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In my opinion the objection prevails and the value of the suit is held to be Rs. 2,600 on which court-fee has been paid and, as I find, on which the pleader's fee was assessed in the Court below. The memorandum of appeal will be returned to the appellant or his Advocate for presentation to the proper Court with an endorsement of the date on which it was presented to this Court and the date on which it is returned.

We have considered the question of costs. No doubt the plaintiff made a mistake in instituting the appeal to this Court, but objection was not taken by the respondents at any earlier stage. Even at the time of the hearing of the appeal the matter was not brought to our notice till the argument had advanced to a considerable extent. In the circumstances, the parties should bear their own costs of this Court.

AGARWALA, J.—I agree.

*Preliminary objection upheld.*

*Memorandum of appeal returned.*

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5,  
January,  
9, 10, 25.

## APPELLATE CIVIL.

Before Fazl Ali and Rowland, JJ.

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*Limitation Act, 1908 (Act IX of 1908), section 28 and article 47—proceeding under section 145, Code of Criminal Procedure, 1898 (Act V of 1898)—suit by unsuccessful party, against one who was not a party to the proceeding—suit instituted more than three years after the order of Criminal Court—article 47, whether operates as a bar—section 28, scope and significance of.*

\* Appeal from Appellate Decree no. 762 of 1931, from a decision of Maulavi Shaikh Ali Karim, Additional Subordinate Judge of Ranchi, dated the 13th January, 1931, reversing a decision of Babu Anjani Kumar Sahay, Munsif of Hazaribagh, dated the 29th July, 1929.

After the expiry of the period of limitation for instituting a suit for possession of any property the person who should have instituted such suit, but has failed to do so, ceases to have any right to the property; the law declares not simply that the remedy is barred but that the title is extinct in favour of the possessor.

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*Ganga Gobind Mundal v. The Collector of the Twenty Four Parganas*(1) and *Bhagwan Ramanuj v. Ram Krishna Bose*(2), followed.

Held, therefore, that a suit instituted by a party who was unsuccessful in a criminal proceeding under section 145, Code of Criminal Procedure, 1898, against one who was not a party to such a proceeding would be barred by article 47 of the Limitation Act, 1908, if the suit is instituted more than three years after the order of the Criminal Court.

*Aukhil Chunder Chowdhry v. Mirza Dilawar Hossein*(3) and *Pakki Adinarayana v. Namburu Suramma*(4), distinguished.

### Appeal by the plaintiffs.

The facts of the case material to this report will appear from the following judgment of Macpherson, J. who referred the case to the Division Bench.

MACPHERSON, J.—The question for decision in this second appeal is whether the Subordinate Judge of Hazaribagh was right in holding that the plaintiffs' suit must fail by reason of the provisions of article 47 read with section 28 of the Indian Limitation Act, 1908. Article 47 prescribes a limitation of three years beginning from the date of the final order in the case for a suit by a person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898, or any one claiming under such person, *to recover the property comprised in such order* and section 28 provides that at the determination of the period of limitation set out in the Act to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

The plaintiffs who are the appellants were entered in the record-of-rights finally published in 1913 or 1914 as raiyats of the holding set out in khata 58 comprising 6.71 acres in village Balak which is the khorposh tenure of defendant no. 1. The holding had been settled with them by Mahaut Dayal Das, thikadar under the landlord of Balak. The settlement was made just at the end of his thika and appears to have comprised some lands recently purchased by or in the

(1) (1867) 11 Moo. I. A. 345.

(2) (1919) 74 Ind. Cas. 561, P. C.

(3) (1880) 6 Cal. L. R. 93.

(4) (1925) 48 Mad. L. J. 372.

