

(1942) 04 CAL CK 0010
In the Calcutta High Court

Khaleque Newaz Khan Choudhury and Others APPELLANT
Vs

Moulvi Choudhury Labibuddin Ahmed Siddique Mutwalli and RESPONDENT
Another

Date of Decision : 01-04-1942

Acts Referred:

Limitation Act, 1963 — Section 28

Citation : AIR 1943 Cal 67

Hon'ble Judges : R.C. Mitter, J;Khundkar, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—At the time of the Thak Survey of 1856-1857, a very large area of land in Pargana Talibabad was measured by the Thak Amins as common land of four permanently settled estates, Touzis Nos. 273, 274 275 and 276 of the Dacca Collectorate. The said area spread over a number of villages situate in the Districts of Dacca and Mymen-singh. The area covered forests, beels, jhils, watercourses, etc., and a good part was arable g land. In the said area the shares of the said four estates were as follows:

Touzi No. 273 5 Annas 181/2 gandas Touzi No. 274 1 Anna 9 gandas Touzi No. 275 3 Annas 111/2 gandas Touzi No. 276 5 Annas 1 ganda
Total. 16 annas. 2. The plaintiffs and their predecessors-in-interest are called for brevity's sake the Baliadi zemindars. They are and were part proprietors of Touzis Nos. 274 and 276. Their share therein is 13 annas 141 gandas. The remaining 2 annas 5 gandas share in the said two estates belong to the defendants. They and their predecessors are called the Srip haltuli zemindars. Touzi No. 273 belonged exclusively to the defendants' ancestors and now belong to them. Touzi No. 275 belonged to the Nawab of Dacca, the Roys of Moira and others. In 1894 there was a petty settlement of those common lands, that is to say, a survey and settlement under chap. 10, Ben. Ten. Act, not of the whole District in which the said lands were situate but only of those lands on the application of the proprietors of the said four estates.

A map and a record of rights was prepared. On 5th October 1896, there was a partition by agreement between the Baliadi zemindars and the. Srip haltuli zemindars, and an instrument of partition was executed.

3. This document is Ex. A and is the most important document in the case.

4. We have stated before that the Srip haltuli zemindars were part proprietors of Touzis Nos. 274 and 276 and the Baliadi zemindars were their cosharers in the said two estates. The Srip haltuli zemindars were also the sixteen annas proprietors of Touzi No. 273. This partition evidenced by Ex. A was between the - Baliadi zemindars and the Srip haltuli zemindars but the latter executed the deed only in their character and capacity as part proprietors of Touzis Nos. 274 and 275 and the allotments that were made to the latter were in that character and capacity only. The position therefore was that although the common lands of the said four estates were being partitioned by Ex. A, the proprietors of two of these estates namely of Touzi No. 273 and No. 275 were not parties to that partition. The properties were grouped in three schedules annexed to this instrument, Ex. A, namely Schedule Ka, Schedule Kha and Schedule Ga. Schedule Ka was allotted to the Baliadi zemindars, Schedule Kha to the Drip haltuli zemindars qua part proprietors of Touzis Nos. 274 and 276 and Seh. Ga was left ij mali between the four estates. Strictly speaking, this was an ineffective partition, for all the joint proprietors of the common lands had not joined. But that fact is not now material by reason of subsequent events and because of the frame of the suit in which this appeal arises. The parties to that instrument were, however, alive to that defect and they made provisions therein to meet possible eventualities. In para. 6 of that instrument, it was provided that if the proprietors of estate No. 273 or No. 275 were given any lands from out of Schedule Ka or Kha at the partition under the Bengal Estates Partition Act, which was then pending, the parties to that instrument agreed among themselves to make good their respective losses from Schedules Ka and Kha from out of the lands of Schedule Ga which was kept joint. In those proceedings under the Bengal Estates Partition Act, the lands of Touzi No. 275 were separated in the year 1902-1903. Good slices were taken out of Schedules Ka and Kha of Ex. A and allotted exclusively to the proprietors of Touzi No. 275. The lands of Touzi No. 273 were not, however, separated and that touzi has now interest in the remaining lands of Schedules Ka, Kha and Ga of Ex. A left after separation of the lands of Touzi No. 275. As Touzi No. 275 has gone out it is admitted that shares of the three remaining estates, Nos, 273, 274 and 276 in the lands which are common to them are as follows:

