Judge-in-charge of Nazarat, Civil Court, Purulia and the accused persons named are the five petitioners

before this Court. In that complaint it has been said that it was being made --

As directed by Sri S.N. Mukherjee, District Judge of Purulia by his order No. 27 dated 25.10.60 based on his order No. 26 dated 17.9.60

(copies of which are annexed and form part of the petition of complaint).

25. As I have said already against that order of the District Judge the present Rule was issued u/s 115, C.P.C. and under Article 227 of the

Constitution of India. In support of the Rule the learned Advocate Mr. Gouranga Chatterjee has contended first that an application having been

made before the learned Subordinate Judge who was the Civil Court concerned and that application having been rejected by a judicial order of the

learned Subordinate Judge the application made to the District Judge should not have been entertained. Mr. Chatterjee"s contention in this respect

was that though section 476 Cr. P.C. did not apply and, therefore, no appeal will lie u/s 476B Cr. P.C., there having been an order by a Civil

Court the remedy against that order, if any, was available only by moving this court in revision against that order. That order having been left

untouched, the order could not be by-passed in the manner it has been sought to be done by making a direct application u/s 195(1) (a) Cr. P.C. to

the District Judge. Mr. Chatterjee, therefore, contended that the District Judge"s order was without jurisdiction.

26. The second contention of Mr. Chatterjee is that on the merits the learned Subordinate Judge was perfectly right in holding that the proper

remedy, even if the allegations were assumed to be true, was by way of application under Order 21, Rule 97, C.P.C. Mr. Chatterjee argues that if

that application had been made an investigation under sub-rule (2) of that Rule would be required to be held and therein it would be open to Mr.

Chatterjee"s client to show that the obstruction or resistance was occasioned by the petitioners claiming in good faith to have a right to be in

possession of the property on their own account and if they could succeed to satisfy the court that it was so they will be entitled to the protection of

the law under Order 21, Rule 99, and the court would be required to make an order dismissing the application. If, on the other hand, the decree-

holder would succeed to satisfy the court that the resistance and obstruction was occasioned without any just cause by the judgment-debtor or by

some other person at his instigation or on his behalf, the court would direct the applicant to be put into possession of the property and the

consequence envisaged in Order 21, Rule 98 will follow. The attempt of the present opposite parties to avoid that investigation and to by-pass the

order of the learned Subordinate Judge cannot be countenanced in law, and should be held to be improper.

27. Thirdly, Mr. Chatterjee argues that the view of the learned District Judge that no consideration of bonafide claim of right could arise in the

circumstances of the present case is erroneous and is based on complete neglect of the whole scheme of law as appearing in Order 21, Rules 98

and 99, C.P.C. The remedy under Order 21, Rule 100, C.P.C. as suggested by the learned District Judge is, according to Mr. Chatterjee, not

applicable to a party who can successfully bring his case within order 21, Rule 99. Before possession is actually delivered, contemplation of a right

of private defence is not germane according to Mr. Chatterjee, because the CPC itself contemplates lawful resistance or obstruction to delivery of

possession by persons claiming in good faith a right to be in possession of the property on his own account or on account of some person or her

than the judgment-debtor as Rule 99 of Order 21 shows. The last contention of Mr. Chatterjee was that it is improper for the learned District

Judge purporting to act in his administrative capacity to over-ride and nullify the judicial order of the learned Subordinate Judge functioning as a

court.

28. For all these reasons Mr. Chatterjee has contended that the District Judge even if he was acting in his administrative capacity is a Tribunal

within the meaning of Art. 227 of the Constitution of India who is amenable to not only judicial but also administrative control of this court and his

order is liable to be revised and the order of the learned Subordinate Judge should be restored.

29. In answer to these contentions Mr. Manan Kumar Ghosh appearing for the opposite parties has raised the contention that this Court has no

jurisdiction to revise an administrative order of the District Judge either u/s 115, C.P.C. or under Art. 227 of the Constitution. Mr. Ghosh contends

that the District Judge in his administrative capacity is not court and, therefore, he is not amenable to the revisional jurisdiction u/s 115 C.P.C.; and

he is not a Tribunal either and, therefore, he is not amenable to the jurisdiction under Art. 227 of the Constitution. Mr. Ghosh has relied on a

decision of this Court reported in (2) 42 C.W.N. 531 (Ramesh Chandra Poddar v. Hari Mohan Poddar).

