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thus been in possession of the entire area of Thok Lachhmi Kant adversely to the co-sharers since 1890. We are therefore of opinion that the plaintiffs' suit is also barred by time.

The appeal is therefore dismissed with costs and the lower court's decree affirmed.

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton*

1939 *August* 31

PASHPAT PRATAP SINGH, RAJA (PLAINTIFF-APPELLANT) *v.* UDAI BHAN PRATAP SINGH (DEFENDANT-RESPONDENT)*

*Alluvian and diluvion—Custom of* dhardhura, *what is*—Wajib-ul-arz, *interpretation of—Civil Procedure Code (Act V of* 1908), *section* 11—Res judicata—*Compromise decree—Rule of* res judicata, *whether applies to compromise decrees—Registration Act (XVI of* 1908), *section* 17 (vi)(2)—*Amendment of* 1929 *to the Registration Act, whether has retrospective effect.*

The custom of *dhardhura* means that the main stream of the river would always remain the boundary between the two villages in quesion irrespective of the fact that the change in the course of the river is gradual or sudden. In other words, land thrown out by a change in the course of the river would by custom appertain to the village in proximity with which it comes out of the river.

Where a *wajib-ul-arz* recited that the custom governing *dhardhura* was that the stream of the river shall constitute the boundary line, *held,* that it meant that a custom relating to *dhardhura* prevailed to the effect that the main stream of the river will alway constitute the boundary between the villages lying on the two banks. *Sheo Ram* v. *Pashupat Pratap Singh* (1), distinguished.

A consent decree does operate as *res judicata* in a subsequent suit. Where, therefore, a custom of *dhardhura* is pleaded by the plaintiff and denied by the defendant so that an issue on the custom does arise in the case which is subsequently compromised by the parties, the compromise decree is a bar

*First Civil Appeal No. 17 of 1936, against the order, dated the 31st October, 1935, of Mr. Maheshwar Prasad Asthana, Second Additional Civil Judge, Fyzabad.

(1) (1932) I.L.R., 7 Luck., 179.

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in *res judicata* in a subsequent suit. *Durga Prasad* v. *Narain* (1) and *Pranal Annee* v. *Lakshmi Annee* (2), relied on. *Mst. Said Khanam* v. *Said Muhammad* (3), *Pirojshah Bhikaji Vandrivalla* v. *Manibhai Nichhabhai* (4), *Govinda Krishna Yachendrulo Garu Bahadur* v. *Venkata Subiah* (5), *Putta Venkata Satyanarayana* v. *Puttu Gangamma* (6) and *Gopalasami Vastad* v. *Govindasami Vastad* (7), referred to.

The words "except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding" occurring in paragraph (vi) of section 17, sub-section (2) of the Registration Act were added to the said paragraph by an amendment made in 1929 and cannot have retrospective effect so as to apply to the decree in question. Before the said amendment every decree or order of a court was exempt from the operation of section 17 of the Act so that even if the decree in question affects property worth more than Rs.100 it was not required to be registered.

Dr. *Qutub Uddin Ahmad*, for appellant.

Messrs. *Niamat Ullah* and *Bhagwati Nath Srivastava*, for the respondent.

ZIAUL HASAN and HAMILTON, JJ.:—This is a plaintiff's appeal against a decree of the learned Second Additional Civil Judge of Fyzabad, dated the 31st October, 1935, by which he dismissed the plaintiff-appellant's suit for possession of 1,367 bighas, 12 biswas of land and Rs.2,500 as damages.

The river Gogra, also called Sarju, flows west to east between the districts of Basti and Fyzabad and while the plaintiff-appellant's village Dewaraganj Berar lies to the north of the river, the defendant's village Nainpura lies to the south. The plaintiff claimed the land in suit on the allegations that it formed part of his village Dewaraganj Berar and lay to the north of the river Gogra but that in 1334 Fasli the river changed its course suddenly as a result of which the land in suit fell to the south of the river and was, at the quinquennial settlement of the defendant's village in 1334 Fasli

(1) (1928) I.L.R., 4 Luck., 181.
(2) (1899) L.R., 26 I.A., 101.
(3) (1930) A.I.R., Lah., 487.
(4) (1911) I.L.R., 36 Bom., 53.
(5) (1929) A.I.R., Mad., 694.
(6) (1911) 11 I.C., 834.
(7) (1912) 17 I.C., 434.

treated as part of the defendant's village and designated as Manjha Naipura. The plaintiff's case was that there was no custom of *dhardhura* between the villages of Dewaraganj Berar and Naipura and that even if it be assumed, which is not a fact, that the disputed land accreted to Naipura gradually, still the plaintiff was the owner of it by reason of the fact that it emerged at its old place and still formed a portion of the plaintiff's village. He also relied on section 4, clause 2, of Bengal Regulation, XI of 1825, and averred that he was legally entitled to possession of the land by law also. The damages were claimed in respect of *jhau* and *kusehri* plants that grew on the land in suit and were said to have been wrongfully disposed of by the defendant.

