

I only wish to mention one other point. I have said nothing about what actually constitutes a breach of the peace, and that is a matter that also is very frequently argued. It is questioned whether in order to reach what is known as a breach of the peace you have to go so far as to inflict blows. One view is that you must go that length. The other view is that you may have a breach of the peace long before you come to the infliction of blows. This view contemplates that the mere assembling of men for a criminal purpose is a breach of the peace and that the mere use of language, if it is violent enough, is a breach of the peace. But on this topic I do not wish to express any opinion, because to do so is not necessary for the purposes in hand.

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Rule discharged.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

SHRIDHAR MADHAVRAO DHOPAOKAR AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v. GANPATI PUNJA GODSE AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS.²

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ber 18.

Civil Procedure Code (Act V of 1908), Order XXI, Rules 95, 96—Court-sale—Symbolical possession—Judgment debtor in actual possession—Adverse possession—Limitation.

In execution of a decree in a suit of 1890, the plaintiff purchased the plaintiff property at a Court-sale and a receipt for possession was given by the plaintiff to the bailiff on the 3rd July 1901. The defendants, judgment-debtors, who had been previously in possession of the property were, however, not disturbed in their possession at the date of the receipt. The plaintiff having sued to recover possession on the 3rd July 1913,

²Second Appeal No. 167 of 1916.

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Held, that the plaintiff was not entitled to succeed as the provisions of Order XXI, Rule 95, Civil Procedure Code, 1908, under which the case fell were not complied with; a formal receipt for possession would not help the plaintiff to dispossess the defendants.

Radha Krishna v. Ram Bahadur⁽¹⁾, distinguished.

SECOND appeal against the decision of K. H. Kirkire, First Class Subordinate Judge, A. P., at Nasik confirming the decree passed by D. M. Mehta, Joint Subordinate Judge at Nasik.

Suit to recover possession.

In 1890, the plaintiffs' father obtained a decree against the father of defendants Nos. 1 to 3 and in execution of the decree he purchased the plaintiff property consisting of a house and cultivable lands at a Court-sale. On the 3rd July 1901, a receipt for possession was given by the plaintiffs to the bailiff. On the 3rd July 1913, the plaintiffs sued to recover actual possession of the property.

The defendants contended that they had been all along in possession of the property; that they knew nothing about the purchase by the plaintiffs' father at the Court-sale or possession through Court taken by him; and that the suit was barred by adverse possession.

The Subordinate Judge held that the statement made in the receipt of possession as to the possession having been given to the plaintiffs by the bailiff was false; that the plaintiffs got only symbolical possession, but the actual possession remained with the defendants. He dismissed the suit as being barred by adverse possession of the defendants.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree.

⁽¹⁾ (1917) 20 Bom. L. R. 502 (P.C.).

The plaintiffs appealed to the High Court.

M. V. Bhat for the appellants :—The symbolical possession obtained by us ought to save limitation running against us, because symbolical possession has been held to be sufficient to interrupt adverse possession when the person setting it up is a party to the execution proceedings in which symbolical possession is given : see *Radha Krishna v. Ram Bahadur*⁽¹⁾. The Full Bench decision of *Mahadev Sakharam v. Janu Nanji Hatle*⁽²⁾ ought to be held to have been overruled by the Privy Council decision in *Radha Krishna's case*⁽³⁾. In *Juggobundhu Mukerjee v. Ram Chunder Bysack*⁽⁴⁾ it was held that symbolical possession availed to dispossess the judgment-debtors sufficiently because they were parties to the proceedings in which it was ordered and given. This decision is one of long standing and has been followed for many years as observed by their Lordships of the Privy Council in *Radha Krishna's case*⁽⁵⁾.

Y. N. Nadkarni for *K. H. Kelkar*, for the respondents :—Symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code, 1908, except where the Code expressly or by implication provides that it shall have that effect : see *Mahadev Sakharam v. Janu Nanji Hatle*⁽⁶⁾. The cases thus provided for by the Code are those mentioned in Rule 35, sub-rule (2) ; Rule 36 and Rule 96 of Order XXI, Civil Procedure Code, 1908. Those are the cases where the property is in the possession of tenants and not of the judgment-debtor. The case of *Radha Krishna v. Ram Bahadur*⁽⁷⁾ would apply only in those cases where the property being in the possession of the tenants delivery of physical possession could not be possible and the

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(2) (1917) 20 Bom. L. R. 502 (P.C.)