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names of the plaintiffs and also bakasht, abandoned or surrendered lands which ordinarily a temporary lessee could not settle. The plaintiffs if not the illegitimate sons of that mahanth, as is probable, were at least his servants. On his death there was a proceeding under section 145 of the Code of Criminal Procedure between his successor, the present defendant no. 2, and the present plaintiffs which terminated on the 8th November, 1921, in an order declaring the second defendant to be entitled to possession and forbidding any disturbance of his possession till his eviction from the property in due course of law, and the crops of the land which had been previously attached, were made over to him. As the present plaintiffs did not institute any suit to set aside the summary decision and recover possession of the lands within the period of three years from the date of the order ordained by article 47, *prima facie* their right to the property was extinguished under section 28.

In 1926, however, the first defendant as landlord of the village instituted a suit against the second defendant for a declaration of title and recovery of possession of the holding on the ground that the latter was not entitled to retain possession thereof, he or these plaintiffs-appellants as farzidars of his math having been fraudulently recorded in the record-of-rights. The defence of defendant respondent no. 2 that these plaintiffs-appellants had not been his farzidars but that he was in possession adverse to them, failed, and the landlord's suit was decreed. He obtained delivery of possession in spite of an application under Order XXI, rule 100, of the Code of Civil Procedure by these plaintiffs-appellants who thereupon brought the suit out of which this second appeal has arisen for a declaration of their raiyati title to and recovery of possession of the holding on the ground that they were the real raiyats. Some other allegations were made—in particular, they alleged that they had all along been in possession, hoping thereby to answer the anticipated defence of limitation—which, however, have been negatived by the courts of fact. The mahant defendant disclaimed all interest. The khorposhdar relied mainly on limitation. He pleaded that the defendants were farzidars of the math and that he instituted the suit against the mahant as soon as he learnt of the fraud committed upon the landlord.

The Munsif decreed the suit on the view that article 47 of the Limitation Act was not a bar since the khorposhdar now in possession was not a party to the proceeding under section 145 of the Code of Criminal Procedure, and he further held that the entry in the record-of-rights of plaintiffs as raiyats had not been rebutted and that the landlord was estopped from denying the tenancy as he received rent by suit or otherwise from the plaintiffs before he instituted the suit against the mahant.

In appeal the learned Subordinate Judge differed on both points and dismissed the suit.

The plaintiffs now appeal.

It is not now claimed that the question of estoppel has been wrongly decided. It is urged, however, in reliance of the decision in

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*Aukhil Chandra Chowdhry v. Mirza Dilawar Hossein*(<sup>1</sup>) that article 47 of the Limitation Act does not affect the suit. It was there decided that under the corresponding provision of the Limitation Acts of 1871 and 1877 the article could only apply between the parties whose possession has been confirmed by the Magistrate and each one of the parties to that proceeding who claimed against them, and that it did not apply in favour of one of the parties who subsequently succeeded by regular suit in ousting the parties put in possession by the Magistrate. In *Jogendra Kishore Roy Chowdhry v. Projendra Kishore Roy Chowdhry*(<sup>2</sup>) the matter came before a Full Bench of the Calcutta High Court in 1896. Hill and Champai, JJ. had referred the matter stating that they felt great hesitation in following the ruling of 1880. They observed:

"It is certainly not warranted by the terms of article 47 into which it virtually reads the words 'provided the suit 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 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 whatsoever hands the lands may be.

On the whole, we are unable to agree with the ruling in the case of *Aukhil Chander Chowdhry v. Mirza Dilawar Chowdhry*(<sup>1</sup>) . . ."

They therefore referred the question to a Full Bench.

"Whether, as laid down in *Aukhil Chander Chowdhry v. Mirza Dilawar Chowdhry*(<sup>1</sup>), 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.*"

The Full Bench, however, found it unnecessary to decide the exact point referred, as they held that the limitation of three years prescribed by article 47, schedule II, of the Limitation 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, and that as both the defendants in the case before them claimed the land under the same title and the litigation was between

(1) (1880) 6 Cal. L. R. 93.

(2) (1896) I. L. R. 23 Cal. 731, P. B.

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persons all of whom were bound by the order under section 145 question referred did not arise in the case before them.