The suit was contested by the defendant mainly on the ground that the custom of *dhardhura* exists between the parties' villages. The defendant did not admit that there was a sudden change in the course of the river in 1334 Fasli and pleaded that he had been in possession of the land for more than twelve years and that the suit was barred by *res judicata* and estoppel. On the pleas raised by the defendant fifteen issues were framed by the learned trial Judge. In the present appeal we are however concerned with the following issues:

(1) Whether the lands in suit appertained to the plaintiff's village as surveyed in 1860 as alleged? If so, to what effect?

* * * * * *

(6) Whether there is a custom of *dhadhura* as specifically alleged in oral pleadings? If so whether it bars the plaintiff's claim?

(7) Whether Exhibit A-4 bars the plaintiff's claim,

(*a*) by way of *res judicata*,

(*b*) as an agreement, or

(*c*) by way of estoppel as alleged?

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(8) Whether Exhibit A-2 as an agreement was

(*a*) without consideration,

(*b*) confined to the parties to the agreement, or

(*c*) illegal being in contravention of sections 3 and 4 of the Bengal Regulations as alleged.

* * * * * *

*Ziaul Hasan and Hamilton, JJ.*

(11) Whether the decree, Exhibit A-4, was passed in terms of the compromise, Exhibit 2? If so, whether

(*a*) it went beyond the scope of the suit,

(*b*) is unenforceable against the plaintiff,

(*c*) is inadmissible in evidence, or

(*d*) is beyond the jurisdiction of this court as alleged.

* * * * * *

We take up the sixth issue first.

It was agreed that the custom of *dhardhura* meant that the main stream of the river would always remain the boundary between the two villages in question irrespective of the fact that the change in the course of the river is gradual or sudden. In other words, land thrown out by a change in the course of the river would by custom appertain to the village in proximity with which it comes out of the river. We find that the question of the custom of *dhardhura* between the districts of Basti and Fyzabad came up for consideration before the settlement officer in 1866. In that year Malik Hidayat Husain, taluqdar and prprietor of mauza Asupur in the Fyzabad District, brought a suit against the Raja of Bansi in respect of some alluvial land which went over to the Basti side by a change in the course of the Gogra. Inquiries as to the existence of the custom of *dhardhura* were set on foot by the settlement officer and on the 26th February, 1866, the sadr qanungo submitted a report (Exhibit A-6) mentioning the names of six zamindars whose statements he had

taken and stating that the custom of *dhardhura* existed between the two districts and recounting several instances in which the custom had been enforced. On the next day, that is, the 27th February, 1866, he submitted another report (Exhibit A-7) after making inquiries from some tenants the gist of whose statements he submitted in his report as follow:

> "The exact number of years is not known but about sixteen years ago the course of the river was towards north and *manjh* had emerged out towards south and at that time we were in possession and occupation of the said *manjh*. Now the course of the river has, for about the aforesaid years, been towards the south, near the village and *manjh* has emerged out towards the north and since that time the said *manjh* has been in possession and occupation of the inhabitants of Babwapur (sic) pargana Sôli, district Basti, and we are not in possession. The custom of *dhardhura* has been prevalent from times old, i.e. has ever been prevalent. This *manjh* is two *kasis* in length from the eastern boundary of Bantpur to Chandipur."

On the 9th April, 1866, the Settlement Officer delivered judgment in Malik Hidayat Husain's case in which he summed up his findings as follows:

> "I will now briefly sum up the result of the inquiry as contained in the joint memo. of the 20th January last in these proceedings. The *Shastras* of the Hindus, the treaty of the 14th January, 1812, made by the British and Oudh Governments the decisions of the Agra Saddar and the inquiries now prosecuted in seven districts through which the river Gogra passes for a distance of more than 200 miles, all go to prove (1) that custom is the rule to follow in cases such as this and (2) that the—I may say—invariable custom is that the main stream is the boundary."

