

(1965) 05 AHC CK 0018
In the Allahabad High Court
Case No : Second Appeal No. 4357 of 1962

Kamla Pandey and others

APPELLANT

Vs

Raghubir Dusadh and others

RESPONDENT

Date of Decision : 20-05-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145
Limitation Act, 1963 — Article 47, 28

Citation : (1965) 35 AWR 429

Hon'ble Judges : Gangeshwar Prasad, J

Bench : Single Bench

Advocate : Jagdish Misra, for the Appellant; G.D. Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Gangeshwar Prasad, J.—This second appeal arises out of a suit for a declaration that the decree of the Assistant Collector in suit No. 46 u/s 59/61 of the UP Tenancy Act and the appellate decrees in the said suit passed by the Commr. and the Board of Revenue are void, ineffective and without jurisdiction, and also for a declaration that the Plaintiffs are Bhumidhars in possession of the land to which the decrees relate. The Plaintiffs also claimed possession over the land in the alternative. Briefly stated, the case of the Plaintiffs was that they were Zamindars of the village in which the land in suit is situate and one Asharfi was the tenant of the land. Asharfi, it was alleged, relinquished his rights in the land, and the Plaintiffs thereupon entered into possession and cultivated it themselves with the result that it became their Khudkasht and they acquired the rights of a Bhumidhar therein after the enforcement of the UP Zamindari Abolition and Land Reforms Act. The Defendants, according to the Plaintiffs, were not sons of Asharfi as they claimed to be and had no interest in the land, but they filed a suit in the revenue court against the Plaintiffs on 15.6.1954 u/s 59/61 of the UP Tenancy Act for a declaration of rights in respect of it. The suit was decreed by the Assistant Collector and the decree passed by him was confirmed in appeal by the

Commissioner and then by the Board of Revenue. The validity of these decrees was challenged by the Plaintiffs on the ground that no suit u/s 59/61 of the UP Tenancy Act was maintainable in the revenue court after the passing of the UP Zamindari Abolition and Land Reforms Act and the decrees passed in suit No. 46 are, therefore, nullifies and they do not affect the rights of the Plaintiffs in regard to the land in suit. It was also alleged by the Plaintiffs that in proceedings u/s 145 Code of Criminal Procedure between the parties the possession of the Plaintiffs in the land in suit was upheld on 13.7.1954 and since the Defendants did not get the order passed in the proceedings set aside the order had become final and the right and interest of the Defendants in the land in suit had come to an end.

2. The suit was contested by the Defendants. They claimed to be sons of Asharfi who was admittedly the tenant of the land and they denied that Asharfi ever relinquished his rights in it. They also pleaded that Asharfi continued in possession till his death and the Defendants had, thereafter, been throughout in possession as his heirs. They also claimed to have become Bhumidhars by making the requisite deposit under the UP Zamindari Abolition and Land Reforms Act. They asserted that the revenue courts had jurisdiction to entertain their suit u/s 59/61 of the UP Tenancy Act and pleaded that the decree passed in the suit operates as res judicata. Both the courts below have dismissed the suit. They have found that Asharfi had never relinquished his tenancy and the Plaintiffs had never entered into possession, and further that the Defendants are the sons of Asharfi and they have always been in possession of the land. The contention of the Defendants that the revenue court had jurisdiction to entertain suit No. 46 u/s 59/61 of the UP Tenancy Act and the decree passed in the suit operates as res judicata has also been upheld by the courts below. The Plaintiffs have come in appeal to this Court.

3. Mr. Jagdish Misra, learned Counsel for the Plaintiffs, has devoted the major part of his argument to attacking the validity of the decrees passed by the revenue courts in suit No. 46. His contention is that the said suit was for a declaration u/s 59/61 of the UP Tenancy Act that the Respondent were hereditary tenants of the disputed land, but no such suit was maintainable after the enforcement of the UP Zamindari Abolition and Land Reforms Act, because tenancy rights had been altogether wiped out and new rights had taken their place, and that a suit for a declaration of such newly created rights was not cognizable by the revenue court on the date on which suit No. 46 was instituted. In support of this contention the learned Counsel has placed reliance on *Shital Prasad v. Board of Revenue* (1)(1960 AWR 96). The answer of Sri G.D. Srivastava, learned Counsel for the Respondents, to this contention is that no plea as to want of jurisdiction having been taken by the Appellants in suit No. 46, it is not open to them to raise that plea in a subsequent suit, and further that the alleged cause of action for suit No. 46 having arisen prior to the enforcement of the UP Zamindari Abolition and Land Reforms Act, the revenue court was competent, by virtue of Clause (2) of the UP Land Tenures (Legal Proceedings

