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criminal revision is to hold that upon the facts alleged by the prosecution and found proved by the lower appellate court, no offence of *criminal trespass* as defined in section 441 of the Indian Penal Code, has taken place. The applicants are therefore legally entitled to an acquittal in respect of the charge of criminal trespass punishable under section 447 of the Indian Penal Code.

I accordingly allow this application for revision, set aside the conviction and sentences passed upon the applicants, acquit them of the offence charged and order that the fines if paid by them be refunded to them.

*Application allowed.*

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava,  
 Chief Judge*

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 November, 25

HARDEO SINGH (DEFENDANT-APPELLANT) v. HIRA SINGH  
 AND ANOTHER (PLAINTIFFS-RESPONDENTS)\*

*Civil Procedure Code (Act V of 1908), order XXI, rule 35(2)  
 —Joint possession, delivery of—Delivery of possession by beat  
 of drum—Copy of warrant not affixed on property—Delivery  
 of possession made with approval and consent of judgment-  
 debtor and acquiesced in by him—Delivery of possession, if  
 valid and effective against judgment-debtor.*

Delivery of joint possession merely by beat of drum without affixing a copy of the warrant on the property is wrong and contrary to the specific provisions contained in order XXI, rule 35(2), Civil Procedure Code. Where, however, delivery of possession is made by beat of drum on the spot with the approval and consent of the judgment-debtor and is acquiesced in by him, it must be held to be valid and effective as against

\*Second Civil Appeal No. 10 of 1935, against the decree of Pandit Pearey Lal Bhargava, Additional Civil Judge of Sitapur, dated the 29th of September, 1934, setting aside the decree of Babu Raghu Nath Prasad Varma, Munsif of Biswan at Sitapur, dated the 30th of April, 1934.

him. *Harbhagwan v. Taja* (1), relied on. *Khub Ram v. Surat* (2), *Jauhari Lal v. Peman* (3), *Nidhi Ram v. Parsa Ram* (4), *Jauhari Lal v. Peman* (5), *Mukand Lal v. Ilam Din* (6), and *Raghunath v. Raghunath Sahai* (7), referred to.

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A person who is a party to legal proceedings is not entitled to question the legality of the procedure adopted in such proceedings except in the manner authorised by law, that is, by appeal to a higher tribunal; and if he allows wrong procedure to be followed without effective protest he must be deemed to have acquiesced in it and therefore to be bound by it. *Harbhagwan v. Taja* (1), relied on.

Mr. H. H. Zaidi, for the appellant.

Mr. C. P. Lal, for the respondents.

SRIVASTAVA, C.J.:—This is a defendant's appeal against an appellate decree of the learned Additional Civil Judge of Sitapur reversing the decree of the learned Munsif of Biswan in that district. It arises out of a suit for possession in respect of 46 bighas, 12 biswas *kham* land in village Kakori.

One Lalta Bakhsh Singh died leaving two sons Hem Singh and Hardeo Singh. Hem Singh who was the elder of the two brought a suit for recovery of his *haq jethansi*. The suit was referred to arbitration and on 1st November, 1918, a decree was passed in terms of the arbitrator's award. The decree awarded Hem Singh 46 bighas, 12 biswas *kham* land in village Kakori. It was further stated that this area included 39 bighas, 16 biswas cultivated and 6 bighas, 16 biswas uncultivated land and that the cultivated land was to include land of three kinds, namely, (1) land lying to the north of the road, (2) land lying to the north of Lachhi grove, and (3) land lying to the west of Lachhi grove and that the uncultivated land was to include a given area of grove, tank, *abadi* and *parti* land. There was no specification of the land either cultivated or uncultivated with reference to khasra numbers. On the 3rd of September, 1921, Hem Singh applied for execution of

(1) (1925) 89 I.C., 596.

(2) (1916) 39 I.C., 753.

(3) (1920) 55 I.C., 19.

(4) (1923) 74 I.C., 1.

(5) (1920) 68 I.C., 182.

(6) (1924) 84 I.C., 952.

(7) (1929) 118 I.C., 892.

