CIVIL APPELLATE

Before Falshaw, J.

JAIMAL SINGH,—*Appellant*

versus

RAKHA SINGH AND OTHERS,—*Respondents*

Execution Second Appeal No. 340 of 1955.

1956

Sept. 4th

Code of Civil Procedure (Act V of 1908)—Section 47—Decree for possession—Symbolical possession delivered in execution—Decree-holder satisfied with symbolical possession instead of actual possession—Execution consigned as fully satisfied—Decree-holder again making an application for physical possession after a year alleging that the judgment-debtor did not allow him to enter upon the land—Whether second execution application competent.

Held, that, where symbolical possession has been erroneously delivered to a decree-holder against the judgment-debtor, the decree providing for actual and not symbolical possession, such delivery of possession is not a nullity but being possession obtained through an officer of the court and due process of law and the judgment-debtor being, in the contemplation of law, a party thereto, it operates as actual possession as against the latter.

Held further, that the decree-holders, although entitled to the delivery of actual possession, were satisfied with the delivery of symbolical possession only and informed the court that the possession had been delivered to them to their satisfaction, with the result that the decree was consigned to Record Room as fully satisfied. In the circumstances the judgment-debtor must be regarded as being in the position of a trespasser from the date of the delivery of the symbolical possession or, at any rate, from the date when the crops standing on the land were removed and that the proper remedy of the decree-holders was to institute a fresh suit for ejectment and they were not entitled to come forward a year later with a second execution application.

Jagdish Nath Roy v. *Nafar Chandra Paramanik and others* (1), followed. *Khetra Mohan Kundu and others* v. *Joginder Chandra Kundu* (2), not approved.

Execution Second Appeal from the order of the Court of Shri Badri Parshad Puri, Senior Sub-Judge, with enhanced appellate powers, Ludhiana, dated the 1st February, 1955, affirming that of Shri V. D. Aggarwal, Sub-Judge, III Class, Ludhiana, dated the 17th July, 1954, ordering that the possession be delivered to the respondents under Sub-Rule 1 of Rule 35 of Order 21, Civil Procedure Code by removing the appellant from the lands for which the respondents have the present decree in their favour.

B. S. CHAWLA, for Appellant.

I. S. KAREWAL, for Respondents.

JUDGMENT

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Falshaw, J.—This execution second appeal has arisen in the following circumstances. Rakha Singh and Natha Singh respondents obtained a decree against Jaimal Singh appellant for the possession of about 7 bighas of land on the 16th of August, 1952 and on the 20th of August, 1952, they applied for the execution of the decree by delivery of possession of the land. The Court ordered the issue of the necessary warrant and fixed the 8th of November for its return. On that date the decree-holders appeared and filed a receipt acknowledging having received possession of the land and on the strength of this acknowledgment the execution application was consigned to the Record Room as fully satisfied.

It appears, however, from the report of the bailiff dated the 10th of September, 1952, that physical possession of the land had not been delivered, as the crops of the judgment-debtor were

(1) A.I.R. 1931 Cal. 427.
(2) A.I.R. 1918 Cal. 350.

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standing on the land in suit, and only symbolical possession was delivered. The execution application from which the present appeal has arisen was filed about a year later on the 18th of August, 1935 and it was alleged that the decree-holders had not actually been placed in possession of the land in the previous execution proceedings on account of the presence of standing crops on the land and the judgment-debtor had since then not allowed them to enter on the land, of which they now sought delivery of actual possession. This was opposed by the judgment-debtor on the ground that after the decree-holders had acknowledged the delivery of possession in the previous year and the execution application had been consigned to the Record Room as satisfied, the executing Court was functus officio and no second execution application lay, the proper remedy of the decree-holders being a fresh suit for possession.

Both the executing Court and the learned Senior Sub-Judge in first appeal held that in the circumstances of the present case the decree-holders were entitled to maintain a fresh application for delivery of actual possession and the judgment-debtor has filed this appeal.

