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moral. Apart from that we find on the facts that the transaction was not greatly speculative. It was certainly risky. As we have held that the debt was not tainted with immorality we uphold the decision of the court below and dismiss this appeal with costs.

*Appeal dismissed.*

### APPELLATE CIVIL

*Before Mr. Justice Gokaran Nath Misra and Mr. Justice Muhammad Raza.*

FAQIR BAKHSH SINGH (PLAINTIFF-APPELLANT) v.  
UDERAJ SINGH (DEFENDANT-RESPONDENT).\*

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*Under-proprietary rights—Certain co-sharers held occupancy tenants by one court and on appeal by only one co-sharer he was held to be an under-proprietor at the time of first regular settlement—All the co-sharers recorded as under-proprietors in the regular settlement and the subsequent settlement—Recognition as under-proprietor and transfers by them as such—Co-sharers, whether to be treated as occupancy tenants or under-proprietors.*

Where at the time of the first regular settlement a number of co-sharers obtained decrees from the court of the Extra Assistant Commissioner granting them under-proprietary rights in different lands but on appeal by the taluqdar the Settlement Officer held that they will be deemed to hold those lands in occupancy rights only and not as *sir* and only one of the co-sharers appealed against that decree to the Financial Commissioner who reversed that order and restored the order of the Assistant Commissioner, though the other co-sharers had not appealed but after the order of the Financial Commissioner all of them were recognised by the Taluqdar as holding under-proprietary rights in the lands held by them and they were recorded as such in the papers prepared at the first regular settlement as well as in the subsequent settlement and assessed to rent accordingly and in a subsequent litigation the defendant co-sharer's ancestors claimed

\*Second Civil Appeal No. 36 of 1929, against the decree of Pandit Kishan Lal Kaul, Additional Subordinate Judge of Fyzabad, dated the 17th of October, 1928, confirming the decree of Pandit Hari Shankar Chaturvedi, Munsif Haveli, Fyzabad, dated the 14th of August, 1928, dismissing the plaintiff's suit.

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under-proprietary rights which were not questioned by the Taluqdar and they further made transfers as under-proprietors from time to time which were also never questioned by the taluqdar, *held*, that the effect of the decree of the Financial Commissioner was that not only the co-sharer who had appealed but also the defendant and the other co-sharers who had not appealed became under-proprietors of the land held by them and that the decree of the Settlement Officer cannot be referred back to show that they were only occupancy tenants. *Bipin Chandra Chatterji v. Dewan Singh* (1), and *Prithipal Singh v. Ganesh Din Singh* (2) relied on.

Mr. *Radha Krishna* for Mr. *Ali Zaheer* for the appellants.

Mr. *R. D. Sinha*, for the respondent.

MISRA and RAZA, JJ. :—This is an appeal from a decree of the Additional Subordinate Judge of Fyzabad, dated the 17th of October, 1928, affirming a decree of the Munsif, Havali, Fyzabad, dated the 14th of August, 1928.

The litigation which has given rise to this appeal relates to the property of one Sheobaran Singh, who died in 1914. The land in dispute is situate in village Intgaon in the district of Fyzabad. Sheobaran Singh died issueless. He executed a will in favour of the defendant's father Sahib Bakhsh Singh on the 17th of January, 1914. The plaintiff Faqir Bakhsh Singh is the nephew of Autar Singh. He claims the land in dispute as the heir of Autar Singh, who is alleged to be the heir of Sheobaran Singh deceased. Autar Singh died in or about 1926. Though it is neither alleged nor shown that Autar Singh ever got possession of the property in suit as the heir of Sheobaran Singh, but the plaintiff alleges that he was in possession of the property in the absence of Autar Singh, who was in Burma, and that the defendant's father Sahib Bakhsh Singh dispossessed him (plaintiff) in 1918. It is noticeable that

(1) (1925) 2 O.W.N., 894.

(2) (1922) 25 O.C., 396.

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Autar Singh never sued for possession of the property in suit but the present suit was brought by the plaintiff Faqir Bakhsh Singh on the 16th of February, 1928.

The suit was contested by the defendant Uderaj Singh, son of Sahib Bakhsh Singh deceased on various grounds. He set up the will executed by Sheobaran Singh in favour of his (defendant's) father, Sahib Bakhsh Singh, on the 17th of January, 1914, and alleged further that Sheobaran Singh was holding the land in suit as an under-proprietor. We are not concerned with other points taken in defence.

The first court dismissed the suit holding that the will set up by the defendant was genuine and that Sheobaran Singh was holding the land in suit as an under-proprietor and was, therefore, competent to execute the will in favour of the defendant's father.

The plaintiff appealed questioning the correctness of the finding of the first court as to the nature of the tenure under which the land was held by Sheobaran Singh. He contended that Sheobaran Singh was holding the land simply as an occupancy tenant and could not, therefore, execute any valid will in favour of the defendant's father. He thus contended that the will set up by the defendant was invalid and could not confer any title on the defendant. Though in his memorandum of appeal the plaintiff did not question the finding of the trial court about the genuineness of the will but his plea-der applied to the court of first appeal for permission to amend the memorandum so as to raise also the question that the will was not genuine. The application was rejected by the learned Additional Subordinate Judge. The learned Additional Subordinate Judge agreed with the finding of the learned Munsif that Sheobaran Singh was holding the land as an under-proprietor and that he was competent to execute the will. The result was that

the plaintiff's appeal was dismissed by the learned Additional Subordinate Judge.

The plaintiff has now come to this Court in second appeal.

We think there is no substance in this appeal.

