

both the courts. The defendants Nos. 3 to 8 were discharged from the suit. We order accordingly. Let a decree be prepared in terms of the compromise.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith
SUNDAR LAL AND OTHERS (APPELLANTS) v. KING-EMPEROR
 (COMPLAINANT-RESPONDENT)*

Criminal Procedure Code (Act V of 1898), section 164—Police producing eye-witness before Magistrate for recording his statement—Magistrate recording statement after two days—Evidence, how far to be believed—Witness deposing to be eye-witness to a murder but not giving information—Witness disbelieved as against some accused—Evidence, how far to be accepted.

Where an alleged eye-witness of a crime, whose name is not mentioned in the first information report comes in doubtful circumstances three days after the commission of the crime and makes his statement before the investigating police officer, is produced by the police before a Magistrate with a request to record his evidence under section 164 of the Code of Criminal Procedure but the Magistrate directs him to appear before him two days later thus compelling the witness to remain for two days more in the company of the police, this circumstance along with others makes the evidence of the witness very doubtful.

Although it may not be said that the evidence of a person who has seen a murder committed and does not give any information thereof is little better than that of an accomplice, his evidence is to be looked upon with suspicion.

If a witness is capable of falsely swearing away the lives of some accused, he could very well be deemed capable of swearing away the lives of the other accused even though the latter may be innocent and so if the witness is disbelieved as against some accused his testimony should not be accepted as against other accused.

Dr. J. N. Misra and Mr. Lachhmi Narain, for the appellant.

*Criminal Appeal No. 524 of 1933, against the order of S. Khurshed Husain, Additional Sessions Judge of Kheri, dated the 25th of November, 1933.

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The Assistant Government Advocate (Mr. H. K. Ghosh) for the Crown.

NANAVUTTY and SMITH, JJ.:—This is an appeal against a judgment of the learned Additional Sessions Judge of Kheri convicting the appellants Sundar Lal, Sri Ram, Munnu Lal, Kallo and Raj Bahadur of an offence under section 302 of the Indian Penal Code, and sentencing them each to transportation for life.

The story of the prosecution is briefly as follows:

On the night between the 16th and 17th of June, 1933, Bachu Lal was sleeping in his *kathal* and mango grove outside the abadi of village Barhwari-Udho in order to keep watch over the crop of the trees. One Bihari, Kachhi (P. W. 4), of the same village had his vegetable field close by, and he too is said to have been sleeping that night on a *takht* (wooden platform), close to the cot on which Bachu Lal was. A little after mid-night, when the moon had risen, Bihari was awakened by the rustling of the dry leaves caused by the tread of some seven or eight men who were coming towards the cot on which Bachu Lal was sleeping. By the light of the moon Bihari recognized seven out of the eight men. The men whom he recognized were Sundar Lal, Rameshur Dayal, Sri Ram, Munnu Lal, Mahadeo, Kallo and Raj Bahadur. They were all armed with *lathis*, and one of them had also a *banka* with him. Two of these men, Rameshur and Mahadeo, stood near the cot of Behari in order to prevent him from interfering with the commission of the murder, while four of the others caught hold of Bachu Lal and pressed him down with *lathis* and one of them began to hack him with the *banka*. All the seven men recognized by Bihari were known to him from before the occurrence, but Bihari could not identify the man whom he saw standing towards the feet of the deceased at the time of the murder. After murdering Bachu Lal all the eight men left the place. Before doing so, however, they had threatened to kill Bihari in case he disclosed their names to anybody. After the murderers