In deciding the matter in favour of the decree-holders the Courts below have apparently relied mainly on the decision of Richardson and Beachcroft, JJ. in *Khetra Mohan Kundu and others* v. *Jogendra Chandra Kundu* (1). I use the word "decision" in this context advisedly, since there is practically no judgment which consists merely of two or three sentences to the effect that the appeal must be dismissed with costs as the decision of the lower Court is correct, and in order

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to make this decision intelligible the publishers have printed the judgment of the lower Court which constitutes all but about half a dozen lines of the report. It appears from this judgment that in execution of a decree for possession of certain property in a partition suit, the decree-holder had applied for execution and he was given what is described as formal possession of the property, of which he gave an acknowledgment in the executing court, the execution application then being consigned to the Record Room as partly satisfied. Thereafter the decree-holder again applied for execution by delivery of actual possession and his execution application was dismissed on the ground that he had already had possession delivered to him in the manner for which he had applied. The Court of first appeal had held that since he was entitled to actual possession and actual possession had not been delivered to him in the first execution application, execution of the decree was incomplete and the second application lay. Certain earlier decisions of the Calcutta High Court were distinguished on the ground that the Code of Civil Procedure had been changed in the meantime.

This decision certainly appears to support the case of the decree-holders in the present case, though it might have been better if the learned Judges had delivered a full judgment instead of a brief order dismissing the appeal, and had discussed the cases mentioned in the order of the lower appellate Court. There is moreover no doubt that a contrary view has been taken by the two learned Judges of the same Court, Rankin, C.J., and Mukerji, J., in *Jagadish Nath Roy* v. *Nafar Chandra Paramanik and others* (1), in which there is a full discussion of the law on the point, and the case now relied on by the Courts below in

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this case has been mentioned but dismissed from consideration on the ground that the judgment did not contain any reasons. The facts in this later decision do not appear to differ in any essential particular from the facts of the present case. The decree-holder had obtained a decree for possession of certain land from which the defendants were allowed two months to remove certain structures which they had erected thereon. This decree was passed in first appeal, the suit having been dismissed by the trial Court, and a second appeal had been filed in the High Court during the pendency of which the decree-holder applied for execution. In his execution application he specifically stated that he wanted the delivery of physical possession by the ejectment of the judgment-debtors and the removal of their structures. A warrant was issued by the executing Court directing the bailiff to put the decree-holder in possession and to remove the structures, but apparently, according to the report on the warrant, only symbolical possession was delivered by fixing a bamboo pole and proclamation by beat of drum. Before the date fixed for the return of the warrant the judgment-debtors had applied for stay of execution, but their application was kept pending until the report was received. On the date fixed the decree-holder did not raise any objection that he had not been delivered possession in the form desired by him, and the order was recorded that possession of the decretal land had been delivered. An application had been filed in the High Court by the judgment-debtor for stay of execution in connection with his appeal and apparently an order staying execution was granted during the pendency of the appeal without either party's bringing it to the notice of the High Court that some sort of delivery of possession had already taken place. The judgment-debtors' appeal was dismissed by the High Court

about two years after the events related above, and about a year after that the decree-holder again applied for execution by delivery of actual possession.

The learned Judges held, upholding the decision of the Courts below, that in these circumstances the second execution application was not maintainable. I quote the following passage from the judgment, which was delivered by Mukerji, J.—

> "It has been contended before us on behalf of the appellant that it is for the Court to enforce its own processes effectively and in a manner contemplated by law and that if the peon in the discharge of his duty delivers only symbolical possession to a decree-holder, who is entitled under the decree to get actual possession, it is the duty of the Court to rectify the error, and that consequently the appellant in the present case was entitled to put in a second application for execution with the prayer that he did. On the other hand the respondents have contended that, as between the decree-holder and the judgment-debtor symbolical possession taken by the former is equivalent to actual possession so as to make the judgment-debtor a trespasser from the point of time when such symbolical possession is taken, and that, therefore, a second application for execution by way of delivery of actual possession does not lie, but that the decree-holder's only remedy is by way of a suit.
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> So far as the decisions of the Calcutta High Court are concerned, they have, unlike

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the decisions of the Bombay High Court and the later decisions of the Madras High Court, uniformly laid down that where, as here, symbolical possession has been erroneously delivered to a decree-holder as against the judgment-debtor, the decree providing for actual and not symbolical possession, such delivery of possession is not a nullity but being possession obtained through an officer of the Court and process of law and the judgment-debtor being, in the contemplation of law, party thereto, it operates as actual possession as against the latter and his representatives and that from this point of view a suit for actual possession against the judgment-debtor must be instituted within twelve years from the date on which symbolical possession has been given; *Lokeswar* v. *Purgun* (1), *Hari Mohan* v. *Babul Ali* (2), *Bhulu Beg* v. *Jatindra* (3). These decisions however do not mean that a decree-holder to whom the peon erroneously delivers symbolical possession cannot refuse to take such possession and stand upon his rights to get the kind of possession that the decree has entitled him to. If in the present case the conduct of the decre-holder might be construed as indicating a repudiation on his part of the symbolical possession which the peon had given him or at least as disclosing a desire on his part not to be content at the time with the kind of possession that the peon had