The appellant's learned Counsel contends that the learned Subordinate Judge was wrong in disallowing the appellant from raising the question of the genuineness of the will but we think this contention is not well founded. In our opinion the learned Subordinate Judge was perfectly right in rejecting the application of the plaintiff's pleader. It is not disputed that the defendant's father Sahib Bakhsh Singh had obtained letters of Administration from the Court of the District Judge, Fyzabad, on the 8th of September, 1917. It is exhibit 8 and with this is attached a copy of the will in question. The plaintiff was a party to these proceedings. He had questioned the genuineness of the will but the point was decided against him. These letters of Administration were granted to Sahib Bakhsh Singh after contest of the plaintiff on the ground that the will was a forgery. The matter was taken in appeal to the Court of the Judicial Commissioner of Oudh, but the will was held to be genuine by that court also. It is now too late for the plaintiff to question the genuineness of the will. Under these circumstances we think the learned Subordinate Judge was perfectly right in rejecting the application made by the plaintiff's pleader. The genuineness of the will was not, very properly, questioned by the plaintiff's pleader in his memorandum of appeal. This point must, therefore, be decided against the plaintiff in this appeal.

Now the only question for decision is whether Sheo-  
baran Singh was holding the land in dispute as an under-  
proprietor or simply as an occupancy tenant. It is not

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denied that the predecessors or the ancestors of Sheobaran Singh had obtained a decree from the Court of the Extra Assistant Commissioner against the then taluqdar of Khapradih at the time of the first regular settlement in respect of the land in suit. Under that decree the ancestors of Sheobaran Singh and certain other persons were granted under-proprietary rights in respect of the lands held by them including the land in dispute. This decree was passed on the 18th of June, 1869, in the leading case of one Prayag Singh. It appears that the Taluqdar appealed from the decree or decrees passed by the Extra Assistant Commissioner to the Settlement Officer. The appeals were filed against Prayag and also against the ancestors of Sheobaran Singh and others. The Settlement Officer reversed the decision of the Extra Assistant Commissioner and held that Prayag Singh and the defendant's ancestors and others "will be deemed to hold the land decreed by the Extra Assistant Commissioner in occupancy rights only and not as *sir*." Prayag Singh alone filed an appeal in the Court of the Financial Commissioner of Oudh, who by his judgment dated the 24th of February, 1870, set aside the decree of the Settlement Officer and restored that of the Extra Assistant Commissioner. Though this judgment of the Financial Commissioner was not passed in favour of the ancestors of Sheobaran Singh, as the appellant before him was only one person, namely Prayag Singh, but it appears that after the passing of that judgment all the persons who had claimed under-proprietary rights against the taluqdar were recognised as under-proprietors of the lands held by them. They were recorded as such in the papers prepared at the time of the first regular settlement and also in the papers at the time of the subsequent settlement which, we understand, was made in 1301 Fasli. The entry in the *khewat* prepared at the settlement of 1301 Fasli shows

that the land in dispute was treated as an under-proprietary holding and rent was assessed on it accordingly, by the order of the Settlement Officer. It is also in evidence that there was some litigation between the ancestors of Sheobaran Singh and the taluqdar in 1883 and in that litigation they had claimed the rights of an under-proprietor. These rights were not questioned by the Taluqdar in that litigation. It is also in evidence that the ancestors of Sheobaran Singh and their co-sharers made transfers as under-proprietors from time to time and these transfers also were never questioned by the Taluqdar. We think the evidence on record is quite sufficient to show that the title of Sheobaran Singh and his ancestors as under-proprietors has all along been recognised since the 24th of February, 1870. It was held by the late Court of the Judicial Commissioner of Oudh in the case of *Bipin Chandra Chatterji v. Dawan Singh* (1), under circumstances similar to those of the present case that Dawan Singh, whose predecessor-in-title had not appealed against the Settlement Officer's judgment, which governed the case of all claimants of the under-proprietary rights at the time of the first regular settlement, must be treated on the footing of an under-proprietor. In that case also the final decree in favour of certain agricultural holders was of occupancy tenancy; but they were consistently treated at the time of settlement and afterwards as under-proprietors and whatever may have been the original effect of the decree, their title as under-proprietors was recognised for a long time. It was held that where in 1870 a Settlement Officer passed a decree declaring certain agricultural holders to be holders in occupancy right but in a subsequent litigation they were treated as *sir* holders and under-proprietors and were entered as such in the settlement record and in the abstract prepared at

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the time of the first settlement, the decree of the Settlement Officer cannot be referred back to show that they were occupancy tenants and not under-proprietors. In our opinion the effect of the decree which was passed in favour of Prayag Singh was that not only he but all his co-sharers in the village became the under-proprietors of the lands held by them. They were recognised as such by the Taluqdar and their title as under-proprietors was never questioned by the Taluqdar since then. The principle of the decision in the case of *Prithipal Singh v. Ganesh Din Singh* (1) decided by their Lordships of the Privy Council also helps the defendant in this case. In that case, in the settlement of 1867 the predecessors of the defendants held no greater interest in the village in suit than that of a *thekadar* and a decree was also passed in 1868 declaring that they had only *thekadari* and not *pukhtadari* rights. But ever since 1869, in the *wajib-ul-arz*, the *khewat*, the recent settlement and the various other court proceedings they were recorded and treated as *pukhtadars*. It was held that whatever may have been the original effect of the decree but as from that time till now the estate had been regulated upon the footing that the defendants possessed *pukhtadari* rights a title so long recognised could not now be overthrown. We, therefore, hold agreeing with the lower courts that Sheobaran Singh was holding the land in dispute as an under-proprietor and that he was competent to execute the will dated the 17th of January, 1914.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1922) 25 O.C., 396.