

respondents. This being so, no question arises as to his being entitled to any interest.

I maintain the order of the Tribunal dismissing the petitioner's application under section 13 of the Displaced Persons (Debts Adjustment) Act, No 70 of 1951. In the result, the appeal fails and is dismissed. The respondents will be entitled to their costs throughout.

Prem Nath  
v.  
M/s Kaudooma  
Rikhiram and  
another  
Tek Chand, J.

#### APPELLATE CIVIL.

Before Grover, J.

KAKU SINGH—*Petitioner.*

*versus*

GOBIND SINGH AND OTHERS—*Respondents.*

Execution First Appeal No. 179 of 1956 treated as  
Civil Revision No. 551 of 1957.

*Code of Civil Procedure (V of 1908)—Sections 144 and 151—Order of restitution not falling under section 144—Appeal from—Whether competent—Actual and symbolical possession—Effect of—Delivery of symbolical possession where actual possession should have been delivered—Effect of.*

1957  
Nov. 5th

*Held*, that the order directing restitution of possession not on account of variation or reversal of decree or order but because a stay order had been made by the High Court, is not made under the provisions of section 144 of the Code of Civil Procedure but is made in exercise of the inherent powers under section 151. Such an order is not appealable but can be challenged by petition for revision.

*Held also*, that so far as the law of limitation is concerned, it is well settled that delivery of symbolical possession is deemed to be as effectual as delivery of actual possession especially when any dispute arises between the decree-holder and the judgment-debtor. But delivery of symbolical possession given in circumstances in which actual possession ought to have been given is a nullity as symbolical possession is not actual possession nor is it equivalent to

actual possession except where the Code of Civil Procedure expressly or by implication provides that it should have that effect.

*Mam Chand v. Ali Mohammed and another* (1), *Sukhdeo Das and others v. Rito Singh* (2), *Brij Mohan Singh v. Rameshar Singh and others* (3), *Mst. Khairan v. Raghbir Singh* (4), relied upon; *Maharaja Sasikanta Acharjee v. Jalil Bakhsha Munshi* (5), not followed; *Mst. Ram Kali and others v. Goverdhan Lal* (6), *Erfan Ali Choudhary v. The King* (7), *Jawala Parshad and others v. Jiwan Ram and others* (8), referred to.

*Petition for revision of the order of Shri Murari Lal Puri, District Judge Patiala, dated the 30th October, 1956, holding that the possession be restored to the Judgment-debtor on 30th October, 1956.*

BABU RAM, for Appellant.

D. C. GUPTA, for Respondents.

#### JUDGMENT

Grover, J.

GROVER, J.—This appeal is directed against the order of the District Judge, Patiala, by which he has ordered restoration of possession of certain lands which had been taken in execution proceedings by the decree-holders. It would be necessary to briefly state the facts.

On the 21st of June, 1956, a decree for pre-emption of agricultural land measuring 187 bighas 5 biswas situate in village Bhore was passed in favour of Kaku Singh and others, who are the appellants now. The decree-holders deposited the sum of Rs. 20,000 which was determined to

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- (1) A.I.R. 1934 Lah. 1023
  - (2) A.I.R. 1917 Pat. 495
  - (3) A.I.R. 1939 Oudh. 273
  - (4) A.I.R. 1937 Lah. 350
  - (5) A.I.R. 1931 Cal. 779
  - (6) A.I.R. 1935 Lah. 612
  - (7) A.I.R. 1948 Pat. 418
  - (8) A.I.R. 1950 Pepsu 22.