30. The first question that arises therefore is whether this Court has jurisdiction to exercise the power of revision and superintendence in respect of

the order of the learned District Judge mentioned above. In the present case the District Judge has clearly stated is that order that he was making in

his administrative capacity. The question is, in such administrative capacity, is the District Judge a court or a tribunal: If he is a court and if by the

order complained of he has decided a case then there cannot be any doubt that section 115 of the CPC will be attracted. Even if he is not a court

but only a Tribunal, then though section 115 of the CPC would not be applicable, Art. 227 of the Constitution of India will apply. But the question

would arise as to the scope of the power of superintendence given by that Article -- that is, whether that power of superintendence shall extend

only to judicial orders or will include administrative superintendence also. The learned District Judge has emphasised in his order that in making it

he was acting as the administrative authority in the district of Purulia. Mr. Ghosh, however, has relied on the decision of this court in the case of (2)

Ramesh Chandra Poddar v. Hari Mohan Poddar, (42 C.W.N. 531) in which a Division Bench of this Court (Jack and Patterson, JJ.) held that an

order by the District Judge making a complaint u/s 195 (1) (a) Cr. P.C. after a Subordinate Judge refused to do so, is an administrative order

against which no application in revision lies. On examining that decision however, we find that in the leading judgment delivered by Jack, J. in that

case after dealing with the merits of the matter the learned Judge said -

After all this is really an administrative order and we are not inclined to infer with the decision of the Judge in revision. This Rule is accordly

discharged.

In my opinion this application was entirely misconceived. The orders, both of the Subordinate Judge and of the District Judge, were purely

administrative orders, and as such are not subject to revision by this Court.

31. That is all that was said in that case and it does not appear that the point of jurisdiction of this Court was either raised or decided. Moreover,

that decision was given in 1938 when the corresponding provision to present Art. 227 of the Constitution of India was Section 224 of the

Government of India Act, 1935 which had curtailed the scope of the old Section 107 of the Government of India Act, 1915. In a later case

reported in (3) 44 C.W.N. 1011 (Madhusudan Chatterjee v. Haridas Gope), another Division Bench of this Court (Bartley and Sen, JJ.) revised

an order passed by the District Judge purported to have been made under that Section 195(1) (a) directing a complaint u/s 186 I.P.C. and

obstructing a Commissioner appointed by a Munsif for making inventories on the view that as the Commissioner was subordinate to the Munsif

and the Munsif was subordinate to the District Judge the latter was entitled to make a complaint u/s 195(1) (a). The order that was revised in that

case had been made by the District Judge in an appeal preferred u/s 476 Cr. P.C. after he had held that 476 Cr. P.C. did not apply to the case.

That order, therefore, could only have been made by the District Judge u/s 195 (1) (a) Cr. P.C. in his administrative capacity as a ''public servant.

Yet this court revised it and held -

It is clear that the public servant concerned withdraw the proceedings originally instituted by him and it is definitely undesirable that these

proceedings should be revived by the petitioner who was not a public servant.

In the second place the learned Judge is clearly wrong in the view which he takes that sec. 195(1) (a) authorises him to lodge a complaint u/s 186

of the Indian Penal Code, as the aggrieved person is not a public servant.

32. I may add here that in the present case the District Judge in his administrative capacity as a public servant has overruled an order passed by the

Subordinate Judge in his judicial capacity. To my mind that makes the manner of exercise of powers by the District Judge all the more undesirable.

33. The two decisions we have referred to, one reported in 42 C.W.N. 531 and the other reported in 44 C.W.N. 1011 between themselves look

like conflicting but we have also to notice that both the decisions were given at a time when the powers of superintendence were restricted by

section 224 of the Government of India Act, 1935. That power has since been enlarged under Article 227 of the Constitution of India. The nature

of that power has been fully discussed by their Lordships of the Supreme Court in the case of (Waryam Singh and Another Vs. Amarnath and

Another, in these words:

In this connection it has to be remembered that section 107 of the Government of India Act, 1915 was reproduced in the Government of India

Act, 1935 as Section 224. Section 224 of the 1935 Act, however, introduced sub-section (2) which was new, that nothing in the section should

be construed as giving the High Court any jurisdiction to question any judgment of any inferior Court which was not otherwise subject to appeal or

revision. The idea presumably was to nullify the effect to above. Section 224 of the 1935 Act has been reproduced with certain modifications in

Art. 227 of the Constitution. It is significant to note that sub-section (2) to section 224 of the 1935 Act has been omitted from Art. 227.

