

PETITIONER:
BALWANT NARAYAN BHAGDE

Vs.

RESPONDENT:
M. D. BHAGWAT & ORS.

DATE OF JUDGMENT 23/04/1975

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
GUPTA, A.C.
UNTWALIA, N.L.

CITATION:
1975 AIR 1767 1975 SCR 250
1976 SCC (1) 700

ACT:
Land Acquisition Act (1 of 1894) ss. 9(1), 17(1) and 48(1)-
Possession taken of acquired land-Occupant resuming
possession-Effect of-If Government can withdraw from the
acquisition.

HEADNOTE:
For the purpose of acquiring land for an Agricultural College a notification was issued under s. 4 of the Land Acquisition Act, 1894, in January 1959, with respect to several pieces of land one of which belonged to the respondents and was in possession of the appellant as tenant. After the issue of the notification under s. 6, in February 1959, the Commissioner directed that possession of that land may be taken under s. 17(1) on the expiry of 15 days from the publication of the notice under s. 9(1). On March 24, 1959, the appellant filed a statement before the Land Acquisition Officer. In that statement, he did not deny the publication of notice on the spot under s. 9(1) nor did he put any impediment to the taking of the land. He merely wanted the compensation amount to be paid to him and wanted stay of the taking possession of his house on the land. The Land Acquisition Officer passed orders in the presence of the appellant directing the Tahsildar to take possession of the land and hand it over to the Principal of the Agricultural College. The Tahsildar went to the spot, inspected the land for the purpose of determining what part was waste and arable and should therefore be taken possession of and took possession of the land, leaving out the small portion containing the house of the appellant, and handed over possession of the land so taken over to the Principal of the Agricultural College. The appellant was not present at the time when the Tahsildar took possession. There was, thereafter, correspondence between the appellant and the Government. and various reports had been made by the officers of the Government and on April 16, 1959, a stay order was passed by the Government. On December 13, 1961, the Land Acquisition Officer wrote to the Commissioner that possession of the land was still with the appellant, and on August 8, 1968, withdrawal from the acquisition of that part of the land under s. 48(1) of the Act, was directed by the

Commissioner.

The respondents and the Agricultural College filed writ petitions in the High Court, challenging the release of the land. The High Court allowed the petitions holding that possession of the land was taken (even though the Government took the stand that they had taken only 'symbolical' possession) and given to the Principal of the College and that, therefore, it was not open to the Commissioner to withdraw from the acquisition under s. 48(1) as amended by the Land Acquisition (Maharashtra Extension and Amendment) Act.

Dismissing the appeal to this Court,

HELD : (Per Curiam) : Neither the Government nor the Commissioner could withdraw under s. 48(1) from the acquisition of any portion of the land which had been taken over by and vested in the Government. [253-F]

(Per P. N. Bhagwati and A. C. Gupta JJ) : When Government proceeds to take possession of the land acquired by it under the Act, it must take actual Possession since all interests in the land are sought to be acquired by it, and there is no question of taking 'symbolical' possession as understood

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under the C.P.C. Nor would possession merely on paper be enough. How such actual possession may be taken would depend on the nature of land. It is not an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking possession of land in every case. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or occupant of the land that possession would be taken at a particular time, though it may be desirable to do so in order to eliminate the possibility of a fraudulent or collusive transaction of talking of mere paper possession, without the occupant or the owner ever knowing about it. [252E-H, 153A-B]

On the facts and circumstances of the present case, the Tahsildar had taken actual possession of that part of the land which was waste or arable and handed it over to the Principal of the College. The Land Acquisition Officer thought that actual possession could not be regarded as having been taken unless the appellant was excluded from the land, and, since the appellant, without any obstruction entered on the land and continued in possession, he mistakenly stated that actual possession was not taken. The legal position is that even if the appellant entered upon the land after actual possession had been taken by and the land vested in, the Government, the appellant's possession would not obliterate the consequence of vesting in the Government. [253-B-E]

[Discussion regarding delivery of 'symbolical' and 'actual' possession under the C.P.C. is not necessary for the disposal of the appeals], [252-D]

(Per Untwalia J.) : (1) Under the C.P.C., a symbolical or formal delivery of possession has the effect, of dispossessing the judgment-debtor from his right, title or interest in the property, although, as a matter of fact, he may have succeeded in resuming possession shortly after dispossession. It does not, however, dispossess the person in actual possession in his own right not liable to be evicted under the decree or in pursuance of the auction sale. [263A-B]