had left the place Bihari himself ran away to his house on account of fear, and from his house the next morning he went to village Barwar which is two miles from Barhwari-Udho, to the house of his uncle Reoti. On the third day after the commission of the murder, that is, on the 19th of June 1933, Bhup chaukidar came to Bihari at Barwar and told him that Sub-Inspector Mohan Singh wanted him. It was in the afternoon of the 19th of June, 1933, that the statement of Bihari was recorded for the first time. The report of the murder was made at Thana Pasgawan by Ghanshyam, brother of the deceased Bachu Lal, at 9 a.m. on the morning of the 17th of June. In that report the names of the assailants of Bachu Lal were not mentioned. Sub-Inspector Mohan Singh, officer in charge of police station Pasgawan, who had recorded the first information report, at once proceeded to the spot, prepared a *panchayatnama* (exhibit 8), and sent the corpse of Bachu Lal to the dispensary at Gola for post-mortem examination. A site plan (exhibit 10) was also prepared by the investigating officer. After recording the statement of Bihari on the 19th of June, the Sub-Inspector arrested Sundar Lal, Munnu Lal, Sri Ram, Kallo and Mahadeo. Raj Bahadur and Rameshur Dayal surrendered themselves in Court. After completing his investigation Sub-Inspector Mohan Singh prosecuted all the seven persons in the Court of Thakur Raja Ram Singh, a Magistrate of the 1st class in Kheri, on a charge under section 302 of the Indian Penal Code, and all the seven accused were committed to stand their trial at the Court of Session.

The learned Additional Sessions Judge of Kheri acquitted Rameshur Dayal and Mahadeo of the charge under section 302 of the Indian Penal Code and convicted the remaining five accused for an offence under section 302 of the Indian Penal Code and sentenced them each to transportation for life, as mentioned above.

The medical evidence and the post-mortem report of Thakur Lakhan Singh, Medical Officer in charge of the

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dispensary at Gola, clearly show that in respect of the death of Bachu Lal an offence of wilful murder was committed by some person or persons. The fact that Bachu Lal was murdered is not denied by the learned counsel for the appellants. It is therefore unnecessary to examine the medical evidence at any length. There were 13 incised wounds on the body of Bachu Lal, and the cause of death as given by the medical expert was haemorrhage and shock resulting from the multiple incised wounds on the face and neck of the deceased caused by some heavy sharp-edged weapon like a *gandasa* or *banka*. The principal point for determination in this appeal is whether the appellants are proved, upon the evidence on the record, to have been the murderers of Bachu Lal.

The case against the accused rests solely upon the testimony of Bihari (P. W. 4). It is significant to note that in the first information report made by Ghanshyam, the brother of the deceased, there is absolutely no mention not only of Bihari Kachhi, having witnessed the commission of the murder, but there is also no mention therein of Bihari having slept on a *takht* close to the cot on which Bachu Lal was sleeping at the time when he was murdered. This, in our opinion, is a very significant omission, and tends to discredit the testimony of Bihari secured by Sub-Inspector Mohan Singh three days after the actual commission of the crime. In his cross-examination Ghanshyam (P. W. 3) has deposed in the Court of Session that on the night on which the murder took place he as well as his deceased brother Bachu Lal were at the house of one Gubrey Gadarya, on the occasion of a marriage at the latter's house, and that Bihari had also joined that marriage party. He has further deposed that Bachu Lal had asked him at about midnight, that is to say, an hour or two before he was murdered, to go to his house as there was no one there. He has further deposed that he thought that both his brother Bachu Lal and Bihari would go to his brother's

grove and sleep there during the rest of the night. Thus the last time that Ghanshyam saw his brother alive was at the house of Gubrey a couple of hours before the murder, and the last thought that Ghanshyam had in his mind concerning his brother was that he (Bachu Lal) and Bihari would be sleeping in the mango grove that night. Not a word is mentioned in the first information report about Bihari having attended the marriage party at the house of Gubrey a couple of hours before Bachu Lal was murdered, or that Bihari had gone with Bachu Lal to the grove and had slept close to the latter at the time of the commission of the murder. There is no mention even in the first information report of any *takht*, or wooden platform, being found lying close, to the cot of the deceased. Had Bihari really been sleeping every night with the deceased in his mango grove for nearly a fortnight before the commission of the crime, as now alleged by the prosecution, then the very first thought of Ghanshyam would have been to go in search of Bihari and to learn from him what had happened that fatal night, and how his brother came to be murdered.

The learned Assistant Government Advocate has argued that Ghanshyam is an ordinary villager, and that he was so overwhelmed with grief at the murder of his brother that it never occurred to him to mention these facts to the police at the time when he made his first information report. Ghanshyam is a Brahman, and he certainly knows a little Hindi, because he has signed his name in Hindi on the first information report. We find it hard to believe that such a person would have so easily and readily forgotten the very existence of Bihari, and the fact that the latter was sleeping on a *takht* close to the cot upon which his brother was at the time when he was murdered. The mind of Ghanshyam at the time he made his report was working actively, for, in his first information report, he mentions his suspicions against certain persons, whom he has named in that report, as having enmity with the deceased and whom he strongly

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suspected of having committed the crime. It would be natural to suppose that a man who had such strong suspicions against certain persons of being the murderers of his brother would be most anxious to have his suspicions verified by questioning Bihari who, so far as his knowledge went, was sleeping alongside his brother at the time of the murder.