On these findings the suit of Hidayat Husain for possession of the alluvial land as belonging to his village was decreed (Exhibit A-8). The defendant to the suit, who was the predecessor-in-interest of the present plaintiff, filed an appeal against the decree of the Settlement Officer, before the Commissioner of Fyzabad and the learned Commissioner by his judgment, dated the 25th July, 1866 (Ex. A-9) dismissed the appeal

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and confirmed the decree of the Settlement Officer. The learned Commissioner said:

> "Under these circumstances the first thing for the settlement court to do was to ascertain whether there was any clear and definite usage of *shikast paivast* immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river. The Settlement Court did ascertain the existence of such clear and definite usage which governed his decision."

*Ziaul Hasan and Hamilton, JJ.*

It appears that after the decision in Malik Hidayat Husain's suit, agreements were taken from zamindars whose villages lay on either side of the river Gogra as to the observance of the custom in future. Exhibits A-17, A-18 and A-19 are instances of such agreements executed in September, 1866. It appears that the present defendant tried to obtain a copy of a similar agreement executed by the then zamindar of Naipura but his application was disallowed as the agreement was "quite torn" and "not fit to be copied" (*vide* Exhibit A-72). There are however on record lists of the villages, Exhibits A-13, A-14 and A-16) the owners of which executed agreements to observe the custom of *dhardura* in future and the name of the plaintiff's village Dewaraganj Barar is mentioned at no. 8 in list A-14.

The next document relied on by the defendant-respondent is the *wajibularz* of the plaintiff's village Dewaraganj Barar (Exhibit A-23). Paragraph 3 of this *wajibularz* runs as follows:

| | |
|---|---|
| "Custom governing *dhardhoora* (the stream constituting the boundary lines) | On the boundary of the village opposite to Fyzabad District the river Gaghra lies and the stream constitutes the boundary line." |

It was argued by the learned Counsel for the appellant that the custom of *dhardura* is not specifically mentioned in this *wajibularz* but our reading of paragraph 3 is that it recites that the main stream of the river Gogra will always constitute the boundary between the villages lying on the two banks, in other words, that

the custom of *dhardhura* prevails between the two districts.

We now come to a suit filed by the predecessor-in-interest of the plaintiff-appellant himself, in the Court of the Subordinate Judge of Gorakhpur, in 1900 in respect of some alluvial land, against the predecessor-in-interest of the present defendant (*vide* Exhibit A-1). In this suit the plaintiff's predecessor himself claimed the land on the custom of *dhardhura*. Paragraph 3 of the plaint runs as follows:

> "That the custom of *dhardhura* has from times old been observed in respect of parties' villages as well as in respect of other village situate along the borders of the river Gagra which has ever been accepted by the ancestors of the parties and the said custom has always been entered in the Government papers."

The defendant to the suit no doubt denied the cusom but the parties at last came to terms and filed a compromise (Exhibit A-2) in the following terms:

> "It has been mutually settled and determined for ever amongst the parties that the custom of *dhardhura* shall as usual continue to apply in respect of the village Dewaraganj Berar of the plaintiff and village Naipura of the defendant and the land to the north of the river Gogra in the Basti District would continue to belong to the plaintiff and the land to the south of the said river in district Fyzabad would belong to the defendant, and to this custom there would in future be no excuse or objection whatever and there would be no objection, dispute or argument on behalf of any of the parties the land emerged out suddenly or emerged out gradually in front, and none of the parties shall be in a position to challenge or dispute this in any way whatever in case the river branches out into two streams; on the other hand, the main deep stream out of the two channels of the river Gogra, separating district Basti from district Fyzabad shall be taken to be the boundary line of the villages of the parties, viz. the village of Dewaraganj Berar and village Naipura, mentioned above and contrary to this no objection on behalf of either of the parties shall be maintainable by any of the departments."

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On this compromise a decree (Exhibit A-3) followed which incorporated the terms of the compromise. We shall deal with the decree and compromise in connection with issues 7, 8 and 11.

Further, we have on record a judgment of the Subordinate Judge of Fyzabad, dated the 15th November, 1936 (Exhibit A-20) in a suit between other parties, zamindars of villages on either side of the Gogra in which also the custom of *dhardhura* was the basis of the suit and issue 1 in the case was specifically framed on the question of the existence of the custom. The learned Judge held as follows:

> "The deep stream rule is therefore established as against the absentees particularly in view of its judicial recognition in the Maharaja of Ajodhia's suit against the Raunahi zamindars (Exhibits 46 and 47). And this rule applies whether the *manjha* is capable of identification with the old land or not and whether it has appeared by a sudden change in the course of the river or by slow accretion. And this custom is an ancient one Exhibit 47). This disposes of the first issue and the first part of the fourth issue in plaintiffs' favour."