(2) When a public notice under s. 9(1) of the Act is published at a convenient place or near the land to be taken that Government intends to take possession, ordinarily there

would be no question of resisting or impeding the taking of possession. Delivery of possession by the owner is not required and the Collector can enforce surrender under s. 47 if impeded. On taking possession either under s. 16 or s. 17(1), the land vests absolutely in the Government free from all encumbrances. Therefore, in a proceeding under the Land Acquisition Act for acquisition of land all interests are wiped out, and hence, the taking of possession must be taking actual possession on the spot and not symbolical possession; and surely it cannot be a possession merely on paper. [263E-G]

(3)As to the mode of taking possession, the Act is silent. Unless possession is taken by the written agreement of the party concerned the mode of taking possession obviously would be for the authority to go upon the land and do some act which would indicate that the authority has taken possession of the land. It may be in the form of a declaration by beat of drum or otherwise or by hanging a written declaration on the spot that possession has been taken. The presence of the owner or the occupant is not necessary to effectuate the taking of possession. [263H, 264A]

(4)In the instant case, actual possession of the land was taken by the Tahsildar on the spot and the possession was handed over to the Principal of the College. The Land Acquisition Officer's statement that the land was not actually taken possession and the Government's stand that, only symbolical possession was taken, should be viewed from the correct legal position. So viewed, the appellant's resuming possession after once the land was validly taken by the Government would not have the effect of undoing the fact (if vesting in the Government. [264B, E-F]

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 75 & 76 of 1974.

Appeal by special leave from the Common Judgment and Order dated 27 /28-9-1973 of the Bombay High Court, Nagpur Bench, in Spl. Civil Applications Nos. 826 of 1968 & 389 of 1971. Sardar Bahadur Saharya and Vishnu Bahdur Saharya, for the appellants.

M.N. Phadke and A. G. Ratnaparkhi, for respondent No. 1 and 2 (in Appeal No. 75/74).

Niren De, Attorney General of India, M. N. Phadke and A. G. Ratnaparkhi, for respondent No. 1 (In Appeal No. 76/74).

K.L. Rathi and M. N. Shroff, for respondents Nos. 3-6. (In Appeal No. 75/74) and respondent No. 3 (in appeal No. 76/74).

The Judgment of P. N. Bhagwati and A. C. Gupta, JJ. was delivered by Bhagwati, J. N. L. Untwalia, J. gave a separate Opinion.

BHAGWATI, J.-We agree with the conclusion reached by our brother Untwalia, J., as also with the reasoning on which the conclusion is based. But we are writing a separate judgment as we feel that the discussion in the judgment of our learned brother Untwalia, J., in regard to delivery of 'symbolical' and 'actual' possession under rules 35, 36, 95 and 96 of Order XXI of the Code of Civil Procedure, is not necessary for the disposal of the present appeals and we do not wish to subscribe to what has been said by our learned brother Untwalia, J., in that connection, nor do we wish to express our assent with the discussion' of the various

authorities made by him in his judgment. We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land, since all interests in the land are sought to be acquired by it. There can be no question of taking 'symbolical' possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the land and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was laying fallow and there was no crop on it at the material time, the act of the Tehsildar in

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going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it.

We are of the view, on the facts and circumstances of the present case, that the Tehsildar took actual possession of that part of the land which was waste or arable and handed it over to the Principal of the Agricultural College. It is true that the Special Land Acquisition Officer in his letter dated 13th December, 1961 to the Commissioner stated that possession of the entire land was still with the appellant and it was not actually taken possession of by the Principal, Agricultural College. But it is obvious that this statement was made by the Special Land Acquisition Officer because he thought that actual possession of the land could not be regarded as having been taken, unless the appellant was excluded from the land and since the appellant immediately, without any obstruction, entered upon the land and continued in possession, "the land was not actually taken possession of by the Principal, Agricultural College". This was plainly erroneous view, for the legal position is clear that even if the appellant entered upon the land and resumed possession of it the very next moment after the land was actually taken possession of and became vested in the Government, such act on the part of the appellant did not have the effect of obliterating the consequences of vesting. There can, therefore, be no doubt that actual possession of 19 acres 16 gunthas of waste and arable land was taken by the Tehsildar on 3rd April, 1959 and it became vested in the

Government. Neither the Government nor the Commissioner could thereafter withdraw from the acquisition of any portion of this land under s. 48(1) of the Act.

The result is that the appeals fail and are dismissed with costs.. There will be only one set of costs.