Annas Gandas Karas Krant Tils Touzi No. 273 7 12 2 1 3 Touzi No. 274 1 17 1 1 3 Touzi No. 276 6 10 0 0 14 The total shares of Touzi Nos. 274 and 276 would be - 8 7 1 1 17. 5. Estates Nos. 274 and 276 were under the management of the Court of Wards. During such management the Cadastral Survey, that is to say, the survey and settlement of the whole district under chap. 10, Ben. Ten. Act, was commenced. That survey and settlement was commenced in 1912 and the

record of rights was finally published in 1917 after the Court of Wards had released estates Nos. 274 and 276 from their management. The plaintiffs, the Baliadi zemindars, filed this suit, which is a suit for partition, on 2nd November 1935. They describe the properties in suit in three schedules attached to their plaint. Schedule 1 consists of 72 items. They say that the shares of the parties in respect of those properties have been correctly recorded in the record of rights. Schedule 2 comprises 4 items. The plaintiffs say that the shares of the parties in respect of those items have been incorrectly recorded in the record of rights. They pray for partition of the properties of Schedule 1 and Schedule 2 according to their correct shares. In Schedule 8 they detail properties which according to them ought to be kept joint. The properties thus described in those three schedules correspond to such of the properties of Schedules Ka and Ga of the instrument of partition, Ex. A, which were left after the separation of the lands of Touzi No. 275 at the partition under the Bengal Estates Partition Act.

6. We have already pointed out that after that event three touzis only, namely, Nos. 274, 276 and 273 had interest in the remaining properties of Schedule Ka, Kha and Ga of Ex. A. The position then was that in those properties of Schedule Ka, the Srip haltuli zemindars (the defendants in the suit) would have a share, but only as proprietors of Touzi No. 273, and the plaintiffs would have the remaining share, for those properties were allotted to them exclusively by Ex. A for their 13 annas odd gandas share of Touzi Nos. 274 and 276. In those properties of Schedule Ga which were still joint with the three Touzis Nos. 273, 274 and 276 the plaintiffs would have (13 annas odd ganda of 8 annas 7 gandas 1 k. 1 kr. 17 tils), because the last mentioned figures represent the total share of Touzi Nos. 274 and 276. The shares of the defendants would be (2 annas odd gandas of 8 annas 7 gandas 1 k. 1 kr. 17 tils) as part proprietors of Touzi Nos. 274 and 276, and they would have a further share 7 annas 12 gandas 2 k. 1 kr. 3 tils share as proprietors of Touzi No. 273. Their total share in Soh. Ga would thus be a little more than 8 annas 16 gandas and the plaintiffs' share a little more than 7 annas 3 gandas. In those properties of Schedule Kha of the partition deed, Ex. A, the defendants would have 16 annas in their joint capacity as part proprietors of Touzi Nos. 274 and 276 and as the 16 annas proprietors of Touzi No. 273. For this reason none of the items of Schedule Kha of the partition deed, Ex. A, has been included in the plaint.

7. Various defences were raised by the defendants. We would state only those which are material to the appeal. They are : (i) that the defendants have acquired by adverse possession 16 annas of 40 plots of item 9 of Schedule 1 of the plaint: alternately they say plaintiffs' title to the said plots has been lost by lapse of time; (ii) that they have shares in items 20, 22, 37, 43, 44, 45, 53, 55, 57, 63 and 69 of Schedule 1 of the plaint on the ground that though they are situate within the geographical limits of Schedule Ka of the partition deed, Ex. A, they were expressly kept by that deed as joint lands of all the touzis ; (iii) that in item 56 of Schedule 1 they have a larger share than what has been recorded in the record of rights; (iv) that in item 3 of Schedule 2 they have the share as

recorded in the record of rights; and (v) that they are entitled to compensation from out of the lands of Schedule Ga of the partition deed, Ex. A, for what had been taken away from their allotment, Schedule Kha of the said deed, by the proprietors of Touzi No. 275, when the lands of the latter were separated in 1902-1903 in the proceedings under the Bengal Estates Partition Act.