In his deposition in the Court of Session Ghanshyam has stated in cross-examination that he may have informed the investigating police officer that Bihari used to sleep in the same grove with his brother and that on the night of the murder he was so sleeping with Bachu Lal. Even the fact that for a fortnight before the occurrence Bihari had been sleeping every night in the grove with Bachu Lal is not mentioned in the first information report, and no explanation is forthcoming as to why this fact was not mentioned by Ghanshyam in his first report.

The statement of Ghanshyam recorded by Sub-Inspector Mohan Singh on the 17th of June, 1933 (exhibit H), has been proved by the evidence of the latter, as also by the evidence of Ghanshyam himself, and in that we find that all that Ghanshyam stated before the investigating police officer on the morrow of the occurrence is that occasionally Bihari Kachhi used to go and sleep with Bachu Lal in his grove. Not a word is mentioned that on the night of the murder Bihari was, as a matter of fact, sleeping with Bachu Lal in the grove when the murder took place. There is no mention in the statement of Ghanshyam before the investigating police officer of any *takht* being found close to the cot on which Bachu Lal used to sleep, and on which he was murdered. There is no reason to suppose that Ghanshyam was in any way trying to shield the murderers of his brother, or to save Bihari from any charge of murder that might be brought against him. From the evidence of Ghanshyam we have grave reasons for suspecting the truth of the story told by Bihari.

These suspicions are further strengthened by the statement of Gokul chaukidar made before the police on the 17th of June, 1933. This statement is marked exhibit G, and has been proved by the evidence of Sub-Inspector Mohan Singh (P. W. 13), who has deposed that it is a correct copy of the statement of Gokul chaukidar, and that whatever was stated by Gokul was written by him, and that he did not add anything of his own accord, to that statement of the chaukidar. Gokul chaukidar has not been examined by the prosecution, but he has been examined under section 540 of the Code of Criminal Procedure by the trial Judge as a Court witness. In his statement (exhibit G) Gokul has stated that Bihari Kachhi came to him, and told him that Kampta Prasad, Mukhiya, had sent for him (the chaukidar), as there was an urgent matter, and when the chaukidar questioned Bihari as to what the urgent matter was, Bihari told him that Bachu Lal had been murdered by some one. Now this statement of Gokul (exhibit G), if it is believed to be true, negatives the whole case for the prosecution, because it shows that on the morning of the 17th of June, 1933, a few hours after the commission of the murder, Bihari Kachhi, informed the chaukidar that Bachu Lal had been murdered, and that the names of the murderers were not known to him.

It is further significant to note that when Ghanshyam went to the Thana to make a report about the murder of his brother, he was accompanied by this very Gokul chaukidar and by Kampta Prasad, Mukhiya, and neither Gokul nor Kampta Prasad mentioned anything to the police as to who the murderers were. If, as a matter of fact, Bihari had known who the murderers were, and had mentioned their names to Gokul and Kampta Prasad, they would certainly have named them at the Thana, and would have brought Bihari with them at the same time in order that the first information report might be made by the very person who was sleeping by the side of the murdered man, and who was an

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eye-witness of the occurrence. Gokul chaukidar was examined as a witness by the learned Additional Sessions Judge under section 540 of the Code of Criminal Procedure. In his deposition he has admitted that the statement (exhibit G) read out to him in Court was made by him to Sub-Inspector Mohan Singh on the 17th of June, and that he had given a true and correct account in that statement. In order, however, that his evidence may not damage the case for the prosecution, he has now pretended that he did not know Bihari Kachhi, of Barhwari-Udho at all, and that the man who came to fetch him was an old man of the name of Bhawani. It is obvious to us that a considerable amount of pressure has been put upon this unfortunate witness in order that his evidence may not destroy the case for the prosecution, and he has thus been constrained indirectly to deny the truth of his own statement recorded a few hours after the commission of the murder. The fact, however, remains that the name of no assailant is entered in the first information report, although the brother of the deceased, accompanied by Gokul and Kampta Prasad, had gone to make the report, and it is inconceivable that if any of these persons had known the names of the actual murderers of Bachu Lal they would not have mentioned them in the report made at the Thana, for they could have had absolutely no reasons whatsoever for withholding the names of the murderers from the police.