UNTWALIA, J.-These two Civil Appeals filed by Shri Balwant Narayan Bhagde on grant of special leave by this Court arise out, of a common judgment of the Bombay High Court allowing Special Civil Application No. 826/1968 filed by Shri M. D. Bhagwat and Shri E. R. Mahajani, respondent Nos. 1 and 2 in Civil Appeal No.75 of 1974 and Special Civil Application No. 389/1971 filed by the Punjabrao Krishni

Vidyapeeth--(hereinafter called the Agricultural College)--to quash the order of the Commissioner

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Nagpur purporting to give sanction for withdrawal of the acquisition by his letter dated 8-8-1968 in respect of a portion of the land comprised in Survey No. 30/2 in village Umari, District Akola. The High Court has held that possession of the land in question was taken by the Collector, Akola and given to the Principal, Agricultural College. It was, therefore, not open to the Commissioner to withdraw from the acquisition of the land under section 48(1) of the Land Acquisition Act, 1894 as it stands amended by the Land Acquisition (Maharashtra Extension and Amendment) Act hereinafter called the Act. It is well-settled and nothing to the contrary was canvassed before us, that after possession of the land forming the subject matter of acquisition has been taken in accordance with section 16 or section 17(1) of the Act, the land vests in the Government and the Government or any other authority is not at liberty to withdraw from the acquisition of any land of which possession has been taken; vide, State of Madhya Pradesh and Ors. v. Vishnu Prasad Sharma and Ors.(1) and Lt. Governor of Himachal Pradesh and Another v. Sri Avinash Sharma(2). The controversy, therefore, centered round the question as to whether possession of the land which was released by the Commissioner under section 48(1) of the Act had been taken or not.

For the purpose of the Agricultural College a large area of land was acquired near Akola. A notification under section 4 of the Act was issued on the 24th January, 1959 by which several pieces of land measuring 236 acres 7 gunthas (40 gunthas make one acre) were sought to be acquired including 20 acres 32 gunthas of Survey No. 30/2 in Village Umari, Pargana Akola. The total area of this plot is 20 acres 33 gunthas. A separate notification under-section (4) was issued for acquisition of the remaining one guntha which contained a well. As the land was urgently required for the purpose of College, action under section 17 of the Act was taken dispensing with the following of the procedure under section 5A. The Sub-Divisional Officer, Akola was appointed the Land Acquisition Officer to perform the functions of the Collector under the Act. A notification under section 6 of the Act was issued on the 17th February, 1959. A direction was given for taking possession of the land under section 17(1) on the expiration of 15 days from the publication of the notice under section 9(1). Notice under section 9(1) of the Act was subsequently published on 6-3-1959. After expiry of 15 days from the publication of the notice under section 9(1) on 24 3-1959 the land Acquisition Officer ordered the Tehsildar, Akola to deliver possession of the land to the Principal, Agricultural College or his nominee in the presence of the Sub-Divisional Officer, P.W.D. Building and Roads Section, Akola and directed him to report

compliance alongwith the possession receipt obtained from the Principal by 2-4-1959. The Tehsildar took and handed over possession on 3-4-1959 and made a report. Out of 20 acres 33 gunthas of land comprised in Survey No. 30/2 possession was taken and handed over in regard to 19, acres and 16 gunthas only. An area of 19. acre 17 gunthas which contained a double storied house of the appellant and a well etc. was for the time being left and possession of the same was not taken.

1[1966] 3 S.C.R. 557.

2[1970] 2 S.C.C. 149.

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It appears, just after the issuance of the notification under section 6 of the Act, the appellant who claimed to be the tenant of the land, the owners admittedly being respondents 1 and 2 in Civil Appeal No. 75 of 1974 made a representation to the Government that his field in Survey No. 30/2 should not be acquired and the acquisition should be withdrawn. He seems to have filed an application to that effect before the State Government on 18-2-1959. Some stay order thereupon is said to have been passed staying the proceeding in respect of the appellant's land. Following upon this correspondence took place and reports came to be made in April, 1959 and thereafter until the withdrawal from the acquisition of 12 acres and 23 gunthas of the land in Survey No. 30/2 was directed to be made by the Commissioner in the year 1968. As already stated the withdrawal was challenged by filing two writ petitions in the Bombay High Court.