8. The learned Subordinate Judge did not give effect to their claims as mentioned in (i) to (iv). They have accordingly appealed and reiterate before us their contentions on the said heads. The learned Subordinate Judge gave effect to their fifth contention and declared the parties to be entitled to compensation and appointed a commissioner to ascertain the extent. The plaintiffs have preferred cross-objections to this part of the decree. We will take up the points in the order enumerated above. Item 9 of Schedule 1 comprises the lands of village Kalampore. The whole of that village was included in Schedule Ka of the partition deed, Ex. A, that is to say, it was allotted to the plaintiffs' predecessors in their character as 13 as. l&l gds. proprietors of Touzi Nos. 274 and 276. As the defendants were parties to that instrument only in their character of co-proprietors of the said two touzis and not in their capacity as exclusive proprietors of Touzi No. 273, their interest in the same as proprietors of Touzi No. 273 was not affected by that partition deed.

9. The plaintiffs accordingly admit in their plaint that in that village, they, the plaintiffs, have 8 as. 7 gds., odd share, and the defendants the remaining 7 as. 12 gds., odd share as proprietors of Touzi No. 273 and pray for partition of that village on that footing. The defendants who fall into two groups, namely, defendants 1 and 2, called the Purva Taraf Srip haltuli zamindars, and defendants 3 and 4, called Paschim Taraf Srip haltuli zamindars, admit that the respective shares would have been what have been stated in the plaint, but the Purva Taraf zamindars say that they have acquired by adverse possession the share of the plaintiffs in six plots of that village and the Paschim Taraf zamindars say that they have acquired by adverse possession the share of the plaintiffs in 27 other plots and that the two tarafs together have similarly acquired the 16 annas of 6 other plots. They thus say that in 40 plots of the said village the plaintiff's title has been extinguished. Their alternative case is that the plaintiffs have lost their title to those 40 plots by reason of Section 28, Limitation Act, they having failed to institute a suit for possession in time. Those 40 plots are specified in their written statements. To establish their claim based on adverse possession the defendants have to establish (a) that they were in exclusive possession for the period of 12 years or more that they were in such possession under an assertion hostile to the plaintiffs and that hostile assertion was made to the knowledge of the plaintiffs more than 12 years before suit, for the plaintiffs and defendants were admittedly cosharers of the said plots. Their alternative case rests on an order passed in their favour by the Magistrate on 31st March 1911, in a proceeding between them and the plaintiffs u/s 145, Criminal P.C. We would state the established facts bearing upon these two alternative cases, which are common to both the alternative cases.

10. In the petty settlement of 1894, a number of plots of village Kalampore had been recorded in the exclusive possession of the Srip haltuli zamindars (defendants' predecessor but at the partition of 1896 (EX. A) those plots were included in the allotment of the Baliadi zamindars (plaintiffs' predecessors). But in spite of that fact the Srip haltuli zamindars asserted that those plots were in their exclusive possession as Khamar lands of Touzi No. 273. This led to a suit between them and the Baliadi zamindars in 1904. This was Title Suit No. 133 of 1904 in which they were the plaintiffs and the Baliadi zamindars were the defendants. In that suit they pleaded that those lands were the lands of Touzi No. 273 and in them the other two estates, Touzis Nos. 274 and 276, had no share. That was the only point they raised. The defence was that those lands were the common lands of all the three estates. The pleadings are not on the record but the respective cases of the parties appear from the judgment in that suit which is Ex. 11 (n.39). This question of title formed the subject-matter of issue 8 of that suit.