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In the present litigation the plaintiffs-appellants' contention that the khorposhdar now in possession not having been a party to the proceeding under section 145, could not take advantage of article 47 of the Limitation Act, the Subordinate Judge met by pointing out that there was no answer to section 28 of that Act which provides for the extinguishment of the rights of these plaintiffs-appellants.

My own opinion inclines towards the view that the unsuccessful party in a proceeding under section 145 has no rights at all left to the property after the limitation of three years has expired, irrespective of the question of the identity of the person who is thereafter in possession of the property, that is to say, whether the person in possession is or is not within the category of persons successful in the proceeding under section 145 and persons claiming under them. Some support may be obtained for this view in the decision of the Madras High Court in *Solai Ammal v. Jogi Chetty*(<sup>1</sup>). Reference was made to some observations in *Pakki Adinarayana v. Namburu Suramma*(<sup>2</sup>) in regard to the two Calcutta cases, but the implication is not very clear. I also find it hard to discern how there can be a revival of a title of which there has been a statutory extinguishment.

To my mind the appeal should be decided by a Division Bench and I direct that it be placed before such a Bench. I would add that no other point was raised before me.

On this reference—

*Phulan Prasad Varma and Harinandan Singh,*  
for the appellants.

*S. M. Mullick* (for *S. C. Mazumdar*), for the respondents.

FAZL ALI, J.—The question to be decided in this appeal is whether the plaintiffs' suit is barred under the provisions of Article 47, read with section 28, of the Indian Limitation Act of 1908. The trial court held that the suit was not barred but the lower appellate court came to the opposite conclusion and dismissed the suit. Thereupon the plaintiffs filed this Second Appeal which has been referred to us by Macpherson, J. of this Court before whom it originally came up for hearing.

The plaintiffs have sued for a declaration of their title to and recovery of possession of certain lands, two-thirds of which were settled by one Mahant Dayal

(<sup>1</sup>) (1919) 56 Ind. Cas. 875.

(<sup>2</sup>) (1925) 48 Mad. L. J. 372.

Das with them in 1898 and the remaining one-third was purchased by them in 1901 under a registered sale deed. The plaintiffs were duly entered in the record-of-rights as raiyats of these lands but in 1921 one Mahant Sarup Narain Das (defendant no. 2) who had meanwhile succeeded Mahant Dayal Das claimed possession of the lands on the ground that the plaintiffs were benamidars of Mahant Dayal Das and in a proceeding under section 145 of the Code of Criminal Procedure which followed, an order was passed declaring Mahant Sarup Narain Das to be entitled to possession and forbidding any disturbance of his possession till he was evicted from the property in due course of law. More than three years after this order the first defendant Bhup Narain Das as landlord of the village instituted a suit against Mahant Sarup Narain Das (defendant no. 2) for declaration of his title to and recovery of possession of the holding and ultimately a decree was passed in his favour and he duly obtained possession under the decree in spite of an application made by the plaintiff under Order XXI, rule 100, of the Code of Civil Procedure. The plaintiffs thereupon brought the suit out of which this appeal has arisen.

The plaintiffs' main contention is that article 47 applies only as between original parties to a proceeding under section 145 or those claiming under them and that it cannot therefore be availed of by defendant no. 1 who was neither a party to the proceeding nor is a party claiming under one of the parties. It appears to me, however, that section 28 is a complete answer to their contention and I have no doubt that the suit has been rightly dismissed by the lower appellate court. Section 28 of the Indian Limitation Act runs thus:—

“ At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.”

