

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Macpherson,
Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Rampini.*

JOGENDRA KISHORE ROY CHOWDHRY (PLAINTIFF) *v.* BROJENDRA
KISHORE ROY CHOWDHRY (DEFENDANT NO. 1) AND BISSESWARI
DEBI CHOWDHURANI (DEFENDANT NO. 2).^a

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March 23.

*Limitation Act (XV of 1877), Schedule II, Article 47—Code of Criminal Pro-
cedure (X of 1882), Chap. XL—Order respecting possession under—Order
under section 145, persons bound by.*

The limitation of three years prescribed by Article 47, Schedule II of the Limi-
tation Act (1877) applies to all persons bound by or parties to an order under
section 145 of the Criminal Procedure Code, and to any other persons who may
claim the property through any such persons under a title *derived subsequent*
to the order.

Ashkil Chunder Chowdhry v. Mirza Delawar Chowdhry (1) distinguished.

THE facts of this case, so far as they are material for this report,
appear in the judgment of the Full Bench.

The Division Bench (Hill and Rampini, JJ.) referred this
case to a Full Bench, with the following observations :—

“ This is a suit for the possession of certain land. The defence,
so far as is pertinent to this second appeal, is that the suit is barred
by limitation under Article 47, Schedule II, Act XV of 1877,
inasmuch as it is brought more than three years after an order by
the Magistrate under section 145 of the Criminal Procedure Code,
declaring the second defendant, Bisseswari Debi, to be in possession
of the land in dispute. The plaintiff, Jogendra Kishore Roy
Chowdhry, was party to the proceeding under section 145,
and so, of course, was the second defendant; but the
defendant No. 1, Brojendra Kishore Roy Chowdhry, who is the
adopted son of the defendant No. 2, was not a party to it. The
lower Courts have held that this suit is barred under the aforesaid
Article 47, and have dismissed the suit, and the plaintiff now
appeals and contends that this finding is wrong. ”

^a Reference to Full Bench in appeal from Appellate Decree No. 979 of
1893 against a decree of Babu Radha Krishna Sen, Subordinate Judge of
Mymensingh, dated the 1st of March 1893, affirming the decree of Babu Purno
Chunder Mitter, Munsif at Netrakona, dated the 15th of March 1892.

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“There can be no question that according to the terms of Article 47 the suit is barred. The Article lays down that three years is the period of limitation for a suit ‘by any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, Chapter XL, or by any one claiming under such person to recover the property comprised in such order.’ Now, the plaintiff was a party to the proceeding under section 145 of the Criminal Procedure Code. He would, therefore, seem to be bound by such order, for he was forbidden by that order to disturb the possession of the defendant No. 2, until evicted from the subject of dispute in due course of law; and he is now suing to recover the property comprised in such order. But the appellant contends that, notwithstanding the terms of the Article, he is not barred by it. He argues that the Article is applicable only when the person sued is the individual in whose favour the order under section 145 of the Code of Criminal Procedure has been made, because the possession of that person is the only possession which his opponent is, by virtue of section 145, bound to respect, and he contends that, if that person were to abandon possession immediately after the order or were ousted by a paramount title or were to transmit his possession to another, and a suit were then to be brought by the person, as against whom the order under section 145 had been made, against the person in possession, in none of these cases could the plaintiff be said with propriety to be bound by the order of the Magistrate.”

“His argument derives support from the case of *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdhry* (1), in which it has been held that Article 46 of the former Limitation Act, which corresponds with Article 47 of the present Act, can only apply between the parties whose possession was confirmed by the Magistrate, and each one of the parties to that proceeding who was claiming possession against them, and that it does not apply in favour of one of those parties who subsequently succeeds by a regular suit in ousting them.”

“Now, if this ruling be correct, this suit is clearly not barred, for the proceeding under section 145 of the Criminal Procedure

(1) 6 G. L. R., 93.

Code was not between the parties to this suit. No doubt it was between the present plaintiff and the defendant No. 2, but this is immaterial, for the defendant No. 2 disclaims all interest in the land which forms the subject of this suit, which is, therefore, one between the plaintiff and the defendant No. 1 only."

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"Considerable argument has been addressed to us as to whether the defendant No. 1 can be regarded as claiming under the defendant No. 2 in consequence of the terms of a compromise which was entered into in a suit between them with respect to the property of the defendant No. 2's husband, of whose estate the defendant No. 2 was the executrix, and which terminated in the defendant No. 2's making over to the defendant No. 1, 12 annas of the property, and in the defendant No. 2's retaining possession, with the consent of the defendant No. 1, of the remaining 4 annas to be enjoyed by her for her lifetime. But we think it unnecessary to express our opinion on the point at this stage, since it appears to us that the question at present is whether Article 47 is or is not confined in its application to suits brought against the individual in whose favour the order under section 145 has been made. Should it be held that it applies also in the case of persons claiming through or under that individual the question will then become material."