Thus the first information report and the statements of Gokul chaukidar and of Ghanshyam (exhibits G and H respectively) tend virtually to destroy the statement of Bihari Kachhi, recorded for the first time on the 19th of June, 1933, three days after the occurrence.

Bihari Kachhi was a resident of Barhwari-Udho where the deceased and his brother lived. He was, however, not produced before the investigating police officer, Sub-Inspector Mohan Singh, till the afternoon of the 19th of June, when he was brought by Bhup

chaukidar from village Barwar, two miles from Barhwari-Udho, from the house of his uncle Reoti. Neither the chaukidar Bhup nor Reoti has been examined to corroborate the story of the discovery of Bihari in the house of Reoti in village Barwar. In this connection it is worthy of note that Bhup chaukidar and Bihari left the house of Reoti in village Barwar on the morning of the 19th of June, and it took them nearly six hours to cover the distance of two miles from Barwar to Barhwari-Udho. No satisfactory explanation is forthcoming as to why so much time was taken by Bhup to bring Bihari before Sub-Inspector Mohan Singh. It is in the evidence of the prosecution witnesses that the Superintendent of Police was at village Barhwari-Udho on the 19th of June, 1933, but Bihari was not produced before that officer in order that he might question him.

It is to be noted that Bihari Kachhi is a tenant of Ghanshyam and of the deceased Bachu Lal, and it is obvious that he was a witness entirely under the influence of his zamindar Ghanshyam. His statement was recorded under section 164 of the Code of Criminal Procedure by a Magistrate on the 24th of July, 1933, a day before the case was put up for the recording of the prosecution evidence in the Court of the Committing Magistrate. This was done obviously for the purpose of pinning him down to the statement that he had made before the police on the 19th of June, 1933.

Apart from the circumstances set forth above, which tend to throw grave doubts on the truth of the story related by Bihari Kachhi in Court, we may note that Bihari is not a witness who came to give evidence of his own free accord before the police. Under section 44 of the Code of Criminal Procedure every person aware of the commission of a murder is bound, in the absence of any reasonable excuse, the burden of proving which would lie upon him, forthwith to give information to the nearest Magistrate or police officer of the commission of such offence. Failure to give such information is

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punishable under sections 176 and 202 of the Indian Penal Code. Now in the present case Bihari gave no such information of his own accord to the police or to a Magistrate, and if he had not been sent for by Sub-Inspector Mohan Singh through Bhup chaukidar, he would never have made the statement recorded by the investigating police officer on the 19th of June, 1933.

In these circumstances we find ourselves wondering if Bihari Kachhi, did, in fact, witness the occurrence about which he has now given evidence, or whether he is not a mere tool in the hands of his zamindar Ghanshyam and others, and has been made to give evidence so as to supply the necessary legal evidence to support the suspicions of Ghanshyam against the persons suspected by him to have been concerned in the crime. Five of the persons named in the first information report by Ghanshyam as being likely to have committed the murder of his brother have been named by Bihari as having been actually seen by him committing the murder of Bachu Lal. In this connection it is also very significant to note that nowhere in his deposition as a witness before the Committing Magistrate or when his statement under section 164 of the Code of Criminal Procedure was recorded, or in the Court of Session has Bihari named Raghunandan as one of the murderers of Bachu Lal. He has throughout his statements given the names of seven persons as the assailants of Bachu Lal, and mentioned the fact that there was one more assailant, who stood at the foot of the cot on which the deceased was lying at the time the murder was committed whom he could not identify. Yet, although Bihari has not named this eighth man, the police have identified this unknown assailant as Raghunandan, and have not only issued warrants of arrest against him, but have also taken proceedings under sections 87, 88 and 512 of the Code of Criminal Procedure. This clearly shows that, so far as Raghunandan is concerned, the investigating police officer, Sub-Inspector Mohan Singh, has taken action

against this accused apparently on his own initiative, and not upon information supplied to him by Bihari.