The appellant filed a counter in the Writ application of the owners but did not do so in answer to the Writ application of the College. On behalf of the Governmental authorities two counters were filed in the two Writ Petitions. In the owners' petition the petitioners had stated that pursuant to the relevant notifications, Government took possession of 19 acres 16 gunthas of land on 3-4-1959 And gave possession of the same to the Principal, Agricultural College. The Government in its return filed in the said case denied that possession as alleged was taken from the appellant and given to the Principal, Agricultural College. In paragraph 3 of Special Civil Application No. 389/1971 it was stated on behalf of the Agricultural College that the Tehsildar took possession only of 19 acres and 16 gunthas out of the field as the remaining area was found in the meantime on spot inspection not to be waste or arable to which the provision of section 17 of the Act could apply. Actual possession of 19 acres 16 gunthas alongwith the other pieces of land measuring 200 acres and odd was delivered to the Principal, Agricultural College. In the return filed on behalf of the Officers of the Government the contents of paragraph 3 of the petition were admitted. But it was asserted that Government had taken only symbolical possession and the physical possession of the land remained with the appellant. On consideration of the relevant materials placed before the High Court it has come to the conclusion that actual possession of the land in question was taken and handed over on 3-4-1959 on the spot ; and, even symbolical possession, if land is occupied by a person other than the owner. would be good possession for the purpose of section 48 of the Act.

Mr. Sardar Bahadur Saharya, learned counsel for the appellant, submitted that possession of any portion of the land comprised in Survey No. 30/2 was not taken by the Government or given to the Principal, Agricultural College, it was all a paper delivery of possession, no notice was

ever given to the appellant as to the date and time of taking possession of the land on the spot, and the symbolical delivery of possession, even if any. had not the effect of divesting the appellant from the Actual possession over the land. Counsel further submitted that the order of withdrawal which is confined to
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an area of 12 acres 23 gunthas only out of Survey No. 30/2 leaving a further balance of 6 acres 33 gunthas to the College was valid. Mr. Hathi appearing for the Government and its authorities struck to their stand that only symbolical possession was taken and actual possession remained with the appellant. Learned Attorney General for the Agricultural College, followed by Mr. Phadke for the owners, submitted that no where the appellant had challenged the taking of possession of the land on the spot on 3-4-1959. The effect of taking possession of the land was to vest it in the Government and no portion of it could be released under section 48(1) of the Act. It was further submitted that there is no provision in the Act requiring the giving of any notice to the possessor of the land of the exact date and time of taking possession on the spot and notice published under section 9(1) is sufficient.

It may be stated at the outset that there does not seem to be any dispute as respects the fact that Bhagwat and Mahajani were the owners of the land at the time of the issuance of the notification under section 4 of the Act and the appellant was in its occupation or actual possession as a tenant. It is also not in dispute that possession was taken on 3-4-1959 in respect of the large portion of land measuring more than 200 acres. There is no controversy that the Agricultural College not only needed the land in question but subsequently steps were taken for acquiring an additional area of 340 acres for the needs of the College.

The Commissioner in his order dated 17th February, 1959 had directed that the possession of the land may be taken on the expiration of 15 days from the publication of the notice mentioned in section 9 (1) of the Act. The order recorded on 11-3-1959 shows that the notice in form 'D' under section 9(1) of the Act was published on 6-3-1959, so the possession of the land could be taken on 21-3-1959 or there after. Some persons filed their written statement showing their interest in the land to be acquired and their claims for compensation on 11-3-1959. On 24-3-1959 various other persons including the appellant appeared before the Land Acquisition Officer. Appellant's counsel prayed for time to file his written statement. He was directed to do so by 5.00 p.m. on 24-3-1959. On this date the land Acquisition Officer recorded the order in presence of the parties including the appellant directing Tehsildar Akola to take possession of the land and hand it over to the Principal, Agricultural College, in the presence of S.D.O., P.W.D., Akola and to report compliance with possession receipt by 2-4-1959. A written statement on behalf of the appellant was filed by 4.20 p.m. on 24-3-1959.

It is necessary to refer to the claim of the appellant made in the written statement aforesaid. He stated that he was interested in the field as he was its protected lessee and as such 'he was entitled to receive compensation that may be granted. The amount of claim put forward in respect of the field in Survey No. 30/2 by Bhagwat and Mahajani was stated to be acceptable to the appellant. But he said that he was entitled to the said amount. In respect of the bungalow the appellant stated that it was his residential house, it was not nece-

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ssary to be acquired, dispensing with the provision of section 5A in respect of the house was 'not legal, therefore, the proceeding being not in accordance with law be 'dropped. Finally, the prayer in the written statement was to stay the delivery of possession of the bungalow at least for two months. It would thus be seen that in his written statement filed on 24-3-1959 the appellant did not deny the publication of notice on the spot under-section 9(1) nor did he propose to put any impediment in the taking of possession of the land comprised in Survey No. 30/2. He merely wanted the stay of taking possession in respect of the house.