This significant omission has been regarded by all High Courts in India before whom this question has arisen as having restored to the High Court

the power of judicial superintendence it had u/s 15 of the High Courts Act, 1861 and section 107 of the Government of India Act, 1915.....Our

attention has not been drawn to any case which has taken a different view and, as at present advised, we see no reason to take a different view.

34. Soon thereafter in 1955 the Supreme Court in the case of (7) Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, referred to War-

yam Singh''s case and held that the ""superintendence is both judicial and administrative."" Their Lordships said:

We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under Art. 227 of the Constitution, and

that that superintendence is both judicial and administrative. That was held by this Court in (6) Waryam Singh and Another Vs. Amarnath and

Another, , where it was observed that in this respect Art. 227 went further than section 224 of the Government of India Act, 1935, under which

the superintendence was purely administrative, and that it restored the position u/s 107of the Government of India Act, 1915.

35. These two decisions of the Supreme Court have abundantly made clear that the administrative superintendence of this Court over the

administrative functions of the District Judge was availing even under the restricted section 224, of the Government of India Act, 1935. What had

been curtailed by that Section was the judicial superintendence and that even has now been restored by Art. 227 of the Constitution of India. I

have no doubt, therefore, in my mind that even if in the present case the District Judge was acting in his administrative capacity, he is amenable to

the superintending powers of this court under Art. 227 of the Constitution. In that view of the matter I do not see any necessity to advert to the

question whether the earlier two decisions of this court referred to above are conflicting, because as I have said already, both of them had been

given under the restricted section 224 of the Government of India Act, 1935, and the present case is under Article 227 of Constitution of India.

36. Now the question arises whether the District Judge acted within his powers or properly in nullifying the judicial order of the learned

Subordinate Judge passed in a case pending in his court, the District Judge purporting to act in the matter in his administrative capacity. I am clearly

of the view that the District Judge purporting to act in the matter in his administrative capacity, has acted improperly and in excess of his powers.

There is no doubt that as a public servant superior to the process-server the District Judge is competent to make a complaint u/s 195 (1) (a) Cr.

P.C. But legal competence is one thing, proper exercise of jurisdiction is another. When the Subordinate Judge who was also competent to make a

complaint u/s 195(1) (a) Cr. P.C. was petitioned in a case pending in his court u/s 476 Cr. P.C. and the learned Subordinate Judge after rightly

holding that for an offence u/s 186 I.P.C. section 476 Cr. P.C. has no application and the petition made before him was misconceived, applied his

mind to the matter in his judicial capacity and declined to make a complaint u/s 195(1) (a)Cr. P.C., it was not within the powers of the District

Judge acting in his administrative capacity to override that judicial order and make a contrary order. The proper course could have been to take a

revisional application to this court against the order of the learned subordinate Judge passed judicially, as section 476 Cr. P.C. not being

applicable, an appeal u/s 476B Cr. P.C. would not lie. In my view, therefore, the order of the learned District Judge overriding the judicial order of

the learned Subordinate Judge has been an improper order.

37. On the merits also, as I have said already, the order passed by the learned Subordinate Judge was the correct order because when there was

an obstruction to delivery of possession and there was an application, though purported to be made u/s 476 Cr. P.C., by the decree holder, it fully

answers the elements of Order 21, Rule 97, Sub-rule (1) C.P.C. and under sub-rule (2) of that rule there must have to be an investigation. If on

such investigation it be found that the obstruction was by persons bonafide claiming to have the right to possession then a complaint to a criminal

court u/s 195(1) (a) Cr. P.C. should not be made. No consideration of right of private defence is germane to the matter. What is relevant for

proper justice is the question whether Rule 98 of Order 21 or Rule 99 of that order would be attracted. If Rule 98 would be attracted then a

complaint for an offence u/s 186 I.P.C. would be proper in addition to the penal powers under that rule in Civil Procedure Code. If Rule 99 would

be attracted, then to lodge a complaint and start a prosecution will be unnecessary harassment of a citizen who has acted bonafide in exercise of

his legal rights. Section 79 I.P.C. fully covers such a case.