Raghunandan is not on his trial and is not one of the appellants before us, and we need not, therefore, say anything more about this matter except to point out that this procedure on the part of the investigating police officer throws very serious doubt on the genuineness of the story told by Bihari.

In this connection we may also note that Sub-Inspector Mohan Singh produced Bihari before the Sub-Divisional Magistrate, Thakur Raja Ram Singh, on the 22nd of July, 1933, with a request that the evidence of the eye-witness Bihari might be recorded under section 164 of the Code of Criminal Procedure. On the same date the Magistrate warned Bihari not to make a false statement, and directed him to appear before him two days later on the 24th of July, 1933. On the 24th of July, 1933, Bihari's deposition was recorded by Thakur Raja Ram Singh in Hindi. It did not occur to the learned Deputy Magistrate that by not recording the statement of Bihari at once he was compelling Bihari to remain for two days more in the company of the police officer who had brought him from his village, and instead of removing the fear of the police, if any, from the mind of Bihari, he was throwing this witness once more into the arms of the police. Be that as it may, the manner in which Bihari was produced before the Sub-Inspector, and the circumstances under which he came to make his statement before that officer, three days after the commission of the crime, lead us seriously to doubt the story told by this witness before the police officer and before the Magistrate and in the Court of Session. Although we are not prepared to go to the length of saying that the evidence of a person who has seen a murder committed and does not give any information thereof is little better, than that of an accomplice, as did the learned Judges of the Lahore High Court in

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Nawab v. The Crown (1), we are free to confess that we have grave reasons to suspect the truth of the story told by Bihari Kachhi, in the case before us, and that his evidence does not impress us as being reliable.

The learned Assistant Government Advocate has laid emphasis upon the fact that the trial Judge believed Bihari Kachhi to be a straightforward witness, though he appeared to the learned trial Judge to be "a bit lazy and a simpleton". We accept the description of the witness Bihari given by the learned trial Judge as correct. That, however, does not lead us to believe that Bihari has given truthful evidence in this case. The learned Judge has tried to explain away the conduct of Bihari in running away from his village, immediately after the commission of the murder, to the house of his uncle Reoti in village Barwar. Upon this point the learned trial Judge makes the following observations:

"Bihari appears to be a simpleton, and it is not unnatural for a man of his disposition to have been easily frightened to the extreme in such a case. He could very well expect a similar fate at the hands of the accused if he disclosed their names to anybody in connection with the murder."

We may, for the sake of argument, accept this contention of the learned Judge as correct, but, if Bihari was so terrorised by the murderers of Bachu Lal as to leave his home in Barhwari-Udho and to hide himself in the house of his uncle Reoti in Barwar, then nothing would have induced him to give out the names of these murderers to anybody, and neither the blandishments of Bhup chaukidar nor the threats of the zamindar Ghan-shyam and of Kampta Prasad Mukhiya and of Sub-Inspector Mohan Singh would have induced him to reveal the true story of the commission of the murder and the names of the murderers. In our opinion the evidence of Bihari does furnish internal proof of the

(1) (1923) A.I.R., Lah., 391.

falsehood of the story told by him. Upon any rational view of the matter his conduct appears unintelligible, and we must therefore reject his testimony as unworthy of belief.

The learned Additional Sessions Judge has himself disbelieved the evidence of Bihari so far as the accused Rameshur and Mahadeo are concerned. That very fact ought to have put the learned Judge on his guard against accepting the testimony of this witness as against the other accused. If the evidence of Rai Bahadur Pandit Sankata Prasad Bajpai, Chairman of the Kheri District Board, proves that Bihari was falsely implicating Rameshur then it becomes increasingly difficult to accept the evidence of this false witness against the other accused. If Bihari is capable of falsely swearing away the lives of Rameshur and Mahadeo, he could very well be deemed capable of swearing away the lives of the appellants before us, even though the latter may be innocent.

The assessors unanimously found the appellants not guilty of the offence charged, and it seems to us that the assessors have taken a more just view of the evidence of Bihari than has the learned Additional Sessions Judge.