The Principal of the Agricultural College wrote a letter to the SubDivision Officer and Land Acquisition Officer, Akola on the 6th April, 1959 with an endorsement of the Revenue Inspector who it appears was the Tehsildar, stating therein that he had taken possession of the fields mentioned below in the letter on the 3rd April, 1959, in presence of the Sub-Divisional Officer, P.W.D. and the Naib Tehsildar, Akola. The total area mentioned in this letter is 234 acres 31 gunthas including 19 acres and 16 gunthas in Survey No. 30/2. The Revenue Inspector endorsed "handed over as above."

On the facts and in the circumstances of this case it is difficult to accept the argument put forward on behalf of the appellant that the taking and giving of possession on 3-4-1959 was only on paper and not on the spot.

The High Court in its judgment has referred to a letter dated 7-4-1959 by the Land Acquisition Officer to the Collector, Akola to say that the appellant represented before him that a stay order had been passed in respect of Survey No. 30/2 by the Minister for Agriculture and the proceedings for taking possession of this land may be deferred pending further instructions from the higher authorities ; but before any step could be taken on the representation of the appellant, the land Acquisition Officer got the information that possession had been taken and given but in spite of that in the letter dated 7-4-1959 a direction was given to the Tehsildar to withhold taking possession of the field in Survey No. 30/2 of village Umari temporarily. Thereupon, the Tehsildar made a report dated 11-4-1959 stating therein "possession has already been delivered to the Principal, Agricultural College. Akola and the possession receipt is enclosed. In case possession of S. No. 30/2 is still to be withheld, the Principal, Agricultural College, S.D.O., P.W.D. and the lessee of the field would be approached in this respect and necessary action would be taken accordingly." As a matter of fact it would appear from the letter dated 16-4-1959 written by the Assistant Secretary of the Government of Bombay to the appellant in reply to his letter addressed to the Minister for Agriculture a copy of which was forwarded to the Collector, Akola that for the first time in this letter he was requested to stay the proceedings until further orders. No stay order of the State Government seems to have received earlier and prior to the taking of possession of the land in question.

Then comes the letter dated 4-5-1959 written by the Land Acquisition Officer to the Collector, Akola. Reference was made to all these

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documents on behalf of both the parties. The S.D.O. and the Land Acquisition Officer sought instructions of the Collector as to what action was to be taken in respect of

land measuring 19 acres 16 gunthas out of Survey No. 30/2 "the possession of which has already been delivered to the Agricultural Department". The next letter is one from the Principal of the College to the Land, Acquisition Officer dated the 27th May, 1959 asking clarification of the stay order received in regard to Survey No. 30/2. The reply is dated 4-6-1959 informing him that clarification will be made on receipt of further communication from the Collector. The next letter is dated 18-7-1959 from the Principal of the College to the Director of Agriculture stating therein that possession of the whole field no. 30/2 excluding the area of 1 acre 16 gunthas which was also required for the purpose of the College, was delivered on 3-4-1959 but in view of the Government order contained in their letter dated 16-4-1959 the land was not being cultivated and was lying as a sort of no man's land.

Then comes an important letter again referred at the Bar on behalf of both the parties written by the Special Land Acquisition Officer, Akola to the Commissioner, Nagpur on the 13th December, 1961. The difficulty in releasing the land under section 48 (1) was pointed out and further, in this letter it is stated "Taking over possession of IA-15G of land to be acquired under urgency clause was deferred as on joint spot inspection made by the then Sub-Divisional Officer, Principal Agricultural College and S.D.O. (P.W.D.) Akola, it was thought that acquisition of this portion which contains one double storied building, some converted land etc. would entail heavy expenditure." It would thus be clear beyond any shadow of doubt that possession was taken on the spot. On spot inspection the area of 1 acre and odd only was left out of possession. But then in this very letter there is a statement "The Collector Akola was directed to stay the acquisition proceedings in respect of this field until further orders, though possession receipt for S. No. 30/2 was passed on 3-4-1959, the possession (physical) of the entire field S. No. 30/2 of Umari is still retained by the lessee of that field and the land was not actually taken possession of by the Principal, Agricultural College, Akola." Learned counsel for the appellant submitted that physical possession of the entire land comprised in Survey No. 30/2 remained with the appellant and the possession delivered was either on paper or merely symbolical ; it, therefore, could not prevent the release of the land from acquisition under section 48(1) of the Act.