The case was taken up in appeal to the District Judge of Fyzabad and the learned Judge dismissed the appeal by his judgment, dated the 27th July, 1937 (Exhibit A-21).

Besides the documentary evidence referred to above, we have also the sworn testimony of six witnesses D. W's 1 to 6, five of whom are zamindars and one is an agriculturist and all of whom swear that the custom of *dhardhura* prevails between the parties' villages. As against this the plaintiff-appellant could not produce a single witness to say that the custom of *dhardhura* does not exist as between Dewaraganj Barar and Naipura. Nor is there any evidence to show that the zamindar of Dewaraganj Barar was ever in possession of land lying to the south of the main stream or that the zamindar of Naipura was ever in possession of land to north of the main stream.

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In view of the evidence referred to above we have no hesitation in upholding the finding of the learned trial Judge that the custom of *dhardhura* obtains between the villages of Dewaraganj and Naipura.

The learned counsel for the plaintiff-appellant relies on Exhibit 14, a judgment of the Subordinate Judge of Fyzabad in suits brought by the present appellant against some zamindars and in which it was held that the defendants had failed to prove the existence of the custom of *dhardhura* and also on *Sheo Ram* v. *Pashupat Pratap Singh* (1) by which this judgment was upheld in appeal by this Court, but some of the evidence which is now before us was not before the Bench which decided that case. We are in perfect agreement with the general proposition of law laid down in that case but we consider that in the present case there is abundant evidence in proof of the existence of the custom.

We, therefore decide this point against the appellant.

We now take up the seventh issue, namely whether Exhibit A-4, the decree in the suit of 1900 bars the present suit. It was argued that as the suit of 1900 between the prodecessors-in-interest of the parties was decided on a compromise, the decree in that suit does not operate as *res judicata* in the present suit. We are not prepared to accept the proposition that a consent decree can never operate as *res judicata* in a subsequent suit. On the other hand we find that in *Durga Prasad* v. *Narain* (2) it was held by this Court that a consent decree is binding upon the parties and would operate as *res judicata* in a subsequent suit unless there are some special reasons for holding that the compromise and decree were void.—In *Pranal Annee* v. *Lakshmi Annee* (3) in which in a suit for lands by inheritance the defence was that a consent decree passed previously was a bar, their Lordship at page 106 said:

> "The *razinama*, in so far as it was submitted to and was acted upon judicially by the learned Judge was in

(1) (1932) I.L.R., 7 Luck., 179. (2) (1928) I.L.R., 4 Luck., 181.
(3) (1899) L.R., 26 I.A., 101.

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itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal who gave their consent to it."

*Ziaul Hasan and Hamilton, JJ.*

We are therefore of opinion that the decree, Exhibit A-4, though it was passed on a compromise, is a bar in *res judicata* in the present suit by reason of the fact that the custom of *dhardhura* was pleaded by the plaintiff and denied by the defendants so that an issue on the custom did arise in the case which was subsequently compromised by the parties.

The learned Counsel for the appellant has relied on the cases of *Mst. Said Khanam* v. *Said Muhammad* (1) *Pirojshah Bhikaji Vandrivalla* v. *Manibhai Nichhabhai* (2), *Govinda Krishna Yachendrulo Garu Bahadur* v. *Venkata Subiah* (3), *Putta Venkata Satyanarayana* v. *Puttu Gangamma* (4) and *Gopalasami Vastad* v. *Govindasamai Vastad* (5), but none of these cases helps him in our opinion. In the first case it was no doubt held that section 11, C. P. C., does not apply in terms to consent decrees but it was also held that a consent decree has to all intents and purposes the same effect as *res judicata* as it raises an estoppel as much as a decree passed in invitum. In the Bombay case a particular consent decree was held not to bar a subsequent suit on several grounds, namely, that there was no issue raised and no adjudication on the issue whether the village was impartible, secondly, that parties could not make an estate impartible which is partible and that this is opposed to public policy and thirdly, because the compromise involved the interests of a minor and no sanction was granted by the court to the guardian of the minor to enter into the compromise. In the Madras case of *Govinda Krishna Yachendrulo Garu Bahadur* v. *Venkata Subiah* (3) it was held that judgment given by

(1) (1930) A.I.R., Lah., 487.
(2) (1911) I.L.R., 36 Bom., 53.
(3) (1929) A.I.R., Mad., 694.
(4) (1911) 11 I.C., 834.
(5) (1912) 17 I.C., 434.
(6) (1929) A.I.R., Mad., 694.

