

## APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, and Mr. Justice Gokaran  
Nath Misra.

SHER BAHADUR SINGH AND OTHERS (DEFENDANTS-APPELLANTS v. MALIK TAFAZUL HUSAIN AND OTHERS (PLAINTIFFS-RESPONDENTS).\*

1927  
August, 4.

*Alluvion and diluvion—River, change of course of—Land re-appearing after change of course retaining its identity—Gradual or sudden change of course of river, effect of—Riparian owners, law applicable to—Oral evidence as to whether accession of land is gradual or sudden, value of.*

Where a large tract of land was submerged under water by floods in a river and soon after re-appeared on the other side of the river, *held*, that if the lands in suit still retain their identity as lands formerly appertaining to a certain village, the trial of the question, as to whether the lands have changed their position by reason of gradual accession or by a sudden change in the course of the river, becomes immaterial. If the lands have re-appeared upon the old site and, as such, are recognizable, the title to those lands is with the original owner. This principle is applicable even to cases in which the question arises between two riparian owners who own property on either side of the river, and when the land is washed away from one side of the river and re-formed on the other side of it and on the old ascertained site. [*Maharaja of Dumraon v. Secretary of State for India in Council* (1), and *Lopez v. Muddum Mokun Thakoor* (2), relied upon.]

Opinion of witness as to whether the accession of lands in such a case is gradual or sudden, is of little value in determining with precision the technical and legal significance of the terms "sudden" and "gradual". What may appear to a lay observer to be "gradual" might be strictly speaking only "sudden" and *vice versa*.

\*First Civil Appeal No. 92 of 1926, against the decree of Zia-ud-din Ahmad, Subordinate Judge of Gonda, dated the 31st of May, 1926.

(1) (1927) L.R., 54 I.A., 156.

(2) (1870) 3 M.I.A., 467.

1927

SHER  
BAHADUR  
SINGH  
v.  
MALIK  
TAFAZUL  
HUSAIN.

Messrs. *Haider Husain* and *Mahmud Beg*, for the appellants.

Mr. *Bisheshwar Nath Srivastava*, for the respondents.

*Hasan and  
Misra, JJ.*

HASAN and MISRA, JJ. :—This is the defendants' appeal from the decree of the Subordinate Judge of Gonda, dated the 31st of May, 1926. The matter in dispute between the parties is as to the title of a large tract of land now lying on the west side of the river Rapti, which flows partly in the district of Gonda and partly in the district of Basti. The total area of the land for which the claim is made is 239·07 acres. The land is also specified by its survey numbers, and they are stated in two schedules, A and B, attached to the plaint.

To the decree under appeal is annexed a plan or map which explains the geographical situation of the lands in suit. In this plan these lands are denoted by colours, yellow and red, and the river Rapti is shown in blue colour. The trial court, as has already been stated, made a decree for possession in favour of the plaintiffs.

The plaintiffs claim title to the lands in dispute on the ground that previous to the floods of 1330 *fasli*, which caused large inundations in the river Rapti, these lands appertained to village Baitnar but that in the floods of that year they were submerged under water. The yellow portion soon after re-appeared on its old site, and the red portion of the disputed lands within two years following it. Village Baitnar is in the Basti district and admittedly belongs to the plaintiffs. It lies on the east bank of the river. Village Parsauna, which lies on the opposite bank, is situate in the district of Gonda and is the property of the defendants. On these facts the plaintiffs' case is that both according to law and custom they have a title to the lands in suit.

It is difficult to appreciate the defence which has been made to such a simple case as the plaintiffs' is but the trial in the court below seems to have proceeded on the issue as to whether the lands in suit had become part and parcel of the defendants' village Parsauna for the reason that they had been added to it "by the slow and gradual action of the river Rapti in several years." (Paragraph 20 of the written statement of the defendants Nos. 1, 4, 6 and 7 at page 26 of the printed record). The defendants pleaded no custom as a different rule from the ordinary law. In paragraph 21 of the same written statement they said that they were entitled to the lands in suit according to law and custom and as in paragraph 20, to which reference has just been made, they founded their title on the fact that the accretion was due to the slow and gradual action of the river, it is a reasonable inference to draw that they based their title on the principle of "gradual accession". On behalf of the plaintiffs in this court as well as, it seems to us, in the court below no attempt was made to support their title to the lands in suit on any specific usage as varying the law applicable to lands of the nature involved in the present suit.