It is not necessary to refer to the further correspondence which ensued. It may, however, be stated that because of the stay order and the dispute raised in respect of the land comprised in Survey No. 30 in the award prepared by the Collector on 30-1-1960 compensation for the said land was not determined. And eventually in the year 1968 an area of 12 acres 23 gunthas was sought to be released from acquisition. The question for consideration is-was the release valid and proper ?

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In order to appreciate what is meant by taking possession of the land under section 16 or 17(1) of the Act and what is the mode of taking such possession in regard to the waste or arable land with which we are concerned in this case, it is necessary to refer to certain provisions of the Code of Civil Procedure-hereinafter called the Code, and some decisions thereon. Order 21, Rules 35, 36, 95 and 96 of the Code prescribe two modes of delivery of possession based upon the nature of the property concerned. The Code does not prescribe that in respect of a particular property there

can be two modes of giving possession either to a decree-holder or to an auction-purchaser one, "symbolical" and the other "actual". These Rules prescribe that if the property is in the occupation of the judgment-debtor or some-one on his behalf the possession shall be given if necessary by removing the judgment-debtor and placing the decree-holder or the auction purchaser in occupation of the same. On the other hand if the property is of such a nature that the judgment-debtor cannot be in actual occupation of it, as for instance, property in the possession of a tenant, the only mode of giving possession is by proclaiming on the spot that the possession has been given to the decree-holder or the auction-purchaser. In some decisions the former mode of possession has been called "actual" and the latter "symbolical". Really speaking even the delivery of so-called "symbolical" possession is delivery of "actual" possession of the right title and interest of the judgment-debtor. It completely dispossess him. It does not affect the physical occupation of the property by a person who is not bound by the decree or whose interest is not affected by sale of the judgment-debtor's interest in execution of a decree. If the property is land over which does not stand any building or structure, then delivery of possession over the judgment-debtor's property becomes complete and effective against him the moment the delivery is effected by going upon the land, or in case of resistance, by removing the person resisting unauthorisedly. A different mode of delivery is prescribed in the Code in the rules aforesaid in regard to a building, with which we are not concerned in this case. Sometimes the expression symbolical or formal delivery of possession has been used in decisions to connote the actual delivery of possession effective against the judgment-debtor leading to his dispossession in the eye of law even though the duration of the dispossession may be momentary or temporary.

In Juggobundhu Mukherjee and others v. Ram Chander Bysack(1) Garth, C. J. delivering the judgment of the Full Bench consisting of five Judges pointed out at page 588

"In the one case, the delivery of the land is to be made by placing the plaintiff in direct possession. In the other, the delivery is effected by the officer of the Court by going through a certain process prescribed by s. 224, and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant. This is the only way in which the decree of the Court, awarding possession to the plaintiff, can be enforced ; and as, in contemplation of law,

(1) I.L.R. 5 Calcutta 584.

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both parties must be considered as being present at the time when the delivery is made, we consider that, as against defendant, the delivery thus given must be deemed equivalent to actual possession."

"As against third parties, of course, this symbolical possession (as it is called) would be of no avail ; because they are no parties to the proceeding. But if the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits, we think that the plaintiff would have twelve years from such dispossession to bring another suit."

Another Full Bench consisting again of live learned Judges of the Calcutta High Court presided over by Petheram, C.J., in the case of Juggobundhu Mitter v. Purnanund Gossami and another (1) reaffirmed the view taken in Juggobundhu Mukherjee's case (I.L.R. 5, Calcutta, 584) in the following words :

"The Full Bench held that symbolic.* possession obtained by the plaintiff's vendor was effective as against the judgment debtor, defendant, and that the suit brought against him within 12 years of that event was not barred by limitation."

