

## FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice,  
Mr. Justice Lindsay, Mr. Justice Dalal, Mr. Justice  
Mukerji and Mr. Justice Banerji.

KUNJ BIHARI LAL (DEFENDANT) v. KUNWAR JAI MAL  
SINGH (PLAINTIFF).\*

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February,  
14.

*Dhardhura—Question re applicability of custom—Complete  
alteration in course of river—No evidence of similar  
change on previous occasions.*

Notwithstanding the admission of the existence, as between two villages situated on opposite banks of a river, of the custom of *dhardhura*, it was held that such custom was not applicable to the case of the river suddenly and completely altering its course and cutting off a large and recognizable area from one village, in face of the fact that no evidence was given that such a complete change of course had ever happened before for a space of twenty-two years. *Gulab Rai v. Girwar Singh* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. B. E. O'Connor, Dr. Kailas Nath Katju and Pandit Uma Shankar Bajpai, for the appellant.

Dr. Surendra Nath Sen, Munshi Ram Prasad and Pandit Ram Niwas Shukla, for the respondent.

MEARS, C.J., LINDSAY, DALAL, MUKERJI and BANERJI, JJ. :—This is an appeal from the judgement of Babu Gauri Prasad, Subordinate Judge, Pilibhit, who decided that the proved or admitted custom of “*dhardhura*” did not apply in the particular circumstances of the case, and consequently decreed the claim of the plaintiff.

There is in the northern part of the province a river called Deoha, and on the western bank lies the village

\*First Appeal No. 518 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 13th of November, 1924.

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of Ujhainia, and immediately opposite it the village of Mittersenpur. Nobody can predict at the end of any monsoon where that river will finally settle, and an examination of the map shows how extremely unstable has been its course from 1306 *fasli* to 1329 *fasli*. Mr. O'Connor has handed up a map marked in yellow, blue, green and red, so as to impress upon us the astonishing character of the changes which have taken place in the site of the river during the last 22 years. It may be taken as completely certain that there does exist between the *zamindars* of Ujhainia and Mittersenpur the custom of accepting the deep stream of the river, wherever it may happen to be, as the boundary between the villages, and there is no instance of any resident of Ujhainia crossing the river and laying claim to land that for the moment may appertain to Mittersenpur. Similarly it is agreed that no resident of Mittersenpur ever has crossed over the river to lay claim to land which at the moment has passed to the Ujhainia side. *Khewats* from 1306 *fasli* have been produced which show that in the year 1898 the village of Ujhainia consisted of 189 acres. 11 years later, namely, in 1909, the area had increased to 360.33 acres. This increased amount represented land which hitherto had belonged to the *zamindars* of Mittersenpur. In 1910 there was an increase of some 17 acres to the advantage of Ujhainia, and in the years 1911 and 1912 a slight drop, when 33 acres passed back to Mittersenpur. In 1913 no less than 72 acres were added to Ujhainia. In 1914 the position was practically stationary, but in 1915 an addition of 50 acres brought up the area of Ujhainia to 465.56 acres. By 1919 that area had dropped to 425.18. In 1922 the river entirely altered its course and cut across from one point to another, with the result that that added to the Mittersenpur side of the river an area of no less than 360 acres, thus more than restoring the losses of Mittersenpur of the

previous twenty-four years. On the map which Mr. O'Connor has handed in, and which has been initialled "G. M. 1, 16th January, 1928", the course is represented by the red pencil markings. The blue markings are the course of the river before 1922. At page 19 of the record there is a very simple sketch on a small scale which illustrates the position.

This matter originally came before a Division Bench, and at the hearing before them it was assumed by all parties that the statement of the plaintiff, that in 1329 *fasli* nearly 2,000 *bighas* of land appeared on the opposite bank, meant that the area included within the arc on the sketch at page 19 was 2,000 *pakka bighas* or roughly 1,250 acres, and that this was a suit by the zamindar of Ujhainia, who had only suffered a loss of approximately one quarter of the land which had passed over to the Mittersenpur side. It now appears that the total area of land affected by the sudden change of the course of the river is not more than 360 acres in all.

There being a question as to whether this case was distinguishable from the case of *Gulab Rai v. Girwar Singh* (1), it was considered desirable to have this matter re-heard before a Full Bench. During the arguments before the Full Bench the order-sheet was referred to, and it then appeared that the plaintiff's statement made to the court, printed at page 5, was not challenged by the defendant when he stated that never before had the river suddenly changed its course. The defendant elected to call no evidence, but it would have been open to him to have proved, had such been the fact, that in the years 1913 and 1915 the 72 acres and 50 acres, respectively, were lost to the village of Mittersenpur, not by encroachment, but by the river definitely deserting its old channel and cutting a new channel leaving undisturbed recognizable land between the new channel and the old.

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It has been argued before us that it would be improper for us, having regard to the description of this river given at page 11 and onwards of the Pilibhit Gazetteer, to assume that in 1913 and 1915 the river suddenly changed its course by cutting for itself a new channel. The Gazetteer shows that in the rainy season the Deoha becomes a violent, turbulent river, and one of such character that it might in consequence of heavy rains gradually shift its channel so as to transfer from one side to the other even so considerable an area as 72 acres. The learned Subordinate Judge has said, and we agree with him, and indeed we think it to be the kernel of the whole case, that if the defendant had obtained an admission from the plaintiff that on two previous occasions, namely, in 1913 and in 1915, the river had cut a completely new channel and that the custom of the deep bed of the stream was followed, he would have held that the custom, as alleged by the defendant, was wide enough to cover the happenings of 1922. Whilst there is abundant evidence that there is a custom of dhardhura'', there is no evidence that such an event ever before happened as the complete abandonment of the old channel and the making of a new one by the river. On the ground, therefore, that the defendant failed to give evidence on this essential point, we uphold the decision of the learned Subordinate Judge and dismiss this appeal with costs.

*Appeal dismissed.*