Removal of Difficulties) Order 1942, to entertain it. It is, however, wholly unnecessary to decide this controversy in view of the findings of fact recorded by the courts below. The decree in suit No. 46 is relevant only in so far as it may preclude the Plaintiffs from denying that the Defendants are sons of Asharfi and succeeded to the tenancy of Asharfi as his heirs and from asserting that Asharfi had relinquished the tenancy. Evidence on these questions has, however, been led in this case by the parties, and in spite of the view that the courts below have taken about the jurisdiction of the revenue court to entertain suit No. 46 and of the force of the decree passed in that suit, they have recorded clear findings on the said questions. As noted above, they have held that Asharfi never relinquished the tenancy and that the Defendants are sons of Asharfi and they succeeded to the Tenancy and remained in possession thereof. Even if, therefore, the decree passed in suit No. 46 is entirely ignored the result of the concerned with the decree in suit No. 46 only in so far as it may bar the raising of the questions which were adjudicated upon in that suit But if those questions have been gone into in this suit as well and answered against the Plaintiffs and in favour of the Defendants quite independently of the adjudication in suit No. 46, the validity or invalidity of the decree passed in that suit loses all significance. A declaration as to the nullity of the decree cannot be claimed by the Plaintiffs in the abstract and unrelated to his rights in the property in suit, and Mr. Jagdish Misra has conceded that if the Plaintiffs are not found to have any interest in the property in suit determination of the question whether the decrees original and appellate in suit No. 46 are void, ineffective and without Jurisdiction is altogether unnecessary.

4. On the findings recorded by the courts below there is no room for doubt that the Plaintiffs have no right what, soever in the land in dispute. Asharfi, the admitted tenant of the land, never relinquished the tenancy or gave up possession, and upon his death he was succeeded by the Defendants who are his sons and the Defendants have continued in possession. In consequence the Defendants became Sirdars and the Plaintiffs lost all rights in the land after the enforcement of the UP Zamindari Abolition and Land Reforms Act. All that has, therefore, to be considered is whether the Plaintiffs acquired any rights subsequently.

5. It has been urged on behalf of the Appellants that since the Defendants did not institute any suit for setting aside the order passed on 13.7.1954 in the proceedings u/s 145 Code of Criminal Procedure in favour of the Plaintiffs, they lost their rights in the land after the expiry of the period of Limitation prescribed by Article 47 of the Limitation Act and the Plaintiffs are consequently entitled to a decree for possession against them. The contention cannot, however, be sustained.

6. The first thing to be noticed in this connection is that the suit relates to plots Nos. 51, 52, 67, 68, 69/1 and 69/2. The Plaintiffs gave up their claim with respect to plot No. 67 vide their counsel's statement dated 21.11.1961 recorded in the

notes of the trial court. Out of the remaining plots. on v. plots Nos. 68 69/1. 69/2 were the subject matter of the proceeding u/s 145 Code of Criminal Procedure and the remaining plots were totally unaffected by it.

7. It would next be seen that among the Defendants only Raghubir Singh was a party to the said proceedings and it was only Raghubir Singh, who was prohibited, under the order passed therein, from interfering with the possession of Sahdeo Pandey until the latter was ejected by a competent court of law. The question arises whether the other Defendants viz. Katwaru and Ramdeo were bound by the order, and whether it was incumbent upon them to bring a suit within the period of limitation provided by Article 47 of the Limitation Act. In answering this question it is necessary to bear in mind that the Defendants held the land as Sirdars under the UP Zamindari Abolition and Land Reforms Act at the time of the proceedings u/s 145 Code of Criminal Procedure and the land did not partake of the nature of joint family property and was not subject to the incidents of such property. The position of Raghubir Singh in regard to the land in dispute was consequently not that of a manager or Karta. From the ages of the Defendants given in the plaint of this suit it would also appear that all of them were majors at the time of the proceedings. In these circumstances it does not appear possible to contend that Katwaru and Ramdeo Pandey Defendants were also bound by the order passed in those proceedings.