This being the state of pleadings on which the parties went to trial as to the question of their respective titles to the lands in suit, we are relieved from the necessity of considering any question of custom as at variance with the general law. It is true that in support of their title the plaintiffs filed a certain number of *wajib-ul-araez* but the case as presented to us on their behalf by their learned Advocate rests on the admission that the rule of title relating to such lands as stated in these *wajib-ul-araez* is the same as the rule of law relating thereto.

In the light of the pleadings as set forth in the preceding paragraphs of this judgment the merits of

1927

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SHER  
BAHADUR  
SINGH  
v.  
MALIK  
TAFAZUL  
HUSAIN.

*Hasan and  
Misra, JJ.*

1927

SUPR  
 EAHADPR  
 SINGH  
 v.  
 MALIK  
 TAFAZUL  
 HUSAIN.

Hasan and  
 Misra, JJ.

the plaintiffs' case are :—(1) that the lands in suit still retain their identity as lands appertaining to their village Baitnar in spite of the change in the course of the river during the floods of 1329 *fasli* (August—September, 1922), and (2) that the action of the river in throwing the lands in suit from the east side of its bank to its western side (as it now flows) and thus exposing the lands in suit was sudden, and this is not the case of gradual accession.

The trial court on a careful consideration of the evidence on the record and the law bearing on the question has recorded its findings on both these points in favour of the plaintiffs. These findings are challenged in appeal before us.

At the very outset of the opening of the appeal by the learned Counsel for the defendants we intimated our opinion that if it were held in agreement with the trial court that the lands in suit still retain their identity as lands formerly appertaining to the plaintiffs' village Baitnar the trial of the second question as to whether the lands have changed their position by reason of gradual accession or by a sudden change in the course of the river becomes immaterial. This was agreed to by the learned Counsel for the defendants and it was further agreed to that if the lands in suit have re-appeared upon the old site and as such are recognizable the title to those lands is with the plaintiffs.

Apart from the admission made by the learned Counsel for the defendants there is no doubt in our minds that the law is also the same. In the recent case of *Maharaja of Dumraon v. Secretary of State for India in Council* (1) their Lordships of the Judicial Committee have reviewed the previous decisions on the subject and affirmed the principle adopted in the case of *Lopez v. Muddun Mohun Thakoor* (2), as being applicable even

(1) (1927) L.R., 54 I.A., 156.

(2) (1870) 3 M.I.A., 467.

to cases in which the question arose between two riparian owners who owned property on either side of the river and when the land was washed away from one side of the river and reformed on the other side of it and on the old ascertained site.

We agree with the finding of the trial court that the lands in suit reformed on the west side of the river on their old ascertained site are part and parcel of the plaintiffs' village Baitnar. It will serve no useful purpose to enter into any elaborate discussion of the evidence on this part of the case. We will, however, state certain striking features brought out in the circumstances and in the evidence of this case and which features have impressed us most.

In the first place, there is documentary evidence in the case consisting of public records which unquestionably proves that the area of the yellow portion of the lands in suit was 166 acres previous to the change in the course of the river in the year 1922 and it is agreed and it is also found by the commissioner appointed by the trial court for survey purposes that the area of that portion of the lands in suit is still the same, that is 166 acres. It is further proved by the same class of evidence that these 166 acres of land formed part and parcel of the plaintiffs' village Baitnar. In the judgment of the trial court this matter is discussed at sufficient length and reference is made to the documentary evidence bearing thereon. To that reference we will add two more documents as conclusively establishing the point which is being considered by us. They are exhibits 5 and 6. Exhibit 5 has not been printed as part of the record before us: nevertheless it is evidence in the case. Exhibit 6 has been printed but there are certain omissions in the print. It is a certified copy of the khewat of village Baitnar for the year 1328 *fasli*. Exhibit 5 is

1927

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SHEH  
BAHADUR  
SINGH  
v.  
MALIK  
TAFAZUL  
HUSAIN.

*Hasan and  
Misra, JJ.*

1927

SHEE  
BAHADUR  
SINGH  
v.  
MALIK  
TAFAZUL  
HUSAIN.