If the evidence of Bihari be regarded as unworthy of belief, then the evidence of Mathuri (P. W. 2), Gyan (P. W. 6) and Ram Autar (P. W. 5), really does not help to prove the case for the prosecution against these appellants. All these witnesses were discovered after the statement of Bihari had been recorded by the investigating police officer. Their statements have some evidentiary value in so far as they tend to corroborate the story told by Bihari, but if the evidence of Bihari is rejected as false, then the evidence of these three witnesses is quite worthless. Mathuri (P. W. 2) picked out Mahadeo accused as Raj Bahadur in the Court of the Committing Magistrate, and he identified Munnu Lal as Kallo before the said Magistrate, and he could not identify Kallo at all. Gyan (P. W. 6) is a tenant of Bachu Lal, and on

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the 4th of May, 1933, he had the cattle of Bachu Lal, which had been impounded at the instance of Sundar Lal, released from the cattle-pound.

The enmity said to exist between the appellants and the deceased Bachu Lal, as deposed to by Ghanshyam (P. W. 3) is not of such a nature as would make us believe that it would furnish any reasonable pretext or ground for these accused committing the murder of Bachu Lal. The preemption suit between Bachu Lal and Chhanga Mal, father of Sundar Lal, accused, terminated some seven or eight years ago, and can hardly furnish a motive for this murder on the part of Sundar Lal. The possessory suit filed by Sundar Lal against Bachu Lal was compromised some three or four years ago. The first case under section 107 of the Code of Criminal Procedure between the parties occurred some five years ago, and both parties were bound over. The riot case in 1931 resulted in proceedings under section 107 of the Code of Criminal Procedure being taken. Bachu Lal prosecuted Sundar Lal and Rameshur for an offence under section 323 of the Indian Penal Code, but his complaint was dismissed. Sundar Lal filed a complaint against Bachu Lal, and Bachu Lal was convicted and his appeal was dismissed. Bachu Lal is said to have distrained certain crops of the accused Sri Ram, but it is proved that Sri Ram is not a tenant of Bachu Lal, but of Chhanga Mal, the father of Sundar Lal. It is also said that a goat belonging to Bachu Lal strayed into the house of Sri Ram and that annoyed Sri Ram. That can hardly furnish a motive for Sri Ram to commit the murder of Bachu Lal.

It is thus clear upon the evidence of Ghanshyam that the enmity alleged in the first information report, and regarding which Ghanshyam has given evidence, is not of such a nature as would furnish any reasonable pretext for the appellants committing the murder of Bachu Lal, but it may well serve as a motive for Ghanshyam to have

these five appellants falsely implicated on the charge of murdering his brother.

Be that as it may, upon the evidence on the record, we are clearly of opinion that no charge of wilful murder under section 302 of the Indian Penal Code has been made out against any of the five appellants before us.

For the reasons given above, we allow this appeal, set aside the convictions and sentences passed upon each of the appellants, acquit them of the offence charged, and order their immediate release.

Appeal allowed.

APPELLATE CIVIL

*Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice
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NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN (DEFENDANT-APPELLANT) *v.* NAWAB FAKHR JAHAN BEGAM AND OTHERS (PLAINTIFFS-RESPONDENTS)*

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Civil Procedure Code (Act V of 1908), sections 2(2), 11 and 96—Decree—Contribution claimed from defendant's Taluqdari estate—Court finding plaintiff entitled to contribution—Amount only remaining to be determined—Finding whether a decree—Appeal against order, whether lies—Mohammedan law—Succession—Deceased leaving partible and impartible estate—Partible estate diminished by payment of deceased's debt—Heirs, whether can re-habilitate their share by contribution from impartible estate—Co-sharer in joint partible estate suffering loss—Another co-sharer benefiting by other's loss—Latter, whether entitled to contribution—Sui to make good loss from impartible estate, if lies—Res Judicata—Question neither raised nor decided in previous suit—Subsequent suit, whether barred by res judicata.

Where in a suit the plaintiff's contention is that the Taluqdari estate in the hands of the defendant should be made to contribute towards the discharge of a dower decree according to its value and the trial court gives its findings in respect of the bulk of the issues in favour of the plaintiffs, with the result that

*First Civil Appeal No. 65 of 1932, against the decree of Bahu Mahabir Prasad, Subordinate Judge, Lucknow, dated the 1st of September, 1932.