It is not disputed that Mahant Sarup Narain Das (defendant no. 2) in whose favour the proceeding

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under section 145 was decided was in possession of the disputed land for more than three years and as no step was taken by the plaintiffs to question the order under section 145 and to evict defendant no. 2 in due course of law within a period of three years which is the period of limitation as provided by Article 47. It is clear that whatever title (if any) the plaintiffs had to the property was completely extinguished. In the circumstances it was not at all necessary for defendant no. 3 to implead the plaintiffs in the suit which they subsequently brought against Mahant Sarup Narain Das and the plaintiff not having taken any steps to evict Mahant Sarup Narain Das cannot now question the title of defendant no. 1. It is to be noted that section 28 of the Limitation Act provides in clear terms that after the expiry of the period prescribed for instituting a suit for possession of any property, the person who should have instituted such suit, but has failed to do so, shall cease to have any right to the property. As Macpherson, J. has already pointed out there cannot be a revival of title of which there has been a statutory extinguishment. That this is so will be clear on merely reading the section but the matter is also covered by very high authority. In *Ganga Gobind Mundul v. The Collector of the Twenty Four Parganas*(<sup>1</sup>) the Judicial Committee has clearly pointed out that after the expiry of the period of limitation the law declares not simply that the remedy is barred but that the title is extinct in favour of the possessor. In *Bhagwan Ramanuj v. Ram Krishna Bose*(<sup>2</sup>) Fletcher, J., dealing with section 28 of the Limitation Act, observed:—

“ The learned Judge, however, has considered that in a case of this nature, when the suit is barred, the title still remains vested in the plaintiff. That obviously is not so; under section 28 of the Indian Limitation Act, it is expressly provided that at the

(1) (1867) 11 Moo. I. A. 345, 363.

(2) (1919) 74 Ind. Cas. 561.

expiration of the period prescribed by the Act for limitation of suits, not only is the remedy barred but the right is gone. That is quite clear. That being so, the Statute has operated to revoke the estate, that was originally vested in the plaintiff, and to confer a statutory estate upon the defendants”.

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It appears that this case subsequently went up to the Judicial Committee and the decision of Fletcher, J., and the other learned Judge who had concurred in it was upheld.

I may here refer to two cases which have been greatly relied on by the plaintiff-appellants and which induced Macpherson, J. to refer the appeal to a Division Bench. The first case is that of *Aukhil Chunder Chowdhry v. Mirza Dilawar Hossein*(1) which was decided by the Calcutta High Court in 1877 and the facts of which were briefly these:—

In a proceeding under section 318 of the old Code of Criminal Procedure (to which section 145 of the present Code corresponds) the Magistrate in January, 1871, had directed possession to be given to certain persons who may be described as the Roy-defendants of the lands which were the subject-matter of the proceeding. So in 1872 the defendants who were appellants in the High Court instituted a suit against the Roy-defendants to set aside the Magistrate's order and in 1873 they obtained a decree for possession in respect of the disputed land. More than three years after the Magistrate's order the plaintiff-respondents instituted two suits in March, 1874, and January, 1875, respectively, one with respect to ten annas and the other with respect to the remaining six annas of the disputed land and they impleaded the defendant-appellants as parties to these suits in 1875. A question arose as to whether the suit was barred under Article 46 of the Limitation Act of 1877 (to which Article 47 of the present Act corresponds) and

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(1) (1880) 6 Cal. L. R. 98.



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the learned Judges of the Calcutta High Court held that it was not barred and observed :—

“ We think that Article 46 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 ”.

In a subsequent case, however, [*Jogendra Kishore Roy Chowdhury v. Brojendra Kishore Roy Chowdhury*(1)] Hill and Rampini, JJ., felt great hesitation in following this decision and in referring the matter to the Full Bench observed :—

“ 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 read 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 reason 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 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

(1) (1896) I. L. R. 23 Cal. 731, F. B.

recovery of possession in whosoever hands the land may be”.