Hasan and  
Misra, JJ.

the khewat of the same village for the year 1326 *fasli*. It is agreed that quinquennial settlement immediately preceding the floods of the year 1330 *fasli* was made in the year 1325 *fasli*. What the entry in respect of the area of village Baitnar in the papers of that settlement was is shown to us by the report of the qanungo who made inquiries in relation to the approaching quinquennial settlement of the village Baitnar in 1330 *fasli*. In paragraph 3 of this report (exhibit A9) the total area at the time of settlement is given as being 619 acres. In paragraph 5 it is stated that there was a decrease of 166 acres as against the area in the year 1329 *fasli*, and of 256 acres as against the area at the time of settlement. The two khewats (exhibits 5 and 6), the qanungo's report (exhibit A9) and the khataunis of the village Baitnar for the years 1329 and 1330 *fasli* (exhibits 7 and 8) leave no room for doubt that the conclusion at which we have reached in agreement with the trial court that the area of the yellow portion of the lands in suit is exactly the same as it was previous to the change in the course of the river in the year 1330 *fasli* and that that area at that period of time was part and parcel of the plaintiffs' village Baitnar is correct. It is agreed that if the question of identity of the yellow portion of the lands in suit is decided in favour of the plaintiffs it would follow from it that the same question in respect of the red portion of the lands in suit must also be decided in favour of the plaintiffs. In the very nature of things it must be so because the red portion lies to the east of the yellow portion and is physically attached to it.

The second ground on which we agree with the trial court in this part of the case is the physical feature of the lands in suit as disclosed by the commissioner's report and in his evidence in the case. According to that report and evidence, the lands in suit are much higher than the adjoining land to the west and the level of the

river water to the east as it flows now, the difference in level being ten to eight feet. Another feature, as disclosed by the same evidence, is that the traces of the old channel of the river are still discernible. In the evidence and the judgment of the lower court this channel is described by the word *soti*. It is agreed that on the east of the old channel lay the lands of the plaintiffs' village Baitnar; and we may add, the lands now in suit are the same lands on the east of the old *soti* as it now exists. Thus the lands in suit bear distinctive geographical marks of of identification distinguishable from the lands on the west of the old bed.

It will appear from what we have said in the immediately preceding paragraph of this judgment that the identity of the yellow portion of the lands in suit with the lands appertaining to the plaintiffs' village Baitnar is established, both in quantity, so far as the area is concerned, and in geographical position. On these premises it is not disputed that the red portion of the lands in suit also is the land of the plaintiffs' village.

The third mark of identification is shown in the oral evidence on which the learned Judge in the trial court seems to have relied. That evidence is not very convincing, but in the absence of any more convincing evidence in rebuttal we agree with the court below that it may well be relied upon. Some of the plaintiffs' witnesses speak of the *arhar* crops having been sown on the lands in suit previous to the floods of 1330 *fasli* and previous to the change in the course of the river. They further say that on the subsidence of the floods and the river settling into its new channel the dried stalks of the same *arhar* crops were found on the lands in suit and were collected. It was not seriously disputed and indeed it was impossible to dispute that the *arhar* crops were sown by the tenants of the plaintiffs' village Baitnar. This

1927

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SHER  
BAHADUR  
SINGH  
v.  
MALIK  
TARAZUL  
HUSAIN.

Hasan and  
Mitra, JJ.

1927

SHER  
BAHADUR  
SINGH  
v.  
MALIK  
TARAZUL  
HUSAIN.

Hasan and  
Misra, JJ.

evidence, together with the evidence that before the diversion of the river the land in suit were in the possession of the plaintiffs and their tenants, is to be found in the statements of the plaintiffs' witnesses Nos. 1, 2, 3, 6, 7 and 8. The last-mentioned witness, Mr. Sita Ram Singh, was a sub-divisional officer of Domaryaganj, the sub-division within which village Baitnar lies, in the district of Basti. He had occasion to visit the spot in connection with certain proceedings with which we will deal later. His veracity is unquestionable. The plaintiffs' evidence on this part of the case, to which we have just now made reference, is also supported by the statements of two witnesses of the defendants. They are D.W. 1 and D.W. 2. They both say that before the action of the river resulting in the change of its course, the lands in suit were cultivated by the Baitnar people.