38. In my opinion, therefore, in exercise of the powers under Article 227 of the Constitution of India the order passed by the learned District Judge

directing a complaint should be set aside and that of the learned Subordinate Judge should be restored. As I have mentioned before, in pursuance

of the order of the learned District Judge a complaint has been made to the Sub-divisional Officer by the Judge-in-charge of Nazarat. That

complaint should be directed to be withdrawn and the criminal proceedings, if any, started on the basis of that complaint should be quashed.

39. As there has been a difference of opinion between us on the question necessary to be decided in this case, let the records be placed before the

Hon"ble the Chief Justice for direction to lay this case before another Judge in accordance with the provisions of section 429 Cr. P.C.

[The case was thereafter laid before D.N. Das Gupta, J. for hearing and disposal -- Ed.]

Das Gupta, J.

40. This is an application u/s 115 of the CPC and Article 227 of the Constitution of India for revision of an order made by the District Judge of

Purulia directing a complaint to be made against the petitioners in accordance with the provisions of section 195 (1) (a) of the Code of Criminal

Procedure. There was a difference of opinion between Niyogi, J. and Amaresh Roy, J. The matter has been referred to me by The Hon"ble The

Chief Justice.

41. The material facts are as follows: In execution of a final decree passed in Title Suit (Partition) No. 63/47/1952-53 of the Court of the

Subordinate Judge of Purulia a court peon and a pleader commissioner went to give delivery of possession of land to the decree-holders. The

decree-holders made an application in the court of the Subordinate Judge alleging that the pleader commissioner and the peon had been resisted in

the discharge of their official duties by the present petitioners. The prayer of the decree-holders was that a complaint should be made by the court

against the present petitioners in accordance with the provisions of section 195(1) (a) of the Code of Criminal Procedure. On that petition the

learned Subordinate Judge made the following order on the 20th December 1958: --

The application u/s 476 Cr. P.C. is considered in the light of the arguments advanced. No oral evidence adduced. On a careful consideration of

the matter I am satisfied that the application is misconceived. The proper remedy would have been an application under Or. 21, r. 97 C.P.C.,

specially when resistance to delivery of possession was admittedly caused by third parties. In any case, when a plea of bonafide claim of right is

available prima facie to the O.P.s., I am not prepared to make a complaint in the manner suggested in the application which is hereby rejected

without costs to the other side.

42. On the 9th January, 1959, the decree-holders made an application before the District Judge, paragraph 5 of which application is quoted

below.

43. ""That being aggrieved at and dissatisfied with the said order your petitioners beg most respectfully to prefer this application before your honour

as the administrative head of the Nazarat on the following amongst other grounds."" Thereafter the grounds were set in. The decree-holders made a

prayer in that application that the District Judge should make a complaint himself or direct the peon to file a complaint against the present

petitioners.

44. On that application, after holding that he had authority to make a complaint, the learned District Judge observed as follows:

It is to be noted also that the learned Subordinate Judge was wrong in thinking that he was concerned with a proceeding u/s 476 of the Code of

Criminal Procedure, which actually applies only in respect of complaints to be made under clause (b) & (c) of sub-section (1) of section

195.....It appears also that the view that because a civil remedy as provided for under Order 21, Rule 97 of the CPC is available to the decree-

holder, in case of such obstruction or resistance to possession, no action is to be taken under the Penal Law in respect of an act which constitutes

an offence cannot be supported. It has been contended that since the alleged obstructers were not parties to the decree, they could lawfully

oppose the delivery of possession, on the ground of having claim to the land in respect of which such delivery of possession was sought to be

given. It appears, however, that the warrant issued by the Court definitely directed the process-server to give delivery of possession in respect of

the lands mentioned therein with the help of the pleader commissioner. It was an order issued by a competent Court and passed in a judicial

proceeding in accordance with law. The warrant could not be lawfully resisted, since u/s 99 of the Indian Penal Code, the right of private defence

of property is not available against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to

be done by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by

law. No plea of bonafide claim of right referred to in the order of the learned Subordinate Judge can come into operation here. The opposite

parties'' remedy was only under Or. 21, R. 100 C.P.C.