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The Full Bench, however, found it unnecessary to decide whether the case in question had been correctly decided or not and in my opinion it is not necessary for us also to decide that point because the facts as we find them in that case were entirely different from those of the present, the principal distinguishing feature being that in that case before the expiry of the period of three years prescribed by the Limitation Act a suit had been brought by the defendant-appellants and the Roy-defendants who were the successful party in the proceedings under section 145 had been evicted from the possession of the property. That this was an important feature of the case is clear from the fact that the learned Judges of the Calcutta High Court laid some stress upon it observing as follows :—

“ So far as the Magistrate’s order is concerned, the present plaintiffs were only bound to respect the possession of the Roy-defendants, or those claiming under them, unless they instituted a suit within three years. That possession having been got rid of, and the defendants having obtained possession 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 declaration of title ”.

Section 145(6) of the Code of Criminal Procedure provides that if the Magistrate decided that one of the parties was or should be treated as being in possession of the land in dispute he shall issue an order declaring such party to be entitled to possession thereof *until evicted therefrom in due course of law*. Thus if the successful party is evicted by means of a suit by a person other than the parties to the proceeding within the period of three years, the order of the Magistrate being rendered ineffectual the shorter period of limitation ceases to run against the unsuccessful party, and

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there can therefore be no room left for the application of Article 47, and section 28 will not become operative until the expiry of the limitation period laid down in the ordinary law.

The second case relied upon by the appellant is that of *Pakki Adinarayana v. Namburu Suramma*(1) in which it was held (1) that Article 47 of the Limitation Act is not confined in its operation to orders under section 145 of the Code of Criminal Procedure but also applies to an order passed under section 522 of the Criminal Procedure Code restoring possession to a person who is dispossessed by a trespasser when a charge of criminal trespass is substantiated against the latter; and (2) that when a person against whom possession is claimed was not a party to the order in the criminal proceedings and did not claim under the party successful in such criminal proceedings and that order did not uphold his possession, the order is not binding on him and Article 47 is no bar to a suit against such a person. The facts of this case are not clearly set out in the reported decision, but as far as they can be gathered, they appear to be that one of the items of the disputed property which is referred to in the report as item no. 2 was the subject-matter of a charge of criminal trespass brought by the predecessors in title of defendants 1, 2 and 5 against the vendors of the plaintiffs and the latter being found guilty possession was restored to the former. Subsequently defendants 1, 2 and 5 who claimed at one time to be the tenants of the Maharaja of Vizianagram (defendant no. 4) disclaimed all interest in the land and in certain survey proceedings the Maharaja's title was found against and the third defendant in the suit being found to be in possession, the Maharaja as well as defendants 1, 2 and 5 acquiesced in the decision of the survey authorities. The plaintiff thereupon brought the suit against the third defendant whose

(1) (1925) 48 Mad. L. J. 372.

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contention that Article 47 was a bar to the suit was negatived and the suit was remanded to the subordinate Court who had dismissed it on the preliminary ground of limitation without trial on the merits. Now, it does not appear from the report whether the survey proceedings which resulted in favour of defendant no. 2 took place within three years of the order under section 522 of the Code of Criminal Procedure or more than three years after that order. If it took place within three years of the order then in this case also the order under section 522 having been practically nullified by the survey proceedings, the facts of this case would bear close resemblance to those of the case of *Aukhil Chunder Chowdhry v. Mirza Dilawar Hossein*(1) decided by the Calcutta High Court. However that may be, if the learned Judges of the Madras High Court in *Pakki Adinarayana v. Nambura Suramma*(2) or the learned Judges of the Calcutta High Court in *Aukhil Chunder's case*(1) intended to lay down that in no case can a suit instituted by a party who was unsuccessful in a criminal proceeding under section 145 or 522 of the Code of Criminal Procedure against one who was not a party to such a proceeding be barred by section 47, even though it may have been instituted more than three years from the order of the Criminal Court, I am unable to agree to such a wide proposition and would respectfully dissent from it.

In my opinion the plaintiff's suit was rightly dismissed by the lower appellate court and the appeal should be dismissed with costs.

ROWLAND, J.—I agree.

*Appeal dismissed.*

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(1) (1880) 6 Cal. L. R. 93.

(2) (1925) 48 Mad. L. J. 372.