The finding above recorded is enough, as we have already said, for the disposal of the appeal but inasmuch as the second question as to whether the present case is a case of gradual or sudden accession is a question of fact we might as well briefly state our reasons which have induced us to agree with the finding of the learned trial Judge that this is not a case of gradual accession. The most convincing reason lies in the same fact to which we have already adverted in the discussion of the question of identification in the preceding part of this judgment. That fact is that on a reference to the entries in respect of the area in the khewats (exhibits 5 and 6) and of the khataunis (exhibits 7 and 8) of the village Baitnar it must be held that the lands in suit or at any rate the yellow portion of them formed part of village Baitnar in the year 1329 *fasli* but that they ceased to appertain to that village in the year 1330 *fasli*; in other words, a huge compact block of land measuring about 800 bighas kham changed its position in relation to the bed of the river within the period of 12

months at the most. Before the change in the course of the river it was an adjunct to its bank on the east as forming part of village Baitnar and after the change the same lands, that is to say 800 bighas kham, re-appeared on the west side of the course of the river. We have said that this change in the position of the lands in suit took place at the most within 12 months but strictly speaking all this happened within a short period of three or four months during the rainy season of the year 1329 *falsi* (July—September, 1922). This is borne out not only by the general experience as to the effect of rains on rivers like the river Rapti, but also by direct and positive evidence on the record. Indeed, the evidence discloses the fact that the submergence of the lands in suit under water was not a continuous one. Sometimes, when there was less rain, the lands could be seen for a fortnight or so, and when the rain again fell in abundance those lands were recovered by water. We might here refer specifically to the statement of the defendants' witness No. 1, who is not only a zamindar himself but is also the *karinda* of the zamindars of Parsauna, the adjoining village of the defendants, and their co-sharers. He says that "before the cutting of this 400 bighas of land it was in the cultivation of Baitnar people. In the *Asarh* and *Sawan* of 1329 and the two months following those two months, the river was in flood. During this period the river rose at least 10 or 12 times. Each flood used to stay for 10 or 15 days." It is, in the circumstances, impossible to hold that the lands measuring 400 bighas adjoining one side of the river and submerged under water for a period of three or four months and on subsidence of the water re-appearing on the other side of the river are gained by gradual accession. Indeed, in the very nature of things, we must hold that the change in the position of the lands was due to the sudden change in the course of the river.

1927

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 SHEER  
 BAHADUR  
 SINGH  
 v.  
 MALIK  
 TAFAZUL  
 HUSAIN.

*Hasan and  
 Misra, JJ.*

1927

SHER  
BAHADUR  
SINGH  
v.  
MALEK  
TAFAZUL  
HUSAIN.

Hasan and  
Mitra, JJ.

The second reason in support of the view that this is not a case of gradual accession lies in the fact that the lands in suit are about 10 to 8 feet higher in level than the former and the present channels of the river. This state of things cannot happen in a case of gradual accession. It seems to us that the finding that the lands in suit have retained their old identity and the further finding that the change in the course of the river took place within a period of three or four months necessarily lead to the conclusion that the lands in suit did not come to be joined to the defendants' village Parsauna by gradual accession. Witnesses produced by the parties state their opinion as to whether the accession of the lands in suit was gradual or sudden. This opinion is of little value to us in determining with precision the technical and legal significance of the terms "sudden" and "gradual". What may appear to a lay observer to be "gradual" might be strictly speaking only "sudden" and *vice versa*. For this reason we refrain from discussing oral evidence on this part of the case.

It appears that in the year 1923 a dispute arose between the zamindars of Baitnar and of Parsauna on the question as to whether the lands in suit should be recorded in the village papers appertaining to the village of Baitnar or to the village of Parsauna. Proceedings in this connection appear to have been taken in the revenue courts of the district of Gonda, within which the defendants' village Parsauna is situate. Some of the papers relating to those proceedings have been filed by the plaintiffs and some by the defendants, and at the hearing of the appeal they were frequently referred to on both sides. We, on our part, do not attach much importance to those papers. They, more or less, express the opinion of several revenue officers engaged directly or indirectly in determining the question as to whether the lands in suit should be recorded as part of one village or of the

other. Such of the papers as are filed on behalf of the defendants are (1) the report of the Naib Tahsildar of Utraula, dated the 18th of September, 1923 (exhibit A7). (2) The order of the Assistant Collector of Gonda, dated the 8th of December, 1923 (exhibit A8). (3) The order of the Deputy Commissioner of Gonda, dated the 14th of February, 1924 (exhibit A6). (4) The report of another Assistant Collector of Gonda, dated the 18th of May, 1924 (exhibit A1) and lastly (5) the final order of the Deputy Commissioner of Gonda, dated the 30th of May, 1924. On behalf of the plaintiffs a joint report of Mr. Browne Sub-divisional Officer of Utraula, district Gonda, and of S. R. Singh, Sub-divisional Officer of Dumariaganj, district Basti, dated the 20th of January, 1924 (exhibit 15/1) has been filed.