45. Although the learned District Judge was quite conscious of the fact that no appeal lay to him from the order of the learned Subordinate Judge

he dealt with the matter as if he was hearing an appeal from the order of the learned Subordinate Judge. Thereafter the learned District Judge

observed as follows:

In these views, the matter having come into my notice on the basis of an application made by the decree-holders, I am at least administratively

required, irrespective of that application, to act on the report of the process-server, who must be deemed to be public servant subordinate to the

District Judge for purposes of clause (a) sub-section (1) of section 195. I, therefore, proceed to make a complaint u/s 195 (1) (a) of the Code of

Criminal Procedure against the opposite parties. The learned District Judge never came to any finding that it was necessary or expedient in the

interest of justice that a complaint should be made against the present petitioners. It does not appear from the order of the learned Judge that he at

all considered the matter from that aspect, namely, whether interest of justice required that he should make a complaint in accordance with

provisions of section 195(1) (a).

Certain decisions which were considered by the learned Judges have also been cited before me, namely, (3) Madhu Sudhan Chatterjee v. Haridas

Gope, 44 C WN 1011 , (2) Ramesh Chandra Poddar v. Hari Mohan Poddar, 42 C.W.N. 531 and (1) Rajshahi Banking and Trading

Corporation, Ltd. v. Surendra Nath Mitra, ILR (1942) 2 Cal. 108. Referring to the decisions Niyogi, J. was of the view that the order made by

the District Judge was a purely administrative order, that such an administrative order cannot be subject of revision u/s 115 of the CPC and that

the Rule should be discharged. Regarding the applicability of Article 227 of the Constitution of India His Lordship was of the view that it was not

necessary to express any definite opinion.

Amaresh Roy, J.

46. was of the view that this Court can interfere with such an order under Article 227 of the Constitution of India and that the Rule should be made

absolute and the order of the District Judge set aside.

47. I have considered the above decision and also the decisions in (6) War-yam Singh and another v. Amarnath and another, (1954) S.C.A. 334

and (7) Hari Vishnu Kamath v. Syed Ahmad Ishaque and Ors. (1955) S.C.A. 105. (The Supreme Court decisions were considered also by

Niyogi and Roy, JJ.) It is true that the District Judge make an administrative order for protection of a Civil Court peon when he is resisted in the

discharge of his official duties. It is also true that the power of superintendence is to be exercised by the High Court most sparingly and only in

appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors. The real question

in the instant case is whether the District Judge did really make an administrative order although he purported to do so. In my opinion on the facts

of this case appearing in the order of the District Judge himself it is impossible to maintain that he had authority to make an administrative order

making a complaint against any and every person resisting the peon in the discharge of his official duties. Resistance in this case is alleged to have

been offered not by the judgment-debtors but by a third party, namely, the present petitioners who had been judicially held by the Subordinate

Judge to be entitled to offer resistance. Resistance offered or obstruction raised by the third party was in the exercise of a right claimed by them

and the decree-holders approaching the District Judge for an administrative order had already been directed to take appropriate proceedings

under the Civil Procedure Code. It is impossible to maintain that the District Judge had power to make an administrative order in the face of the

order of the Subordinate Judge which had not been set aside in an appropriate proceeding. Merely saying that the order is an administrative order

would not make the order immune from interference by this Court under the powers of superintendence vested in this Court under Article 227 of

the Constitution of India. This court has certainly power to scrutinize the order and to see whether it is within the bounds of the administrative

authority of the District Judge.

48. In the result I agree with Amaresh Roy, J. that the order of the learned District Judge cannot be sustained and must be set aside. The order of

the learned District Judge directing a complaint to be made in accordance with the provisions of section 195(1) (a) of the Code of Criminal

Procedure against the present petitioners is, accordingly, set aside and any proceeding that may be pending relating to the complaint is quashed.

The Rule is accordingly made absolute.