11. The learned Subordinate Judge first examined the documentary evidence directly bearing upon the question of title and came to the conclusion that those documents did not establish the fact that those lands had been included only in Touzi No. 273 at the time of the permanent settlement of 1793. The Srip haltuli zamindars however contended that from the fact of long and exclusive possession on their part as proprietors of Touzi No. 273, the inference ought to be made that those lands had been included at the time of the permanent settlement of 1793 in that estate only. In considering this aspect of the case the learned Subordinate Judge went into the question of possession. He found that the lands were waste and incapable of possession before the petty settlement of 1894, but from that year onwards the Srip haltuli zamindars were in exclusive possession. As he was asked to infer a grant for long possession he refused to draw that inference as the possession of the Srip haltuli zamindars was of recent origin. He accordingly dismissed the suit. In that case the Srip haltuli zamindars did not set up a claim of acquisition of title by adverse possession. This appears from p. 47, lines 30 to 40 of that judgment, Ex. 11. The net result of that judgment is that it was found that the Baliadi zamindars were found to be part owners of those lands which were in suit. But this judgment did not silence the Srip haltuli zamindars, for, in respect of the self, same lands disputes again arose and this led to a proceeding u/s 145, Criminal P. C, in which the Baliadi zamindars were the first parties and the Srip haltuli zamindars were, the second parties. The Baliadi zamindars' case before the Magistrate was that they were co-owners with the Srip haltuli zamindars and were in joint possession with the latter, but the case of the Srip haltuli zamindars was that the lands appertained only to Touzi No. 273 of which they were the exclusive owners and they were in exclusive possession.

12. Relying mainly upon the finding of possession in the judgment of the Title Suit No.133 of 1904 (Ex. 11) the Magistrate came to the conclusion that the second parties were in exclusive possession up to November 1909 when the

crops on the property were attached by the Magistrate u/s 145, Sub-section (8), Criminal P. C. He declared the second parties to be entitled to possession until evicted therefrom in due course of law and forbidding all disturbances of such possession until such eviction. This order was passed on 31st March 1911 (EX. 11 (d)(ii-59). The Baliadi zemindars did not institute a suit for declaration of their title to the said lands within three years of this order. It is admitted by the plaintiffs that the subject-matter of Title Suit No. 133 of 1904 and of the proceedings u/s 145, Criminal P.C., are the forty plots of lands mentioned in the written statements of defendants 1 to 4. (Order No. 94 dated 26th May 1938, 1-14). On these facts rests the second alternative case of the defendants. We are of opinion that this alternative case ought to succeed. We have pointed out the respective cases of the parties before the Magistrate. The order u/s 145, Criminal P.C., was in favour of the Srip haltuli zemindars. Article 47, Limitation Act, provides that a suit for possession by the party bound by the order of the Magistrate must be brought within three years from the date of the final order. It is the accepted view of this Court that a suit for joint possession by a co-owner bound by an order passed u/s 145, Criminal P. C, in favour of his co-owner whose exclusive possession is maintained by that order comes within Article 47, Limitation Act.

13. There is no difference on this point between the learned Judges who decided Atab Sunarri Vs. Talib Husain Mia and Others, and 39 C.W.N. 853 : 163 I.C. 370 : 39 C.W.N. 853 Jogesh Chandra v. Suresh Chandra. But the divergence creeps in later. In the first mentioned case it was held that if such a suit is not brought within the period prescribed by Article 47, Limitation Act, the title of the co-sharer bound by the order of the Magistrate is extinguished by reason of Section 28, Limitation Act. In the last mentioned case it was, however, held the right to joint possession is lost but the title remains. No reference was made in the last mentioned case to Section 28, Limitation Act, and what is more remarkable is that the learned Judges placed reliance on Atab Sunarri Vs. Talib Husain Mia and Others, for the proposition they laid down therein. We cannot appreciate the distinctions and the reasons given in 39 C.W.N. 853 :163 I.C. 370 : 39 C.W.N. 853 Jogesh Chandra v. Suresh Chandra.