A few general comments, in respect of the papers filed on behalf of the defendants, fall to be made at this stage. The order of the Assistant Collector, dated the 8th of December, 1923, is founded on the opinion that "166 acres of land was not transferred from Basti side to Gonda by a sudden change of the course of the river as is alleged by the patwari of Baitnar and the witnesses of the Maliks. On the other hand it is clearly proved that there has been a gradual addition of new and unidentifiable land to the Gonda side owing to the fluvial action of the river and as such it has become an accretion to the tenure of the persons to whose village it has been added." This opinion involves the determination of the question as to what "a sudden change in the course of the river" and "a gradual addition" means. It further involves the question as to the grounds on which the opinion that the land was "unidentifiable land" was based. On the merits of the case as presented to us it is impossible to accept the Assistant Collector's opinion that the lands were added by gradual accession and not by a sudden change in the course of the river, and that

1927

---

SHER  
BAHADUR  
SINGH  
v.  
MALIK  
TAFAZUL  
HUSAIN.

*Hasan and  
Misra, JJ.*

1927

SHEP  
BAHADUR  
SINGH  
v.  
MALIK  
TAFAZUL  
HUSAIN.

Hasan and  
Misra, JJ.

it is unidentifiable. It appears to us that the Assistant Collector did not fully appreciate the significance of the words "sudden change" and "gradual accession." The order under consideration seems to be founded on the report of the Naib Tahsildar, dated the 18th of September, 1923. Specific reference to this report is made in the order at more than one place. The Naib Tahsildar's report is wholly unacceptable to us as of any evidential value not only for the reason which we have given in relation to the order of the Assistant Collector but also for the reason that we think that it is not correct in certain material particulars of facts. In this report he says that "the land in question is a new deposit of land and mud at a low level unidentifiable, and there is no existence of old deep stream." We have shown that the lands in suit lie at a much higher level, and we have further shown that the traces of the old deep stream still exist, all this by unimpeachable evidence. Indeed the two facts are not seriously disputed on the side of the appellants.

As to the report of another Assistant Collector of Gonda, dated the 18th of May, 1924, it may be mentioned that it was made in pursuance of an order of remand for inquiry passed by the Deputy Commissioner of Gonda as a court of appeal from the order of the 8th of December, 1923. Little need be said about the merits of this report. It again rests on the views of the Assistant Collector as to what the terms "gradual" and "sudden" connote in relation to the change in the course of a river. Obviously, we must form our own judgment on those two questions unhampered by the various views of the Assistant Collectors. But the previous order of the 8th of December, 1923, and the subsequent report of the 18th of May, 1924, together lose their value in view of the final opinion expressed by the Deputy Commissioner of Gonda in his order of the 30th of May, 1924. He says :

“I am not prepared, therefore, to discuss the question of the rights of the case—it is outside the province of this case so long as I am satisfied on the question of possession to discuss whether there has been gradual or sudden accretion. It may be that the appellants (the zamindars of Baitnar) have a very good case as regards such a large area of land, but they must go to the Civil Court to determine it as to the question of the 1330 *fashi* settlement with them. If they do not go to the Civil Court to determine their title or get this order removed in appeal they will have to apply that the assessment (paper torn), they had gratuitously laid on themselves, may be cancelled. As regards boundary I agree with the lower court that, for the present, the river must be considered as the boundary between Parsauna and Baitnar.”

It now remains to assess the evidential value of the joint report of Messrs. Browne and S. R. Singh, dated the 20th of January, 1924. Its chief value, it seems to us, lies in the plan of the course of the river in the years 1325, 1326, 1327, 1329 and 1330 *fashi*. Their opinion as to whether the change in the course of the river was sudden or gradual and whether the land was recognizable or not is based on a more solid foundation, that is to say, the physical situation of the lands in suit in relation to the surroundings of the river between the years 1325 and 1330 *fashi*. These gentlemen held that the block of 166 acres of land was cut off by a sudden change in the river, and that it was recognizable.

We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

1927

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SHER  
BAHADUR  
SINGH  
c.  
MALIK  
TAFAZUL  
HUSAIN.

Hasan and  
Misra, JJ.