8. Article 47 of the Limitation Act is confined in its application to persons bound by an order of the nature mentioned therein, and those claiming under such persons. The persons bound by an order u/s 145 Code of Criminal Procedure have to be determined with reference to that section, and the persons who claim under them have to be determined with reference to the character and the legal incidents of the property to which the order relates. In determining the class of persons contemplated by the Article it should be remembered that the Article may in certain cases have the effect of curtailing the period of limitation ordinarily available for instituting a suit to recover possession of the property, and that the failure to institute such a suit within the period allowed by the Article will result not only in the remedy of such persons becoming barred but also in their rights becoming extinct by force of Section 28 of the Limitation Act. The Article should, therefore, be construed strictly and its application should not be extended to persons who do not clearly fall within its terms.

9. Who, then, are the persons bound by an order respecting the possession of a property u/s 145 Code of Criminal Procedure? The answer naturally is-the persons against whom an order under Sub-section (6) of the section is passed by the Magistrate. It is true that the Sub-section does not expressly state that the order shall operate only, against the party who is not found to be in possession or is not treated under Sub-section (4) as being in possession nor does it expressly provide that the, order forbidding disturbance of possession is directed against such a party only. But the scheme running through the various Sub-sections and the language used therein leave no room for doubt that proceedings

u/s 145 Code of Criminal Procedure are not between all such persons as may be interested in the property, to which the proceedings relate but only between, such persons as are actually parties to them by reason of having been required under Sub-section (1) to attend the court and to put in written statement or by reason of having been made parties under Sub-section (7). Persons who are made parties by the court on their own application and are required or allowed to file written statement of their claim respecting possession of the, property in dispute will also stand on the same footing as the persons originally required to attend the court and file written statement and they will likewise be bound by the order passed, in the proceedings. But neither on the words of the section nor on general principles is it possible to hold that persons who are not parties to the proceedings are also bound by the order passed therein merely because of their interest in the property in dispute. I am supported in this view by *Raghu v. Gujai* (2) (AIR 1918 Nag 242); *Ram Lal v. Thakur Din and Ors.* (3) (AIR 1921 Oudh 191); *Mst. Maya Devi v. Diwan Chand* (4) (AIR 1935 Lah 115); *Mian Sharif Gul v. Said Gul and Ors.* (5) (AIR 1941 Pesh 65); *Shahkar v. Rex through Wahajuddin and Ors.* (6) (1950 AWR 388); and *Shankbta Shukul v. Gobindi Devi* (7) (1950 AWR 388).

10. In *Lachman Singh and Ors. v. Diljan Ali and Ors.* (8) (AIR 1918 Pat 504) which may be relied upon in support of a contrary view, the members of a community were held to be bound for the purpose of Article 47 of the Limitation Act by the order passed against a member of the community in proceedings u/s 140 Code of Criminal Procedure, but the facts of the case would show that on the face of the plaint itself it appeared that the Plaintiffs held themselves bound by the proceedings u/s 145 Code of Criminal Procedure and the decision proceeded on the footing that the person against whom the order u/s 145 Code of Criminal Procedure was passed represented the community and was treated in the suit filed by other members of the community as having done so. This case cannot, therefore, be regarded as an authority for the proposition that an order u/s 145(6) Code of Criminal Procedure binds even those persons who are not parties to the proceedings in which the order is passed.

11. In *Raghunandan Pandey v. Kishin Mohan Singh and Ors.* (9) (AIR 1922 Pat 210) a learned single Judge of the Patna High Court certainly observed with reference to proceedings u/s 145 Code of Criminal Procedure that they were binding upon the whole world, but, with great respect to the learned Judge, I find myself unable to subscribe to that proposition. The basis of the observation was that since Clause 3 of Section 145 Code of Criminal Procedure requires that a copy of the order of the Magistrate Under Clause (1) shall be published being affixed to some conspicuous place at or near the subject matter of the dispute, the affixation amounts to a notice to the persons interested in the subject matter of the dispute to come forward and be made parties to the proceedings. Even if this were, so, affixation of the order cannot either have the effect of making every body who claims an interest in the property in dispute or to be in possession thereof a party to the proceedings unless an order under Clause (1)

of Section 145 Code of Criminal Procedure has been issued in relation to him, or of entitling him to be made a party. The view taken in the above case was, after a detailed examination of the provision of Section 145 Code of Criminal Procedure and the authorities bearing on the point, expressly dissented from by another learned single Judge of the Patna High Court in a later case In the matter of Inderdeo Singh Vs. Kesho Singh and Others, .