14. The phraseology of Section 28 and Article 47, Limitation Act, is clear and unambiguous. A fixed period of three years is given to a person bound by an order made u/s 145, Criminal P.C., to sue for possession. If he fails to sue for possession within that fixed period his right to the property is extinguished by reason of Section 28. The right that is extinguished is such right as he had in that property. It may be that he was the sole owner or that he had a joint share with the person in whose favour the Magistrate had made the order. In either case his failure to institute a suit within three years of that order entails the extinguishment of his right, (whatever the nature of that right may have been. If he was the sole owner, he loses the right of ownership. If he had a right only as co-owner his right as cosharer is extinguished. We accordingly hold that not only the claim of the Baliadi zemindars for joint possession was lost but also their title

to the same as cosharers as soon as three years expired from the date of the order of the learned Magistrate. They can only set up a title which may have been acquired by them subsequent to that order but cannot set up their old title, that is to say, the one they had before that order was passed. In the case before us there is no case of fresh acquisition of title by the Baliadi zemindars after that order. As their title to the subject-matter of the proceedings u/s 145, Criminal P.C., based on the fact of co-ownership of Touzis Nos. 274 and 276 had been extinguished on 1st April 1914, they cannot on the basis of that self-same title claim partition of these 40 items of village Kalampore. We see great force in the observation made in 51 C.L.J. 4611 that a suit for partition in such circumstances would be a mere device to evade the provisions of the statute, namely Section 28 and Article 47, Limitation Act. In this view the consideration of the other alternative case of the defendants based on Article 144, Limitation Act (adverse possession) is unnecessary but we would express our views shortly on the point.

15. The evidence leads us to the conclusion that the Srip haltuli zemindars are all along in exclusive possession of these forty plots of Kalampore. No doubt they were included in the separate allotment of the Baliadi zemindars in the partition of 1896, but the judgment delivered in Title Suit No. 133 of 1904 shows that the Srip haltuli zemindars were in exclusive possession since 1894 up to 1905. This possession was asserted by the latter in that suit on the basis of title as proprietors to Touzi No. 273. But the decision given in that title suit nullified the adverse effect of that exclusive possession on the part of the Srip haltuli zemindars, because it was ; found that the latter were in possession only in their character as co-owners of the Baliadi zemindars. In effect the title of the Baliadi zemindars was declared to these plots of Kalampore. That judgment was pronounced on 29th June 1908. The proceedings u/s 145, Criminal P.C., started in the latter part of 1909 establish two things : (1) that the Srip haltuli zemindars continued to be in exclusive possession and (2) they again asserted a hostile title and that to the knowledge of the Baliadi zemindars.

(i) In the Cadastral Settlement proceedings these lands were recorded in the joint possession of the Baliadi zemindars and the Srip haltuli zemindars. The record of rights was finally published in 1917. Immediately thereafter two suits, one by the Purva Taraf and the other by the Paschim Taraf, were instituted by the Srip haltuli zemindars u/s 106, Ben. Ten. Act. The Purva Taraf withdrew their suit but the Pasehim Taraf fought out the Baliadi zemindars and ultimately succeeded. The final judgment in that case delivered by the Special Judge on appeal (Ex. 11 p. 11-131) establishes the fact that the Baliadi zemindars had no possession but the possession was with the Srip haltuli zemindars. There is no cogent evidence on the record which would lead us to hold that since then the Baliadi zemindars have succeeded in getting joint possession. We hold that since 1894 these forty plots have been in the exclusive possession of the Srip haltuli zemindars and that as that possession was held by them on an assertion that they were the exclusive owners thereof as proprietors of Touzi No. 273 made to the knowledge of the plaintiffs in November 1909 in the course of the

proceedings started u/s 145, Criminal P.C., their adverse possession commenced from November 1909 and their title was perfected by prescription in November 1921. We accordingly hold that the case set up by the defendants as based on adverse possession ought to succeed.