"If then, the above ruling is right, and if we follow it, the plaintiff's suit may be in time, and the question as to whether the defendant holds the property wholly or partially by title paramount to the defendant No. 2 will have to be considered and decided. If, however, it is not right the plaintiff's suit is out of time and the appeal must be dismissed."

"Now we must say we feel great hesitation in following the above cited ruling. It is certainly not warranted by the terms of Article 47 into which it virtually reads the words 'provided the suit is between the parties to the proceeding under the Criminal Procedure Code, in which the order respecting the possession of the property was passed,' which are not to be found there. It is, therefore, in reality a piece of legislation, and it gives no reasons for the view it expresses. Reason might perhaps be found for the ruling in the argument that it is hard on a person bound by an order under section 145 of the Criminal Procedure Code, that

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he should be bound, as it has been said, for all time, though the possession of the property may have passed from his opponent to some third party. On the other hand, it may be the policy of the law, and perhaps a sound one, that, when proprietors of land dispute respecting the possession of land in such a way as to cause a likelihood of a breach of the peace, the party found to be out of possession should have only three years instead of (not "all time" but) twelve years to bring his suit for recovery of possession in whosoever hands the land may be."

"On the whole, we are unable to agree with the ruling in the case of *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdhry*, and we, therefore, think proper to refer this case to a Full Bench to whom we propound the following question":—

"Whether, as laid down in *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdhry* (1), Article 47 of Schedule II of the Limitation Act applies only between the parties whose possession was confirmed by the Magistrate, and each one of the parties to that proceeding who was claiming possession against them, or whether it applies to any person bound by an order respecting possession of property made under section 145 of the Criminal Procedure Code, even though the defendant to the suit may not have been a party to that proceeding."

Babu Srinath Das (*Babu Jogesh Chunder Roy* with him) for the appellant. — I contend on the authority of *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdhry* (1) that the question should be answered in my favour. Reads the referring order. [MACPHERSON, J. — But the question does not arise in this case in the broad form in which it has been put.]

[PETHERAM, C. J. — We must dispose of the whole appeal to answer the question; it all depends whether the plaintiff is claiming through the person in whose presence the order was passed.]

Dr. Ras Bihari Ghose. — My extreme contention before the Division Bench was that Article 47 would apply, no matter in whose possession the property was at the time of the order, but I

also tried to distinguish the case of *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdry* (1). But the whole case may now be disposed of. [MACPHERSON, J.—The case does not lay down the law in that broad form.]

Babu *Srinath Das* (after stating the facts of the case).—The compromise, under which defendant No. 1 comes, was subsequent to the Magistrate's order. The question therefore is whether the Article would apply to a suit between plaintiff and defendant No. 1. Under section 145 a Magistrate does not decide the rights of the heirs of the parties; he protects only a personal right. [PETHERAM, C. J.—You say that the operation of the order is entirely gone as soon as a party dies?] The order does not say that any other person in possession will be protected. Defendant No. 2's possession was protected, but she is not now in possession. Then again could the heir be punished for contempt for disturbing the order? [MACPHERSON, J.—Could the party *against* whom the order is passed transfer his right and get twelve years?] There is special provision in the section as regards the party *against* whom the order is passed. *His* representative is bound. The Article in question does not cover the present case, and the case of *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdry* (1) supports me. The principle of decision was the same in a similar class of cases.—*Durgaram Roy v. Raja Narsing Deb* (2); *Nitta Kolita v. Bishnuram Kolita* (3); *Ohintamoni Sen v. Iswar Chandra* (4).

Dr. *Ras Bihari Ghose* (Babu *Boikanta Nath Das* with him) for the respondent.—The case cited is no authority for the proposition sought forward. In this case Bissoswari's possession was as trustee; and the beneficiary, the defendant No. 1, is bound by the order. Article 47 is not restricted to the person named in the order. If the ancestor happens to die after a period of three years from the date of the order, it cannot be contended that the heir would get twelve years to bring his suit. Under the last section of the Limitation Act the title would be extinguished at the end of three years. My extreme contention, that the Article would apply, if the property sought to be recovered was comprised in the order, no matter in whose possession the property was at the

(1) 6 C. L. R., 93.

(2) 2 B. L. R., 254.

(3) 2 B. L. R., 49 App.

(4) 3 B. L. R., 122 App.

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1896 time of the order, is no doubt opposed to the ruling in *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdry* (1); but it is not now necessary to press that contention in the present case.

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Babu *Srinath Das* in reply.

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The judgment of the Full Bench (PETHERAM, C. J., MACPHERSON, TREVELYAN, GHOSE and RAMPINI, JJ.) was as follows:—

This reference arises out of a special appeal, and under the rules of the Court it is necessary that this Bench, in addition to answering the question referred, should dispose of the special appeal.