12. In Ram Sahai and Another Vs. Binode Bihari Ghosh, persons who were not parties to proceedings u/s 45 Code of Criminal Procedure were held to be bound by the order passed therein, but that was because the person who was a party in the proceedings was either the manager of the joint Hindu family consisting of himself and such other persons and represented their interest in the joint family property which was the subject matter of dispute or he was the person from whom the person held to be bound had derived their interest in the property. This case was followed in Alluri Venkatasomaraju and Others Vs. Alluri Varahalaraju alias Ramabadri Raju and Others, which was a case, of a joint family Obviously these two Cases are distinguishable from the instant case, where as has been noticed above, the land in dispute was not a joint family property and Raghubir Singh who was a party to the proceedings u/s 145 Code of Criminal Procedure was only a cotenureholder and that fact alone could not constitute him a representative of all the tenureholders in the absence of anything to indicate that he was treated or accepted as such by the other co tenureholders.

13. I should now refer to the decision of their Lordships of the Supreme Court in Raja Braja Sundar Deb Vs. Moni Behara and Others, . The material facts of the case were that there was a dispute about a fishery between some fishermen and the landlords of the Zamindari in which the fishery was situate. The fishermen started proceedings u/s 145 Code of Criminal Procedure which terminated in their favour. No suit was, however, brought within the period prescribed under Article 47 of the Limitation Act for recovery of possession against the fishermen. Long after the expiry of the period, a suit by one of the landlords was brought against the fishermen who were parties to the proceedings u/s 145 Code of Criminal Procedure and also against a large number of other fishermen for a declaration of his rights in the fishery and for an injunction. In appeal. against the decision of the trial court which decreed the suit the High Court of Patna, while finding that the landlords had lost their rights in the fishery in dispute by reason of the operation of Article 47 of the Limitation Act, held that the order made in the proceedings u/s 145 Code of Criminal Procedure was not binding to the extent of five pies share. The exception made in favour of five pies share was based on the fact that the cosharers from whom the Plaintiff had purchased that five pies share were not, in the view of the High Court, parties to the proceedings u/s 145 Code of Criminal Procedure. The Supreme Court did not accept that five pies share was saved from the operation of Article 47 of the Limitation Act and observed:

The High Court, however, was not right in holding that the order made in Section 145 Code of Criminal Procedure proceedings was not binding on the Plaintiff to the extent of five pies Share. Its true scope and effect do not seem to have been fully appreciated. The order appears to have been made after notice to all the landlords and was brought about by reason of the action of all of them and binds the full sixteen anna interest in the zamindari. In clear and unambiguous terms the Magistrate declared that the second party were in exclusive possession of the disputed fishery and that the landlords had no right to disturb their possession and they were directed to bring a suit to establish their right to possession. This they failed to do with the result that the order became final and the right of the landlords to get into possession of the fishery became extinguished.

14. The observations made it clear that the notice had been issued by the Magistrate to all the landlords and it was against all the landlords that the final order passed in the proceedings was directed. It was a matter of no consequence that all the landlords had not appeared before the Magistrate because what makes a person party to the proceedings is not his appearance in response to the order u/s 145(1) but the order itself. To my mind the observations of the Supreme Court in the above quoted case suggest the necessity of a notice to a person u/s 145(1) Code of Criminal Procedure and of a prohibition addressed to him u/s 145(6) Code of Criminal Procedure before he can be held to be bound by the result of the proceedings and to have lost his rights on account of his failure to institute a suit within the period allowed by Article 47 of the Limitation Act. There is also another passage in the judgment of the Supreme Court which emphasises the importance and effect of the fact whether a person is or is not a party to the proceedings u/s 145 Code of Criminal Procedure and that passage is as follows:

It was then argued that in any case the benefit of the order made u/s 145, Code of Criminal Procedure, could only be taken by the persons in whose favour that order was made and that it could not operate for the benefit of all the 846 fishermen represented by the eighteen Defendants or in favour of all fishermen who would come to reside in these nine villages in times to come. In our opinion, this contention has force and the High Court was in error in holding otherwise. There is no evidence whatsoever to show that besides the twelve persons mentioned as second party in Section 145, Code of Criminal Procedure, proceedings who else was represented by them and we are, therefore, bound to hold that the benefit of that order can only be given to those Defendants who are represented by those twelve persons. The learned Counsel for the Appellant gave us a list of the persons who were parties in Section 145 proceedings and of those out of the Defendants who stand in their shoes. According to this list, Defendants 1,2,3, 5,6,7,9 and 12 are the persons who themselves or through their predecessors in interest were parties in the former case and are entitled to the benefit of the result of those proceedings. All the other Defendants whether impleaded personally in this suit or in a representative capacity or those whom they represent, are not entitled to take advantage of those proceedings.