(ii) The plots in respect of which the second point is raised by the appellants are jalas, ghats, beels etc., which fall within the geographical limits of the properties described in Schedule Ka of the partition deed of 1896, Ex. A. The point depends upon the construction of para. 1 of that partition deed. By that deed the Baliadi zemindars and the Srip haltuli zemindars got in their respective separate allotments the properties described in Schedules Ka and Kha attached thereto. In para. 1 it was however provided that beels, jheels, ghats, paths, rivers, khals, halots and ditches within the geographical limits of Schedules Ka and Kha were to remain joint between them. In Schedules Ka and Kha it is however expressly mentioned that the lands mentioned in item 17 of Schedule Ga only were to be excluded from the separate allotments of the parties. That item includes only those beels, jheels, etc., which had been mentioned in another paper called the Ekw al and the area of which had been put together in column 6 thereof. In our judgment the schedule qualifies the general statement made in para. 1 of the deed and only these beels, jheels, etc., which were detailed in that Ekw al and not all beels, jheels, etc., which may be found to exist within the geographical limits of Schedules Ka and Kha were excluded from partition. Unfortunately, however, the Ekw al was not made an annexure to the deed. There is some dispute as to whether the area as mentioned in item 17 of Schedule Ga was measured in khadas, phakis, etc., or in bighas, eottas, etc. The translation is not correct. But that difference between the parties is not vital. It seems to us that the defendants cannot succeed on this point as they have not produced the said Ekw al.

(iii) Item 56 comprises the lands of village Muthajuri. The dispute between the parties relate to their respective shares in the lands recorded in Khatians Nos. 484 to 521 and 524 to 534 of that village. In them the defendants claim eight annas share, though they have been included in the separate saham, Schedule Ka of the partition deed, Ex. A. It is admitted that in them touzi No. 273 has a share. Generally speaking, the defendants would have about seven annas 12 gandas odd share in those lands included in Schedule Ka of the partition deed, Ex. A, which also appertains to touzi No. 273. But the defendants rely on para. 2 of the said deed. That paragraph makes a special provision with regard to the share of the Srip haltuli zemindars qua proprietors of touzi No. 273 in those lands which had been measured at the petty settlement of 1894 as the lands of village Muthajuri. The question thereupon depends upon one fact, namely, whether the lands of the aforesaid khatians were measured as the lands of Muthajuri at the petty settlement of 1894. To determine that fact a commissioner was appointed. His report (1-86) which is not challenged is that those lands were measured at the petty settlement of 1894 as parts of Muthajuri. We accordingly hold that in the lands of khatian Nos. 484 to 521 and 524 to 534 of Muthajuri the defendants

have eight annas share.

(iv) Item 3 of Schedule 2 consists of lands in Mouza Mehdiaseelai. Those lands have been allotted to the plaintiffs' separate allotment, Schedule Ka, at the partition of 1896. In the record of rights finally published in 1917, the defendants' share has been recorded as 8 annas 16 gandas odd share. The plaintiffs in their plaint challenged the correctness of that entry in the record of rights and claim the larger share, namely 8 annas 7 gandas odd share. The learned Subordinate Judge was too technical in not allowing the defendants to raise the question. But his decree that the defendants were entitled to about 7 annas 12 gandas odd share therein is correct, for the fact of those lands being included in Schedule Ka of the partition deed, Ex. A would give the plaintiffs the larger share they claim. The partition deed (Ex. A) rebuts the presumption afforded to those entries in the record of rights. We accordingly overrule this point raised by the appellants and confirm this part of the decree of the learned Subordinate Judge.

(v) Regarding the cross objection we are of opinion that the learned Subordinate Judge is correct in holding that the parties are to be compensated for the lands that have been taken out by Touzi No. 275 from Schedules Ka and Kha of the partition deed, Ex. A. But we think that specific directions ought to be given. In finding out the exact quantity of land that will have to be given by way of compensation the following facts must be taken into consideration: (1) the quantity of land so taken out from each of the Schedules Ka and Kha of Ex. A must be first ascertained; (2) their value at the time when those lands were taken out by Touzi No. 275 must be determined; (3) the compensation must be reckoned by that value and lands of equal value must be allotted to the party who would be entitled thereto, such value to be determined on the basis of prices prevailing as at the time of the institution of this suit.

16. Order No. 60 dated 31st January 1938 is to be supplemented in the manner indicated above. On these three points parties would be entitled to lead evidence. As the appellants have succeeded substantially they must have one half of the costs of this appeal from the contesting respondents. We do not interfere with the order for costs of the lower Court as made by the learned Subordinate Judge. There would be no order for costs for the cross objection.

Khundkar, J.

17. I agree.