The facts of the case of Sri Radha Krishna Chanderji V. Rain Bahadur and others(2), are these : The dispute related to 150 bighas of land. The plaintiffs had filed a suit to recover possession of the said land. The principal defendant who was the appellant before the Privy Council was an idol by shebiats who was in actual possession of the land by their tenants. The predecessors of the defendants in the suit were parties to an earlier mortgage action. In due course a decree was obtained. The property which, according to the finding, included the disputed land was sold. The mortgagee decree-holders were the purchasers of the property. "The land being in occupation by cultivating tenants under an apparently bona fide title they received formal possession as usual after due proclamation by beat of drum in 1898." (vide page 200 column 2). Lord Sumner delivering the judgment of the Board said At the same page "This interruption, if such it was, of the defendants' actual possession was not of long duration. Hence the necessity for the present suit. Hence also the defence of adverse possession for more than twelve years before suit began." It would thus be seen that formal possession of the land in actual occupation of the tenants, which in a sense was symbolical, was characterised as interruption of defendant's actual possession. And finally the ratio of the decision of the Full Bench of the Calcutta High Court in Juggobundhu Mukherjee's case (I.L.R. 5, Calcutta, 584) was approved thus- at page 201, column 1 :

"In the High Court and before their Lordships it was further argued that symbolical possession would not avail against the defendants, but that only actual dispossession would interrupt their adverse possession. The High Court

(1) I.T.R. 16 Calcutta 530.

(2) A.T.R. 1917 Privy Council 197 (2).

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following a decision of the Full Bench in Juggobundhu Mukherjee v. Ram Chandra Bysack- (1880) 5 Calcutta, 584=5 C.L.R. 548 (F.B.) held that symbolical possession availed to dispossess the defendants 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. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered."

In the case of joint possession the decision of the Privy Council in Sri Radha Krishna Chanderji's case [A.I.R. 1917 Privy Council, 197(2)] has been referred with approval by this Court in the case of M. V. S. Manikayala Rao v. M. Narasimhaswami and others(1) in paragraph 7 at page 474 in the judgment of Sarkar, J, as he then was, as also in

paragraph 20 at page 478 is that of Ramaswami, J. I may just quote a sentence from paragraph 7 which says :

"By the delivery of symbolical possession under the order of November 6, 1939, the adverse possession of the defendants was interrupted."

Mohammad Noor, J., in the case of Ram Prasad Ojha and others v. Bakshi Bindeshwari Prasad and others⁽²⁾ has considered the point in his separate but concurring judgment with reference to the relevant provisions of the Code at page 147. In that case the question of defendants adverse possession arose with reference to a property which was not in occupation of any tenant. The suit for possession after the mortgage sale and delivery was being resisted by a person who was in no better position than the mortgagor judgment-debtor. The learned Judge pointed out at pages 147 and 148

"When it is said that symbolical possession is not binding upon a third party but actual possession is, it is only meant that when a decree-holder or an auction-purchaser has been put in actual occupation of the property every body else has been ousted from it, and consequently dispossessed. This is an obvious fact and not a question of law. On the other hand if the Court simply proclaims that the decree-holder or auction-purchaser has been given possession but on account of the nature of the property they have not been placed in physical occupation of the property itself, such a delivery of possession can be binding only upon those who are parties to those proceedings or on those who claim through them. The difference, as I have said, is due to the nature of the property and not on account of the difference in the nature of possession. The question will always be not what was the mode of delivery of possession but who has in fact been ousted by it."

(1) A.I.R. 1966 S.C. 470.

(2) A.I.R. 1932 Patna 145.

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The same learned Judge had the occasion to consider the question again in the case of Mahabir Singh and others v. Emperor⁽¹⁾. And that too with reference to a property which was not in possession of any tenant but of the judgment-debtor. The question arose in a criminal case and the confusion arising out of the use of the expressions "the actual" and "symbolical" possession was again discussed at page 568. The writ of delivery was issued in the previous litigation under Order 21, Rule 95 of the Code and in that connection the different modes of delivery of possession over a piece of land were discussed. The momentary possession given to the purchaser was characterised as delivery of symbolical possession by the Additional Sessions Judge and not actual possession. The learned Judge pointed out at page 569, column 1:

"It issued its writ under Rule 95, and the peon formally put the auction-purchaser in possession of the property. It is wrong to think that there are two kinds of delivery of possession ; one actual and the other symbolical independent of the nature of possession of the judgment debtor. Even if the delivery of possession was symbolical, its

effect against the judgment-debtor was the same."

The so-called paper possession or possession on paper is no delivery of possession, actual, formal or symbolical. A Bench of the Madras High Court consisting of Rajamannar, C.J. and Rajagopala Aiyangar, J. has stated at page 762 in the case of Pathaperumal Ambalam v. Chidambaram Chettiar(2) :

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"The next question is whether it makes any difference in legal effect if possession is taken through court. The Code contemplates no notice to the judgment-debtor at that stage or any objection being raised by him to the delivery of possession under Rule 95, or Rule 96, and as the full title to the property has passed from the judgment debtor to the auction purchaser, he has no interest in the property to protect."