15. It will thus be seen that the fishermen who were not parties to the proceedings u/s 145 Code of Criminal Procedure were not held entitled to the benefit of the order passed in favour of the other fishermen who were not parties. And it would, therefore, follow that the fishermen who were not parties to the proceedings would also not have been bound, by the order passed in the proceedings if it had gone against those who were parties. In accordance with the decision of their Lordships, of the Supreme Court it must, in my opinion, be held that the person against whom Article 47 of the Limitation Act can operate must either be a person who was a party to the proceedings u/s 145 Code of Criminal Procedure and against whom the order under Clause (6) of the section was passed or one claiming under such a person. Of course if the person who was a party held, in regard to the property in dispute, a position which made him in law a representative of other persons in all legal proceedings, like that of a manager of a joint Hindu family in regard to joint family property, such other persons would also be deemed to have been parties to the proceedings and, therefore, within the mischief of Article 47 of the Limitation Act. But otherwise, persons who were not parties to the proceedings u/s 145 Code of Criminal Procedure and against whom no order under Clause (6) of the section was passed cannot be regarded as bound by the order and to have lost their rights to the property in dispute on account of their failure to institute a suit within the time allowed by Article 47 of the Limitation Act.

16. I have already mentioned that in the present case the land in dispute in the proceedings did not possess the character and the incidents of a joint family property and Raghubir could not, therefore, in law represent his brothers Katwaru and Ramdeo who were co-sirdars of the land with him. The order passed in the proceedings was also directed against Raghubir alone. In these circumstances Katwaru and Ramdeo Defendants were not bound by the order and they could not be affected by Article 47 of the Limitation Act.

17. Further, there is nothing on the record to indicate that Sahdeo Pandey was actually put in possession of the plots which were involved in the proceedings u/s 145 Code of Criminal Procedure, in pursuance of the order passed therein. It may be that by virtue of some order passed in suit No. 46 u/s 59/61 of the U.P. Tenancy Act which was pending at that time and in which the possession of the Defendants was upheld (whatever may be the legal effect of the decree passed in the suit), the order passed in the proceedings u/s 145 Code of Criminal Procedure was prevented from taking effect. But quite apart from that, there is evidence in this case that the Defendants have continued in possession of the land in suit and this evidence has been accepted by the court and it has been found that the Defendants were in possession and the Plaintiffs had miserably failed to prove their possession. In these circumstances no question of extinction of rights by virtue of Article 47 read with Section 28 of the Limitation Act arises.

18. A person against whom an order u/s 145 (6) is passed is not required by law to have the order set aside by means of a suit and is only forbidden to disturb

the possession of the person in whose favour the order is passed. Further, Article 47 of the Limitation Act applies to suits for recovering the property comprised in the orders mentioned therein, and Section 28 of the Limitation Act is also limited in its operation to suits for possession of property. If, therefore, inspite of an order passed u/s 145(6) Code of Criminal Procedure the necessity of a suit for recovery of possession does not arise on account of the fact that the person against whom the order is passed is not actually dispossessed or the necessity is subsequently dispensed with on account of actual possession being restored to or secured by such person before the expiry of the period of limitation, no suit for recovery of the property comprised in the order need be filed and Article 47 and Section 28 of the Limitation Act will in that case have no application. I may in this connection refer to *Krishnacharya v. Lingawa* (14) (ILR 20 Bom 270). The case arose when the Limitation Act of 1877 was in force but the relevant provisions were the same in that Act as well. An adverse order had been passed against the Plaintiff of that case by a Mamlatdar but the Plaintiff had continued in possession notwithstanding the order. Article 47 of the Limitation Act of 1877 which applied to such an order also, as Article 47 of the present Limitation Act does, and Section 28 of the Limitation Act of 1877 were pleaded as bars to the suit. The plea was not accepted and it was observed:

Article 47 only applies to ejectment suits and there was no occasion to the Respondent to bring such a suit if she continued in possession notwithstanding her failure in the possessor suit.

19. To sum up, it is clear that the Plaintiffs lost all their rights and interests in the land in suit after the enforcement of the UPZA and LR Act and never acquired any fresh rights or interests, thereafter. They have also not been in possession of the land. The Defendants have been in possession of the land as sons and heirs of Asharfi who was a tenant of the land and had never relinquished his tenancy. The Plaintiffs are, therefore, not entitled to any of the relief's claimed by them and their suit has rightly been dismissed.

20. The appeal fails and it is accordingly dismissed with costs.