

(1973) 03 AHC CK 0029
In the Allahabad High Court
Case No : Special Appeal No. 1228 of 1969

Brij Bhushan Dubey and Others

APPELLANT

Vs

Paraidhan Dubey and Others

RESPONDENT

Date of Decision : 15-03-1973

Acts Referred:

Limitation Act, 1908 — Article 47, 28

Citation : AIR 1974 All 102 : (1973) 43 AWR 609

Hon'ble Judges : Satish Chandra, J;N.D. Ojha, J

Bench : Division Bench

Advocate : V.K.S. Chaudhari, for the Appellant; S.K. Tiwari and S.M. Misra, for the Respondent

Final Decision : Allowed

Judgement

Ojha, J.—The appellants and respondents Nos. 1 and 2 are descendants of a common ancestor Ram Rachha Dubey. They were joint sir holders of the land in dispute. A suit was filed by the appellants for joint possession over the land in dispute in the Civil Court which was decreed and joint possession was delivered to them in execution of the said decree on 1-3-1929. It appears that proceedings u/s 145 of the Code of Criminal Procedure were also initiated in respect of this land and an order was passed on 31-5-1929 holding Ram Swarup Dubey father of respondent No. 1 to be in physical possession over the land in dispute. The Magistrate passing the aforesaid order took into consideration the decree passed for joint possession by the Civil Court and specifically held that even though the appellant! will not be entitled to interfere with the physical possession of Ram Swarup Dubey over the land in dispute until they obtained a decree from a competent Court for possession, they could if they were entitled to profits by virtue of the decree passed by the Civil Court, recover the same through a competent Court. It was specifically held in the said order that till the appellants got their share partitioned, they were entitled to their share of profits of the land in dispute. From the evidence produced by the parties it appears that thereafter

the appellants did recover profits of their share from the said Ram Swamp Dubey and, in fact, in one of such suits for profit, viz., suit No. 2 of 1941, the parties entered into a compromise on the basis of which the claim of the appellants for profits was decreed at the rate of Rupees 31/12/- per year with interest. The appellants seem to have been satisfied with their joint possession in the sense that they continued to get their share of profits and did not institute a suit for partition. When the village where the land in dispute is situated was brought under consolidation operations, they made a claim for their share in it. The consolidation authorities, however, repelled their claim mainly relying upon Article 47 of the Indian Limitation Act, 1908. It was held by these authorities that since these appellants did not file a suit for possession within three years from the date of the order passed in proceedings under Section 145, Criminal P. C. their rights got extinguished by virtue of Section 28 of the Indian Limitation Act. The appellants instituted a writ petition in this Court which has been dismissed by a learned Single Judge on the same ground. Hence, this special appeal.

2. Article 47 aforesaid provides three years as the period of limitation for filing a suit to recover the property comprised in an order respecting the possession of immovable property made under the Code of Criminal Procedure 1898. The starting point of limitation is mentioned as the date of the final order in the case. For the respondents reliance was placed on *Atab Sunarri Vs. Talib Husain Mia and Others*, ; *Mt. Jaidevi Kuari Vs. Dakshini Din and Others*, and *Mehar Ali Vs. Kalut*, , wherein it was held that Article 47 applied even to suits by a co-owner either for joint possession or for partition, if he had been ousted from possession by virtue of an order passed u/s 145, Criminal Procedure Code. We express no opinion on the question as to whether the words "to recover the property comprised in such order" used in Article 47 are wide enough to include even a suit for joint possession or partition by a co-sharer inasmuch as on the facts of the present case we find it unnecessary to do so.

3. u/s 28 of the Limitation Act the right of a person to claim possession is extinguished if another person takes possession to the exclusion of the rightful owner in assertion of his own right and in derogation of the rights of the owner. If the person who is bound by an order u/s 145, Criminal Procedure Code, is not completely ousted from the property, but admittedly, continues to remain in joint possession by express terms of such an order, it cannot be said that he has been excluded from possession. In *Mohammad Baqar and Others Vs. Naim-un-Nisa Bibi and Others*, it was held that as under the law possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster following thereon for the statutory period. There can be no question of ouster if there is participation in the profits to any degree.

4. In view of the fact that successive claims of the appellants for profits were decreed and, in fact, one of them on the basis of a compromise, even after the order u/s 145, Criminal Procedure Code was passed, and in view of the further

fact that the said order itself specifically recognised the rights of the appellants to get profits of their share, it cannot be said that the respondents were in possession to the exclusion and ouster of the appellants within the meaning of the aforesaid observations in the case of Mohammad Baqar and Others Vs. Naim-un-Nisa Bibi and Others, .

5. In *Amjadi Begam v. Syed Hasan* ATR 1944 Oudh 250 it was held that failure to sue within the period of three years under Article 47 of the Limitation Act after an order u/s 145, Criminal Procedure Code does not necessarily bar a subsequent suit. The onus lies on those who plead the bar to show that the necessary conditions are satisfied. It cannot be presumed that they are satisfied merely because possession was restored to the successful party. The order of restoration implies nothing except that he was previously in possession. It does not imply that he was previously in adverse possession. It was further held that Article 47 contemplated the institution of a suit to recover possession by a person who disputes the right of the successful litigant u/s 145, Criminal Procedure Code to be in possession. When the successful litigant has claimed to be in possession on the footing of a licence, the other party may decide not to contest that claim, and if he comes to this decision, he should not be held barred ever afterwards from asserting his own title, that title never having been in dispute.

6. As already pointed out above, in the instant case, the right of the appellants to claim profits of their share was not only specifically recognised and ensured by the order u/s 145, Criminal Procedure Code itself, the appellants were actually paid their share of the profits even after the said order and we are, therefore, of the opinion that the claim of the appellants was not barred by Article 47 read with Section 28 of the Indian Limitation Act. The consolidation authorities have committed a manifest error of law in taking a contrary view.

7. In the result, the appeal is allowed, the judgment of the learned Single Judge is set aside and the orders of the consolidation authorities are quashed. The Consolidation Officer is directed to decide the claim of the appellants on merits, in accordance with law and in the light of the observations made above. The appellants will be entitled to their costs.