be the pre-emption money and on the 21st of August, 1956, execution of the decree was taken out by them. On the 23rd of August, 1956, the executing Court issued warrants for possession and ordered that the warrants should be returned after compliance on the 10th of September, 1956. On the 9th of September, 1956, actual possession of *kila* Nos. 140 to 147 was delivered. On the remaining land the crops were standing and only symbolical possession was delivered. On the 10th of September, 1956, the decree-holders orally represented to the executing Court that actual possession of the land on which the crops were standing should also have been delivered. The case was adjourned to the 16th of September, 1956, and an order was made that actual physical possession should be delivered to the decree-holders. The warrants having been issued on the 20th of September, 1956, they were sent to the collector on the same day and he forwarded them to the Tehsildar for due execution. On the 20th of September, 1956, the judgment-debtors got a stay order from the High Court of erstwhile Patiala and East Punjab States Union by which execution was stayed. The order was taken *dasti* and presented to the District Judge, who was the executing Court, on the same day. Thereupon the executing Court ordered the warrants to be recalled but by the time the orders reached the Revenue authorities, the possession of the land had been delivered. When the orders were actually delivered to the Revenue authorities it was reported by them that possession had already been given to the decree-holders and therefore no action could be taken. It is stated that possession was actually delivered on the 21st of September, 1956, i.e. after the stay order had been made by the High Court. Thereupon three out of the six judgment-debtors, namely, Mst. Sarla Devi, Tara Singh and Sadhu Singh filed an application

Kaku Singh  
v.  
Gobind Singh  
and others

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Grover, J.

Kaku Singh  
v.  
Gobind Singh  
and others  
Grover, J.

before the executing Court asking for restoration of possession on the grounds that the stay order by the High Court had been passed long before the delivery of possession and consequently possession could not have been delivered after the making of the stay order and therefore the same should be restored. This application was resisted by the decree-holders but the learned District Judge by his order dated the 30th of October, 1956, accepted the application and ordered that possession of lands other than the land comprised in *kila* Nos. 140 to 147 should be restored to the judgment-debtors. The possession of *kila* Nos. 140 to 147, however, was not ordered to be restored as the stay order had not been made before the 10th of September, 1956, when actual physical possession of those *kila* numbers had been given to the decree-holders.

There are two preliminary matters, however, which must be decided before any decision is given on the merits of the case. One of the questions is whether the present appeal is competent under section 47 of the Code of Civil Procedure. The order under appeal directed restitution of possession of certain land as stated before. This order was clearly not made under the provisions of section 144 of the Code inasmuch as no decree had been varied or reversed and restitution had been ordered only because a stay order had been made by the High Court. Such an order could only be made in exercise of the inherent powers under section 151 and if that be so, only a revision would be competent and not an appeal. It is true that there is authority for the view that where an execution sale is set aside under Order XXI rule 92 and restitution is to be allowed, section 144 has no application, but such restitution can be granted in exercise of the Court's inherent power, and where the Court acting under section 151 exercises

the same jurisdiction which section 144 gives it, the order of restitution made under section 151 is appealable, *vide Maharaja Sasikanta Acharjee v. Jalil Baksha Munshi* (1). The Calcutta case, however, was decided more or less on certain grounds peculiar to that case and the practice and the view followed in earlier decisions of that Court were largely followed. It was recognised in that case that in the definition of 'decree' as given in section 2(2), section 47 had been kept separate from section 144, but the fact that in an artificial definition intended only for purposes of laying down provisions for appeals, those sections have been enumerated separately should not be taken to mean that questions which arose under section 144 might not be questions falling within section 47. Applications for restitution which were not by way of execution of the decree varying or reversing an original decree but were independent applications in connection with execution proceedings were considered to be such as gave rise to matters under section 47 of the Code. With all respect it is somewhat difficult to accept the view adopted by the Calcutta High Court in the case referred to above. It seems to be widely accepted now that such proceedings or orders as are made under section 151 can only be made if they do not fall within any of the other provisions of the Code, and if an order is properly made under section 151 it is not appealable and can be challenged only by petition for revision. In *Mam Chand v. Ali Mohammed and another* (2), Abdul Rasid, J., held that apart from the provisions of section 144 the Court had ample power under section 151 to order restitution. He did not accept the rule laid down in the Calcutta case *Gnanoda Sundari Mojumdar v. Chandra Kumar De* (3), that an order made under section 151 in exercise by analogy of jurisdiction under

Kaku Singh  
v.  
Gobind Singh  
and others

\_\_\_\_\_  
Grover, J.