(3) (1880) 5 Cal. 584;

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property could be delivered only symbolically. Symbolical possession in such cases is good possession so as to prevent limitation running in favour of the judgment-debtor.

The property here was admittedly in the possession of the judgment-debtor. The Code contemplates delivery of physical possession and not merely symbolical possession. What is purported to have been given in this case does not amount to symbolical possession even as both the lower Courts find that the bailiff's receipt is a bogus one.

SCOTT, C. J.:—In this suit, which was filed on the 3rd of July 1913, the plaintiffs alleged that in execution of a decree in a suit of 1890 their father purchased the plaintiff property at an auction sale, and a receipt for possession was given by the plaintiffs to the bailiff on the 3rd of July 1901. This suit is for possession; it is filed exactly on the day the twelfth year expires. Both Courts have held that the cultivable land and the house, which are the subject of the suit, were, on the 3rd July 1901, and had for some time previously been, in the possession of the defendants Nos. 1 to 3, and that the defendants Nos. 1 to 3 were not disturbed in their possession on the date of the receipt, but that statements were made in it both by the plaintiffs and by the bailiff as to possession having been given to the plaintiffs which were entirely false. Order XXI, Rule 95, of the Code provides that “where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf...and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.”

The form prescribed for the warrant to the bailiff is given in Appendix E., No. 39, and runs as follows :—

“Whereas...has become the certified purchaser of..... at a sale in execution of decree in suit No..... of 19 ; you are hereby ordered to put the said...., the certified purchaser, as aforesaid, in possession of the same.”

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It is clear, therefore, that the provisions of the Civil Procedure Code have not been complied with. It is, however, argued that there has been what is called symbolical possession, and it is contended that the provisions of the Code as interpreted in *Mahadev Sakharam v. Janu Namji Hatle*⁽¹⁾, may be disregarded in consequence of a decision in the Privy Council in *Radha Krishna v. Ram Bahadur*⁽²⁾. There, according to the judgment of the Judicial Committee, a sale took place, and the mortgagees were the purchasers. They received a sale certificate that they were entitled to all the zemindari rights in eight annas pucca of Mouza Nagdah, and the land being in occupation of cultivating tenants under an apparently *bona fide* title, they received formal possession as usual after due proclamation by beat of drum in 1898. That was, therefore, a case falling under section 319 of the Civil Procedure Code of 1882, which provides that “when the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under section 316, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser”.

(1) (1912) 36 Bom. 373.

(2) (1917) 20 Bom. L. R. 502 (P.C.).

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The difficulty supposed to be created by the Privy Council judgment is due to a reference in the concluding paragraph to a Full Bench decision of the Calcutta High Court in *Juggobundhu Mukerjee v. Ram Chunder Bysack*⁽¹⁾ in which it was said that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given, and their Lordships observed that there was no reason to question it or to hold that the rule of procedure should be altered.

In the Calcutta case it was said that where land was in the occupation of the defendants delivery must be by placing the plaintiff in direct possession under section 223 of the Code of 1859, but where it was in occupation of ryots the decree awarding possession to the plaintiff as against the defendant (not in actual occupation) could only be enforced by proclamation and as in contemplation of law both parties must be considered as being present at the time when the delivery is made. The delivery thus given by proclamation must be deemed equivalent to actual possession. This would be so only under section 224 of the Code of 1859 corresponding with section 264 of the Code of 1882 and Order XXI, Rule 36 of the present Code or section 319 and Order XXI, Rule 96, dealing with the case of delivery to a purchaser at a Court-sale of land in occupation of tenants.

The present case, however, falls under section 318 of the Code of 1882 which is re-enacted in Order XXI, Rule 95.

We affirm the decree and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

(1) (1880) 5 Cal. 584.