It has further been pointed out

"The characterisation of possession taken under Order 21 Rule 96, as "paper possession" is hardly justified and runs counter to the principle on which the provision is based. Symbolical possession obtained under Order 21, Rule 96 is quite a different thing from paper possession, which might correctly describe only the possession obtained by a party who being entitled to actual possession, the judgment-debtor himself being in possession, obtains delivery of possession on paper without actual possession ; or those cases where without complying with the requisites of the statute a false return is made as if they were complied with."

(1)A.I.R. 1934 Patna 565.

(2) A.T.R. 1954 Madras 760.

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It would thus be seen that a symbolical or formal delivery' of possession as understood in law has the effect of dispossessing the judgment-debtor from his right title or interest in the property. It does not dispossess the person in' actual possession in his own right not liable to be evicted under the decree or in pursuance of the auction sale. A symbolical or formal delivery of possession against the judgment-debtor is giving of actual possession of the property in the eye of law and has the effect of dispossessing him although as a matter of fact he may have succeeded in resuming back, possession as before shortly after dispossession.

In a proceeding under the Act for acquisition of land all interests are wiped out. Actual possession of the land becomes necessary for its use for the public purpose for which it has been acquired. Therefore, the taking of possession under the Act cannot be "symbolical" in the sense as generally understood in Civil Law.' Surely it cannot be a possession merely on paper. What is required under the Act is the taking of actual possession on the spot. In the eye of law the taking of possession will have the effect of transferring possession from the owner or the occupant of the land to the Government.

Section 9(1) of the Act reads as follows

"The Collector shall then cause public notice to be given at convenient places or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him."

When a public notice is published at a convenient place or near the land to be taken stating that the Government intends to take possession of the land, then ordinarily and

generally there would be no question of resisting or impeding the taking of possession. Delivery or giving of possession by the owner or the occupant of the land is not required. The Collector can enforce the surrender of the land to himself under section 47 of the Act if impeded in taking possession. On publication of the notice under section (1) claims to compensation for all interests in the land has to be made ; be it the interest of the owner or of a person entitled to the occupation of the land. On the taking of possession of the land under section 16 or 17 (1) it vests absolutely in the Government free from all incumbrances. It is, therefore, clear that taking of possession within the meaning of section 16 or 17(1) means taking of possession on the spot. It is neither a possession on paper nor a "symbolical" possession as generally understood in Civil Law. But the question is what is the mode of taking possession ? The Act is silent on the point. Unless possession is taken by the written agreement of the party concerned the mode of taking possession obviously would be for the authority to go upon the land and to do some act which would indicate that the authority has taken possession of the land. It may be in the form of a declaration by beat of drum or otherwise or by hanging a written declaration on the spot that the authority

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has taken possession of the land. The presence of the owner or the occupant of the land to effectuate the taking, of possession is not necessary. No further notice beyond that under section 9(1) of the act: is required. When possession has been taken, the owner or the occupant of the land is dispossessed. Once possession has been taken the land vests in the Government.

In the instant case in agreement with the findings of the Court, I hold that the eye of law actual possession of the land in question was taken by the Tehsildar on the spot and the possession was handed over to the Principal of the Agricultural College. It appears that the appellant on his part thought that he never gave up possession and claimed to continue in actual possession of the disputed land, because of the stay order passed by the Government on or about the 16th April, 1959. It is in the background of the law discussed above that the statement that "the possession (physical) of the entire field S. No. 30/2 of Umari is still retained by the lessee of that field and the land was not actually taken possession of by the Principal Agricultural College, Akola", occurring in the letter dated the 13th December, 1961 written by the Special Land Acquisition Officer, Akola to the Commissioner, Nagpur has got to be appreciated and so also the stand of the Government in its counter as to what was meant by taking of symbolical possession. Viewed in the light of the discussion of law I have made above, it would be noticed that possession of the land, in any event, was taken on the spot and it vested in the Government. The appellant's resuming possession of the land after once it was validly taken by the Government had not the effect of undoing the fact of the vesting of the land in the Government. The Government or the Commissioner. was not at liberty to withdraw from the acquisition of any portion of the land of which possession had been taken, under section 48(1) of the Act.

In the result the appeals fail and are dismissed with costs. One set of hearing fee.

V.P.S.

Appeals dismissed.

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JUDIS