(1) A.I.R. 1931 Cal. 779  
(2) A.I.R. 1934 Lah. 1023  
(3) A.I.R. 1927 Cal. 285

Kaku Singh  
 v.  
 Gobind Singh  
 and others  
 \_\_\_\_\_  
 Grover, J.

section 144 was appearable. He treated the memorandum of appeal as a petition for revision in that case. To the same effect are the views of the High Court of Patna and the Chief Court of Oudh : *Sukhdeo Das and others v. Rito Singh* (1), and *Brij Mohan Singh v. Rameshar Singh and others* (2). I, therefore, consider that an appeal would not lie in the present case, but I would treat the memorandum of appeal as a petition for revision as has been prayed for by the learned counsel for the decree-holders.

The other question that has been raised on behalf of the decree-holders is that out of the six vendees only Mst. Sarla Devi, Tara Singh and Sadhu Singh had filed the appeal to the High Court and had applied for restitution as well and that Gobind Singh, Kapur Singh and Ujjagar Singh who are now represented by Shri Dalip Chand Gupta never filed any appeal or moved for restitution of possession. Later on it transpired that on the 4th of June, 1957, Gobind Singh made an application for being transposed to the array of appellants in the appeal which is pending against the decree. This application was granted on the 9th of August, 1957, subject to all just exceptions. In the meantime on the 5th of August, 1957, some sort of settlement is said to have been made between Sarla Devi, Tara Singh and Sadhu Singh on the one side and the decree-holders on the other by which the aforesaid judgment-debtors agreed to allow the decree-holders to remain in possession because the order of restitution had not so far been carried out and the possession was still with the decree-holders. It has been strenuously urged by the counsel for the decree-holders that Gobind Singh and others have no *locus-standi* to defend the present appeal or revision as they never obtained any stay order and

(1) A.I.R. 1917 Pat. 495

(2) A.I.R. 1939 Oudh. 273

never applied for restitution of possession. On the other hand, it is pressed before me that there had been one sale which was sought to be pre-empted, the sale being indivisible in favour of all the vendees and that the appeal which had been filed by three of the vendees, namely, Sarla Devi and others as well as the application for restitution would have enured for the benefit of Gobind Singh and others as well. Moreover, Gobind Singh was transposed to the array of the appellants in the other appeal in which the stay order had originally been granted and, therefore, if Sarla Devi and others had compromised with the decree-holders there should be no prejudice to Gobind Singh and others who were entitled to challenge the decree for pre-emption in their own right and to prosecute all proceedings which may be necessary to safeguard their rights. The objection raised has, therefore, no force.

Kaku Singh  
v.  
Gobind Singh  
and others  
Grover, J.

The first point which has been urged by Shri Babu Ram, the learned counsel for the appellants, is that the decree had been completely executed before the 20th of September, 1956, when the stay order was made by the High Court. According to him possession had passed of the entire land in question by the 10th of September, 1956, as actual possession of kila Nos. 140 to 147 had been admittedly delivered and symbolical possession of the remainder of the land had also been delivered. He contends that the mere fact that crops were standing, was no ground for non-delivery of actual possession of the entire land and that the Court by ordering delivery of actual physical possession on the 16th of September, 1956, of such land of which only symbolical possession had been delivered, merely rectified a mistake which had been made by its own officers. According to Shri Babu Ram, symbolical possession is as

Kaku Singh  
v.  
Gobind Singh  
and others  
—  
Grover, J.

good as physical possession and is effectual delivery of the possession for all purposes. He has invited my attention to various authorities : *Mt. Ram Kali and others v. Gowardhan Lal* (1), *Erfan Ali Choudhary v. The King* (2), and *Jawala Parshad and others v. Jiwan Ram and others* (3), in which it has been held that symbolical possession is equal to actual possession. A great deal of stress was laid on the Pepsu decision. In that case a suit had been brought to obtain possession of certain lands on the allegation that the decree-holder had been put in possession of the property in dispute in execution of the decree and that he had subsequently been dispossessed. The defendants denied that the plaintiffs had ever obtained possession and set up adverse possession of their own. In that case the crop was found to be standing on the land and, therefore, only formal possession had been delivered and the fact of delivery of symbolical possession had been proclaimed in the village by beat of drum. The defendants had set up the plea that the delivery of the symbolical possession was not equivalent to actual possession and therefore it did not put an end to their adverse possession. Chopra, J., examined at length the various authorities dealing with the effect of delivery of symbolical possession and came to the conclusion that symbolical possession should be deemed equivalent to actual possession and that a subsequent suit by the decree-holder for actual possession instituted within 12 years from the date of the symbolical possession must be deemed to be within time. In *Mt. Ram Kali and others v. Gowardhan Lal* (4), a decree for possession had been made and ultimately possession was given to the decree-holder by pointing out the fields the actual possession being with the tenant. Later on