(1) (1882) 7 Cal. 418
(2) (1897) 24 Cal. 715
(3) A.I.R. 1923 Cal. 138

given him but to get the khas possession which he was entitled to under the decree and for which he had prayed in his first application for execution, I should be prepared to hold that he was perfectly within his rights to come before the executing Court to have his remedy. But I am unable to put any such meaning on his conduct.

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I do not lay much stress on the receipt that was given on his behalf, for the receipt may, in my opinion, be read as merely reciting what the peon had done. What is more important, in my opinion, is that he never complained before the Court that the writ had not been duly executed. On the returnable date fixed for the writ, i.e., 27th August, 1924, it was his duty if he was dissatisfied with what the peon had done to ask for a fresh and proper execution of the writ by delivery of actual possession. There was appearance on his behalf before the Court on that date, though for a different purpose, namely for issue of processes under Order 21 Rule 30, C.P.C., as already stated. It is true that by virtue of the rule and the interim stay order issued by this Court, there could be no fresh execution on or after 28th August, 1924, until the second appeal was disposed of. But his acquiescence in the closure of the proceedings as to possession on 27th August, 1924, with the Court's remark in the order sheet that possession had been delivered can lead to only one conclusion namely that symbolical possession was the only kind

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of possession that he wanted to have at that stage. The peon's action is explicable on no other footing than that the decree-holder's agent, when on the spot, wanted to have nothing more than symbolical possession.

"It is also noteworthy that the application of 1st August, 1927, on which the present proceedings are founded is not a complaint against the peon's act but a fresh application for execution. The case, therefore, seems to me to be one of those cases in which a decree-holder having armed himself with a decree for khas possession executes that decree in the first instance by obtaining symbolical possession only with some ulterior object of his own, and thereafter subsequently and as a second instalment asks for khas possession. The question is whether such a course is permissible under the law. I am of the opinion that it is not."

On the whole I am of the opinion that this decision is applicable to the facts of the present case and I find myself in general agreement with it. It is obvious that the decree-holders in the present case, although they were entitled to delivery of actual possession, were satisfied at the time with the delivery of symbolical possession to them in September, 1952, and informed the Court that possession had been delivered to them to their satisfaction on the 8th of November, 1952, when the case came up for hearing, with the result that the decree was consigned to the Record Room as satisfied. As in the Calcutta case it may be that there had been some ulterior motive for adopting

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this attitude at that stage. It may be that they wanted to use this delivery of possession as the basis of criminal proceedings against the judgment-debtor, since I find it mentioned in the judgment of the executing Court that a criminal complaint was in fact unsuccessfully instituted. It is obvious that they must ordinarily have expected to obtain possession of the land when the standing crops were removed, which must have been by October, 1952, but instead of even then coming forward and objecting that they had been given only symbolical instead of actual possession, they waited until August, 1953, for bringing the present execution application. In the circumstances, agreeing with the view of the learned Judges of the Calcutta High Court, I consider that the judgment-debtor must be regarded as being in the position of a trespasser from the date of delivery of symbolical possession or, at any rate, from the date when the crops standing on the land were removed, and that the proper remedy of the decree-holders thereafter was to institute a fresh suit for ejectment and they were not entitled to come forward a year later with a second execution application. I accordingly accept the appeal and dismiss the execution application, but since I do not consider the position of the judgment-debtor to be particularly deserving any sympathy, I order that the parties should bear their own costs throughout.

FULL BENCH

Before Bhandari, C.J., Khosla and Kapur, JJ.

UNION of INDIA,—*Petitioner*

versus

KANAHAYA LAL-SHAM LAL,—*Respondent*

Supreme Court Appeal No. 3-D of 1956.

1956

Sept., 5th

Constitution of India, Article 133—Code of Civil Procedure (Act V of 1908)—Section 110—Judgment partly in favour of a party and partly against him—Appeal by the