The Subordinate Judge, who heard the first appeal, states the facts of the case as follows:—

“This was a suit to recover possession of a plot of land by declaration of the appellant’s title thereto, the appellant claiming the said land as appertaining to a *hat* called Naraingunge, *alias* Lakhigunge, situate in his zemindary No. 78. It appears that there was a proceeding with regard to the land under section 145 of the Criminal Procedure Code between the appellant on the one side and the defendant No. 1, Bisseswari Debi Chowdhurani, on the other, and the Deputy Magistrate of the Sub-Division of Netrokona passed an order on the 9th of April 1888 retaining Bisseswari Debi in possession of the land.”

The plaint in the present suit was filed on the 9th May 1891.

Towards the end of his judgment the Subordinate Judge proceeds: “The deposition of the witness Guru Das Chuckerbutty as well as the documents filed in the appeal show that Bisseswari Debi claimed a life-interest in 8 annas share of the Gouripur Estate under the will of her husband, though she was in possession as executrix of the whole estate. Subsequently Bisseswari Debi and the defendant No. 1, who is her adopted son, entered into a compromise by which a 4 annas share of the estate was allowed to Bisseswari to be enjoyed during her lifetime, while the remaining 12 annas share was given up to the defendant No. 1. The latter also got the land in dispute with other properties in his share by partition.”

Upon these facts both the Munsif and the Subordinate Judge have dismissed the suit as barred by limitation, it having been brought more than three years after the final order of the Deputy Magistrate. The case came before the Division Bench of this Court in second appeal, and the learned Judges who constituted that Bench, feeling themselves unable to agree with the decision of this Court in the case of *Aukhil Chunder Chowdhry v. Mirza Delawar Chowdhry* (1), have referred the question to the Full Bench "whether, as laid down in that case, Article 47 of Schedule II of the Limitation Act applies only between the parties whose possession was confirmed by the Magistrate and each one of the parties to that proceeding who was claiming possession against them, or whether it applies to any person bound by an order respecting that property made under section 145 of the Criminal Procedure Code, even though the defendant to the suit may not have been a party to that proceeding."

There can, we think, be no doubt that the limitation of three years applies to all persons bound by, or parties to, the order and to any persons claiming under or through any such persons, and that as far as that part of the judgment is concerned that is what was decided in the case above cited. Mr. Justice Pontifex in delivering the judgment of the Court said: "So far as the Magistrate's order is concerned the present plaintiffs were bound to respect the possession of the Roy defendants or those claiming under them, unless they instituted a suit within three years."

That is precisely the present case, as the Subordinate Judge finds that both the defendants claim the land under the same title; indeed that of the defendant No. 1 is derived through the defendant No. 2, as she was in possession of the whole estate of her husband as his executor at the time when she adopted the other defendant, and the present litigation is between persons, all of whom were bound by the order, as they were all either parties to it or derived their title to the property from or through some person, who was a party to it. It is true that the learned Judge in the case cited goes on to say: "That possession having been got rid of, and the defendants having obtained possession

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adversely to the Roy defendants, we do not think that Article 46 prevents the present plaintiffs from suing the present defendants in a regular suit for a declaration of title." But no such question arises in the present case, and we do not think we ought to express any opinion upon it. Our answer to the question referred is that the three years' limitation applies to all persons bound by, or parties to, the order, and to any other persons who may claim the property through any such persons under a title derived subsequent to the order.

The appeal will be dismissed with costs.

S. C. C.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice O'Kinealy, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose, Mr. Justice Devcrley and Mr. Justice Banerjee.

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 May 2.

JONARDAN DOBEY (PETITIONER) v. RAMDHONE SINGH AND OTHERS
 (OPPOSITE PARTIES.)^a

*Code of Civil Procedure (Act XIV of 1882), sections 100, 108 and 157—
 Ex parte decree—Defendant not appearing at an adjourned hearing—
 Act VIII of 1859, sections 119 and 147.*

Section 108 of the Code of Civil Procedure (Act XIV of 1882) applies to every case in which a decree is passed *ex parte* against a defendant, either under section 100 by reason of his non-appearance at the first hearing, or under section 157 by reason of his non-appearance at an adjourned hearing.

Zain-ul-Abdin Khan v. Ahmed Raza Khan (1) distinguished. *Sital Hari Banerjee v. Heera Lal Chatterjee* (2) overruled.

THE facts of this case appear sufficiently from the order of reference of Banerjee and Rampini, JJ., which was as follows:—

"This is a rule calling upon the other side to shew cause why an order of the Court granting an application for setting aside an *ex parte* decree under section 108 of the Code of Civil Procedure should not be reversed.

"The facts of the case, so far as they are necessary to be referred to for the decision of this Rule, are shortly these: The petitioner before us brought a suit in the Court below against three defen-

^a Full Bench Reference in Rule No. 880 of 1895 against an order of Mr. Warde-Jones, Munsif of Govindpur, dated the 8th January 1895.

(1) I. L. R., 2 All., 67.

(2) I. L. R., 21 Calc., 269.