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(1) A.I.R. 1935 Lah. 612  
(2) A.I.R. 1948 Pat. 418  
(3) A.I.R. 1950 Pepsu 22  
(4) A.I.R. 1935 Lah. 612



the judgment-debtors who claimed to be in actual possession instituted a suit for declaration that the previous decree had been obtained by fraud and that in any case the judgment-debtors had acquired good title to the land by adverse possession for over 12 years since then. Tek Chand, and Bhide, JJ., relied on the decision of the Privy Council in *Sri Radha Krishna Chanderji v. Ram Bahadur and others* (1), and followed the view that symbolical possession was sufficient to dispossess a person, who was a party to the execution proceedings. The objection that the delivery of symbolical possession was irregular inasmuch as the land was not in occupation of the tenant as required by the provisions of Order 21 Rule 36 of the Code of Civil Procedure, was repelled on the ground that when a person was put in symbolical possession of property by an officer of the Court, where actual possession would have been delivered the form in which execution was given was immaterial, and as between the parties to the proceedings such formal possession was as effectual as a complete transfer of possession from one party to another. In the Privy Council case referred to above, it was argued before their Lordships that symbolical possession would not avail and that only actual dispossession could interfere with adverse possession. Their Lordships of the Privy Council, however, followed, a decision of the Full Bench of the Calcutta High Court, *Jugobundhu Mukerji v. Ram Chandra Bysack* (2), which laid down the rule that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given.

Kaku Singh  
v.  
Gobind Singh  
and others  
—  
Grover, J.

Referring to the provisions of the old Code sections 223 and—it was pointed out that

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(1) A.I.R. 1917 P.C. 197

(2) I.L.R. 5 Cal. 584

Kaku Singh  
v.  
Gobind Singh  
and others  
—  
Grover, J.

section 223 applied where the land was in the actual possession of the defendant and section 224 where it was in occupation of the tenants. In the one case, delivery of the land was to be made by placing the plaintiff in direct possession, and in the other, the delivery was to be effected by officers of the Court in accordance with the provisions of section 224. That was the only way in which the decree of the Court awarding possession to the plaintiff could be enforced, and as in contemplation of law both parties must be considered as being present at the time when the delivery was made, the learned Judges considered that the delivery thus given must be deemed equivalent to actual possession. The aforesaid rule was applied in a later Full Bench decision of the Calcutta High Court in *Joggubundhu Mitter v. Purnanund Gossami and another* (1), where again the effect of delivery of symbolical possession was examined. The principle was extended even to the case of a purchaser at an auction in execution of decree. The use of the expression symbolical or formal possession was considered somewhat critically by a Bench of the Madras High Court in *Kocherlakota Venkatakristna Row v. Vatrevu Venkappa and another* (2). In all cases of delivery of possession of immovable property the officer entrusted with warrant of delivery proceeds to the spot and delivery of possession is effected on the land in the presence of the decree-holder and others and after the delivery is effected, a receipt acknowledging delivery of possession and attested by witnesses is obtained and forwarded to the Court along with the return to the warrant. If the judgment debtor be the party in possession, it is difficult to see what else has to be done to put the decree-holder in actual possession. The delivery of possession,

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(1) I.L.R. 16 Cal. 530

(2) I.L.R. 27 Mad. 262

therefore, cannot legally be characterised as symbolical or formal.

Kaku Singh  
v.  
Gobind Singh  
and others  
—  
Grover, J.

It would, therefore, seem that so far as the law of limitation is concerned (practically all the authorities discussed above decided matters which arose on questions of limitation) it is well settled that delivery of symbolical possession is deemed to be as effectual as delivery of actual possession especially when any dispute arises between the decree-holder and the judgment-debtor. But delivery of symbolical possession given in circumstances in which actual possession ought to have been given is a nullity as symbolical possession is not actual possession nor is it equivalent to actual possession except where the Civil Procedure Code expressly or by implication provides that it should have that effect—*vide Mst. Khairan v. Raghbir Singh* (1).