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consent when there are pleadings in action does not operate as *res judicata*. At page 696 it is said:

> "From the extract of the judgment in O. S. no. 122/18 given above, it is clear that though the defendants appeared in person they filed no written statement; they simply confessed judgment and a decree was passed against them for the balance of the amount remaining unpaid."

Then again:

> "If so the question now raised not having been put in issue in the prior suit how can a decision in that suit operate as *res judicata* in a subsequent suit."

In the case under consideration as we have pointed out above the issue as to the existence of the custom was clearly raised by the pleadings of parties. In the Madras case of *Putta Venkata Satyanarayana* v. *Puttu Gangamma* (1) also the issue, the decision of which was sought to operate as *res judicata*, was not raised in the previous suit. The last case of Madras, namely, *Gopalsami Vastad* v. *Govindasami Vastad* (2) does not also go beyond holding that section 13 of the (old) Civil Procedure Code does not apply in terms to a consent decree.

We therefore decide this point also against the appellant and hold that the decree Exhibit A-4 bars the present suit by way of *res judicata*.

Issue 8 involves three questions. First, whether the compromise, Exhibit A-2, was an agreement without consideration. We are of opinion that it clearly was not. The defendant to the suit gave up this claim to the land in suit in consideration of the plaintiff to the suit agreeing to abide by the custom of *dhardhura* in future. The second question is whether the compromise was personally between the parties thereto and cannot be enforced against their representatives-in-interest. We see no reason to hold so. The learned counsel for the appellant relies on the case of *Baboo Bissessurnath* v. *Maharajah Mohessur Bux Singh Bahadur* (3) but the facts of that case were totally different from those of the case before us. In that case an

(1) (1911) 11 I.C., 834. (2) (1912) 17 I.C., 434.
(3) (1872) I.A., Supplementary Vol. 34.

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*ikrarnama* was sought to be enforced against a person who was neither himself a party to the *ikrarnama* nor a representative of any party thereto. In the present case both the parties are representatives-in-interest of those who entered into the compromise (Exhibit A-2). The third question is whether the compromise was illegal as being in contravention of sections 3 and 4 of Bengal Regulations XI of 1825. We are in agreement with the finding of the learned Judge of the court below that it would have been illegal if it had not been found that the custom of *dhardhura* exists as contemplated by section 2 of the said Regulation. As we have held that the custom referred to in section 2 exists, sections 3 and 4 of the Regulation are not called into play. Issue 8 is also decided against the appellant.

As to issue 11. The first point involved in it is whether the decree Exhibit A-4, went beyond the scope of the suit. It was argued that it went beyond the scope of the suit in so far that it declared the existence of the custom of *dhardhura*. We are unable to accept this argument. Paragraph 11 of the plaint, Exhibit A-1, of the suit of 1900 shows that a declaration as to the existence of the custom of *dhardhura* was in fact included in the relief claimed so that if the parties made a declaration as to the existence of the custom in the compromise and the decree gave effect to that compromise, it cannot be said that the decree went beyond the scope of the suit.

The next point is whether the decree is unenforceable against the plaintiff; but no question of the decree Exhibit A-4 being enforced against the plaintiff arises in the present suit.

The third point raised in regard to Exhibit A-4 was that it was inadmissible in evidence as it dealt with property worth more than Rs.100 and ought to have been registered. We see no force in this argument also. Reliance is placed on the words—

> "Except a decree or order expressed to be made on a compromise and comprising immovable property other

than that which is the subject-matter of the suit or proceeding."

occurring in paragraph (vi) of section 17, sub-section 2 of the Registration Act (but these words) were added to the said paragraph by an amendment made in 1929 and cannot have retrospective effect so as to apply to the decree in question. Before the said amendment every decree or order of a court was exempt from the operation of section 17 of the Act so that even if the decree in question affects property worth more than Rs.100 it was not required to be registered.

*Ziaul Hasan and Hamilton, JJ.*

The last point in relation to issue 11 namely whether Exhibit A-4 was beyond the jurisdiction of the court was not pressed before us.

The only other issue on which the finding of the court below was challenged in the grounds of appeal is issue 1, which was to the effect whether the land in suit appertained to the plaintiff's village as surveyed in 1860 as alleged. The learned Judge of the trial court held that the plaintiff had failed to prove that the land in suit appertained to his village in 1860 but we are of opinion that it is not necessary to decide this question. It is not seriously disputed that the land lying to the north of the river Gogra before it changed its course in 1334 Fasli appertained to the plaintiff's village. The suit of the plaintiff however fails on issues 6, 7 and 8 and for this reason also it is not necessary to go into the question.

The appeal therefore fails and is dismissed with costs.

*Appeal dismissed.*