

Before Mr. Justice Dalal and Mr. Justice Pullan.

GULAB RAI AND ANOTHER (DEFENDANTS) v. GIRWAR SINGH (PLAINTIFF) AND TIKA RAM AND OTHERS (DEFENDANTS).\*

1926  
November, 22.

*Bengal Regulation No. XI of 1825 (Alluvion and Diluvion)*  
—Custom determining boundary of estates divided by a river—Dhardhura—Sudden or gradual accretion.

If it is satisfactorily proved that the custom of *dhardhura* subsists as between the owners of contiguous estates divided by a river, it is no reason for not applying the custom that in a particular instance it may seem to press hardly on one side or the other, e.g., on account of a very considerable or sudden change in the course of the stream. *Isree Singh v. Mirza Shurfoodeen* (1) and *Shohrat Singh v. Ghulam Ezid* (2), referred to.

THE facts of this case, so far as they are material for the purposes of the present report, appear from the judgement of the Court.

Dr. *Surendra Nath Sen*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

DALAL and PULLAN, JJ. :—This appeal arises from a suit brought by the owners of the village lands of Jia Nagla to recover from the owners of the village lands of Timaria Ghat a considerable area of land transferred from one side of the Mahewa river to the other as the result of a change in the course of the stream. The plaintiff Girwar Singh himself admits that the custom of *dhardhura* prevails between the villages of Jia Nagla and Timaria Ghat, and there is abundant documentary evidence dating back to the first settlement to prove this fact. The meaning of the custom of *dhardhura* is that the deep stream is to be regarded as the boundary between two

\* First Appeal No. 322 of 1923, from a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 24th of March, 1923.

(1) (1869) 1 N.-W.P., H.C.R., 224. (2) (1920) 18 A.L.J., 195.

1926

---

 GULAB  
 RAI  
 v.  
 GIRWAR  
 SINGH.

villages. The custom is sanctioned in the Bengal Alluvion and Diluvion Regulation, XI of 1825, which lays down in the second section that "whenever any clear and definite usage . . . may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on one side and accession on the other) the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties." In the present case immemorial usage is established by the old settlements, and it is not denied that on several occasions in the past, land cut off by the river has been incorporated in the opposite village.

The learned Subordinate Judge has decreed the plaintiff's suit and restored to him land which is now on the opposite side of the river, not because the custom of *dhardhura* does not apply to these villages, but because in his opinion the custom cannot be intended to cover the present case. Undoubtedly the decision of the learned Judge was affected by his personal opinion that the whole custom is inequitable, being "an aggravated form of gambling in which not only who wins or loses, but also the amount of the stake, is left to be determined by the caprice of a river due to natural causes." We need only point out that there is another side to the picture. By allowing their constantly shifting boundary to be determined by natural, or possibly in their opinion supernatural, causes, the parties have for many years, perhaps centuries, lived together in peace, without bloodshed and without litigation. If this

is gambling, it is at least fair gambling in which neither party can take an advantage of the other.

The Judge seeks to base his view that the whole custom is inequitable on a decision of the Allahabad High Court of the year 1869—*Isree Singh v. Mirza Shurfoodeen* (1). This ruling will not justify condemnation of the whole custom, but only its application to cases where there has been a sudden and not a gradual accretion, and so he argues that the accretion in the present case was brought about by abnormal circumstances, whereas the custom must refer only to normal circumstances. We have perused the judgement in the case of *Isree Singh v. Shurfoodeen* (1) and we find that the Judges were of opinion that the custom of *dhardhura* when applied to lands gained otherwise than by gradual accretion is opposed to equity, "and it is doubtful how far in extreme cases in which it would lead to the transfer of large tracts of land, the courts would be warranted in applying it." From this they go on to say that they would not be at liberty to admit the plaintiffs' claim "unless similar claims in similar cases in their neighbourhood were shown to have been heretofore admitted." The case was twice remanded, but the evidence of previous examples was held to be insufficient to prove the custom, and the suit failed on this account. The judgement is, therefore, not a clear authority for the view that *dhardhura* cannot apply to cases of a sudden and considerable diversion of a stream.

Nor is the reference of the learned Judge to the more recent decision of this High Court in *Shohrat Singh v. Ghulam Ezid* (2), more helpful to his argument. In that case it was found that the evidence did not establish the existence of any custom of *dhardhura*, and a decision based on the non-existence of

(1) (1869) 1 N.-W.P., H.C.B., 224.