In the present case the decree-holders themselves felt entitled to actual possession and that was the reason why on the 16th of September, 1956, a prayer was made to the Court that actual physical possession should be delivered which was acceded to. It cannot, therefore, afford any benefit to the decree-holders to invoke the principle that the delivery of symbolical possession was as effectual as the delivery of actual possession. There is another aspect of the matter which needs consideration. The essential question is whether on the date when the High Court made an order staying execution, namely, the 20th of September, 1956, any execution proceedings could be said to be pending and which had to be stayed. For, if no execution proceedings were pending and the decree had been satisfied on the 10th of September, 1956, by delivery of actual possession of some land and symbolical possession of the remainder, there remained

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(1) A.I.R. 1937 Lah. 350

Kaku Singh  
v.  
Gobind Singh  
and others  
—  
Grover, J.

nothing that could have been ordered to be stayed. It seems to me that when the decree-holders applied for delivery of actual possession, the execution proceedings either continued or started afresh because when formal possession had been given in execution proceedings, a fresh application in execution for actual possession of the property can be maintained and such proceedings will clearly be execution proceedings. There is no need to bring a suit for recovery of actual possession even if symbolical possession had previously been delivered and actual possession can be obtained by means of execution,—*vide Durga Prasad Jana v. Dinabandhu Jana and others* (1). The execution proceedings were either continuing or fresh execution proceedings had been initiated and consequently when the order was made on the 20th of September, 1956, staying execution, then it became operative from the point of time it was made and actual possession could not have been delivered thereafter as was done in the present case.

The other point which has been raised on behalf of the decree-holders is with regard to the effect of the stay order made on the 20th of September, 1956. I have been referred to some decisions where the view has been adopted that a stay order takes effect only when it is communicated, *Gn. Tarulata Devi v. Bibhuti Bhushan Roy, etc.* (2), *L. Parshotam Saran v. B. Barhmanand and others* (3). This contention cannot be accepted in view of the decision of a Bench of this Court in *Din Dayal v. Union of India* (4), according to which an order passed by an appellate Court for staying of execution proceedings operates as soon as it is

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- (1) A.I.R. 1918 Cal. 318.  
(2) A.I.R. 1958 Cal. 467  
(3) A.I.R. 1927 All. 401  
(4) 1953 P.L.R. 478

made and the legal authority to proceed with the execution is withdrawn by the order of stay.

Kaku Singh  
v.  
Gobind Singh  
and others

—  
Grover, J.

In view of what has been discussed above, the contention of the decree-holders must fail and consequently this appeal treated as revision will stand dismissed. In the circumstances I make no order as to costs.

K.S.K.

SUPREME COURT.

*Before Sudhi Ranjan Das, C. J., T. L. Venkatarama Aiyar, Sudhanshu Kumar Das, A. K. Sarkar, and Vivian Bose, JJ.*

NOHIRIA RAM—Appellant.

*versus*

1. THE UNION OF INDIA (IN C.A. No. 116 OF 1957),
2. DIRECTOR GENERAL OF HEALTH SERVICES,  
GOVERNMENT OF INDIA (IN C.A. No. 117 OF 1957),
3. GOVERNMENT OF INDIA (IN C.A. No. 117 OF 1957)  
*Respondents.*

*Constitution of India (1950)—Articles 309 and 310—Fundamental Rule 9(4)—Cadre—Meaning of—Appellant appointed in post outside the cadre of the regular establishment—Whether entitled to claim seniority in that office—Fundamental Rules 111 and 113—Appellant holding lien on additional post—Whether liable to be transferred to foreign service—Declaratory decree—Appeal against—Effect of—Appellant, whether entitled to refuse to serve in the previous post.*

1957  
—  
Nov. 8th

*Held*, that Fundamental Rule 9(4) explains what is meant by a cadre; it means in effect the strength of an establishment or service (later amended to include a part of a service) sanctioned as a separate unit.

*Held*, that the post to which the appellant was appointed permanently in April, 1930, was outside the cadre of the