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the decree by delivery of possession over the 46 bighas and odd land decreed in his favour. A notice was issued under order XXI, rule 22 of the Code of Civil Procedure to the judgment-debtor who appeared and contended that no delivery of possession could take place without actual partition. Hem Singh however desired that possession be delivered to him in accordance with the decree without specification of numbers. In other words he wanted delivery of symbolical possession to him as in the absence of partition only such a possession could be delivered over the joint land. The judgment-debtor Hardeo Singh stated that he had no objection to the delivery of possession in that manner. Thereupon a warrant for delivery of possession under order XXI, rule 35 of the Code of Civil Procedure was issued and on the 27th of November, 1921, possession was delivered to Hem Singh in terms of the warrant. Thereafter the execution case was consigned to records as fully satisfied.

The plaintiffs who are the legal representatives of Hem Singh now deceased brought the present suit for possession of the aforesaid 46 bighas and odd land on the allegation that they had recently been illegally dispossessed of the said land by the defendant Hardeo Singh. The defendant resisted the suit on various grounds. The pleas raised in defence found favour with the trial court but they have been rejected by the lower appellate court. The first contention urged on behalf of the defendant appellant is that the decree dated the 1st of November, 1918, passed on the basis of the award was incapable of execution. This contention does hardly lie in the mouth of the defendant-appellant when he himself had agreed to the decree being executed and possession being delivered in accordance with the decree (exhibit X). On the merits also I am of opinion that though actual and separate possession could not be delivered in the absence of any specification of the land by reference to the khasra numbers yet

it was possible to deliver symbolical possession as contemplated by order XXI, rule 35(2) of the Code of Civil Procedure.

Next it was argued that possession should have been delivered under order XXI, rule 35(1) of the Code of Civil Procedure. This argument is inconsistent with the previous one. It is also without force inasmuch as rule 35(1) contemplates actual possession which was not possible in this case because of the absence of specification of the numbers of the land comprised in the area decreed.

Lastly it was argued that in any case the delivery of joint possession under order XXI, rule 35(2) was invalid inasmuch as no copy of the warrant of delivery of possession was affixed on the property as required by the said rule. Reliance has been placed on the decisions of the Lahore High Court in *Khub Ram v. Surat* (1), *Jauhari Lal v. Peman* (2), and *Nidhi Ram v. Parsa Ram* (3), in support of this contention. It may be mentioned that though the warrant for delivery of possession was not affixed to the property yet it is admitted that a proclamation was made by beat of drum. It might also be noted that it appears from the judgment of the lower appellate court that for a very long time the practice prevailing in the Sitapur District has been to proclaim delivery of possession merely by beat of drum without affixing a copy of the warrant on the property. The practice is no doubt wrong and contrary to the specific provisions contained in order XXI, rule 35(2). The cases relied on by the learned counsel for the appellant are no doubt in his favour. It has been held in these cases that the failure to affix a copy of the warrant on the property of which formal possession is to be delivered as required by rule 35(2) of order XXI of the Code of Civil Procedure is a material defect and renders the delivery of formal

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(1) (1916) 39 I.C., 753.

(2) (1920) 55 I.C., 19.

(3) (1923) 74 I.C., 1.

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possession ineffective. But the course of decisions in the Lahore High Court does not seem to be uniform. At any rate there are cases of the same court in which it has been held that where a question arises between the parties to the proceeding in which symbolical possession has been given the validity of the proceedings cannot be affected by the existence of any such informality. *Jauhari Lal v. Peman* (1), *Mukand Lal v. Ilam Din* (2) and *Raghunath v. Raghunath Sahai* (3).

As has already been stated the delivery of possession in this case was made with the approval and consent of the judgment-debtor. It was also proclaimed by beat of drum at the spot. We think that in such circumstances the delivery of possession must be held to be effective as against the judgment-debtor. In *Harbhagwan v. Taja* (4) it was held that a person who is a party to certain legal proceedings is not entitled to question the legality of the procedure adopted in such proceedings except in the manner authorised by law, that is, by appeal to a higher tribunal and if he allows a wrong procedure to be followed without effective protest he must be deemed to have acquiesced in it and therefore to be bound by it. If I may say so with respect I entirely agree with these observations. For the above reasons I am of opinion that the delivery of possession which has been acquiesced in by the appellant must be deemed to be valid and effective as against him. The result therefore is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1920) 68 I.C., 182.

(3) (1929) 118 I.C., 392.

(2) (1924) 84 I.C., 952.

(4) (1925) 89 I.C., 596.