(2) (1920) 18 A.L.J., 196.

1926  
 GULAB  
 RAI  
 v.  
 GERWAR  
 SINGH.

the custom can be no authority in a case where the custom is not only proved but admitted.

Thus we have to decide merely whether the lower court in the absence of authority was justified in finding that the custom of *dhardhura* only applies "to the shifting of the main channel of a stream from one side to another in the much wider sandy bed," and not to more violent changes brought about by outside agency. We may say at once that the change of river bed of the Mahewa took place in the year 1326F., and probably again in the two succeeding years, owing to the action of the neighbouring river Ganges, which broke one of the embankments constructed either in the Moradabad or Aligarh district. The exact nature and position of the breach is not clearly explained, but it is hardly material for the purpose of determining this appeal. We have referred to the District Gazetteer of Budaun published in 1907, and find the following passages. At page 8, writing of the Ganges, the author observed:—"Numerous islands occur along its course, and as the deep stream rule prevails, they are apt to be transferred from one district to another several times within the course of a few seasons." Of the Mahewa he writes at page 9:—"The Mahewa, which originally was nothing but a local drain, now acts as an overflow channel of the Ganges, owing to changes that have occurred in Moradabad. Consequently, before it enters this district, its narrow and often tortuous bed is filled to overflowing, with the inevitable result of serious flooding when the stream is swollen by the drainage brought down along its small tributaries. These inundations fill the whole of the Mahewa valley, and the country is swept by a destructive rush of water, which leaves nothing behind but damage on every side . . . In many

places the river by its efforts to straighten its winding course, has cut away much good land, carving for itself experimental channels and then abandoning them." Further, at page 16, we find:—"The worst damage is done by the Mahewa which frequently destroys good land and leaves behind it a barren silt. In former days serious floods in this river seldom occurred, but about 1871 a large volume of water was transferred from the Ganges into the Mahewa channel." A reference to the map shows that the Mahewa is so close to the Ganges during its course in the Budaun district that it must always have been endangered by the floods of that river, and we have the authority of the Gazetteer for holding that the floods of the Mahewa caused by the Ganges have been severe at least since 1871. After that date there was a settlement in which the condition of *dhardhura* was affirmed both in Jia Nagla and in Timaria Ghat, and it seems idle to suppose that the riparian owners affirmed the custom in the belief that it would not prevail when the Mahewa altered its course on account of the action of its larger neighbour. We are also doubtful whether the changes in the "much wider sandy bed" have any reality, in view of the reference in the Gazetteer to the narrow and tortuous bed of the stream.

We find that in the present case the floods originating with the Ganges have changed the course of the Mahewa to such an extent that in the course of three seasons 136 bighas of land have gone over from the Jia Nagla side of the river to that of Timaria Ghat. Previous khewats show no such large accretion in the past, but the mere extent of the land transferred cannot be the factor to determine whether the custom of *dhardhura* proved to be in existence

1926

---

GULAB  
RAI  
v.  
GIRWAR  
SINGH

1926

GULAB  
RAI  
v.  
GIRWAR  
SINGH.

can be enforced. Considerable losses are contemplated by the Government which allows a zamindar, who loses 5 per cent. of his whole estate, to obtain remission of land revenue. Another suggested distinction is between sudden and gradual accretion. But this is a difficult test to apply to these Indian streams. Their action is always the same. They swell from little or nothing to a flood extending sometimes for miles. When the flood subsides it is seen that the channel has changed; we find it impossible to say that an accretion so caused is gradual, and we do not believe that the riparian owners who affirmed the custom intended to restrict its operation to gradual accretion. On the contrary we are of opinion that they had no more clear idea of a gradual accretion than the plaintiff Girwar Singh, when he tried to explain it in court, and could only say that it meant the erosion of a yard or two.

We appreciate the careful consideration given to this case by the learned Subordinate Judge, and his wish to avoid doing what he believed to be an injustice, but in our opinion his view was mistaken. The custom of *dhardhura* has been proved to exist as between the two contesting parties. It must be applied whenever the river by changing its course throws land from one side to the other. It applies to the present case, therefore, although the reason for the change in the course of the Mahewa river is to be found in the action of the Ganges. All customs of this nature involve occasional hardship for one side or the other, but that is no reason for the abrogation of the custom by a court.

In our opinion the land so transferred to the opposite bank of the Mahewa has become part of the village land of Timaria Ghat, and the plaintiffs are not entitled to recover it.